

Even most lawyers, let alone the rest of the population, are a bit fuzzy on how the regulatory system works. As the Biden Administration is gearing up to start a slew of regulatory proceedings, here's what you need to know about the process.

Issuing Regulations

Q: Where do agencies like EPA get the power to create regulations?

A: EPA and other agencies are created by Congress. They also get the power to issue regulations from laws passed by Congress. For instance, the Clean Water Act tells EPA to issue regulations based on the "best available technology" for controlling the discharge of toxic water pollutants.

Q: Who decides whether an agency should start the process to issue a new regulation?

A: Some statutes set deadlines and require agencies to act. In those situations, a court can intervene if the agency misses the deadline. Otherwise, it's mostly up to the agency's discretion whether to start the process (often with a nudge from the White House, of course).

Q: What's the first step in the regulatory process?

A: When an agency has decided to propose a regulation, it prepares an analysis of the costs and benefits of the regulation. If the regulation is considered significant, the agency then sends the proposed regulation and its analysis to the White House.

Q: What happens in the White House?

A: The Office of Information and Regulatory Affairs (OIRA) reviews the analysis. Often, there is some back and forth between the agency and OIRA (pronounced Oh-Eye-Ra). When OIRA has given the go-ahead, the agency moves on to the next step.

Q: What then?

A: The agency next publishes the proposal and asks for public comment. This process is required by a law called the Administrative Procedure Act. When the comment period has closed, the agency works through the comments and revises the regulation. The revision has to pass through OIRA again before the regulation can be issued.

Q: How does the public find out about the final regulation?

A: The final version of the regulation is published, along with responses to any significant comments. Preparing the response document can be a very time-consuming process. An important rule will receive very detailed comments from industry, public interest groups, and often state governments. Each comment requires a careful response.

Legal Challenges to Regulations

Q: Presumably, at least some of the affected groups are likely to be unhappy with the final product. You can't please everyone! What can these groups do?

A: The next step is litigation. In the case of a significant regulation, it's almost inevitable that someone will go to court.

Q: Can anyone who disagrees with a regulation sue?

A: No. To get their lawsuit considered by a court, a plaintiff must have standing.

Q: What is needed for a plaintiff to have standing?

A: The basic requirement for standing is "injury in fact." That means that they will actually be injured by the regulation, not just that they're angry about it. Usually, the industry just shows that a regulation will cost them money. But members of the public can also have standing if a regulation will affect air or water quality, or even if the regulation will result in changes in public lands that they visit.

Q: OK, so once plaintiffs have demonstrated standing, what do they have to show in order to overturn a regulation?

A: One basis for overturning a regulation is procedural. For instance, the Trump Administration often tried to skip the period for public comment. Courts regularly overturned the Administration's decisions for its failure to follow the required process.

Q: If the agency did follow the required process, does the plaintiff have other arguments?

A: Remember that regulations have to be authorized by laws passed by Congress. So another way of challenging a regulation is to argue that it's actually not within the agency's

legal authority. For instance, an important regulation by the Obama EPA regulated certain wetlands. Plaintiffs argued that the EPA had misinterpreted the statute and that those wetlands weren't actually subject to federal regulation.

Q: How are those legal challenges resolved?

A: Under current law, courts use what's called the *Chevron* doctrine. Under that doctrine, if the meaning of a law passed by Congress is unclear, courts give the agency's interpretation the benefit of the doubt. This doctrine has been questioned by conservatives on the Supreme Court, so we may see a change in this approach sometime soon.

Q: If an agency acted within the legal authority given by Congress, does that mean a rule will necessarily be upheld?

A: Not necessarily. Remember that the agency has to justify its action and respond to all significant comments. If the agency's justification contains logical leaps or fails to address important arguments by commenters, the court will send the regulation back to the agency to try again.

Q: How long does this whole process take?

A: A really major regulation can take several years before it's issued in final form. The litigation can take another couple of years. Hopefully, all of this results in regulations that are really well grounded and carefully considered. But it's a heavy lift to get there.