Rulemaking and Regulations

FROM PEANUTS ON A PLANE TO THE FUTURE OF E-CIGARETTES

Imagine that as you embark on a holiday vacation, you encounter two out of the ordinary travel situations. First, as you wait your turn at the Transportation Security Administration (TSA) checkpoint, you cannot help but notice the person in front of you is getting a pat-down and an extensive bag check. Next, you notice an airport security official pull an e-cigarette from this person’s purse. The TSA officer appears befuddled, asking his coworker, “What’s the regulation on these?” Since this situation does not involve your own luggage, you move on to your gate, awaiting your departure.

Eventually, you board your plane and depart on time. As your plane reaches a cruising altitude, the airline attendant seems overly attentive to the passenger in front of you. Suddenly, the airline attendant is on the intercom asking if anyone has an EpiPen. Unfortunately, the nearby passenger was allergic to the free airline peanuts. Although these two encounters may seem out of the ordinary, they both involve government regulation and are explainable.

One of the perks of flying in the United States today is that you receive free peanuts and a drink. But, in 2011, the U.S. Department of Transportation (DOT), under agency rulemaking processes, proposed a rule in the Federal Register (a daily publication of the federal government detailing new or changing rules and regulations) to ban airlines from serving peanuts on a plane due to growing concerns surrounding allergic reactions. Based upon extensive research and the fear of airline lawsuits, the DOT provided the public three options for consideration in its proposed rule: (1) complete ban; (2) ban when a passenger requests...
a peanut-free flight; or (3) offer a peanut-free buffer zone (sit where you can’t be in contact with peanuts). After careful consideration of the law and input from the public, the DOT determined peanuts could stay (Anjarwalla 2010; Federal Register 2011).

While peanuts on the plane are not regulated by the DOT, what about the use of e-cigarettes? Most people are well aware that smoking regular cigarettes is not allowed on an airplane, but an e-cigarette is a battery-operated vaporizer that allows a person to simulate the effects of smoking without the smoke. Although the impacts of e-cigarettes are still being examined by the Food and Drug Administration (FDA) for minors, the Pipeline and Hazardous Safety Administration (part of the DOT) made a determination about their use during air travel. If traveling by airplane, a person is not allowed to have an e-cigarette in their checked bag or charge the battery while sitting in their seat during flight. The concern is that the batteries could catch fire during flight. A person is, however, allowed to bring their e-cigarette in their carry-on bag if it is turned off during the duration of the flight (Gilliard 2015).

Inevitably, we might not spend a lot of our time thinking about peanuts on a plane or e-cigarettes, but federal agencies like the DOT or FDA do, from which we benefit. To better understand how and why agencies are able to create regulations, this chapter introduces you to an often overlooked aspect of decision making.

The focus of Chapter 4 is to examine the process and implementation of U.S. regulations. Specifically, the goal of this chapter is to unpack how and why U.S. regulations are made, and what happens after a regulation goes into effect. To provide context, we begin the chapter with a definition of regulation. With this definition, we use the concept of delegation of authority to illustrate that regulatory policymaking cannot occur until after Congress creates a law. With this foundation, we introduce students to agency policymaking (also known as rulemaking) with a step-by-step guide about the process, using federal and state examples. Inevitably, this process can encounter some controversy along the way, and we use the protection of the polar bear to illustrate this point.

To answer our second question—what happens after a regulation goes into effect?—we examine the actors involved with the implementation of U.S. regulations (e.g., regulators or businesses). In order to understand this aspect of the regulatory arena, we use the example of a dry-cleaning business to document how a regulator will conduct a site visit to ensure compliance with a law. This example also allows us to investigate how the relationships between regulators and the regulated community (e.g., businesses) can impact the implementation of public policy.

After our whirlwind tour of U.S. regulations, we close the chapter with innovative solutions for the future and our everyday citizen connection section. We use examples from Cornell University’s Regulation Room to suggest how students can become better versed in the rulemaking jargon to participate in processes. Our everyday citizen section will entice the tech-savvy student, or those of us who aspire to become regulatory policy wonks. Our goal with this chapter is to engage public policy students in a conversation about U.S. regulations—how and why they are created.
UNDERSTANDING THE CONTEXT OF U.S. REGULATIONS

Negative connotations often arise when we think of the term regulation. For example, take the USDA’s efforts to regulate the size of the hole in Swiss cheese. In the United States, Americans prefer smaller-sized holes because we like to use our cheese for sandwiches. However, Europeans prefer larger-sized holes because they demonstrate a high-quality cheese. Also, U.S. cheese manufacturers do not want larger-sized holes because the slicer required for this type of cheese is expensive (Skrzycki 2003).

Common phrases that come to mind when considering the term regulation include, but are not limited to, “bad for business,” “waste of taxpayer dollars,” or “inefficient.” To illustrate some of these arguments, we use examples from the Republican primary debates for the 2016 election and public opinion data from Gallup. During the Republican primary debates, several candidates repeatedly noted that regulation is bad for business. In particular, presidential candidate John Kasich (Republican governor of Ohio) argued that if elected president, he would freeze all major government regulations for an entire year because they cost the taxpayer too much money. To examine this point, Figure 4.1 suggests that since 2001, Americans have perceived there is too much government regulation on business and industry.

FIGURE 4.1
Public Perceptions
In general, do you think there is too much, too little, or about the right amount of government regulation of business and industry?

To counter these sentiments, Charles Goodsell (2004) suggests we should not allow these negative perceptions about U.S. regulation to overshadow the essential work of those who create government regulations—bureaucrats who work for U.S. agencies. Put succinctly, “The more Americans believe that bureaucracies are bad, the more likely they are to agree with efforts to slash taxes and gut government programs. That is why it is increasingly important that we begin to see that most of the criticisms of government bureaucracy are based more on myth than reality, and that these administrative agencies play a central role in promoting the important missions of a modern democratic government” (Amy 2007). Although the sentiments for and against government regulation exist, it is important to begin with a clear definition.

**Defining Regulatory Policy**

As noted in Chapter 1, U.S. regulations are a subset of public policies. Regulation, as defined by Meier (1985), is an “attempt by government to control the behavior of citizens, corporations, and subgovernments” (1). By way of comparison, Eisner, Worsham, and Ringquist (2006) suggest that regulation is an “array of public policies explicitly designed to govern economic activity and its consequences at the level of the industry, the firm, or individual unit of activity” (3). Nonetheless, U.S. regulations are important to understand because they: (1) attempt to promote public interest, (2) try to prevent or compensate for market failures, and (3) respond to the demands demonstrated by elected officials or the American people (Eisner et al. 2006).

