



GIBSON DUNN

Fundamentals of Rulemaking

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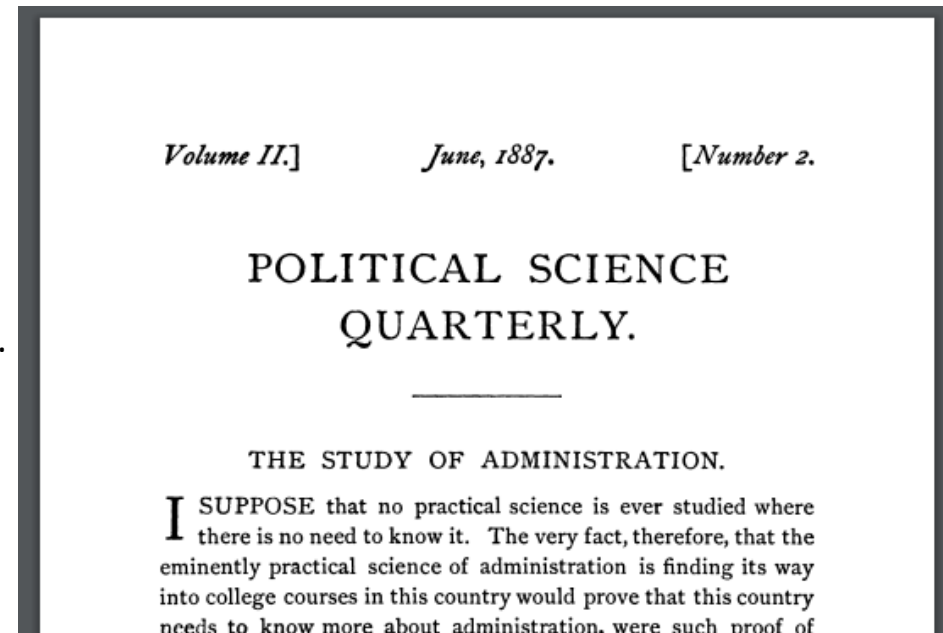
How to Influence the
Regulatory Process
(Advanced
Considerations)

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The Rulemaking Process


Principles of the Administrative State

- The regulatory process has its foundations in the Progressive Era and the same principles and basic structures envisioned then remain largely unchanged.
- Modern society too complex for politicians to govern through divided system of government.
- Public policy and the administration of government is a science, which has a right and wrong answer. Expertise can perfect public policy.
- Public policy, therefore, should be made largely by experts who are separate from politics.



Regulatory Process is the Compromise between these Principles of Administrative State and the Constitution

- How can we square these principles with the Constitution?
 - Lawyers. Lots of lawyers.
- Delegated power -- can only exercise power given by Congress or the President.
- As importantly, a robust process that holds these powerful administrators accountable through the public, the elected branches, and the courts.
 - Administrative Procedure Act (1946).
 - State analogues.

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| <h1 style="margin: 0;">FEDERAL REGISTER</h1> | |
| <p>Volume I</p> | <p>Nos. 1-121</p> |
| <p><i>Saturday, March 14, 1936</i></p> | <p><i>No. 1</i></p> |
| <p>PRESIDENT OF THE UNITED STATES.</p> | |
| <p>EXECUTIVE ORDER</p> | |
| <p>ENLARGING CAPE ROMAIN MIGRATORY BIRD REFUGE</p> | |
| <p><i>South Carolina</i></p> | |
| <p>By virtue of and pursuant to the authority vested in me as President of the United States, and in order to effectuate further the purpose of the Migratory Bird Conservation Act (45 Stat. 1222), it is ordered that the following-described</p> | |
| <p>Thence with mean high water along sandy beach and sand dunes,</p> | |
| <p>N. 31°59' E., 17.19 chs.;
 N. 65°32' E., 6.81 chs. to the northeasterly point of Bull Island; thence,
 S. 37°27' E., 8.12 chs.;
 S. 22°53' E., 19.29 chs. to corner No. 2, a point on the northeasterly end of the cove of Bull Island, facing the Atlantic Ocean; from this corner a U. S. B. S. standard concrete post marked "2 WC COR 2 BULLS ISLAND 1935", set 18 in. in the ground for a witness corner on the west slope of a grassy sand dune about 200 chs. northeast of a dense growth of cedar, myrtle, and palmetto, bears S. 71°30' W., 0.60 ch. distant; from which witness corner a U. S. C. & G. S. concrete monument marked "BULL 1934" bears N. 67°48' W., 3.18 ch. distant; an 18 in. cedar blazed and marked "BT WC COR 2" bears S. 13°00' W., 2.23 chs. distant;</p> | |

