November 30, 2016

From Creation to Reform, Part I: The Process of Agency Rulemaking

INTRODUCTION

Estimates of the total economic impact of federal regulations vary dramatically. According to the Office of Budget and Management (OMB), regulations cost the United States economy between $68.4 billion and $102.9 billion and provided benefits of $260.9 billion to $981.0 billion from 2004 to 2014 (in constant 2010 dollars). However, in reaching these totals, OMB only considered 120 of the 36,457 regulations published in the *Federal Register* during that period: rules that it expected to generate $100 million or more in costs or benefit, a substantial portion of which could be monetized. Of the 36,457 regulations, 2,851 were reviewed by OMB, and 549 were considered major rules, with an economic impact of at least $100 million per year or another notable economic impact.[1] Additionally, any cost-benefit analysis is only as strong as the data and assumptions that underpin it, and evidence suggests the strength of the data often used by regulatory agencies and the OMB is dubious at best.[2]

In contrast, other attempts to measure the costs of regulations have taken a top-down approach, using general indicators about the quantity of regulation and analyzing comparative performances either within the United States' economy or across economies worldwide.[3] A report from the Competitive Enterprise Institute found that regulations cost the U.S. economy $1.885 trillion dollars in 2015; [4] a National Association of Manufacturers estimate for 2012 was slightly higher, at $2.028 trillion (in 2014 dollars).[5] Further, a 2013 study by John Dawson and John Seater published in the *Journal of Economic Growth* indicates that the regulations added to the *Federal Register* between the years 1949 and 2005 cost the United States an average of 2 percentage points of GDP growth per year, and a 2016 study by the Mercatus Center estimates that if regulatory burdens had been held constant from 1980 to the present, the economy would be a quarter larger; a $13,000 per capita annual increase.[6] However, questions remain as to the validity of the top-down approaches used in these studies, which often do not account for benefits that accrue to society as a result of regulation.[7]

Given the considerable impact that regulations cumulatively impose on the U.S. economy, it is worth a brief look at the history and process of federal agency rulemaking, and how that process can be improved and reformed in order to best serve Americans and the economy at large.

ORIGINS OF AGENCY RULEMAKING AUTHORITY

Though lawmaking power was originally apportioned to Congress in the Constitution, in government today, the vast majority of rules with the force of law are not written by Congress, but rather by the Executive Branch and its myriad departments and agencies.[8] Laws enacted by Congress often contain "enabling legislation" that gives agencies power to issue rules to meet particular goals or requirements set forth by Congress. The Executive Branch has over 2 million employees, excluding active-duty men and women in the armed services and postal workers.[9] There are 15 executive branch departments containing nearly 120 agencies, as well as 60 independent agencies and commissions that ostensibly operate apolitically (though the President is responsible for appointing the heads of many of these agencies).[10] Taken together, these agencies issued 3,410 new rules in 2015. This compares to 114 laws enacted by Congress during the same year—a ratio of 30:1.[11]

Article I of the Constitution of the United States vests in the Congress the power:

> *To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, and in any Department or Officer thereof.* [12]

Through the early 1900s, the judiciary considered the separation of powers in Article I to prohibit the transfer of lawmaking powers from the legislature to the executive. This legal concept is known as the nondelegation doctrine, which states "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[13]

The early United States did feature a basic array of agencies, though relatively speaking the federal government was quite small. The Departments of War, State, Navy, and Treasury, along with the Office of the Attorney General, formed the core of the executive branch. The Department of the Interior joined its cohorts in 1849; the Department of Justice and Post Office followed in 1870 and 1872, respectively.

EXPANSION OF THE REGULATORY APPARATUS

The time period from approximately 1865 to 1900 saw the beginnings of significant regulatory growth in government, beginning with independent regulatory commissions created by Congress to regulate industry. The first of these commissions was the Interstate Commerce Commission (ICC), which was established to regulate interstate commerce via railroad, especially in transporting agricultural products. The ICC was quickly followed by commissions targeting other industries, usually with very similar organizational structures and mandates. The expectation for the commissions was that they would be able to bring more specific attention and expertise to bear on regulatory issues than Congress could afford

to spare, and would operate apolitically. However, in practice, these agencies were often "captured" by the industries they were supposed to regulate and used by market leaders as anti-competitive bludgeons.[14]

In the last century, courts have increasingly moved away from the nondelegation doctrine, shifting in 1928 to introduce the notion that Congress could delegate powers to the executive branch as long as the statute included an "intelligible principle" to guide executive actions. Mandates as broad as regulation "in the public interest" have been upheld as an "intelligible principle."

