



# Background on the Rulemaking Process

## I. Basic Outline

### A. What is a federal regulation?

A regulation is a rule spelling out how a law will be implemented. When Congress passes a law, it often leaves details up to administrative agencies. This is because certain decisions require expertise that may exist in the administrative agency but not in Congress. Correctly made rules (that is, developed in compliance with the process set out in the Administrative Procedure Act) have the force of law for both those engaged in the regulated activity and the agencies which generated the rules.

### B. What is regulatory policy?

Environmental protection, consumer safety, public health, civil rights: what all these important goals share is the two-step process of Congress enacting broad protective statutes followed by federal agencies developing regulations that implement and give meaning to those laws. Regulatory policy provides the frameworks used by agencies when developing rulemakings. It sets forth the guidelines for developing, promulgating, implementing, and enforcing this complex system of public protections. For example, regulatory policy gives guidance on how to prioritize rulemaking agendas, defines constraints to agencies' rulemaking ability, and determines the breadth and depth of information necessary for an agency to proceed with a rulemaking.

Regulatory policy guides agencies' rulemaking agendas. It has been used to create many of our most valued public protections, such as the removal of lead from gasoline, the ban on arsenic in drinking water, or the installation of airbags in cars.

Public attention is generally focused on Congress and the President in the development of public policy, but most of the work of carrying out policy involves dozens of federal agencies. There are many different kinds of agencies. Some are primarily administrative, managing billions of dollars of federal grants, contracts, and other programs. Some are primarily regulatory, policing and enforcing laws that control activities from racial discrimination to environmental pollution.

The regulatory process is unfamiliar to the general public and these agencies are largely unknown. Regulatory issues tend to be technical, detailed, and complex-everything that makes them unappealing topics for the press and public. And yet we are governed by regulations everyday: the standards for drinking water, home cleaning products, cars and trucks (and their parts) and public transportation, the carpeting and flooring in our homes and offices, the safety of electricity usage, and for much more. The work of federal agencies is critically important.

### C. Basic Theory of Administrative Government

The blurring of functions that takes place when an executive branch agency exercises quasi-legislative rulemaking authority is accepted as a necessity. However, it is rationalized on the grounds that the agency is acting within limits prescribed by Congress. This is the origin of the notion that agencies only exercise discretion delegated to them by Congress.

Unfortunately, the limits are not always easy to find. Congress has directed agencies simply to "promote the common defense and security," to "protect the public health," and to regulate in a "just" and "reasonable" manner "in the public interest." This kind of language has allowed federal agencies wide latitude to set policies and promulgate regulations.

In passing the Clean Air Act in 1970, for example, Congress authorized the administrator of the Environmental Protection Agency (EPA) to "prescribe such regulations as are necessary to carry out his functions under [the Act]."

But when agencies try to implement such broad mandates, they sometimes find themselves accused by members of Congress, the White House, or people outside the government of trying to set independent policy. If they proceed cautiously because they are not sure what Congress intended or are concerned about possible political ramifications, they face the charge that they are procrastinating or being obstructive.

As Senator Patrick J. Leahy (D-VT) once said: "We pass such fuzzy legislation. Then we pass it on to administrative agencies and say: 'You work it out.' Then members and the president go out and campaign against those 'crazy bureaucrats.'"

Occasionally, Congress turns in the other direction-over-prescription. Legislation may require an agency to follow particular procedures, make specific findings, and take final action with a certain time period. Sometimes Congress may even pass a bill that contains equally precise and vague provisions.

There is no clear rule or set pattern. Congress acts as the representative body it is, responding to people's concerns with varying degrees of forethought, debate, and agreement. Not surprisingly, this process is reflected in our laws and their delegations of authority to administrative agencies.

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