

# Rulemaking Pursuing a Policy Agenda

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## Abstract

Rulemaking is a difficult process that involves interpreting legislation, often vaguely written, by legislators into formal rules of action for bureaucratic implementation. The process is highly political and often confrontational, with varied interests attempting to influence the behavior of the bureaucratic experts involved in writing rules, regulations, and setting standards. The end result is often delay, during which time the bureaucracy gets the blame. Even under the best of circumstances, however, rulemaking is a difficult process.

**Rulemaking** derives its legal rationale from the Administrative Procedure Act of 1946. According to the act, a “rule means the whole or part of an agency statement or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” Key terms in this definition include the charge to implement, interpret, and proscribe law or policy. The passage of laws involves a constitutional process involving both houses of Congress and the president. Once a law is passed, however, the task of turning that law into a workable policy ready for implementation has just begun. This step involves decisions about rulemaking that are not specified in the Constitution but rather were defined by Congress when it wrote the Administrative Procedure Act of 1946. Because rules are not passed by Congress, but by an administrative agency, they are often highly controversial. Yet, administrative procedures are necessary because Congress does not have the capacity or the expertise to implement (administer and enforce) the laws it passes. Rather it leaves that task to the experts, the various agencies that make up the federal bureaucracy. And importantly, rules have the same legal standing as laws passed by Congress, although they do not require congressional action.

A first step in the implementation process is to write rules and regulations that guide the administration and enforcement of the law. Without specific

rules and regulations, implementation could not occur. This is because in passing legislation, Congress leaves many of the details of the issue at hand to be determined by the administering regulatory agencies. In addition, laws can be detailed or vague, but all laws require operating rules before they can be implemented. Even when Congress attempts to be detailed in providing instruction to the bureaucracy, agencies often face such a varied and changing regulatory environment that specific rules must be written and rewritten over time to reflect changing realities. It is impossible for Congress to anticipate all of the new technological and environmental factors that may occur years down the road. Thus, even when detailed legislation is passed, agencies have considerable discretion to write new rules that will guide the implementation process.

To write regulations, agencies must interpret the meaning of the law. As laws are often the result of congressional compromise, legislation can lack specificity. This creates unique problems for the implementing agency. Not only it provides that agency with broader discretion to write rules and regulations but also means that the process of rulemaking will be more controversial and elongated. Rulemaking goes through several processes. The law must be interpreted and preliminary rules written with input from various bureaucratic officials, including area specialists and lawyers.

Unfortunately, agencies may not have the necessary resources to effectively implement the law or to write clear rules and regulations. Jones (1975) masterful work on the implementation of the Clean Air Act demonstrates that while Congress delegated the task of setting standards to the Administrator of the Environmental Protection Agency, the EPA lacked sufficient staff resources to determine specifically how to implement the law. Faced with legislative ambiguity, dueling political coalitions, some in favor of stricter regulation, while others were for more permissive standards, and faced with the need to reach out to 50 states that would also implement the law, the Clean Air Act's implementation was delayed. The writing of rules became a game of political football, with standards shifting from strict to permissive with each iteration of the writing of new rules. While it is easy to criticize EPA officials for their failure to write clear rules, the entire regulatory process (from legislation through rulemaking to actual implementation) ensured that implementation of the law would be a highly controversial process.

Furthermore, crafting a general standard in a law into a specific rule is not an easy process. Let us look at environmental regulation, for instance. It is not feasible to remove all particulates from the air or water—the cost and technological challenges are generally prohibitive. Therefore, for example, agency personnel writing rules on water pollution have to decide a standard that both protects the public and is both economically and technologically feasible. This means studying the issue to determine the relative threat of different

levels of a particulate versus the possible benefits to public health. Developing standards with an acceptable level of a particular pollutant can be and often is highly controversial, with some environmental groups arguing for zero tolerance, while the industries that are affected by the rule argue that strict rules are too burdensome. Meanwhile, disagreements in the scientific and legal communities over acceptable levels of pollution can be contentious, as well. Hence, at an agency such as the Environmental Protection Agency (EPA), rulemaking is often a highly argumentative process from the start, even when Congress provides detailed legislation.

