

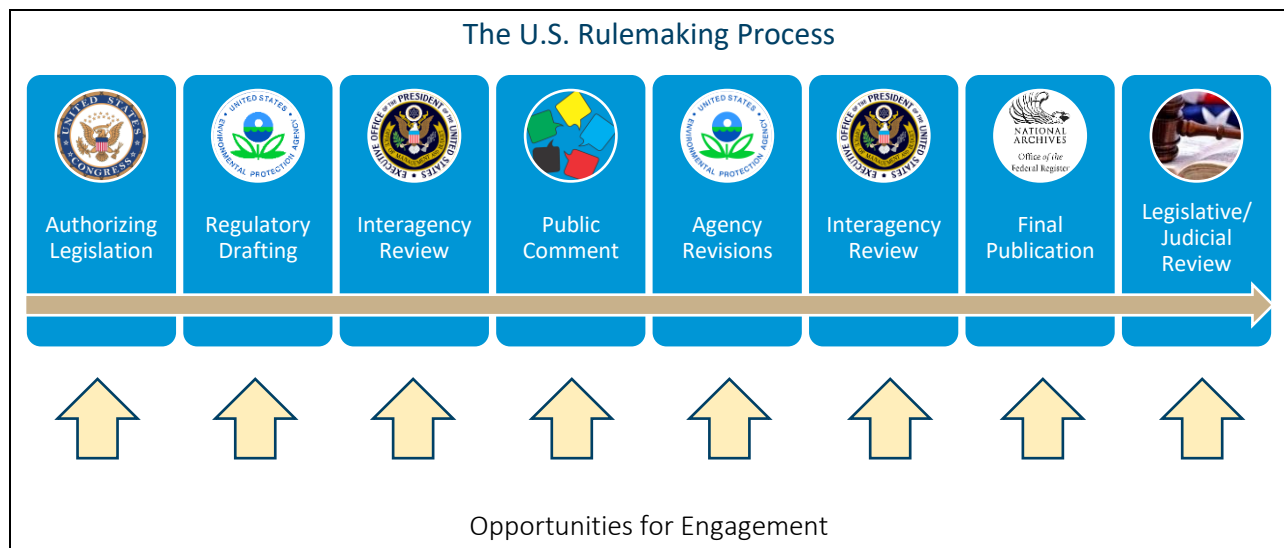
Engaging in the Rulemaking Process

The public has many opportunities to provide input as regulations are being developed.

Susan E. Dudley | June 3, 2021

Abstract

People and organizations interested in influencing public policy often focus on Congress, but most policy details are actually developed in the executive branch by specialist agencies. As regulations are being developed, the public has opportunities to share insights, preferences, information, and experience. This *Insight* offers an overview of the rulemaking process and highlights opportunities to engage at different stages.



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Regulatory Insight

The [U.S. Constitution](#) vests all legislative powers with Congress, but the laws Congress enacts are rarely self-implementing. Statutes often express goals and directives in broad and aspirational terms, and delegate to executive branch agencies the responsibility for “filling up the details.”

Once Congress delegates authority to issue regulations, agencies follow practices guided by statute and presidential executive orders. The [Administrative Procedure Act](#) of 1946 requires agencies to publish and seek comment on proposed regulations (unless they can show good cause not to) and to base final regulations on the resulting rulemaking record.

As the diagram above illustrates, key stages in the regulatory process include 1) initial scoping & drafting by the relevant agency, 2) interagency review, led by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget, 3) a public comment period, 4) agency revisions in response to comment, 5) OIRA review of the final draft regulation, and 6) final publication. There are opportunities for engagement at each of these stages. Further, once a rule is published, the legislative and judicial branches have opportunities to overturn the regulation or send it back to the agency for revision.

Initial Regulatory Development

Regulatory action may be initiated by new legislation or by other triggering events. The [Unified Agenda of Regulatory and Deregulatory Actions](#)—published twice a year in the spring and fall—provides a searchable list of actions underway by agency and stage of action. It may be the first public notice that an agency is considering regulating in a particular area, and will list the statutory authority, timeline, and agency contact, among other things.

There are often opportunities to engage informally with an agency as it researches and drafts its proposed rule. Presidential [Executive Order \(E.O.\) 12866](#) encourages agencies to engage the public early when developing regulations. Such engagement will vary by agency, statute, issue, and constituency. For example, the Department of Transportation works closely with automakers in setting fuel economy and vehicle safety standards. Some cross-cutting statutes call for engagement with particular constituencies, such as the [Small Business Regulatory Enforcement and Fairness Act](#) (small entities) and the [Unfunded Mandates Reform Act](#) (state and local governments).