In order to move beyond definitions, it is important to remember that regulations do not occur in a vacuum and that they involve a variety of actors and steps. Simply put, regulations are defined by congressional law (i.e., statutory law). Statutory law, by definition, is the outcome of the congressional lawmaking process. The congressional lawmaking process includes: members of Congress drafting legislation; committee actions; floor debate; and votes, by both houses of Congress—and, if successful, approval by the president. The Defense of Marriage Act, the Clean Air Act, and the Endangered Species Act are all examples of statutory law. The resulting statutes are the guidelines that set the direction for the policy actions that follow—regulations by specific agencies.

Due to the breadth of U.S. public policy, agencies at the federal and state level often focus on a specific area. Table 4.1 provides examples of federal agencies and their purposes. The examples range from the FDA, which ensures that what we eat or consume is safe, to the U.S. Department of Homeland Security (DHS), which focuses on securing our nation from potential threats. The goal here is not to provide an exhaustive list of every state and federal agency that exists in the United States, but a snapshot into the scope of policy work taken on by agencies.

Much like the federal level, states also have agencies to help carry out policy. These agencies vary by state, and to demonstrate these differences, Table 4.2 provides some state examples. For instance, Montana has a Department of Livestock that attempts to “control and eradicate animal diseases,” whereas Wisconsin’s Department of Natural Resources oversees areas such as hunting, fishing, and clean air and water quality for their respective states.

While the aforementioned briefly defines the U.S. regulations, there is still much more to the story. For instance, how is it possible for both Congress and agencies to create public policy? Recall congressional statutes provide the general direction for an agency to create a regulation, which in turn allows for policymaking to occur in both entities. Regulations
are designed by federal and state agencies through a set process known as rulemaking (which we discuss later in the chapter). Rulemaking is undertaken by agency rule-writers who are charged by Congress to implement congressional statutes (Rinfret and Furlong 2013) by writing rules, which become regulation (law). Once a rule has been written, state and federal regulators and businesses ensure and monitor implementation. However, why would Congress give up its lawmaking authority to an agency? The concept of delegation

### Table 4.1
Examples of U.S. Federal Agencies

<table>
<thead>
<tr>
<th>Federal Agency</th>
<th>Purpose of Agency</th>
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<tbody>
<tr>
<td>Department of Education (DOEd)</td>
<td>Promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.</td>
</tr>
<tr>
<td>Department of Homeland Security (DHS)</td>
<td>Secure the nation from the many threats we face.</td>
</tr>
<tr>
<td>Department of Transportation (DOT)</td>
<td>Ensure safe, fast, efficient, accessible, and convenient transportation system.</td>
</tr>
<tr>
<td>Environmental Protection Agency (EPA)</td>
<td>Protect human health and the environment.</td>
</tr>
<tr>
<td>Food and Drug Administration (FDA)</td>
<td>Protect public health, speed innovations to create medicines, regulate manufacturing and distribution of tobacco, ensure the safety of human and veterinary drugs, and ensure the security of the U.S. food supply.</td>
</tr>
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</table>

### Table 4.2
Examples of State Agencies

<table>
<thead>
<tr>
<th>State Agency</th>
<th>Purpose of Agency</th>
</tr>
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<tbody>
<tr>
<td>Arizona (AZ) Department of Administration</td>
<td>Provide benefits for public employees.</td>
</tr>
<tr>
<td>Montana (MT) Department of Livestock</td>
<td>Control and eradicate animal diseases, prevent the transmission of animal diseases to humans, and protect the livestock industry from theft and predatory animals.</td>
</tr>
<tr>
<td>New York (NY) Department of Corrections and Community Supervision</td>
<td>Provide treatment services in safe facilities for individuals to prepare for reentry into society.</td>
</tr>
<tr>
<td>Ohio (OH) Department of Commerce</td>
<td>Assist businesses in operating lawfully.</td>
</tr>
<tr>
<td>Wisconsin (WI) Department of Natural Resources</td>
<td>Manage fish, wildlife, forests, parks, air, and water resources, while promoting a healthy, sustainable environment and a full range of outdoor opportunities.</td>
</tr>
</tbody>
</table>
of authority is necessary to decipher why Congress delegates its lawmaking authority to federal and state agencies.

Delegation of Authority

Delegation of authority is the term to describe when Congress grants policymaking power to agencies. Although seemingly simplistic, reasons why delegation of authority occurs warrant explanation because it includes a variety of actors across U.S. branches of government and raises questions about accountability (e.g., who holds unelected officials—agency officials—accountable for creating policy). We begin by explaining why Congress delegates its lawmaking authority to agencies before turning to how the president and the courts serve as checks on this delegation of policymaking to address concerns surrounding the role of accountability.

Why Delegate?

Congress delegates its lawmaking authority for a number of reasons. First, according to Davis (1969), delegation occurs because programs are necessary and no one (meaning Congress) is willing to set specific guidelines. Members of Congress do not want to specify particular details about programs in legislation because it could be detrimental for reelection efforts or standing with their political party. For instance, if members of Congress stated explicit details in federal legislation that airlines could not have peanuts on a plane, the effects could be negative. To illustrate this point, consider that a peanut company could be within a congressional member’s district. The peanut ban might lead to layoffs, which could lead to fewer votes for this member of Congress. Therefore, Congress tries to keep the language of legislation vague, leaving it up to agencies to clarify, interpret, and implement.

This leads us onto another reason for congressional delegation of authority: the theory, shift of responsibility (Fiorina 1982). Simply put, this theory presumes that members of Congress shift their decision making to agencies because they can shift the focus, or even blame, to agencies. To illustrate this point, we return to our peanuts on the plane example. Instead of passing legislation that could ban peanuts on a plane, the FDA can research and consider the potential implications for consumers. If a ban is implemented, angry airline companies or passengers would blame the FDA for making this decision, therefore shifting the blame from Congress to the agency.