Once a rule is written, which can take a number of years, the rule is then promulgated in the *Federal Register* and an opportunity is given for a hearing or comment period at which various interests can challenge the validity of the law. This period is often 90 days, allowing those who want to challenge the rule an opportunity to do so in writing or at a formal hearing. During this period, some participants will argue that the rule is too strict, while others will call for more general rules or even no rules at all. Rules may then and often are challenged in court, which can involve further delays in the implementation of the rule. During this period, the actual language of rules may be negotiated and changed to satisfy existing political and economic realities.

Critics of rulemaking often criticize the process and in particular note that agencies take years to write rules. Yet, given the fact that legislation is often vague and does not provide specific instruction to agencies, along with the technological and scientifically sophisticated knowledge that is involved in the writing of rules, it is no surprise that the rulemaking process is elongated. When we add the likelihood of lawsuits and other political challenges to the mix, it is understandable why it may take a decade or more for rules to be written before implementation of a law actually commences.

What makes the process even more difficult is that some rules are then measured against prescribed outcomes. Measuring outcomes is particularly difficult in many areas of social regulation. Hence, it is difficult to determine if rules and regulations are having the anticipated effect. This is the case because in certain areas of rulemaking, such as those involving environmental protection for instance, the impact of changes in the law and its implementation can take decades to determine with any level of accuracy. Thus, for example, a new rule instituted to protect slow moving underground water sources may be effective, but it may take two or three decades for the outcomes data to determine that progress is being made. In the meantime, opposition to the existing rule, generally from industrial sources that are paying the brunt of the cost of enforcement, is likely to grow and with it political pressure is ratcheted up against the implementing agency. As new presidential administrations emerge, and as the composition of Congress changes from one political party control to another over time, agencies therefore face

considerable pressure to modify or eliminate many of what are considered their most burdensome rules and regulations. Without reliable outcomes data to demonstrate that the rules are effective, agencies are at a distinct disadvantage in demonstrating the benefits of many existing rules.

Along with political actors, various political interests have incentives to manipulate rulemaking in favor of their industry. Rulemaking is not value neutral. There are winners and losers in this process. Some industries may benefit by stricter regulation, while others may pay a higher price, thus making their products less viable in the market place. Rulemaking therefore occurs within a political framework where various industrial participants place demands on agency personnel to write regulations that will benefit their industry. For example, at the beginning of the twentieth century, major distributors of beef products such as Armor favored stricter laws and regulations that would certify that their products were safe. The reason why they needed this government recognition was that other firms were selling meat products that were not safe, thus threatening Armor's market. The Food and Drug Administration (FDA) was created to perform this task. As this example demonstrates, rules do not always adversely affect all businesses. Similarly, newly constructed electrical utility plants may push for stricter regulation to force out energy competitors with older equipment. Again, rulemaking occurs in a highly contentious political environment and regulators must decide between what is in the public interest, a term often specifically stated in regulatory statutes but not well defined, and what impact rules and regulations will have on existing and emerging businesses. This is particularly important in the field of newly evolving technology, where innovation occurs at such a rapid pace that rules can be out of date within a short period of time and can actually impair innovation.

Kerwin (1994, p. 6) provides an example of the inherent difficulties involved in interpreting a law into a viable rule. Kerwin notes, in passing the Occupational Safety and Health Act Congress required the newly formed Occupational Safety and Health Administration (OSHA) "to assure so far as possible every working man and woman in the Nation safe and healthy working conditions." Yet the legislation did not clearly define such key terminology as "safe and healthy working conditions" or "so far as possible." Yet the law could not be implemented until such terminology was transformed from legal jargon into concrete rules that allowed for faithful implementation in "the public interest." OSHA therefore was tasked with turning general and ambiguous legislation into specific rules for governing. What for example was meant by "so far as possible"? Such legal terminology provides an agency with a great deal of discretion, and it also invites lengthy legal challenges. OSHA personnel also had to turn "safe and healthy working conditions" into tangible language. For instance, how many exit

doors are required in case of a fire? What sorts of restrictions are placed on the construction of equipment used in labor such as ladders for construction workers? The settings involved were diverse, involving most types of labor, from those working in dangerous jobs to office workers. And the standards had to apply “as far as possible to every working man and woman in the Nation.” The bold sweep of the legislation therefore meant that virtually all forms of labor would be incorporated under the laws provisions, guaranteeing that thousands of rules would be required to cover a multitude of different settings. Each would require vetting within the agency, a public hearing called the comment period, and many would encounter legal challenges that could be the subject of deliberation for decades. Hence, Congress delegated a vital, yet almost impossible task to OSHA.

