

The Federal Rulemaking Process A Quick Overview

What Triggers Rulemaking?

- Legislation, Congressional hearings/reports
- Executive orders and OMB Circulars
- Court Orders
- Agencies act on own initiative to carry out mission
- Petitions for Rulemaking and informal requests from affected parties
- Federal Advisory Committee Recommendations
- Emergency situations, technological developments
- Political Factors

What is the Federal Regulatory Process?

- Legal structure established by the combined requirements of:
 - The Federal Register Act
 - The Administrative Procedure Act (APA)
 - Many individual laws, such as those affecting health, safety, commerce and the environment
- Federal agencies use the regulatory process to issue and enforce legally effective regulations

What is the Federal Register Act?

The Federal Register Act established the basic legal structure of the regulatory system:

- Central location for filing documents for public inspection
- The daily Federal Register -- a single, uniform publication for Executive agency rules and notices and Presidential documents
- The Code of Federal Regulations -- a codification (numerical arrangement) of rules

What is the Effect of Publishing in the Federal Register?

- Provides official notice of a document's existence, its contents and legal effect
 - indicates date of issuance and the effective date of actions
- Specifies the legal authority of the agency
 - delegation of authority from Congress
- Gives documents evidentiary status
 - makes them admissible in court
 - establishes Federal Register text as true copy of original signed document
- Shows how and when the CFR will be amended

What is the Administrative Procedure Act?

Added procedural requirements to ensure:

- due process (fairness) Generally:
 - Rules can't be enforced if not published in Federal Register
 - Rules can't be effective until 30 days after publication

- Must publish statements of organization and procedure for the "who and how" to contact at the agency
- public participation (notice and comment rulemaking) Agencies:
 - Must give notice of proposed rules
 - Must take public comments and respond in final rule
 - Must state the legal basis and purpose of their actions

Overview of Rulemaking Process

1. Grant of rulemaking authority
 - Congress delegates authority directly to agencies
 - President may delegate constitutional authority to subordinates
 - President or Agency Head may re-delegate authority to subordinates
2. Proposed Rule stage
 - Office of Management and Budget (OMB) Reviews
 - Agencies publish Proposed Rule in Federal Register for public comment
3. Final Rule stage
 - OMB Reviews again
 - Agencies publish final rule in Federal Register
 - » responds to comments, amends CFR, sets effective date
4. Congressional review
 - Agencies submit rules to Congress and General Accounting Office (can nullify rule)
5. Effective date
 - 30 day minimum, 60 days for major rule, no minimum for good cause
 - Agency may delay or withdraw rule before it becomes effective

Source: Office of the Federal Register - National Archives and Records Administration

Frequently Asked Questions

QUESTION:

Is a federal agency under any obligation to change its proposed rule based on the comments it receives, or hold public hearings?

ANSWER:

The agency is under NO obligation to modify the rule in light of comments, or to hold further hearings. It can withdraw the rule, leave it unchanged, or modify it. If it announces a final rule, it must include a "concise statement of its basis and purpose." Usually the agency discusses some of the comments it has received in that statement, which accompanies the final rule.

QUESTION:

Does Congress, or anyone else, have any oversight responsibility that could hold up the proposed changes?

ANSWER:

Congress may in a variety of ways try to stop or legislate against the rules. However, there is no indication that any such steps are underway with regard to the recent rule changes proposed as part of the President's faith-based social service initiative.

QUESTION:

Can rules be challenged in court after they are put into effect?

ANSWER:

The possibility of court challenges depends on the particulars of the rule. For instance, in the case of the rule change proposed in December 2002 by the U.S. Department of Housing and Urban Development, if the agency spends money to renovate a building which is used in part for worship, litigation on Constitutional grounds could be very likely -- especially since the U.S. Supreme Court has consistently ruled against such funding in previous cases.

However, in the case of a proposed rule by Substance Abuse and Mental Health Administration -- which would permit faith-based organizations operating government-supported programs to discriminate in hiring based on an individual's religious beliefs -- a challenge may be more difficult. Congress has given agencies the exclusive power to enforce their own regulations, so if an agency decides NOT to enforce a particular provision, courts may not be willing to entertain a challenge against it. Although anything can be challenged, some may not be worth bringing because the chances of success are remote. Since the chance of a successful challenge differs from rule to rule there is no uniform answer to this question.