A final example of why Congress delegates its authority surrounds the role of expertise. Presumably, federal and state agencies are comprised of experts in specific policy areas and therefore have the knowledge to create the necessary details to carry out a policy. For example, a congressional member may not have the expertise to determine how many acres would be necessary to ensure the leatherback sea turtle does not become extinct. Instead, experts within the U.S. Fish and Wildlife Service (FWS) determine what is necessary for the survival of the leatherback sea turtle because their staff have the expertise to study and investigate critical habitat for the species.

Although these examples demonstrate reasons why Congress delegates its authority to agencies to make policy, an overarching concern is that the decisions made by agencies are gone unchecked by unelected bureaucrats. More specifically, the question becomes: How can unelected officials (bureaucrats) within an agency create policy? To address this concern, we document how Congress, the president, and the courts hold agency decisions accountable.
Congress and Accountability

Each branch of government—Congress, the president, and the federal courts—serve as checks on agency decision making. As Figure 4.2 illustrates, Congress, the president, and the U.S. Supreme Court have a variety of mechanisms to ensure that the federal bureaucracy is held accountable. We examine each in turn.

Congress has three dominant mechanisms to oversee agency decision making—the Administrative Procedure Act, budgets, and legislation. For instance, Congress created the Administrative Procedure Act (APA) of 1946. The APA was adopted in 1946 as an oversight and accountability tool for the rapidly expanding government under President Franklin D. Roosevelt’s New Deal that attempted to bring the United States out of the Great Depression. The APA requires agencies to follow its administrative rulemaking guidelines so government entities could carry out congressional statutes through the creation of rules. According to the APA, a rule “means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” (Administrative Procedure Act 1946, Section 551). A rule created by an agency could then carry the same legal force as a law. Administrative rulemaking consists of the stages or processes by which an agency creates and implements a rule. The description of the rulemaking stages later defined in this chapter identify that the APA requirement of public participation during the notice/comment portion of the rulemaking processes allows for significant public involvement in policymaking.

Congress can also check agency decisions through two additional measures. Congress controls agency budgets. The U.S. Senate Appropriations Committee determines how much money an agency has for specific programs. If members of Congress are upset with the policy direction of an agency, the agency’s budget can be decreased. This occurred with the Supplemental Nutrition Assistance Program. Under this USDA program, families below the poverty line receive food stamps. With decreased funding, the agency may have to decrease the amount of support provided to families.

Another important oversight function Congress provides is that its members can write legislation to overturn an agency rule (Kerwin and Furlong 2011). This approach is

![FIGURE 4.2](https://example.com/figure42.png)

**Mechanisms of Accountability**

<table>
<thead>
<tr>
<th>Congressional Accountability Mechanisms</th>
<th>Presidential Accountability Mechanisms</th>
<th>Supreme Court Accountability Mechanisms</th>
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<tbody>
<tr>
<td>Administrative Procedure Act</td>
<td>Appointment power</td>
<td>Litigation to overturn agency decisions</td>
</tr>
<tr>
<td>Budgets</td>
<td>OIRA review</td>
<td></td>
</tr>
<tr>
<td>Legislation</td>
<td>Executive orders</td>
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<tr>
<td>Hearing</td>
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used less frequently because it takes a great deal of effort to create and pass congressional legislation. However, in 2015, the U.S. House of Representatives passed legislation to prevent the U.S. EPA from updating regulations under the Clean Water Act that focus on creating new regulations to protect U.S. streams and wetlands. At the time of this writing, the U.S. Senate had yet to consider this legislation; therefore, the final outcome was not available.

Congress can also conduct oversight hearings of an agency. For example, Congress could be concerned about the FDA program to evaluate peanuts on a plane due to constituent complaints. During a congressional hearing, members of Congress could ask FDA employees to provide testimony about what approaches the agency is taking to ensure individuals are not having allergic reactions on an airplane.

**The President and Accountability**

The president also has oversight authority over agency decision making. For the purposes of this chapter, we use appointment power and the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) as illustrations. Presidents have the power to appoint (with Senate confirmation) who serves as the head of an agency. An agency head (the person at the top of the agency or organization) can determine the policy direction of an agency, which is often within the same political perspective of a president. For example, the 2015 head of the Department of Justice, Loretta Lynch, noted that her agency, in concert with statements made by President Barack Obama, would not investigate states that allowed for the recreational or medicinal use of marijuana, even though it was a violation of federal law.

The other powerful tool that a president can use is OIRA review. OIRA’s role is to review the costs and benefits associated with agency regulations that may be economically burdensome for business (over $100 million). Specifically, under President Ronald Reagan’s Executive Order 12291, the OMB director is authorized to “review any draft proposed or final rule or regulatory impact analysis from a covered agency” (Copeland 2013, 10). Or, as Tomkin (1998) stresses, “Under the order, federal agencies would be required to conduct cost-benefit analysis, known as the Regulatory Impact Analysis of proposals for new regulations as well as for final regulations” (206). Presidents have the authority to issue executive orders to provide policy directives for agencies to implement.

Since President Reagan, subsequent presidents, regardless of party, have continued the practice of OIRA review (Copeland 2013). The goal of OIRA review is to ensure regulations do not have an undue impact on business, and if a president is concerned with an agency regulation, he can direct OIRA staff to review the rule. Within this review process, OIRA invites anyone to meet with their staff to express concerns with an agency rule and also conducts economic evaluations weighing the costs and benefits of an agency rule. Agencies are also invited to these review meetings. If OIRA does not believe an agency has done its due diligence in justifying costs of a rule, it can return the rule back to the agency for more research. Until OIRA approves an agency rule, a rule cannot move forward. Scholars have scrutinized this review process, noting that it allows business groups to dominate conversations with OIRA, impacting agency policymaking (Copeland 2013).
The Supreme Court and Accountability

A final oversight mechanism for agency decision making is the role of the U.S. Supreme Court. As Kerwin and Furlong (2011) remind us, “No institution of government has been as persistent in its oversight of rulemaking for a longer period of time than the federal judiciary” (247). Often, individuals or organizations will use the courts to sue because they are unhappy with the outcome of an agency decision. For example, many states such as Ohio and West Virginia are upset about the guidelines enacted by the EPA’s Clean Power Plan Rule. Under this regulation, current and future coal-burning power plants have to decrease carbon dioxide emission levels 30 percent by 2030. Therefore, some states are suing the EPA to prevent this rule from becoming law. Inevitably, the courts can determine “whether an agency has performed its rulemaking task in a legally permissible manner” (Kerwin and Furlong 2011, 256).

