

Notice & Comment: Advocating for Your Company in the Regulatory Process

Association of Corporate Counsel

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February 6, 2024



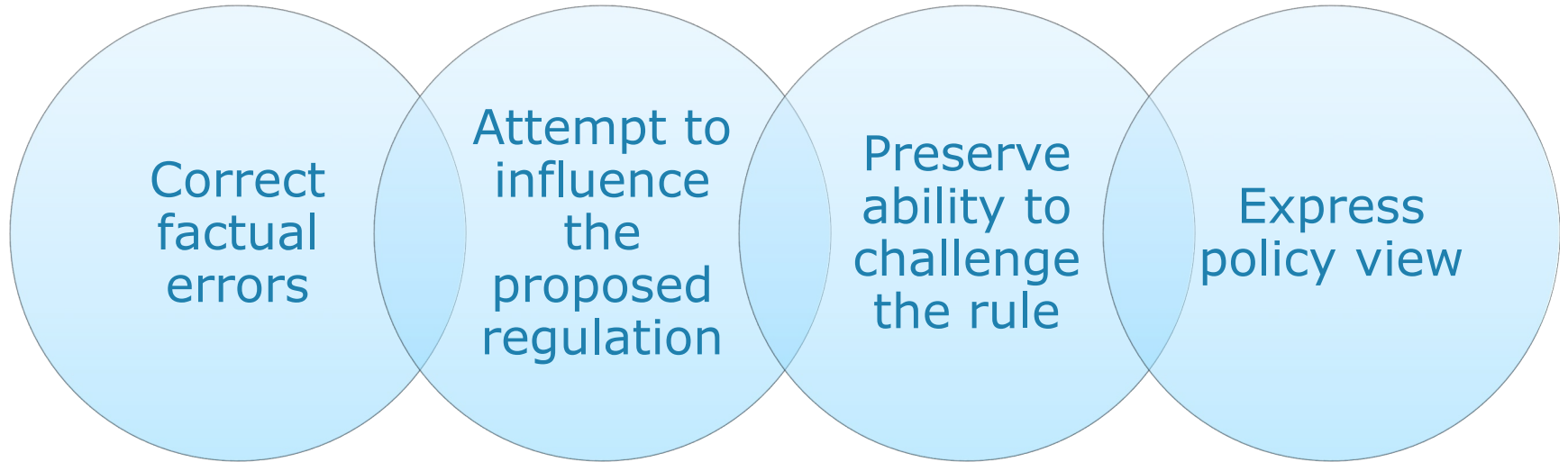
Agenda

- Regulatory Process Overview
- Why comment?
- What to comment on?
- Who should comment?
- What should be in the comment?
- How to decide when to challenge a rule