Advanced Process

- Unified Agenda
 - Agencies generally publish their plan for the year – know what's coming.
- Working groups or other advisory groups.
 - Often write the regulations that agency will consider.
- Petitions for Rulemaking
- OIRA (Oh-eye-ruh)
 - OMB's review of "significant" regulations.
- Congressional Review Act
- Judicial Review

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Rulemaking at the State Level

States are Becoming Increasingly Active in Regulatory Space

- Federal government is generally not passing a lot of laws.
 - Federal agencies are embarked on de-regulation efforts, which will itself involve the regulatory process.
- States are reacting, in going one of two ways:
 - Passing “replacement” regulations.
 - Environmental
 - Consumer protection
 - Health care/insurance
 - Undertaking their own de-regulatory push.
- Predict: state regulatory processes will become more complex, more sophisticated, and more like the federal system.

State Processes Already Parallel to Federal

- State administrative procedures are usually similar to federal.
- State Legislatures normally have more active role in legislating, so much of the regulatory push will come from the State Legislatures.
- State processes attract very little interest or participation.
 - Wide open – strong public policy advocacy at the state level can be very effective in shaping outcomes.

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How to Influence the Regulatory Process (Basics)

The Basics: Know the Process

- The regulatory process will grind on with or without you.
- To be heard, you must know when the regulatory process is at work, so pay attention:
 - The more technical and specific your interest, the less likely it will be in the papers before it is too late!
 - Regulations.gov – Great tool.
 - Reginfo.gov – OIRA's tracking tool.
- Set up alerts, follow actions that may be of interest, and stay current.

The Basics: Public Comment

- The Public Comment period is the time for stakeholders and other interested parties to let the agency know their views.
- If there was no “pre-rule” group that considered the rule, then the first Notice of Proposed Rulemaking is likely the first written, public regulation.
- System is designed to allow open input that is transparent:
 - Judicial review requires that rulemaking be done on the record at the agency, meaning the public comments and the agency’s review process.
- So, if you want to have views heard, submit Comments!

The Basics: Effective Public Comments

- Public Comments should be relevant, substantive, and directed at the issue before the agency.
- Include legal and policy arguments.
 - If believe the agency is acting outside of its authority, say so. But don't only say that – agencies will likely have already considered issues, so focus most on the policy.
- Support your positions *with evidence*.
 - Emphasize BENEFITS if you support.
 - Emphasize COSTS if you oppose.
- DON'T JUST SAY IT—PROVE IT.

The Basics: Effective Public Comments

- Public Comments: Who is the Messenger?
 - Depends on the issue.
 - Trade associations are frequent players to gather common interests and promote them before an agency.
 - Former regulators or respected technical experts.
 - Build coalitions of interests.
 - If there are public hearings, generally want a presence, but the “play” all depends on the circumstances.
 - Big PR stunts or other mass messaging strategies – they are not likely to be directly effective, but could nonetheless be worthwhile for indirect effects.

The Basics: (Substantive) Public Comments Matter

- Regulators want to enact good public policy.
 - Where data and facts support one position over another, they want to know about it.
 - Oftentimes, the decision-makers are not themselves experts on the subject-matter, but the agency staff is. Public comments are your only ability to get them to pay attention to facts and opinions they do not otherwise have.
- Public Comments are not an election!
 - While strong opposition or support from the public or key stakeholders will be considered, the entire *purpose* of the administrative process is for the agencies to make decisions based on reasoned analysis, not an opinion poll.
 - Treating the comment period as such is not effective and even counter-productive.