UNDERSTANDING REGULATORY PROCESSES

Although checks and balances are in place, federal and state agencies do have the authority to create policy through rulemaking because Congress has delegated them the ability to do so. In order to unpack the rulemaking process, Figure 4.3 illustrates the stages of the federal rulemaking process, which we describe in detail.

The APA of 1946 defines the stages by which a rule-writer promulgates a rule. These stages, as Figure 1 indicates, are: (1) pre-rule; (2) Notice of Proposed Rulemaking (NPRM); and (3) final rule. The pre-rule phase (stage 1) is where informal communication occurs between interest groups and agency personnel. This stage is used by an agency to acquire additional research or to discuss a rule with affected entities. For instance, the FDA would use this stage of the process to discuss with tobacco companies and public health organizations their perspectives about e-cigarettes. These conversations inform the agency about potential concerns or areas of research that should be included in a rule.

These informal interactions lead to stage 2, when an agency publishes a Notice of Proposed Rulemaking (NPRM) in the Federal Register. The Federal Register is a daily publication of U.S. federal agency regulations. Recall that agencies are required by the APA of 1946 to publish and provide notice to the public about a rule. As Photo 4.1 illustrates, the Federal Register can be accessed through the Internet by visiting www.federalregister.gov.

FIGURE 4.3
Stages of Federal Rulemaking
Each day the government is operating, the Federal Register is published and updates the rulemaking activities of all federal agencies. For instance, on Friday, November 20, 2015, the Federal Register had seventeen proposed rules. These proposed rules cross agencies, and anyone can search through this information to determine agency activity.

The APA also requires, under stage 2, that the public is provided a window of opportunity to comment on a proposed rule. Congress provided a public comment period to ensure agencies considered public input, creating a mechanism for citizen participation in agency decision making. This comment period is typically open for thirty to sixty days, so that any person can submit a comment to a rule. However, if the agency believes more time is needed for public participation, the comment period can be reopened. This recently occurred with the Bureau of Land Management’s (BLM) hydraulic fracturing rule. The public wanted additional time to consider the rule; therefore, the BLM lengthened the time to submit public comments. Any member of the public can go to www.regulations.gov (the online portal that publishes all rulemaking actions of federal agencies), find the proposed rule, and submit a formal/written comment (see Photo 4.2). A person is also able to view what other comments have been submitted for a particular rule.
Ultimately, public comments provide opinions about the rule, for or against. After the comment period ends, agency personnel are required by the APA of 1946 to review the comments and respond to commenters. After examining the comments, the agency uses this information to determine the language and substance of the final rule. On average, it can take an agency one to two years to review public comments. This length of time depends on the volume or amount of public comments, as well as staff available to review and provide feedback for commenters (Kerwin and Furlong 2011; Rinfret 2011a, b). If a person or group is upset with the final rule, litigation or the court system can be used to challenge the final actions of an agency. Depending on the outcome of a court case, a rule cannot be finalized until a judicial decision is made. Nonetheless, once an agency moves through the stages of the process, a final rule is published in the Federal Register. Although final rules are published electronically in the Federal Register, each rule can be downloaded to your computer or laptop. Figure 4.4 provides an example of the first page of a final rule.

State Rulemaking

The federal rulemaking process is extensive, containing three main stages, but what about state processes? By way of comparison, state rulemaking was designed by the Model States Administrative Procedure Act as a guideline for state rule-writers to follow (Renfrow and Houston 1987). Although the state process is very similar to that of federal rulemaking, each state may have a unique or different step, such as the governor’s role in the process or involvement of members of the state assembly. Instead of detailing each of the fifty state processes, which would take up the remaining pages of this textbook, we use New York as an example to explore what a state rulemaking process entails. If you are interested in the process of your own respective state, we suggest using www.uniformlaws.org, which provides state-specific procedures for promulgating rules.

The New York process follows a three-step approach much like federal rulemaking. More specifically, New York must follow the State Administrative Procedure Act (SAPA). SAPA sets state-specific guidelines for New York rulemaking, such as requiring public comment and the role of other branches of state government, which we examine next.

Stage 1 of New York’s rulemaking process begins with an internal agency review. This review helps to determine if rulemaking is the best or most appropriate action to address a particular problem. For instance, the New York Department of Health decided internally a rule would be necessary to create a program for medical marijuana. More specifically, agency staff would discuss the statutory guidelines for medical marijuana use and determine if their agency had the authority to move forward with a rule. If the agency decides to move forward, agency staff discuss and prepare a proposed rule (NPRM). Often at this stage, agency staff will also reach out to stakeholder groups to receive input on the issue. For the medical marijuana example, an agency may meet with doctors, hospitals, health professionals, and businesses.

Stage 2 of the state process unfolds when the agency submits a formal proposed rulemaking in the New York State Register. Photo 4.3 provides an illustration of the New York State Register. This is where a person can search for information about rules proposed by New York state agencies.
After the agency publishes the notice of proposed rulemaking, the public comment period begins. Public comments must be sent via e-mail or regular mail to the respective agency. The *New York State Register* does not allow information to be submitted to a central location as does the federal government, via Regulations.gov. One reason why a person has to submit a comment via e-mail or regular mail is that it can be costly to maintain a central location for state rules. Due to how comments are submitted, however, a New York agency
has 180 days to review and respond to public comments, as well as to determine what action to take on a rule. An agency can ask for an extension to review public comments, but on average, New York agencies must respond within 180 days.

Stage 3 of the rulemaking process begins when an agency provides a complete text of the rule being finalized to the governor, the president of the Senate, the Speaker of the Assembly, and the Administrative Regulations Reviews Commission (within the New York State Senate). Therefore, at this stage, the filing of the final terms of the rule is published in the *New York State Register*.

In summary, federal and state rulemaking provide a set process for agencies to turn vague congressional legislation into policy. Agencies at the federal and state levels provide ways for us to participate in these processes. At the federal level, the public can participate by submitting public comments to Regulations.gov; however, at the state level a person typically has to submit comments via e-mail or regular mail.

Unfortunately, not many Americans are aware of rulemaking processes unless they directly impact their day-to-day lives, such as peanuts on a plane or e-cigarettes. Although we might not think about agency rules, many groups or organizations across the United States do pay attention. Specific groups (e.g., interest groups that represent an interest, such as the environment, public health, or car manufacturers) try to use this process to influence agency outcomes, which warrants an explanation.