As noted, the specific language used in formulating a rule can have significant economic consequences for a wide variety of industries and companies. They in turn attempt to influence the rulemaking process so that rules are written that favor their products. Sometimes, these challenges can be comical. For instance, it took decades for federal regulators to determine the specific definition of peanut butter: that is, what percentage of peanuts was required before a product could be labeled as peanut butter. Some firms wanted the standard to be lower so that they could market a product that contained a lower percentage of peanuts. This would lower the cost of the product, with the possibility of increased profits. On the other hand, the public would be purchasing a product called *peanut butter* without a high percentage of peanuts. The result was decades of legal wrangling. Similarly, there is a famous case involving the now defunct Interstate Commerce Commission (ICC) involving the definition of what constitutes a chicken. According to the Motor Carrier Act of 1935 and later legislative enactments, certain products were exempt from ICC regulation, mostly notably perishable items. Stock, such as chickens, was considered a perishable item. But what if the chicken was dead? Was it still a chicken? What if the chicken was dead, but its feathers had been plucked? Was it a chicken? Was refuse from chickens a chicken or was it a separate product requiring ICC regulation? The ICC decided these cases in a series of administrative proceedings. While the ICC finally determined the definition of a chicken, the agency was pilloried in the press and rulemaking was delayed for decades.

The peanut butter and chicken cases were decided in dozens of cases considered by administrative courts, which often adjudicate the application and enforcement of rules and regulations. Meanwhile, for a considerable period of time, producers were able to avoid stricter regulation. This resulted in increased short-term profits for a number of industries. As these cases demonstrate, the burden of writing rules and regulations is a highly complex process that evolves over decades.

Changing circumstances also influence how rules are written. For example, as Kerwin (p. 5) writes, laws “administered by the Federal Trade Commission” seek “to eliminate proper restraints on competition.” Originally, these laws were designed to deal with “robber barons and the trusts.” Today, however, the same laws apply to a variety of newly emerging technologies. Hence, the FTC must write new rules that apply existing laws to the constantly changing realities of a technologically developing society.

Because the implementation of rules has costs, which are primarily born by the private sector, the writing of rules has become politically controversial. Gerald Ford and Jimmy Carter issued executive orders governing the costs of rules and regulations. Ronald Reagan then signed several executive orders that limited rulemaking if the cost of a new rule or regulation exceeded a certain dollar value. Any such rule was then subject to review by the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA) and could be revoked. Similarly, the Reagan administration instituted a clearance procedure for administrative rules and regulations. This meant that all new rules and regulations would be reported to OMB and OIRA before a rule could be officially promulgated. This provided the Reagan administration with advance warning of all incoming rules and regulations, thus allowing the administration to block any new rules with which it disagreed. These mostly involved rules that would adversely affect business by placing additional costs on business production. Most affected were rules written by such social regulatory agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration. Presidents since Reagan have kept a careful watch on the cost and scope of rules, often trumpeting a reduction in rules as evidence of their administration’s political success, without reference to the value of these regulations in terms of protecting the public from Ecoli, air and water pollution, and other threats to public health and safety.

Despite the political challenges, there is no alternative to continued rulemaking. It simply is impossible for Congress to pass detailed legislation that considers every single issue that the nation faces or will face in the future. The federal bureaucracy is best equipped to meet those challenges. Yet, it is clear that rulemaking will continue to be as much a political and economic process as it is a scientific or rational process. Rulemaking often necessarily involves tough choices, economic winners and losers, and extended political and legal controversy. For these reasons, the rules that bureaucracy’s write will continue to engender discussion and often-fierce political debate. Examining the nexus between the courts and rulemaking is an area that should provide fertile ground for future research. In addition, there is a need for more research on the legal and administrative hurdles to effective rulemaking.

## REFERENCES

- Jones, C. O. (1975). *Clean air: The policies and politics of pollution control*. Pittsburgh, PA: University of Pittsburgh Press.
- Kerwin, C. M. (1994). *Rulemaking: How government agencies write law and make policy*. Washington, DC: Congressional Quarterly.

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