

The Daily Dish

What's the Hold Up with Regulatory Reform?

DAN GOLDBECK | AUGUST 28, 2017

What's the Hold Up with Regulatory Reform?

On at least one issue, President Trump has never lacked for ambition or clarity of purpose: his agenda on regulatory policy. Then-candidate Trump called for 70-percent cuts in regulation, and soon after taking office the president signed a bold one-in, two-out Executive Order. In fact, over the first few months, the Trump Administration has made notable progress in slowing the development of new regulatory burdens. However, beyond the historic flurry of 14 rules repealed under the Congressional Review Act, the fully realized repeal of past regulatory burdens has, to date, been limited. Why is this?

In general, President Trump (or the various agency heads) cannot simply declare "Regulation X" instantaneously invalid with the stroke of a pen. Rather, one must put forward a new Administrative Procedures Act (APA)-compliant rulemaking that strikes "Regulation X" from the regulatory code. This is not a simple process.

Much like the various mundane ins-and-outs to the legislative process, there are certain requirements a typical regulatory or deregulatory measure must meet to pass legal muster. The two most important criteria, as laid out by the APA, are that the rule undergo the notice-and-comment process and that it is not "arbitrary or capricious." The former establishes a framework where an agency publishes a proposed version of a rule, takes public comment (usually for 30-60 days), considers those comments, and then produces the final version. The latter ensures that regulatory actions derive from: 1) some underlying legal authority granted to the agency; and 2) some well-reasoned argument for its creation. In terms of timing, the notice-and-comment procedure is the main hurdle.

To better illustrate this, let's use the example of the "Waters of the United States" (WOTUS) rule. Under President Obama, the Environmental Protection Agency and the Army Corps of

Engineers proposed the rule in April 2014 and finalized it June 2015, roughly 14 months later. Part of this was likely due to the agencies extending the comment period twice. Part of it was likely the agencies having to sort through more than 1.1 million comments. If outside parties don't believe an agency gave those comments proper consideration, they can (and usually do) file a court challenge. This whole process, particularly for contentious rules, can take considerable amounts of time.

The highly controversial WOTUS rule is one of the Trump Administration's most high-profile targets for repeal and/or revision. Last month, the agencies published their proposed "re-codification" of the rule. Just this past week, they also extended the comment period for that proposal and thus added at least another month to the timetable. It's difficult to predict exactly how long this reversal rule will take to finalize, but it would not be unreasonable for this proposal to – much like the original rule – also take a year or more to finalize. And that final rule would only be merely "Step 1" of the Administration's overall plan for this policy!

The rules on how to make rules are in place for good reason, as they generally help constrain agencies from issuing arbitrary dictates regarding a policy area simply on a whim. However, for those seeking to clear out past regulatory clutter, the process can seem frustrating. Patience and a steady resolve to see such reforms through will be necessary.