

Federal Regulations and the Rulemaking Process

Overview

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 orders. 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 Would Congress Delegate Rulemaking Authority?

There are a number of reasons why Congress may want to delegate rulemaking authority to agencies. Perhaps most importantly, agencies have a significant amount of expertise and can “fill in” technical details of programs that Congress created in statute. This may be useful for Congress, whose Members are responsible for establishing policy in a wide range of issue areas. The rulemaking process also contains opportunities for public participation and transparency through the public comment process required under the Administrative Procedure Act (APA). Finally, even after delegating rulemaking authority, Congress retains its general legislative power, which gives it the ability to conduct oversight and modify or repeal regulations. As such, delegating authority can enable Congress to focus on “big picture” issues, rather than debating all the technical details required to implement a complex public policy fully.

Why Would Congress Refrain from Delegating Rulemaking Authority?

There are also a number of reasons why Congress may *not* want to delegate rulemaking authority, or reasons for which Congress would 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. More generally, Congress faces the possibility that agencies will issue rules in a manner that Congress views as inconsistent with congressional intent. As mentioned above, however, Congress retains its general legislative power and may amend or repeal a regulation.

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, in order 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.

Administrative Procedure Act: 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 in order to promulgate rules. These procedures apply whenever an agency creates, amends, or repeals a rule.

Section 553 of the APA requires that an agency 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 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 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.

Importantly, 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 12291, which established centralized review of almost all agency rules through the Office of Management and Budget’s (OMB’s) Office of Information and Regulatory Affairs (OIRA). In 1993, President William Clinton issued Executive Order 12866, which replaced President Reagan’s order and established the process that is still in effect today. Under President Clinton’s order, 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”—for example, has a \$100 million effect on the economy—and conduct a cost-benefit analysis of the rule if they determine that it is. OIRA reviews the rule and the cost-benefit analysis to ensure that the rule is consistent with the President’s policy preferences.

Congressional Oversight

Statutory Control over Agency Action. Congress maintains ultimate control over an agency’s actions. Congress can pass statutes that expand or contract agency authority, repeal existing rules, or compel an agency to issue certain rules. It is often important for Congress to draft legislation precisely to ensure the agency acts as Congress intends. Congress may also change the procedures an agency 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 through informal staff interviews.

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 promulgate the rule.

Judicial Review of Agency Action

Availability of Judicial Review. The APA provides for a strong presumption of judicial review. Judicial recourse is available for any party aggrieved by a 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. Furthermore, 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) without following proper procedures.

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 R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*
- CRS Report R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*

In addition, there are a number of useful websites for tracking regulations. A few of these sites and some of the possible uses are listed below. CRS is available to provide assistance with using these sites.

- <http://www.federalregister.gov> (search through current and past issues of the *Federal Register*)
- <http://www.regulations.gov> (submit comments on agency rules and track other comments)
- <http://www.reginfo.gov> (search proposed and final rules under review at OIRA)
- <http://www.gao.gov/legal/congressact/fedrule.html> (search for “major” rules and rules submitted to the Government Accountability Office under the Congressional Review Act)

Maeve P. Carey, mcarey@crs.loc.gov, 7-7775

Daniel T. Shedd, dsheddd@crs.loc.gov, 7-8441