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Informal Rulemaking and America's Non-Statutory Laws

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Legal Studies 501

Professor Metcalf

Informal Rulemaking

Informal rulemaking is the non-statutory process of creating, administering and monitoring rules throughout government agencies. Barriers to entry, competition and regulatory need are all proponents of the informal rulemaking process. This is the rules created in regulatory agencies such as the Environmental Protection Agency (EPA) or the Occupational Safety and Health Administration (OSHA). The process of informal rulemaking is critical to the outcome of effective decrees. Specific requirements must be met in order to make the informal rulemaking process legal and legitimate.

In certain government agencies, formal rulemaking is rarely seen. This is often a result of rules being made after opportunity for an agency hearing.¹ In these situations, non-statutory regulations are made as an answer to a critical need or concern. For example, when the Internal Revenue Service (IRS) issues a notice of a hearing based on a particular concern, it is most likely associated with a proposed rulemaking notice.² The IRS and agencies like it do not often make rules through this process. It is mostly done through negotiated informal rulemaking.

In certain cases there is a fusion between the two types of rulemaking. This comes from the need created in statutory requirements. Often legislation will instigate the need for a government agency to act. Many statutes create the need for agencies to further address issues. They may control the amount of time in which a statute must be adhered to by an agency. Additionally, a statute may deem the agency responsible for its success. When the Patient Protection Affordable Care Act passed in 2010, the IRS was the figurehead to adopting specific

¹ "The Informal Rule-Making Process," Harvard, August 5, 2013, accessed August 5, 2013, http://www.hks.harvard.edu/m-rcbg/Conferences/rpp_rulemaking/Eisner_Presentation.pdf.

² "Shared Responsibility for Employers Regarding Health Coverage," IRS.gov, August 5, 2013, accessed August 5, 2013, <http://www.irs.gov/pub/newsroom/reg-138006-12.pdf>.

changes.³ Because penalties and charges in the Affordable Care Act were considered taxes in the legislation, the IRS organically became the responsible agency. The IRS will ultimately be responsible for maintaining 18 new taxes, 47 provisions, 60,000,000 medical records and more than \$1 billion in annual revenue.⁴

The informal rulemaking process consists of identification of need, proposal development, agency review, and federal register.⁵ There is also a component of final rule making within the process. In the initial step, identifying the need is the most crucial factor. Because informal rulemaking is non-statutory, the need must be assessed differently than in legislation. The rulemaking agency must identify a problem based on agency reports, incidents, enforcement issues, or requests of interpretation among others. In the development stage, the consideration is given to the legal authority and rights. Additionally in development, the preparation of supporting documentation is assessed. The agency must then review the rule internally. Once the agency executives declare it to be complete, the administrator approves the rule. If there happens to be a significant need for additional review, the rule is reviewed on a departmental basis. If it is deemed non-significant, it is sent to the federal register.

There are four basic parts of the informal process that must be adhered to in order for the rules to be legitimate. The first is to propose the rule with proper explanation and give the ability for outside entities to ask questions. Then, the need turns to public comments about the rule. This is the opportunity for negotiation special interests and concerns. Once updates are made based on

³ Chris Jacobs, "Morning Bell: The Irs and Obamacare, by the Numbers," The Foundry, June 5, 2013, accessed August 5, 2013, <http://blog.heritage.org/2013/06/05/the-irs-and-obamacare-by-the-numbers/>.

⁴ Chris Jacobs, "Morning Bell: The Irs and Obamacare, by the Numbers," The Foundry, June 5, 2013, accessed August 5, 2013, <http://blog.heritage.org/2013/06/05/the-irs-and-obamacare-by-the-numbers/>.

⁵ "The Reg Map: Informal Rule-Making," August 5, 2013, accessed August 5, 2013, <http://www.reginfo.gov/public/reginfo/Regmap/regmap.pdf>.

the public comments, the final rule is made. This is created with exceptions that are allowed based on previous concern, legal obligation or statutory restrictions.

Each area of focus in the rulemaking process is made available to the public. This public docket will hold all aspects of the rule, public concern, changes and interests. Once the informal rule is implemented, it is placed on a federal register. The rules are then interpreted through public notice and citation to the federal register. Implementing rules through this process is similar to that of interpretation of statutes. It includes review and interpretation of the policy, training to those involved and affected and adjudication about enforcement.