**INFLUENCE AND PARTICIPATION**

We know interest groups lobby members of Congress to influence how congressional policy is made. What about agency policymaking—do groups lobby agency officials to create rules? As noted, an agency can and does meet with groups informally during stage 1 of the rulemaking process. But interest group influence on agency decision making is
not as clear-cut. Interest group influence has been investigated over the last two decades by scholars trying to decipher how and at what stage of the rulemaking process groups try to impact agency decision making (see Figure 4.5 for examples).

Specifically, scholars (Kerwin and Furlong 2011; Rinfret 2011a, b; Rinfret and Furlong 2013; Yackee 2012) have examined at what stage in the process groups can make an impact. One would presume the best mechanism to influence an agency rule would be to submit a public comment. And what scholars have found is the groups that are going to be impacted by a rule—usually businesses—dominate the public comment phase, which can impact the language of a rule finalized by an agency (Golden 1998). In particular, Marissa Golden compared comments submitted by groups with the actual language of a final rule. With this comparison, her research documented that business group comments or their language could be found in a final rule.

Although submitting a public comment is important to document your voice to an agency about a given rule, we are increasingly seeing a variety of groups that are trying to meet with an agency rule-writer during stage 1 to provide positions (Rinfret 2011a, b). For example, Rinfret (2011) has extensively studied this stage of the process and found that groups try to meet with an agency during stage 1. These meetings can often impact what language is placed in an NPRM (stage 2). Although qualitative research suggests agencies and groups note the importance of this stage of the process, it is difficult to examine because the APA of 1946 does not require agencies to document or record these exchanges. A researcher can ask an agency about these exchanges, which they are often willing to provide, but the groups participating during stage 1 do not necessarily want to go on record. Scholars are still investigating the reasons why.

Inevitably, those who are going to be impacted by a rule created by an agency are the individuals who are going to participate in the process. Research suggests business groups often dominate the submission of public comments (stage 2); thus, they can impact the language of a final rule (Golden 1998; West 2009). Furthermore, a growing body of research suggests that the pre-rule stage is the current access point to make an impact (Cook and Rinfret 2013; Hoeff and Ferguson 2007; Rinfret 2011a, b). But the question becomes, What happens after a rule is finalized—what can groups do to make an impact? Recall that during stage 3 of the rulemaking process groups can use litigation to achieve their desired outcome after a final rule is published in the Federal Register. Moreover, a rule cannot become law until pending courts cases are resolved (Kerwin and Furlong 2011). To examine how litigation can impact the outcome of a final rule, we examine the Alaskan polar bear.

**FIGURE 4.5**
Rulemaking and Influence

<table>
<thead>
<tr>
<th>Rulemaking Stage</th>
<th>Mechanisms of Interest Group Influence</th>
</tr>
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<tbody>
<tr>
<td>Stage 1: Pre-rule</td>
<td>• Meet with agency rule-writer</td>
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<tr>
<td></td>
<td>• Provide research to agency rule-writer</td>
</tr>
<tr>
<td>Stage 2: Notice and comment</td>
<td>• Write a substantive public comment and submit to agency</td>
</tr>
<tr>
<td>Stage 3: Final rule</td>
<td>• Sue agency, challenging language of the final rule</td>
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</table>
In 2007, the United States Fish and Wildlife Service (FWS) proposed an NPRM in the Federal Register, asking for public comment about whether the agency should list the polar bear as a threatened species and, if so, how much habitat should be set aside for the polar bears’ survival. The U.S. FWS used the Endangered Species Act (ESA) of 1973 as its statutory authority to propose this rulemaking. More specifically, under the ESA a species can be classified or listed as endangered or threatened. “Endangered” means this species is on the brink of extinction, whereas “threatened” is used to explain that there is concern the species could become extinct. In this rulemaking, the FWS received over one million public comments and determined approximately 187,000 acres of designated critical habitat were necessary for the survival of the polar bear.

Although this rulemaking was finalized in 2008, the storyline continues. In particular, environmental groups such as the Center for Biological Diversity were upset that the species was not listed as endangered because, as a threatened species, reduced protections or exemptions can occur (Rodriguez 2011). In turn, other groups and the state of Alaska argued the rule was unnecessary altogether because the polar bear was already protected by state law and did not need federal intervention (Rodriguez 2011). After the finalization of this rule, lawsuits ensued and the industry perspective was that the science and data were not enough to set aside critical habitat for the polar bear. Federal judge Emmett Sullivan ruled in 2011 that the FWS rationales to list the polar bear were “well supported and that opponents failed to demonstrate that the listing was irrational” (Rodriguez 2011).

In 2015, the question was whether or not the extraction of petroleum resources or coal-burning power plants in the region near the habitat of polar bears were aiding in the decrease of the species’ habitat. This question is still under investigation, and we encourage you to consider what is at stake that drives the complexities of this issue—climate change, the U.S. economy, and the future of the polar bear. Regardless, this story about the polar bear demonstrates that even though the rulemaking process is in place, groups that are not satisfied can try to influence the outcome of a final rule through the courts. The courts are the final decider (unless Congress decides to pass new legislation in lieu of a rule), and polar bears are still a threatened species.

**AFTER A RULE BECOMES A LAW**

Once a federal or state rule becomes a law, we move on to the implementation phase. The implementation and ongoing compliance with regulations involve two crucial populations:
regulators and members of the regulated community (businesses and other regulated entities). These are the individuals on the front lines (sometimes also referred to as street-level bureaucrats or front-line workers) of policy implementation who are largely responsible for the success or failure of that policy (Lipsky 1980; Maynard-Moody and Musheno 2003; Riccucci 2005). As with rulemaking, regulators use a process to examine the day-to-day practices of a regulated entity and to make sure the organization is in compliance with the law. Moreover, on average, a regulator can often be responsible for overseeing five to three hundred companies per year (Pautz and Rinfret 2013). This average depends upon the policy area and government agency. But before we turn to an investigation of how a regulator would review the practices of a regulated entity, it is first important to describe state and federal regulators.

