How a Law Becomes a Regulation
Rulemaking and the Patient Protection and Affordable Care Act

July 22, 2010
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.
Contact

Curtis W. Copeland
wcopeland@crs.loc.gov
(202) 707-0632