Another significant event in the history of federal rulemaking occurred in 1949, with the passage of the *Administrative Procedure Act* (APA). The APA dictates the process by which federal rulemaking can occur, setting out the processes listed later in this paper. The APA's mandates have been expanded by a number of executive orders and other statutory modifications since its passage.

The federal rulemaking apparatus expanded significantly during FDR's New Deal, and again in the 1960s and early 1970s, as consumer health and safety and environmental movements gained increasing traction in the United States. The Occupational Safety and Health Administration (OSHA) was created in 1971; the Consumer Product Safety Commission in 1973. The Environmental Protection Agency (EPA) was formed in 1970 by assembling 15 parts from 5 different departments and agencies. This led to a flurry of new regulatory activity. In response, the Executive Branch began involving itself more directly in the regulatory process.[15] In 1980, the *Paperwork Reduction Act*, among other actions, established the Office of Information and Regulatory Affairs (OIRA) within the OMB. OIRA is charged with reviewing drafts of proposed and final regulation and also conducts reviews and oversees policy implementations per other legislative acts or executive directives. [16]

PRESIDENTIAL INVOLVEMENT IN RULEMAKING

Starting in 1971, President Nixon ordered regulatory agencies to submit summaries of proposed rules as well as any alternatives they considered to the White House when issuing new rules. In 1974, President Ford ordered that agencies utilize cost-benefit analysis as a tool when developing "economically significant" rules. President Carter reinforced the White House's role in the regulatory process in 1978 with the issuance of Executive Order 12044, setting precedent for further executive orders, as shown in Figure 1. President Reagan went further, issuing a 1981 executive order that stated the administration's intent to "reduce the burdens of existing and future regulations." A subsequent 1985 order required agencies to develop regulatory plans to show the administration that new regulations were consistent with that objective.[17]

President Clinton issued an order in 1993 which changed previous orders from the Reagan administration to ensure consistency with the new administration's view on regulation and

that required regulatory analysis of economically significant rules.[18] This order, Executive Order (EO) 12866, became standard operating procedure and allowed the President to exercise significant control over agency procedures. In September 2003, OMB refined its 1996 "best practices" document and 2000 guidance to agencies, replacing these documents with what is known as Circular A-4, which provides guidance to agencies on the development of regulatory analysis, or "Regulatory Impact Analyses" (RIAs) that are required for "economically significant" rules.[19] President Bush issued Executive Order 13422, inserting "agency guidance documents" into the regulatory process and adding presidentially appointed regulatory policy officers inside the agencies directly.[20]

FIG. 1: EXECUTIVE ORDERS ON REGULATORY ANALYSIS AND OVERSIGHT

Executive Order	Title	President	Date Signed
EO 12044	"Improving Government Regulations" (revoked by EO 12291)	Carter	March 1978
EO 12174	"Paperwork" (revoked by EO 12291)	Carter	November 1979
EO 12291	"Federal Regulation" (revoked by EO 12866)	Reagan	February 1981
EO 12498	"Regulatory Planning Process" (revoked by EO 12866)	Reagan	January 1985
EO 12866	"Regulatory Planning and Review" (amended by EO 13258)	Clinton	September 1993
EO 13258	"Amending Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13497)	Bush	February 2002
EO 13422	"Further Amendment to Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13497)	Bush	January 2007
EO 13497	"Revocation of Certain Executive Orders Concerning Regulatory Planning and Review"	Obama	January 2009
EO 13563	"Improving Regulation and Regulatory Review"	Obama	January 2011
EO 13579	"Regulation and Independent Regulatory Agencies"	Obama	July 2011
EO 13609	"Promoting International Regulatory Cooperation"	Obama	May 2012
EO 13610	"Identifying and Reducing Regulatory Burdens"	Obama	May 2012

Source [21]

THE RULEMAKING PROCESS

Most of these regulations, or rules, are created and implemented by regulatory agencies under authority granted to the agencies by Congress under various statutes. The APA dictates the process by which executive agency rules can enter into force. The primary administrative law statutes referenced throughout this document that govern agency rulemaking include the APA, the *Regulatory Flexibility Act*, the *Paperwork Reduction Act*, and the *Congressional Review Act*. The generalities of the informal rulemaking process are shown in Figure 2, which shows the steps that agencies follow in order to implement new rules. In some cases, required comment periods or other deadlines and procedures of the rulemaking process are specified in the statute authorizing the agency rulemaking.[22]