Within an environmental context, state regulators are often responsible for implementing a large majority of policy (Pautz and Rinfret 2013). For instance, many states across the United States have drinking water regulators. The goal is to ensure compliance with the Safe Drinking Water Act (see Chapter 10). Typically, these individuals work for a state’s environmental protection agency. Let’s say a local mobile home park uses a well for drinking water, but this water becomes contaminated. Due to the contamination, a drinking water regulator and the operator of the mobile home park could work closely together to address the issue and to prevent health risks for the community. Together, the regulator and the mobile home park operator could ban the use of drinking water until it was properly tested and safe for consumption.

An example of the type of work a federal regulator oversees is the mining of coal. The mining of underground coal has been categorized as one of the most hazardous occupations in the world (U.S. Department of Labor 2015). One of the most important safety precautions for underground mining is proper ventilation for workers. If ventilation is not provided, deadly results can and have occurred. As a result, the federal Mine Safety and Health Administration (MSHA) regulators have the statutory authority under the Federal Coal Mine Health and Safety Act of 1969 to monitor underground mining practices. An MSHA regulator would examine underground mines to make sure proper equipment and ventilation are provided for miners in order to help prevent respiratory diseases from coal dust.

State and federal regulators run the gamut across policy areas. But, in order to make sure public policy is carried out as intended by the law, a regulator will conduct a site visit of a local mobile home park that reported drinking water contamination or to make sure a mine has safe working conditions for employees. The process to ensure compliance with the law is often described as an inspection process or site visit. In order to better understand the inner workings of these practices, we examine how a regulator would inspect a dry-cleaning facility. We use this particular example, then, to describe why understanding the interactions between a regulator and businesses are also essential to understanding U.S. policy implementation.

Regulating Your Local Dry Cleaner

To demonstrate the processes a regulator might take when visiting a company, we use a local dry cleaner as an example—we use the pseudonyms Sam, the regulator, and Sunny, the owner and operator of Sunny’s Cleaners, to unpack the process.
Sam, the regulator, arrives unexpectedly at Sunny’s Cleaners at 8 a.m. on a cold winter day. Upon arrival, Sam announces to the dry-cleaning attendant that he would like to meet with Sunny’s manager to conduct a site visit. Sunny, the owner of Sunny’s Cleaners, makes his way to the customer pickup counter and greets Sam. Sam asks Sunny if they could meet in his office to discuss any issues or concerns before he begins his site visit of Sunny’s Cleaners. Sunny lets Sam know that he believes his company is in compliance with the law, and notifies staff that Sam will be walking around the floor to examine their dry-cleaning practices. Sunny and Sam, however, discuss some issues that occurred during the last site visit—Sunny’s Cleaners had a malfunctioning machine that was spewing chemicals into the air. Sunny told Sam this issue had been corrected.

Next, Sam conducts a physical inspection of Sunny’s Cleaners, walking around the operations floor and watching the dry-cleaning process. Sam knows this is often the stage in the inspection process in which something could arise. And, unfortunately, Sam did find a dry-cleaning machine that appeared to be leaking a blue substance onto the floor. More specifically, dry-cleaning machines are required to have a spin pan underneath each machine; this was missing. Sam, uncertain of the substance, scratched his forehead and knew he could just point out the problem to Sunny, which could lead to a quick fix. However, if the substance were a health violation, he might have to formally write up or document the violation, which is never easy to do. The other issue was that Sunny’s Cleaners had a violation a couple of years ago, which would mean Sam would have to write a notice of violation, which the company would have to address immediately. Sam decided to ask Sunny what the substance was, Sunny replied it was just detergent; the company had just purchased a new machine and forgotten to install the spill pan. Luckily, this was a quick fix, and one of Sunny’s employees placed the spill pan under the machine.

After several hours, Sam’s site inspection of Sunny’s Cleaners was complete. Sam asked Sunny if they could debrief from the day and discuss the substance on the floor. Sunny knew Sam had to document the incident to follow his agency’s procedures. The two men said their goodbyes and Sam drove back to his office to write up his report. Upon completion, Sam took his report to his supervisor and they discussed the inspection from the day. Although the aforementioned example appears to be seemingly straightforward, and without conflict or controversy, it does not always unfold this way. In our example, it appears that Sam and Sunny have a working relationship, but this is not always the case. We now turn to research about how the approach a regulator uses or the response a business practices can impact the outcome of policy implementation.

THE GOOD, THE BAD, AND THE UGLY

Although we provided a snapshot into the details of a site visit, we have only begun to scratch the surface of the inner workings of this process. More specifically, regulatory relationships are essential to understanding U.S. regulations more broadly. In our dry-cleaning example, what if Sam and Sunny did not have a cordial relationship? Instead, what if Sam just wrote a notice of violation without first discussing the issue with Sunny? Or what if when Sam asked Sunny about the substance, Sunny just brushed off the situation? These are all plausible responses that are driven by different regulatory approaches to a problem.
As a result, the approach a regulator employs to achieve compliance can vary dramatically and has been studied extensively by scholars.

The focus by many scholars has been to understand how the relationships between the regulator and the regulated organization during a site visit impact the implementation of policy (Bardach and Kagan 2002; Hawkins 1984; Hutter 1998). We borrow from Pautz and Rinfret (2013) to unpack what might explain the variation in approach among regulators. As Figure 4.6 suggests, the enforcement style a regulator uses can be classified into three different categories: (1) **precision-based style**, (2) **intention-based style**, or (3) **mix of enforcement styles**.

**Precision-Based** Some scholars would classify this regulatory approach as by the book, or strict in terms of ensuring the regulated community is compliant (Bardach and Kagan 2002). Key attributes of this style, based on past study, include (1) rules orientation, (2) consistency, (3) tough enforcement, (4) deterrence through enforcement actions, and (5) some degree of adversarialism. Regulators who embrace this approach think regulations have to be enforced as they are written in order to be effective—in other words, they have to “go by the book” (Bardach and Kagan 2002). This approach ensures all regulations are applied uniformly and with little room for deviation in terms of compliance assessment. Regulators who express this style believe they are compelled to enforce the rules as written, without deviation. For example, if Sam, the regulator used a “by the book” approach, Sunny’s Cleaners would have been given a notice of violation, which could create a bad relationship between the company and the regulator. However, Pautz and Rinfret (2013) suggest we say “precision-based” instead of “by the book,” “strict,” or “rules-oriented” to more accurately describe this type of regulatory style. “Precision” is a positive term used to describe accuracy and care, which are traits in a regulator who represents this approach.