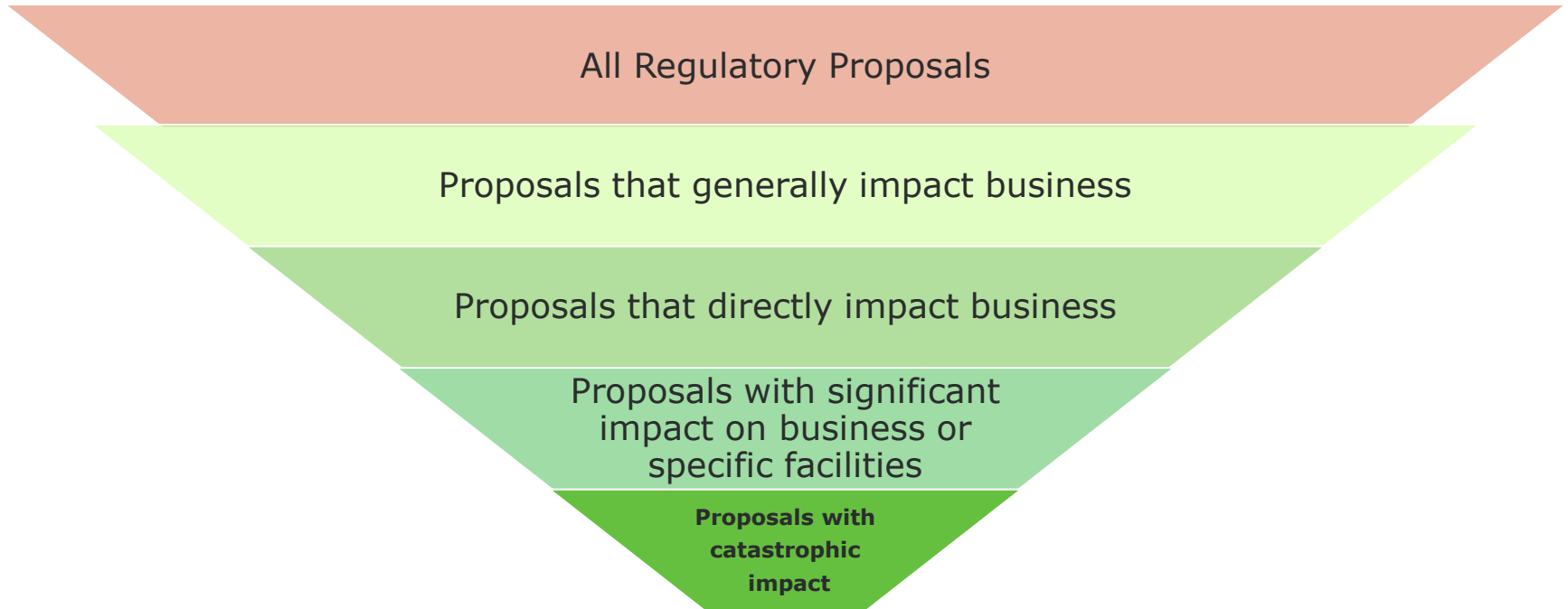
Regulatory Process Overview



Why Comment?



What to Comment On?



What to Comment On?



Is someone tracking proposed regulations for your company?

- > Internal
- > External support
(outside counsel, consultant)
- > Trade associations



Monitor OIRA website (<https://www.reginfo.gov/public/>)

OIRA Dashboard

Environmental Protection Agency		
<p>AGENCY: EPA-OAR TITLE:National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization and Fumigation Operations STAGE: Final Rule RECEIVED DATE: 12/15/2023</p>	<p>RIN: 2060-AU37 Section 3(f)(1) Significant: Yes Economically Significant: No LEGAL DEADLINE: None</p>	<p>Status: Pending Review</p>
<p>AGENCY: EPA-OAR TITLE:Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3 STAGE: Final Rule RECEIVED DATE: 12/18/2023</p>	<p>RIN: 2060-AV50 Section 3(f)(1) Significant: Yes Economically Significant: No LEGAL DEADLINE: None</p>	<p>Status: Pending Review</p>
<p>AGENCY: EPA-OAR TITLE:Request from States for Removal of Gasoline Volatility Waiver STAGE: Final Rule RECEIVED DATE: 12/18/2023</p>	<p>RIN: 2060-AV73 Section 3(f)(1) Significant: Yes Economically Significant: No LEGAL DEADLINE: None</p>	<p>Status: Pending Review</p>
<p>AGENCY: EPA-OAR TITLE:National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review STAGE: Final Rule RECEIVED DATE: 01/17/2024</p>	<p>RIN: 2060-AV82 Section 3(f)(1) Significant: Yes Economically Significant: No LEGAL DEADLINE: Judicial</p>	<p>Status: Pending Review</p>
<p>AGENCY: EPA-OAR TITLE:Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles STAGE: Final Rule RECEIVED DATE: 01/18/2024</p>	<p>RIN: 2060-AV49 Section 3(f)(1) Significant: Yes Economically Significant: No LEGAL DEADLINE: None</p>	<p>Status: Pending Review</p>
<p>AGENCY: EPA-OAR</p>	<p>RIN: 2060-AV71</p>	<p>Status: Pending Review</p>

The screenshot shows the Reginfo.gov website interface. At the top, it identifies the site as an official website of the U.S. General Services Administration (GSA) and the Office of Information and Regulatory Affairs (OIRA). The main content area displays details for a pending regulatory review (EO 12866) with RIN 2060-AU37. The review title is 'National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization and Fumigation Operations'. The stage is 'Final Rule', received on 12/15/2023. The agency is EPA / OAR. The review is significant under Section 3(f)(1) and has no international impacts or pandemic response. Links for 'View EO 12866 Meetings' and 'Request EO Meeting' are provided. The footer includes navigation links for 'About Us', 'About GSA', 'About OIRA', 'Related Resources', 'Disclosure', 'Accessibility', 'EOA', 'Privacy Policy', and 'Contact Us'.