There are many exceptions to the steps outlined in Figure 2. For example, regulations can fall into particular categories, including "major" rules, "significant" rules, and "economically significant" rules; while these types of rules are not identical, they are very similar, and in most cases a rules that is determined to be "economically significantly" will also be classified as a "major" rule.[23] These categories evolved from various statutes and executive orders that can trigger additional requirements in the rulemaking process if a regulation falls within one of them. A regulation can be considered a "major" rule if OIRA determines that it is likely to or does result in:

> *(A) An annual effect on the economy of $100,000,000 or more;*
>
> *(B) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or*
>
> (C) *Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.*[24]

In comparison, a rule is a "significant rule", per E.O. 12866, if it is likely to:

> *(A) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;*
>
> *(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;*

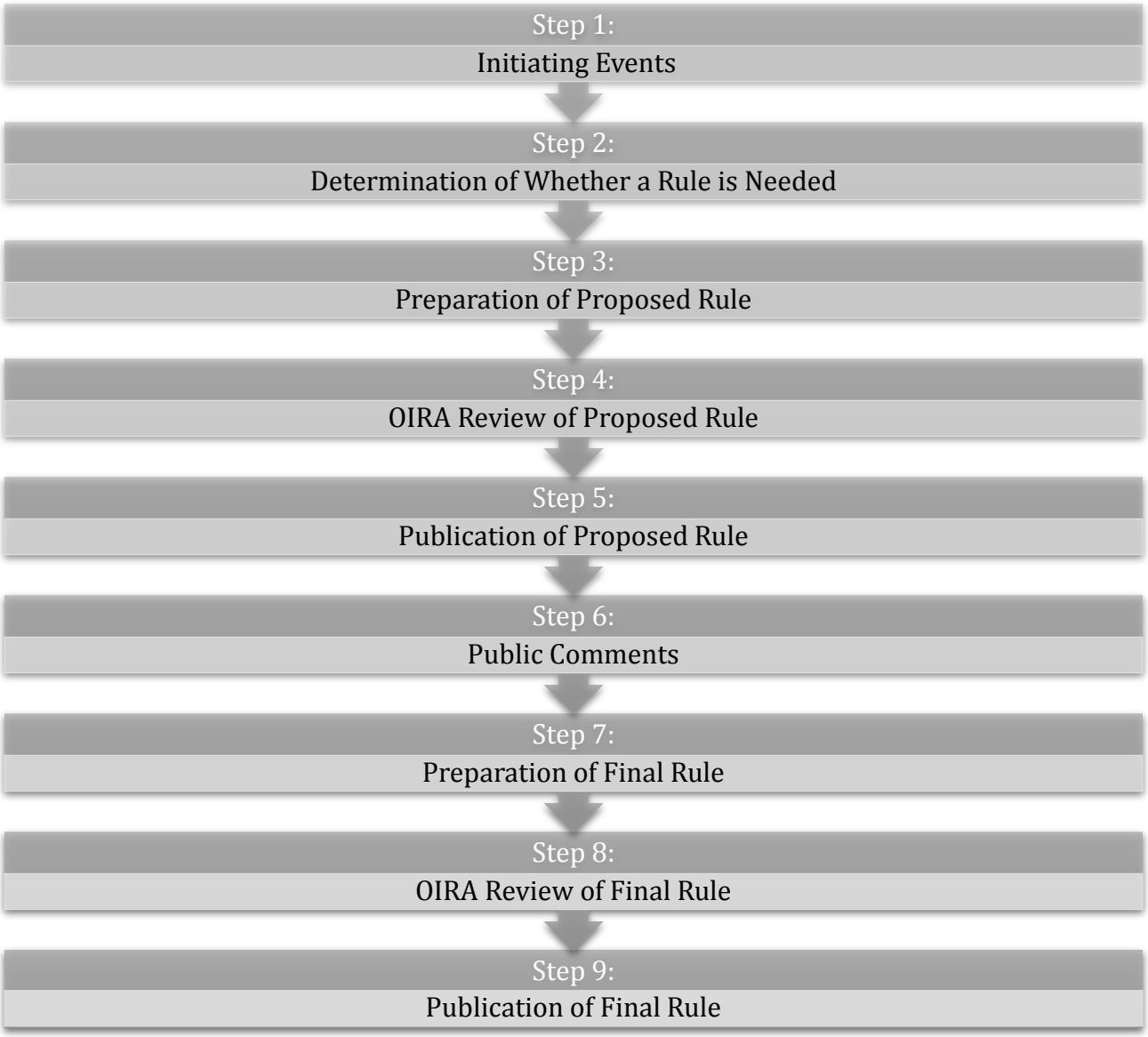
(C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or.