**FIGURE 4.6**
Enforcement Style

- **Precision-based**
  - Rules-oriented
  - Tough enforcement of the law

- **Intention-based**
  - Flexible
  - Accommodative

- **Mix of styles**
  - Cooperative
  - Combination of intention and precision-based
**Intention-Based** This type of regulatory style has also been categorized as flexible, results-oriented, or flexible/accommodative. The regulatory approach used by Sam in our dry-cleaning example is representative of this approach. In particular, Sam the regulator used cooperative or conciliatory means to secure compliance with regulations. He worked with Sunny’s Cleaners to convey that it needed to install a spill pan and they worked together to address the situation. It is presumed this approach would lend itself to a more positive relationship with the company.

Yet it could be argued that this regulatory style may be perceived as soft, easily manipulated, and ripe for regulatory capture (i.e., regulator acts on behalf of the interests of the company instead of the public). Put simply, this label indicates regulators with this style are easily taken advantage of and succumb to the regulated community. Instead, Pautz and Rinfret (2013) illustrate the “intention-based” enforcement style better conveys that regulators who embrace this style examine the intentions of the regulated facility. This is because they consider the intent of the regulation.

**Mix of Enforcement Styles** Historically, scholars suggested regulatory enforcement styles occur in a binary fashion—intention or precision-based. However, subsequent research has demonstrated that the regulator might employ each approach in varying combinations depending on the circumstances, settings, or policy area (Hutter 1988, 1989; May and Winter 2000). One might question why a regulator would personify both approaches during a site inspection. We suggest this is because different circumstances warrant different behaviors. For instance, if Sunny’s Cleaners was a chronic violator and routinely problematic, wouldn’t Sam react differently? Thus, regulators who embrace a mixed enforcement style prefer a combination of various tactics and tools as they seek compliance from the regulated community.

To articulate the use of a mixed approach, Pautz and Rinfret (2012), in a nationwide study of over 1,200 state environmental regulators, found regulators are shifting toward cooperative relationships, and inevitably use a combination of approaches when working with regulated businesses to achieve environmental compliance. The assumption is that collaborative relationships will move beyond an “us versus them” mentality that pits a regulator against a business. Nonetheless, if regulators and a company work together, compliance is more easily achieved.

At this juncture, you have a big picture of the processes and day-to-day approaches used by regulators. But inspection processes can also be fraught with controversy, just like rule-writing. In order to understand how to navigate some of these complexities, we examine why the Animas River in Colorado turned orange in the summer of 2015 (see Photo 4.5).

Regulators are also confronted with issues that can be difficult to manage. For instance, what happened to cause the Animas River in Colorado to turn orange during the summer of 2015? More specifically, in August 2015 the EPA took the blame for the leakage of wastewater into the Animas River (Marcus, Benjamin, and Shinn 2015). But before we can understand why the EPA took the blame, we need to understand the details of the story.

The Gold King Mine, which closed in the 1920s, sits above the Animas River near Durango, Colorado. Some local residents have argued the abandoned Gold King Mine should be classified as a Superfund site (classified by the EPA’s Comprehensive Environmental Response, Compensation and Liability Act of 1980 as a contaminated
site with hazardous substances) due to the toxic levels of mining waste that could spew into the Animas. And, according to Parker (2015), this mine is part of the ever-growing 50,000 in the western United States that are vacant, potentially wreaking havoc; but the cleanup of all of these vacant mines would cost almost $24–54 billion in taxpayer dollars.

Moreover, there were concerns presented by Colorado game and fish authorities about the vacant Gold King Mine—the trout population, plentiful for twenty years, was on the decline in 2014. Nevertheless, it could not be determined the wastewater from the Gold King Mine was the culprit (Parker 2015). Therefore, due to lack of resources and budget cuts, the EPA used a government contractor to examine the Gold King Mine, and the goal was to install a pipe to drain the water so the EPA could eventually plug the mine, keeping the contaminated water away from the river (Thompson 2015). Unfortunately, this did not work, and on August 5, 2015, the mine’s water turned the Animas River water a blood-red orange. Individuals living near the river could choose whether or not to drink the water, and in September 2015 the pH levels of the water were similar to that of vinegar (Parker 2015).

Although the outcome of this case is unfortunate, it is also the case of what happens when a regulator is trying to regulate a company that is no longer in business. The approach the EPA was taking was to plug the mine to prevent catastrophe. These steps did not work in this case, but for some local communities, such as Durango or Silverton, Colorado, “If public reaction is any indication, the disaster has woken up Durangoans to not only how important the river is, but also what is going on upstream. And they’re likely to exert whatever pressure they can on their neighbors up in Silverton to accept, even embrace, Superfund and a comprehensive cleanup effort” (Thompson 2015).

THE FUTURE OF REGULATORY POLICY

As this chapter demonstrates, understanding the complexities and details of the U.S. regulatory arena is an important, yet overlooked, area of public policy. We have documented in this chapter the role that rule-writers and regulators play in implementing public policy. These individuals make sure the peanuts we eat on a plane or the new e-cigarettes’ smoke are safe for us, the consumer. In the final few pages of this chapter, we offer some innovative approaches to foster citizen engagement for the future.

We previously noted participation in rulemaking is often dominated by those who are impacted by a rule. For example, the BLM’s rule for the disclosure of chemicals used in hydraulic fracturing contained public commenters from the natural gas industry, those impacted by the rule. Nevertheless, it is also important for everyone to understand the rulemaking process, especially since information is easily accessible with the submission of public comments via the Internet. The electronic submission of public comments is a relatively new phenomenon, however, something that federal agencies have worked on.
in order to increase the level of awareness for the general public about the process. This approach has increased the level of accessibility from the days by which you would have to submit written comments to agencies via snail mail.

Moreover, with the Obama administration's commitment to an open and transparent government, the goal is to ensure federal agencies are indeed providing timely, accurate, and accessible information to the general public. As described above, Regulations.gov has aided agencies in providing information videos about the rulemaking process and how to submit a comment for an agency's proposed rule.