The Basics: (Substantive) Public Comments Matter (cont)

- Judicial Review!!!
 - The agency must consider the public comments it receives.
 - Substantive, factual public comments create the foundation to either support or oppose ultimate agency action in court proceedings.
 - Sophisticated advocates know this, and they proceed to either put in comments to support or oppose an action with an eye towards what a reviewing court will see.

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How to Influence the Regulatory Process (Advanced Considerations)

Advanced Considerations: Know Your End Game

- What do you want to happen, and what is the likelihood?
 - If very technical and non-ideological, may not need much more than straight-forward participation in the regulatory process.
 - If controversial, then need to have a multi-dimensional approach.
- Know the process that it will undergo – is it an executive agency or independent?
 - Is there a working group or other advisory group involved? Be involved EARLY.
 - Will OIRA review it?
 - Who at the agency will be writing it, reviewing it, advising on it?
- Know who the stakeholders will be.
 - Politically powerful?

Advanced Considerations: Work the System

- Consider whether, when, and how to engage with political branches.
 - OIRA Review
 - Congressional action?
 - APPROPRIATIONS – Congress can exert great power over agencies through the appropriations process. Know who those players are.
 - In state government, this pressure can be even stronger – Virginia budget is full of legislative mandates to stop or start regulating something.
 - Congressional Review Act (unlikely to be necessary or available).
 - Do not get too cute, though – undue influence can jeopardize a rulemaking.

Advanced Considerations: Work the System

- Judicial Review
 - Either way, controversial rules will likely be challenged.
 - If this is where it is going, then know that at the beginning – act accordingly.
 - Help the agency with comments if support.
 - Help the opposition with comments if opposed.
 - Remember deference to agencies is substantial.

Advanced Considerations: Work the System

- TIMING!
- Align the regulatory calendar with the political one.
 - No one has a crystal ball, but think about it.
 - Will there be new people in office?
 - Generally, if you oppose something, delay is your friend. If you support something, delay is your enemy.

Advanced Considerations: Work the System

BUT REMEMBER:

- No substitute for embracing the regulatory process.
- Make the arguments. Be responsive. Be persuasive. Give them no reason to dismiss your views.
 - Oftentimes, regulators make decisions based on thin records and without much engagement.
 - Showing up is the most important step to influencing the regulatory process.

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Noah Sullivan is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. His practice focuses on complex civil litigation in state and federal courts and is a member of the Firm's Litigation Department.

Mr. Sullivan has experience at every stage of civil litigation, working on high-stakes matters across a diverse set of legal issues including federal securities laws, the False Claims Act, and state-law commercial disputes.

Prior to his return to Gibson Dunn, Mr. Sullivan served as Counsel to Governor Terence R. McAuliffe in Richmond, Virginia. Serving first as Deputy Counsel and then Counsel, Mr. Sullivan served as the chief legal advisor to the Governor and Cabinet, including advising on and supervising the conduct of major litigation involving the Commonwealth. Most notably, Mr. Sullivan was instrumental in developing the legal framework for and successfully defending Governor McAuliffe's historic policy to restore voting rights to over 170,000 ex-felons. He also represented the Governor in federal redistricting litigation in which the Governor successfully advocated for the creation of a second minority opportunity Congressional district in Virginia. Mr. Sullivan also helped lead the official state review and response to the white nationalist rally that occurred in Charlottesville, Virginia on August 12, 2017. In addition, Mr. Sullivan was primarily responsible for conducting the review of all executive branch agency rulemakings in Virginia on behalf of the Governor, spanning numerous policy and legal topics conducted under the Virginia Administrative Process Act.

Mr. Sullivan is admitted to practice law in the District of Columbia and the great Commonwealth of Virginia, as well as the federal courts in Virginia and Maryland.