(D) *Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.*[25]

"Economically significant" rules are simply those that satisfy condition (A) of the criteria for "significant rules". As you can see, while the definitions are not identical, there is a significant overlap among the classifications of the rules. It is also worth noting that independent agencies are not required to have their regulations, even "economically significant" ones, reviewed by OIRA.[26]

The informal "notice and comment" rulemaking process discussed here is far more common than formal "on the record" rulemaking, which is used primarily by regulatory commissions for "ratemaking"; for example, when the Federal Energy Regulatory Commission determines allowable electrical transmission rates. The formal rulemaking process involves hearings and presentation of evidence underlying a decision to an administrative law judge or commission, and can include cross-examination. Almost all non-ratemaking types of rulemaking, however, are done using the informal process.[27]

FIG. 2: INFORMAL RULEMAKING PROCESS



Source: ICF Consulting Reg Map and JEC Staff

STEP 1: INITIATING EVENTS

The initiating event starts the agency rulemaking process. One common initiating event is a statutory mandate from Congress that an agency issue a rule. However, the event isn't always an act of Congress; current events and recommendations from within or outside the agency can also start the rulemaking process.[28]

STEP 2: DETERMINATION OF WHETHER A RULE IS NEEDED

Based on the existing body of regulations and statutes, agencies determine at this stage whether it is necessary to publish a new rule. Unfortunately, many agencies fail to adequately define the problem that they intend to solve, sometimes even defining the problem that requires regulation as the absence of regulation itself.[29] If the regulators decide to implement a new rule, they need to determine whether or not that rule must be published in the *Federal Register*. Agencies are required to publish:[30]

- Substantive rules of general applicability
- Interpretive rules
- Statements of general policy
- Rules of procedure
- Information about forms
- Information concerning agency organization and methods of operation

STEP 3: PREPARATION OF A PROPOSED RULE

A notice of proposed rulemaking is issued, which proposes additions, changes, or deletions from regulatory text and contains a request for comments from the public. Most rules must proceed through Steps 3 – 6 in order to take effect, but the following are exceptions:[31]

- Rules concerning military or foreign affairs functions
- Rules concerning agency management or personnel
- Rules concerning public property, loans, grants, benefits or contracts
- Interpretive rules
- General statements of policy
- Rules of agency organization
- Nonsignificant rules for which the agency determines public input is not warranted
- Rules published on an emergency basis

Note that in some cases, even if a rule is eligible for an exception under the APA, other statutes may require that rulemaking procedures be followed.

Two supplemental procedures apply at this step that an agency can utilize to assist in preparing a proposed rule:

- Advanced Notice of Proposed Rulemaking, which requests information from outside parties that may be necessary in developing the proposed rule.
- Negotiated Rulemaking, which is a mechanism under the *Negotiated Rulemaking Act* that allows an agency to bring together representatives of various interests to negotiate the text of a proposed rule.

Additionally, there are two types of final rules that bypass Steps 3 – 6:

- An interim final rule adds, changes, or deletes regulatory text and contains a request for comments. This type of rule is effective immediately upon publication. A subsequent final rule may make changes to the text of the interim final rule based on those comments. Interim final rules are limited to cases in which an agency has "good cause" to find that the normal rulemaking process would be "impracticable, unnecessary, or contrary to the public interest." This can include emergencies, minor technical corrections or amendments that do not result in a substantive change, or limited instances in which a specific regulatory outcome has been specified by Congress in a law. Interim final rules must include a statement by the agency in the preamble that states the agency's reasoning for finding "good cause" to bypass normal rulemaking procedures. [32]
- A direct final rule adds, changes, or deletes regulatory text at a specified future time. An agency issuing a direct final rule has a duty to withdraw the rule and subject it to the normal rulemaking procedure if it receives adverse comments within a period of time specified by the agency. Direct final rules are intended for rules that relate to routine or uncontroversial matters.[33]

