

# The Rulemaking Process

## Issue Overview

The federal rulemaking process is governed by several laws and executive orders. In developing, proposing and finalizing a new rule (or amending or repealing an existing rule), agencies must follow the procedures set out within these laws, clearly stating why the rule is being proposed, conducting public outreach, and sharing the data, information, and analyses that were relied on to develop the rule.

Although agencies cannot issue regulations unless a statute gives them the authority to do so, since 1984, they have been given broad latitude to interpret the statutes as they see fit if the interpretation is viewed as ‘reasonable.’ In turn, agencies have regularly misused this discretion to skirt portions of the rulemaking process, avoid conducting full cost-benefit analyses, expand regulations beyond their authority and/or continuously revise rules despite arguments to the contrary. The agencies also often rely on guidance documents or other interpretations that may not be consistent with the underlying statutes, yet must be followed by impacted parties. The resulting overregulation and abuse of discretionary authority has resulted in confusion, additional permitting requirements, project delays and increased construction costs.

The U.S. Supreme Court invalidated the deference historically given the agencies in June 2024 in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). While it is not certain what this decision means for the future, the reduced deference given to the agencies will likely make it more difficult for them to reinterpret statutes and increase or reduce regulatory burdens.

## Solutions

- Support legislative efforts, e.g., the REINS Act, to fix the broken regulatory rulemaking process.
- Initiate a new regulatory review and public comment process through the Office of Management and Budget (OMB) to rescind and replace the Nov. 9, 2023 revision [OMB Circular No. A-94 “Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs”](#). Alternatively, develop legislation that establishes discount rates for use in cost-benefit analysis of federal regulations.
- Repeal the November 2023 revisions that were made to Executive Order 12866’s definition of “*significant regulatory action*,” which raised the economic threshold from \$100 million to \$200 million and narrowed the scope of regulatory actions that undergo OMB’s centralized review due to raising “*novel legal or policy issues*.”
- Reissue Executive Order 13891 “Promoting the Rule of Law Through Improved Agency Guidance Documents” to ensure significant guidance documents, many of which are treated as regulations, undergo public notice and comment before being finalized.
- Review the basis of rules that agencies developed based on the ‘reasonable’ interpretation of statutes to determine if those are the best interpretation of statutes.