



Congressional Research Service

Assisting the Congress with its deliberations and legislative decisions

How a Law Becomes a Regulation

Rulemaking and the Patient Protection and
Affordable Care Act

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Rulemaking

- How statutes are implemented, and carry the force of law.
- Much more common than statutes.
- Governed by variety of statutes/orders:
 - Administrative Procedure Act (1946)
 - Executive Order 12866 (1993)
 - Congressional Review Act (1996)



Administrative Procedure Act

- Requires agencies to:
 - Publish proposed rule (NPRM) in Federal Register.
 - Allow public to comment (usually 30 days).
 - Publish final rule in Federal Register.
 - Delay effective date for 30 days.
- Many exceptions (e.g., “good cause”).
- Compliance subject to judicial review.



Executive Order 12866

- Covered agencies submit “significant” proposed/final rules to OIRA (600-700/yr).
- OIRA acts as the President’s agent; can return rules to agencies.
- OIRA also reviews information collections under Paperwork Reduction Act (3,000/yr).



Congressional Review Act

- Agencies submit all final rules to GAO and Congress before they can take effect.
- “Major” rules (\$100M) delayed 60 days.
- CRA provides expedited procedures in Senate on resolutions of disapproval.
- Only one rule disapproved using CRA.



Rulemaking Process

- See handout for figure.
- No “average” amount of time.
- Concerns about “ossification.”
- Nevertheless, agencies can move quickly; issue 3,000 final rules per year.



Patient Protection and Affordable Care Act (PPACA)

- Contains dozens of provisions requiring or allowing agencies to issue rules.
- For mandatory rules, Congress sometimes stipulated:
 - What the rules should contain.
 - How the rules should be issued.
 - When the rules should be published or implemented.



Agency Discretion

- Other PPACA provisions:
 - Required rules but did not specify details.
 - Permitted rules, but did not require them.
- Some provisions allowed agencies to decide
 - Whether to issue rules or “guidance.”
 - Whether any action would be taken at all.



PPACA Final Rules

- As of July 15, eight “interim final” rules issued under PPACA:
 - Early retiree reinsurance (HHS, 5/5/10).
 - Insurance coverage options (HHS, 5/5/10).
 - Coverage for children up to age 26 (IRS/EBSA/HHS, 5/13/10)
 - Indoor tanning tax (IRS, 6/15/10)
 - Pre-existing conditions (IRS/EBSA/HHS, 6/28/10)



PPACA Final Rules (continued)

- Five of the eight rules were not specifically mentioned in PPACA.
- None of the rules permitted prior comment:
 - APA's "good cause" exception and/or
 - statutory permission in PPACA/elsewhere.
- None of the rules monetized expected benefits.



Other PPACA Rules

- Agencies have also published:
 - Four proposed rules.
 - Two “requests for information” regarding future rules.
 - One notice to form negotiated rulemaking committee (medically underserved population).
- New rules will be issued next week (e.g., “meaningful use” of electronic health records).



Conclusions

- “War Isn’t Over.”
- Agencies have substantial discretion to “fill in the details.”
- When Congress writes statutes without details, it cedes some control to agencies.



Congressional Oversight

- Oversight and confirmation hearings.
- Meetings with agencies and OIRA.
- Filing comments on rules.
- Congressional Review Act (?).
- Appropriations restrictions.



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