STEP 4: OMB OVERVIEW OF PROPOSED RULE

OIRA reviews any rulemaking actions determined to be "significant," which in this case means that the rule would have an economic impact of $100 million per year or more. Rules from independent agencies are exempt from OMB review.[34] Unfortunately, in many cases where "economically significant" rules require a Regulatory Impact Analysis, the agency's analysis falls short of the standards detailed in executive orders and in OMB guidance, and whether the analysis was utilized to inform decisions pertaining to the rule is often unclear. Indeed, as Mercatus Center scholar Jerry Ellig testified before the Joint Economic Committee, "Regulatory Impact Analyses often seem to be advocacy documents written to justify decisions that were already made, rather than information that helped regulators figure out what to do."[35]

STEP 5: PUBLICATION OF PROPOSED RULE

The APA requires that proposed rules be published in the *Federal Register*, to allow interested parties and the general public to review the rule proposal and facilitate the public comments in Step 6. From 1976 to 2014, the number of pages printed annually in the *Register* dedicated to proposed and final rules more than doubled, from 21,914 to 45,592 pages.[36]

STEP 6: PUBLIC COMMENTS

The APA requires an agency to provide the public an opportunity to submit written comments for consideration; subsequent legislation has expanded this requirement to

include electronic means for submitting public comments. EO 12866 established the standard comment period as 60 days. Public hearings on the rule are optional, unless otherwise required by statute or other agency policy.[37]

STEP 7: PREPARATION OF FINAL RULE

A final rule adds, changes, deletes, or affirms the existing regulatory text based on incorporation of feedback from the comments on the proposed rule.

STEP 8: OMB REVIEW OF FINAL RULE

OIRA again reviews any rulemaking actions determined to be "significant." Because independent agencies are not technically part of the executive branch, they are exempt from the executive orders requiring OMB and OIRA review. However, independent agencies may be subject to provisions in statute that require a particular analysis before an agency rule becomes final.[38]

STEP 9: PUBLICATION OF FINAL RULE

An agency must submit most final rules to both houses of Congress before they can take effect, under the provisions of the *Congressional Review Act*. Major rules are subject to a delayed effective dates, and actions by the President and Congress can nullify a rule under the *Congressional Review Act* (CRA). However, this has occurred only once and under unusual circumstances, as the CRA resolution of disapproval that nullifies the regulation is subject to Presidential veto, and Presidents almost always support their regulatory agencies' rulemaking.[39] The APA requires that final rules, interim final rules, and direct final rules be printed in the *Federal Register*, and the *Federal Register Act* requires rules "that have general applicability and legal effect to be published in the *Code of Federal Regulations*."[40]

JUDICIAL REVIEW

After surviving the rulemaking process, regulations by federal agencies are still subject to judicial review. Many statutes that authorize rulemaking delineate the scope of this review and provide grounds on which regulations can be overturned. Otherwise, the general terms from the APA apply. The APA requires courts to overturn rulemaking that is:[41]

- Arbitrary, capricious, or an abuse of discretion
- Unconstitutional
- Beyond statutory authority
- Promulgated without following proper procedures
- Unsupported by substantial evidence or unwarranted by the facts of a case

The Supreme Court's decision in *Chevron, U.S.A., Inc. v. NRDC*[42] launched an era of judicial deference to agency interpretations of law. Unless Congress was clear on the matter, courts will uphold and agency's "reasonable" interpretation of the statute and not substitute their

own judgment. This decision has made it more difficult – though not impossible – to challenge agency rules.[43]

"MIDNIGHT REGULATIONS"

Midnight regulations are regulations that are passed during the lame duck period of a President's term. Compared to other regulations, these regulations tend to be rushed through the rulemaking process, especially through OIRA review. As a result, the analysis behind these regulations is often significantly less thorough than analysis conducted on other types of regulation. According to a paper by Patrick McLaughlin and Jerry Ellig, "The quality of regulatory analysis is quite likely correlated with the quality of regulations themselves." During their research, they found that many low-quality analyses did not include a single alternative approach to regulating the issue that the regulation purported to address; in fact, many of the analyses were unable to effectively delineate the problem the regulation was intended to correct.[44]

CONCLUSION

Government rulemaking is a complicated process, but it is nonetheless a process worth understanding given the huge impact regulations have both on the economy and on the lives of the American people. As the Congress works to reclaim the lawmaking prerogatives that have been delegated to the Executive and its appointees, it is with this understanding that regulatory reform can ultimately prove effective.

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