In addition to the transparency or availability of Regulations.gov, the Federal Register recently received a facelift. Recall that Regulations.gov is the portal where a person or group would submit or review public comments, and the Federal Register is the daily publication of agency rules. In July 2010, the Federal Register celebrated its seventy-fifth birthday. In order to honor this milestone, Federal Register 2.0 was created. According to David S. Ferriero, a U.S. archivist, the objective was to make the Federal Register website more user-friendly so that information would be accessible and readable (Federal News Staff Radio 2010). Therefore, WestEd Interactive, a web development team from San Francisco, studied the Federal Register by examining over ten years of data to make the website more interactive. This research helped to create GovPulse.US, an application (app) that allows individuals from across the United States to track regulations by region. And, according to GovPulse.US, “GovPulse was built to open the doors of government to the people they work for. By making such documents as the Federal Register searchable, more accessible and easier to digest, GovPulse seeks to encourage every citizen to become more involved in the workings of their government and make their voice heard on the things that matter to them, from the smallest to the largest issues” (GovPulse 2015).

A facelift for the Federal Register or a new app may not be enough to entice the average American to consider rulemaking or participate in its processes. Because of this, Cornell University recently launched the Regulation Room (http://regulationroom.org/). This project, organized by Cornell's CeRi (Cornell eRulemaking Initiative), is a collaborative research group of faculty and students across disciplines—law, computer science, and conflict resolution—to overcome barriers regarding effective online civic engagement. The goal of this pilot program is to engage individuals in how to participate in rulemaking and to provide meaningful public comments. As part of the program, CeRi has been working with the DOT to provide an online venue or the Regulation Room for individuals to discuss proposed rules (Regulation Room n.d.).

Interestingly, one of the first proposed rules discussed in the Regulation Room was the Department of Transportation's peanut rule. This particular rulemaking discussion received over 24,000 visits to the Regulation Room website and provided a means for the agency to reach stakeholders to understand how to participate and ways to read the proposed rule. The Regulation Room, according to Lipowicz (2011), has moderators to help explain information, and key points for each rule instead of having someone try to read through a lengthy government document. Nonetheless, these examples demonstrate ways agencies such as the DOT are trying to enable us to participate in a process we might not have heard about before reading this chapter. Before we conclude the chapter, we offer our everyday citizen connection section. This segment uncovers how you can help to encourage regulatory innovation.
EVERYDAY CITIZEN CONNECTION

You already know from reading this chapter that regulations impact your everyday life, from eating peanuts on a plane, to smoking e-cigarettes, to the practices of Sunny’s dry cleaners. But how can you make a difference beyond submitting a public comment on the Federal Register or attending a public hearing? The vast majority of college students are extremely technologically savvy. Because of this, you can make regulations better. Students just like you are enhancing regulatory compliance. If you have a friend who attends Sonoma Tech or Clemson University, you might want to reach out to them. Why? Sonoma Technology developed airbeam sensors that can be placed in the palm of your hand to track air pollution when you are walking down the street. These data from your palm device could then be reported back to a central computer system. Clemson University developed Intelligent River, which monitors pollution in rivers using geospatial sensors (Giles 2014). So why not use this information to team up with your computer science classmate to create an app for the Federal Register or Regulations.gov?

Not everyone has the background to develop a new sensor, so what can you do if you are a policy wonk? We suggest taking notes from students at the University of Pennsylvania (UPenn). UPenn has a forum called RegX. The goal of this forum is to bring all the regulatory players together—businesses, students, faculty, regulators, and the public to create the “regulatory excellence molecule” (Coglianese 2015). Through information sharing across entities, RegX wants to demonstrate how far-reaching and impactful regulations are—from environmental protection, to financial risks, to preventing disease. RegX might sound expensive or a difficult endeavor to pull off. If you love policy, why not start your own campus forum? Use one of your own student organizations to invite a panel of guests to discuss a regulatory topic. Or have your local state regulatory affairs experts come to campus to explain the rule-writing process, why it is important, and internship opportunities. This could inform others across campus about the far-reaching aspects of regulation and how they might get a job after graduation.

DISCOVERY QUESTION:
Visit your campus homepage. What types of regulations do you think impact your own campus on a daily basis? Why? Are these regulations beneficial or a hindrance?

CONCLUDING THOUGHTS

In this chapter we provided public policy students a roadmap to understanding regulatory policy from process (rulemaking) to implementation (compliance). The rulemaking process occurs over several stages: from pre-rule, to notice of proposed rulemaking, to final rule; but most important, it allows for public input into agency decision making. Technological advances, such as Federal Register 2.0, Regulations.gov, or Cornell University’s Regulation Room, are recent attempts to engage us to become involved in agency policymaking. Moreover, the work of a regulator should not go unnoticed, since these individuals ensure that those who are regulated are in compliance with the law.

We encourage students to continue to think about and research this part of public policy due to the ever-increasing federal congressional gridlock. Because of congressional
gridlock, it does not mean that policymaking has come to a halt; instead, we should focus our attention on the role of federal and state agencies in U.S. public policymaking. Increasing our knowledge about how and why policies are made within administrative agencies is important for the future of public policy more broadly.

**DISCUSSION QUESTIONS**

1. Go to the *Federal Register* and find a final rule of your choice. Upon selection, how would you trace this rule through the stages of the federal rulemaking process? Did you include all of the stages? Why or why not?

2. U.S. regulations are not created in a vacuum. In what ways are other branches of government involved or influence agency decision making? Which branch of government do you think is most influential and why?

3. Often, citizens are concerned that the U.S. bureaucracy yields too much power in decision making. What are the ways the other branches of government can hold state and federal level agencies accountable?

4. What is the U.S. *Federal Register*, and how can someone submit a public comment for agency consideration? Why is it important for citizens to access and influence the rulemaking process?

5. Out of the future alternatives for regulatory policy, which approach will engender the most participation from U.S. citizens?

6. Take two class periods and design an agency public hearing simulation based upon a state or federal rule. Divide the class into groups—agency experts (conduct the hearing), citizen group (provides public comment), and pro/ con groups pertaining to the rule. Discuss the differences between substantive comments versus value-laden comments and how an agency reconciles to inform the language of a rule.

**GLOSSARY TERMS**

| Administrative Procedure Act (APA) of 1946 | mix of enforcement styles 88 | shift of responsibility 76 |
| delegation of authority 76 | precision-based style 88 | statutory law 74 |
| intention-based style 88 | regulation 74 | rule 77 |
NOTES

1. U.S. presidents can also use executive orders to drive regulatory processes, but these are based upon congressional law or statute.


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