

HOW REGULATIONS ARE MADE: THE RULEMAKING PROCESS & PUBLIC COMMENT PERIODS

The regulatory process in the United States is cumbersome, with a lot of power concentrated in regulatory agencies such as the Environmental Protection Agency and the Department of Health and Human Services. There are six main steps to the regulatory process as governed by the Administrative Procedures Act (APA) of 1946.

(1) *Congress Passes Legislation*: When Congress passes a bill it often instructs a regulatory agency to implement the policy. Congress relies on Executive agencies for assistance in implementing the law because Congress often lacks the pertinent technical knowledge. However, many times congressional delegations are so broad that the regulatory agency is given unfettered authority to act.

(2) *Rough Draft of the Rule*: Next the agency writes a rough draft of the rule based on the authorizing legislation and its perceptions of how to address the issue. President Obama has laid out requirements that rules “use the best, most innovative and least burdensome rules for achieving regulatory ends” (2). However, that instruction is not always followed.

(3) *OIRA Review*: Once the agency has written its rough draft, it is sent to the Office of Information and Regulatory Affairs (OIRA), and office in the White House. OIRA’s job is to provide a “dispassionate and analytical second opinion” for the agency. It will review and edit all regulation and arbitrate any disputes between agencies.

(4) *Proposal is Published*: Once OIRA has approved a draft, the proposed rule is released to the public for comments. Rules are generally open 30-90 days for responses. Proposed rules are published in the Federal Register to allow individuals and groups to review and comment on the rule.

(5) *Revisions*: Once public comments are finished, the agency will edit and revise the rule based on the public comments received.

(6) *Final Rule*: After revisions are complete and OIRA has once again approved the rule, it is published in the Federal Register as final. The final rule will include an effective date and should reflect public comments made during the proposed stage.

One key step missing from the rulemaking process is Congressional oversight. Currently, Congress writes the statutes and even has the ability to overturn rules after they are published as “final” using authority granted under the Congressional Review Act (CRA). Given the thousands of rules published each year, using the CRA is more cumbersome than the rule making process itself – in fact only one rule has ever been overturned in this manner. In reality, once Congress hands the statute over, agencies can write rules with almost complete autonomy. In short, under the current process regulatory agencies largely lack accountability for their actions.

QUICK FACTS

- During the first two years of the Obama administration, executive branch agencies created an average of 59 major rules every year, each with an impact greater than \$100 million on the economy.
- Federal regulations cost the economy more than \$1.75 trillion in 2008 or nearly \$16,000 per household, according to the Small Business Administration (1).

NOTABLE & QUOTABLE

“For over a century, legislators have delegated authority to executive branch agencies, and the volume and reach of regulation has grown... However, there is no regulatory equivalent to the fiscal budget— no transparent accounting of spending priorities proposed by the President and appropriated by Congress. Americans are often unaware of regulations’ impacts because their costs are hidden in higher prices paid for goods and services and in opportunities foregone.”

- **Susan Dudley**, Former OIRA Administrator

PUBLIC COMMENT PERIOD: A CHANCE TO SPEAK UP

As mentioned above, after an agency issues a proposed rule there is an opportunity for the public to comment. This is an important part of the regulatory process. While the agency is bound by law to enforce statutes written by Congress, agencies are given flexibility in how they choose to go about it; persuasive public comments can sway their decisions. Additionally, lawmakers and the media may take notice of particularly thoughtful comments or large groups of comments raising the same concern. Agencies are required to respond to all comments, so they cannot ignore your thoughts.

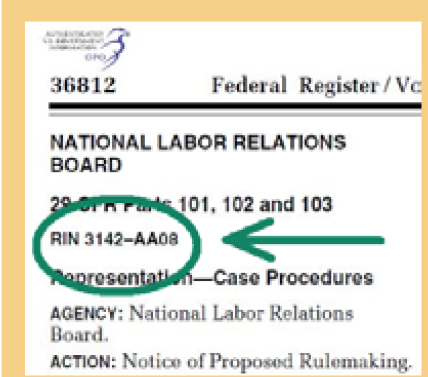
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How does commenting work? Once the proposed rule has been published in the Federal Register, public comment periods are generally open for 30-90 days. The rule itself will contain a contact person and an address to which you should mail your comment, but comments can also be sent electronically by visiting www.regulations.gov or through the agency's website. Typically, a short, typed letter is best. Make sure you include the docket number at the top of your letter or in the subject of your e-mail. The proposed rule itself will contain all the instructions you need.

Here are a few tips for good comment writing. First, be concise. Agencies review quite a few comments each day, so yours is more likely to be effective if reviewers can find your main point. Second, give clear and specific reasons for your opposition to the rule. Vague comments like "I just don't think it's a good idea" are glossed over, whereas specific comments like "This rule will directly harm my business because..." will grab more attention. Third, be honest and do your research. Any falsehoods or errors will make your comment less likely to be taken seriously; you should be professional and polite in tone for the same reason. Finally, be timely: comments must be received by the end of the comment period.

Additional Resources

All proposed and final regulations as well as public comments can be reviewed by visiting www.regulations.gov. OIRA's website also includes a list of all pending regulations and an agenda for the year at www.reginfo.gov



The screenshot shows a notice from the National Labor Relations Board. At the top, it says "36812 Federal Register / Volume 36, Number 101, Monday, October 1, 2012". Below that, it says "NATIONAL LABOR RELATIONS BOARD". Then, "29 CFR Parts 101, 102 and 103". The docket number "RIN 3142-AA08" is circled in green with a green arrow pointing to it. Below that, it says "Representation—Case Procedures". Then, "AGENCY: National Labor Relations Board." and "ACTION: Notice of Proposed Rulemaking."

The rule's docket number is listed along with the proposed rule in the *Federal Register*.

Endnotes:

1. Nicole Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms, SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY (September 2010) (online at <http://archive.sba.gov/advo/research/rs371tot.pdf>).
2. Executive Order 13563 (January 18, 2011) (online at http://www.whitehouse.gov/sites/default/files/omb/infoeg/eo12866/eo13563_01182011.pdf).

Americans for Prosperity Foundation's "Need to Know" informational series explores current events and recent scholarship on public policy issues from a free-market economics perspective. A full list of "Need to Know" briefings is available at www.AmericansForProsperityFoundation.org/NeetToKnow.
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