While engagement at this stage is more idiosyncratic, communicating informally early in the regulatory process may have a greater influence on regulatory design than later in the process, after agencies have developed a case for a particular approach.

Pre-Publication Review

E.O. 12866 requires executive agencies¹ to submit draft proposed & final regulations to [OIRA](#) for review before publishing them in the [Federal Register](#). OIRA posts a [searchable list](#) of regulations under review. It completes most reviews within 60 days, though reviews can occasionally take considerably longer.

During this review (and generally not otherwise), OIRA will meet with members of the public on request. These meetings are considered listening sessions, where OIRA officials, representatives of the regulatory agency, and other relevant staff from the White House and other agencies hear input from parties outside the government. OIRA [posts](#) lists of these meeting, the subject, and all attendees and their affiliations.

Seeking a meeting on a regulation while it is under OIRA review may be useful, particularly to share relevant data, analysis, or experience. OIRA's review is governed by E.O. 12866 and focuses on the expected benefits and costs of alternative regulatory approaches, coordination among government agencies, and consistency with the president's priorities. Given OIRA's mandate and perspective, an effective meeting might address such topics as:

- Alternative approaches to achieving regulatory goals,
- Unintended consequences of particular approaches,
- Situational knowledge that may shed light on benefits or costs, and
- Data or illustrations to support issues raised.

These meetings are generally limited to 30 minutes. While government attendees will not share information on the regulation under review, they may ask clarifying questions.

Public Comment Period

When OIRA concludes its review, the issuing agency publishes its proposed rule in the [Federal Register](#). This notice of proposed rulemaking (NPRM) will provide a deadline by which public comment is requested and include a preamble describing the statutory authority and main considerations underlying the proposed action. The NPRM will also be posted on [Regulations.gov](#), along with supporting documentation (economic analysis, scientific or technical support documents, etc.). Public comment periods are generally 60 days, though they can be longer for more complex rules and shorter for uncontroversial or urgent matters.

¹ E.O. 12866 only applies to executive branch agencies. Independent agencies and commissions, such as the Securities and Exchange Commission and Federal Energy Regulatory Commission, may publish their proposed rules directly in the Federal Register without first undergoing interagency review.

The opportunity to comment is open to anyone, and those interested in a regulatory action should file a comment during this public comment period. Comments become part of the public record for the rule, and courts have interpreted the APA to require agencies to respond to material information received and to base final rules on this rulemaking record.

In filing a comment during the official comment period, focus on what you can provide that is material to the decision and would contribute to the record on which the agency must base its final rule. Be mindful of the agency's authority and constraints; expressions of sentiment are often not as important as provision of a factual basis in support of a particular approach.

While you will direct your comment to the proposing agency, you should consider other audiences as well, including legislators who may be following the rulemaking, the media, other commenters and eventually, the courts. Because the agency's final decision must be based on the rulemaking record, your comment serves as a legal document that can help build a record of support for one regulatory option over another. If the final regulation is subsequently litigated, the courts may take your evidence into account, even if agency did not.

Drafting and Publishing a Final Regulation

After the comment period closes, the issuing agency will review the comments and modify its regulatory approach accordingly. There may be opportunities to clarify points at this stage, but because the final rule must be based on the public record, it is not a time to raise new issues. The agency will draft a final preamble and regulatory text and submit them, along with final analysis and technical support documents, for final OIRA interagency review. OIRA will accept meetings during this review period but, again, it is not time to raise new issues.

At the conclusion of this review, the agency will publish a final rule in the *Federal Register* with an effective date that is usually at least 30 days in the future.

Legislative or Judicial Review

After a regulatory agency promulgates a final rule, an affected party may challenge it in court. Following judicial review, the court may reverse the rule or remand it to the agency for reconsideration. Comments filed in the public record may provide a case for such review.

Additionally, Congress has tools for overturning a regulation—by disapproving it under the [Congressional Review Act](#), by passing legislation that moots or modifies it, or through appropriations restrictions that prevent its enforcement.

Conclusion

Anyone interested in public policy should be familiar with the rulemaking process. Participating in the development of a regulation can be as important as engaging in the legislative process, and in many ways, the rulemaking process is more accessible. Rulemaking is a more transparent and public process than lawmaking; it is characterized less by deal-making and more influenced by analysis and evidence. Opportunities for engagement are plentiful, and anyone can submit a public comment that becomes part of the record supporting a regulatory decision.