Because of its significance, informal rulemaking must take the necessary time and procedures to ensure the rule is fair and fairly governed. A key component of this is public awareness of the entire process. Negotiation in informal rulemaking creates a more effective outcome for the governing agency.

The Art of Negotiation

There is truly a secret art to negotiating and the negotiation process in informal rulemaking is no exception. It takes necessary structure, time allotment and submission in order for one of these negotiations to be effective. Unlike traditional negotiation processes, informal rulemaking does not involve only two parties. It can consist of the governing agency, the executive, legislative and judicial branches of government, the general public, as well as many other regulatory parties. The governing agency must allow all of these parties to voice their concerns and opinions in order for the rule to be legal and carried out effectively.

As in any negotiation, there are key factors that do not change. As cited in an article from Forbes online, in order for a negotiation process to work the outcome from all parties must be

results-oriented.⁶ In the informal rulemaking process one can never assume to be able to delete the rule as it was originally proposed. It can however be changed to create a more universally accepted outcome. The result of any negotiation in this process must adhere to traditional negotiation rules in which all parties are able to voice concerns and opinions and give solutions prior to final conclusion.

Unlike a negotiated work contracts or employee benefits, negotiation for rulemaking often comes through public hearings, written communication, and more recently, online communication. This keeps the issues public and out front. Most regulatory agencies want to hear multiple views on a proposed rule in order for it to be well received. One way of doing this is through online posts and communication. Many agencies have recently begun to use online forums to post rules that would affect a large number of the public. This allows for anyone to view the negotiation process. Public opinion can be the most valuable influence in the informal rulemaking process.

It is also critically important to address all concerns. Similar to most ordinary negotiations, the outcome will only affect certain people or groups of people. It would be beneficial for these specific groups to take action when appropriate in the rulemaking process. For example, if OSHA is proposing regulations for human resources in a manufacturing environment, groups such as the HR representatives or the manufacturing trade associations may want to get involved. Because of their specific interest and area of knowledge, these groups would benefit the most from such regulation.

⁶ Jenna Goudreau, "The Secret Art of Negotiating: Take Your Ego Off the Table", *Forbes* (October 8, 2012): page nr., accessed August 5, 2013, <http://www.forbes.com/sites/jennagoudreau/2012/10/08/the-secret-art-of-negotiating-take-your-ego-off-the-table/>.

Negotiating Rulemaking

One of the main differences in informal rulemaking and traditional statute implementation is the power to negotiate. Often statutory control is reserved to special interest groups or specific political parties. One of the great things about informal rulemaking is the need for public input. Regulatory agencies often have more conclusive outcomes in informal rulemaking because of the necessity for negotiation. Individuals, business groups, trade organizations, and the government can all weigh in on a proposal.

The general public can weigh in on the rule making process by stating their concerns and providing new or alternative ideas to specific inclusions of the rule. While many regulatory rules may not pertain to a majority of the general public, those that do can be well received with public insight. During the first few steps of rulemaking the public has total control over communication. The proposed rule is released to the public and the public can comment about a rule and provide any significant data to support claims. At any time during the rulemaking process the public has access to the records of a rule to determine what content has been received and taken into consideration.

Business groups and trade organizations can also weigh in on this process. These groups tend to provide crucial data to the regulatory agency when establishing proposals. Some agencies are connected to interest groups that can aid in the negotiation process. As an example, OSHA has a program called *Alliance* that connects specific working groups to future regulations.⁷ This allows OSHA to communicate proposals and receive negotiated interests in a timely manner

⁷ "Osha Alliance," Occupational Safety & Health Administration, August 5, 2013, accessed August 5, 2013, <https://www.osha.gov/dcsp/alliances/>.

from targeted groups. Since its creation, OSHA has connected to hundreds of groups and businesses through its 10 region affiliations.

As in lawmaking, judicial review is critical to adhering to U.S. legal standards and the Constitution. In rulemaking, members of the public are open to filing lawsuits against regulatory agencies based on proposed rules. If the public feels the rule does not adhere to law or the Constitution, they are free to file suit. The court can then chose to look further into the claim and will be involved in further negotiations. If the court feels the claim is just, the agency may be denied the proposal altogether.

