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An Overview of Federal Regulations and the Rulemaking Process

Overview of Rulemaking

What Is Federal Rulemaking? Congress often grants rulemaking authority to federal agencies to implement statutory programs. The regulations issued pursuant to this authority carry the force and effect of law and can have substantial implications for policy implementation. When issuing these regulations, agencies are required to follow a certain set of procedures prescribed in law and executive order. These procedures collectively comprise the federal rulemaking process.

“A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.” *National Latino Media Coalition v. Federal Communications Commission*, 816 F.2d 785, 788 (D.C. Cir. 1987).

Why Does Congress Delegate Rulemaking Authority?

Congress delegates rulemaking authority to agencies for a number of reasons. Perhaps most importantly, agencies have a significant amount of expertise and can “fill in” technical details of programs that Congress created in statute. This can be useful for Congress, which is responsible for establishing policy in a wide range of issue areas and does not necessarily have the same depth of expertise that agencies may have. In addition, even after delegating rulemaking authority to agencies, Congress retains its general legislative power, which gives it the ability to conduct oversight, modify or repeal regulations, and amend agencies’ underlying statutory authority. As such, delegating authority to agencies can enable Congress to focus on “big picture” issues rather than spending its time and resources debating all the technical details required to fully implement a complex public policy. Finally, by creating the federal rulemaking process, Congress instituted a number of procedural controls on agencies, such as ensuring that the public would have an opportunity for participation through the public comment process required by the Administrative Procedure Act (APA).

There are also a number of reasons why Congress may *not* want to delegate rulemaking authority, however, or reasons for which Congress may want to do so with caution. One commonly cited reason is that, unlike Members of Congress, agency personnel and officials who write regulations are not directly accountable to the electorate. In addition, Congress faces the possibility that agencies will issue rules in a manner that Congress views as inconsistent

with congressional intent. Generally speaking, the more precise statutory directives are, the less discretion an agency has to independently develop policy objectives.

The Rulemaking Process

Introduction. By delegating authority to administrative agencies to write and enforce regulations that have the force and effect of law, Congress provides federal agencies with considerable power. Therefore, to control the process by which agencies create these rules, Congress has enacted procedural statutes, such as the APA, that dictate what procedures an agency must follow to establish a final, legally binding rule. The rulemaking process, including the requirements of the APA, is summarized in **Figure 1**.

Figure 1. The Rulemaking Process



Source: Graphic created by CRS.

APA: Notice and Comment Rulemaking. Unless an agency’s authorizing statute provides for different procedures, the APA provides the default practice that all agencies must follow to promulgate rules. These procedures apply whenever an agency creates, amends, or repeals a rule.

Section 553 of the APA requires that an agency generally must first provide notice that it intends to promulgate a rule. An agency does this by publishing a notice of proposed rulemaking in the *Federal Register*. The notice must provide (1) the time, place, and nature of the rulemaking

proceedings; (2) a reference to the legal authority under which the rule is proposed; and (3) either the terms or subject of the proposed rule.

The agency must then allow “interested persons an opportunity” to comment on the proposed rule. Typically, an agency will provide at least 30 days for public comment. The agency is required to review the public comments and respond to “significant” comments received, and it may make changes to the proposal based on those comments.

Once this process is complete, the agency may publish the final rule in the *Federal Register* along with a “concise general statement” of the rule’s “basis and purpose.” The rule may not go into effect until at least 30 days after it is published in the *Federal Register*, with certain exceptions.

An agency need not follow notice and comment procedures when promulgating certain rules such as interpretive rules, general statements of policy, and rules affecting only agency management or personnel. Also, if it is “impracticable, unnecessary, or contrary to the public interest,” an agency may forgo these procedures.

The Role of the President in Rulemaking. In 1981, President Ronald Reagan issued Executive Order (E.O.) 12291, which established centralized review of most agencies’ rules through the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA). In 1993, President William Clinton issued E.O. 12866, which replaced President Reagan’s order but left much of the centralized review process intact. Under President Clinton’s order, which still remains in effect, agencies (other than independent regulatory agencies) submit their “significant” proposed and final rules to OIRA for review prior to publication. In addition, covered agencies must determine whether a rule is “economically significant” and, if it is, conduct a cost-benefit analysis of the rule, ensuring that the benefits justify the costs of the rule. OIRA is then to review the content of the rule and the quality of the cost-benefit analysis to ensure that the rule is consistent with the President’s policy preferences.

President Donald Trump added to these underlying requirements when he issued E.O. 13771 in January 2017. E.O. 13771 created a “one-in, two-out” requirement whereby agencies have to offset the costs of new rules by eliminating equivalent costs associated with at least two previously issued rules.

Congressional Oversight

Statutory Control over Agency Action. Congress maintains ultimate control over federal agencies’ actions. Congress can pass statutes that expand or contract agency authority, repeal existing rules, or compel an agency to issue certain rules. Congress typically seeks to draft legislation precisely to ensure that the agency acts as Congress intends. Congress can also change the procedures agencies must follow in order to promulgate a valid regulation. Finally, Congress can use the Congressional Review Act (CRA) to overturn rules through enactment of a joint resolution of disapproval.

Other Forms of Congressional Oversight. Beyond Congress’s power to legislate, Congress may also use the traditional tools of congressional oversight to direct agency priorities. Such congressional actions might include holding committee hearings or gathering information on an agency’s rulemaking activities.

Appropriations. Congress may use the “power of the purse” to require agencies to act in certain ways. If Congress does not want an agency to undertake a certain rulemaking proceeding, it may prohibit the agency from using any appropriated funds to develop or finalize the rule.

Judicial Review of Agency Action

Availability of Judicial Review. The APA provides for a strong presumption of judicial review of agency action. The statute provides judicial recourse for a person aggrieved by final agency action unless a statute precludes judicial review or if a decision is left to agency discretion by law.

Scope of Judicial Review. Under the APA, a court may compel any agency action that is unreasonably delayed or unlawfully withheld. A court may vacate an agency rule if the agency acted (1) arbitrarily or capriciously, (2) in excess of statutory authority, (3) contrary to a constitutional right, or (4) in violation of procedures required by statute.

Helpful Resources

For more information, see the following CRS reports:

- CRS Report RL32240, *The Federal Rulemaking Process: An Overview*
- CRS Report R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*
- CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*
- CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*
- CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*
- CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*

The list below provides a number of websites and online resources that can be useful for tracking regulations. CRS is available to provide assistance with using these resources.

- <https://www.federalregister.gov> (search through current and past issues of the *Federal Register*)
- <https://www.regulations.gov> (submit comments on rules and track other comments)
- <https://www.reginfo.gov> (search proposed and final rules under review at OIRA; search the Unified Agenda, which lists upcoming proposed and final rules by agency)
- <https://www.gao.gov/legal/other-legal-work/congressional-review-act> (search for “major” rules and rules submitted to the Government Accountability Office under the CRA)

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