EO 12866 Meetings

Request for important rulemakings

Focus on economic impact (costs and benefits) of rule

Time to influence OMB

Trade associations great for this purpose

Who Should Comment?

Trade Association

Share costs

Do not have to draw attention to company (at comment stage)

Individual Company

Can be focused on specific company interests

Do not have to meet lowest common denominator

The Importance of the Comment Letter

Creates the administrative record

If it *isn't* in someone's comment letter, there is no basis to challenge later

Does not have to be your own letter, but don't assume someone else will make the argument you want

If it *is* in the record and the agency failed to consider it, you've got the start of a challenge

What Should Be in a Comment Letter?

Factual errors or omissions

Procedural or process failures

Legal errors

Unsupported conclusions

Any information the agency should consider that is not in the record

Getting content for comment letter

Review the proposed rule

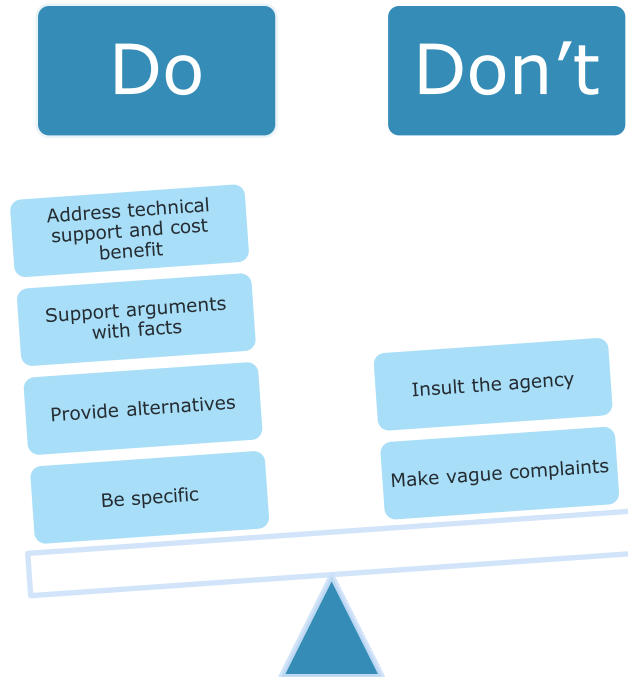
Review key documents in the docket

Review key statutes

Work with your team

- Technical experts (internal and external)
- Business client
- Legal (internal and external)
- Government affairs
- Communications

Effective Comment Letters



Challenging a Rule

Prepare Early!

- Waiting until final rule is published will likely put you at a disadvantage depending on the rule, the court, and size of the docket
- Know what court, the relevant legal standards, and deadline to file a challenge
- Track the final rule at OMB

If the rule is critical and will need to be challenged no matter what the final rule looks like, hire counsel early

- Ideally they help prepare comment letter to ensure proper record is created
- Have counsel review the administrative record, including other key comment letters, before the final rule is out

Considerations in Bringing a Challenge

Who will bring it?
(Trade association or company?)

Do you (or the trade) have **standing**?

Policy and PR considerations

Strength of arguments

Implications for the business

Implications for other litigation

Considerations in Bringing a Challenge

APA standard generally: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

- Some federal statutes will have additional/different standards
- State APA can differ from federal (also check state substantive statute)

Validity or as applied

- As applied has different analysis, deadlines, and standards

Procedural

- Process issue
- Failure to consider an issue/respond to comment

Substantive

- Factual errors
- Technical flaw
- Inconsistent with law

Assessing Likelihood of Success



Rulemaking challenges are not impossible to win!



What does success look like?

- Is it a stay during litigation? Very difficult to get.
- Remand? Rule invalidated? More likely.



Procedural or substantive challenge?

Questions

Thank you!



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ACC Environmental & Sustainability Network
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