A Real World Example

In November of 1986 a California law was passed by direct vote and informally titled Proposition 65. This proposition would regulate toxic chemicals that consumers are exposed too and establish guidelines for reporting the use of these chemicals in consumer products. Since its creation, more than five hundred chemicals have been added to this list.⁸ The law required regulation to take place through the Office of Environmental Health Hazard Assessment. Since its creation, the law has not been readdressed by the California state legislature until this year. Prop 65, as it is now called, protects the people of California from chemical exposure that could be hazardous to their health. However, it also regulates business in a way that can be economically harmful. Because of this, lawmakers have been asking for restructure in the propositions enactment for many years.

⁸ *OEHHA*, July 26, 2013 ed., s.v. "State of California Environmental Protection Agency Office of Environmental Health Hazard Assessment Safe Drinking Water and Toxic Enforcement Act of 1986," accessed August 5, 2013, http://oehha.ca.gov/prop65/prop65_list/files/P65single072613.pdf.

In 2013, California Governor Brown asked for Prop 65 concerns to be addressed by the regulatory agency and new inclusions to be given to the California legislature. In a press release earlier this year, Governor Brown asked to address concerns of overregulation, cost to violators and legal claims. Then, the Office of Environmental Health Hazard Assessment asked for public interest concerns to be given to them before the end of the 2013 California session. The California Environmental Protection Agency began a taskforce that would reach out to business groups that are primary targets of Prop 65 and begin working on new proposals for Prop 65 updates. Because this is a forum for public negotiation, the task force attempted to include as much detail in concern and updates as was possible. The groups targeted included trade associations, manufactures, consumer product safety experts, legislators, and special interest groups throughout the nation that do business in California. These groups were all asked to give a proposal on the three topics Governor Brown suggested.

Once complete, the proposals were summarized into one conclusion for each topic by the California EPA. In the next few weeks, the EPA will give this proposal to the Office of Environmental Health Hazard Assessment and the Governor office. This will be done in hopes that the specific findings will instill change for the first time in many years. This example of negotiation takes place throughout many regulatory agencies. They use the tools of the public to make more effective rules and a more widely accepted outcome.

Key Players

The governance over informal rulemaking falls back to the regulatory agency. But, because the process is an open forum for negotiation, many key players can take part. Whether created by statutory involvement or not, informal rule making begins within the regulatory

agency. This is done through a process of creating the proposal through specific departments and internal leadership. The common misconception is that rules are created on a whim. In actuality, rules, formal and informal, are created based on a need that is to be addressed. This is done by a governing department within an agency. Many proposals may span the scope of an agency where others may only be departmental. This would depend on the gamete of need in each situation. Typically, those in charge of the negotiation of a rule would be the director of the department or the agency. This would be the primary contact for the public and the figurehead in the rules development.

While not in every case, many times the legislative branch plays a significant role. This is primarily limited to formal rule making, though informal rules can have a legislative presence. Members of Congress with specific interest in the regulation may chose to be part of the negotiation process. In this, they would act similar to a public entity in that they would define their inclusions during the public response time. In some cases Congress may be the ones to initiate judicial review based on Constitutional oversight. While it is rare in informal rulemaking, Congress can and does play a role.

Though not directly part of the negotiation, in a situation of judicial review the judicial branch will be responsible for interpreting the Constitutionality of a proposed rule. As stated previously, this will only come after a claim is filed against a potential rule. Because of its place in government, judicial review will be present in any rule making process regardless of formality.

Finally, the most critical negotiating front for most proposals is the public. Public interest is the key component to making informal rules relevant. During the stated period, anyone in the

general public is able to state their opinions. Some regulatory agencies have gone as far to create surveys to make public communication more user-friendly. Some parts of the public segment may be special interest groups, such as those stated in the example above, and even lobbyists. While lobbying has not been heavily involved in regulation, some industries demand it as part of the government relations outreach. More often than not this inclusion comes through formal rulemaking as part of continued communication with Congress.

Why Negotiate?

Negotiation is not an unfamiliar thing to anyone in business or government. The process of negotiation may differ depending on the desired outcome but the basic principles remain the same. Negotiation in informal rulemaking is a critical component that cannot be left out in order for a regulatory agency to create and implement a rule. Because it is non-statutory, the legality of the rulemaking process relies heavily on public involvement and inclusion.

New rules, like legislation, are created everyday for countless agencies on a federal, state and local level. These activities are allowed to be monitored by the public. Public interest helps to define a favorable outcome in the rule making process. Negotiation is the key to this. It is necessary to negotiation so the regulatory agency meets their needs and the public feels included.

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