

PATHWAYS FOR REGULATORY REFORM

1. DEVELOPING THE POLICY

After you determine your regulatory agenda, work with both the relevant agency and the White House to help them formulate an acceptable policy. Even a simple rescission can take weeks to formulate, as the agency must have a sound basis for its action; obtaining administration buy-in for a proposed new regulation can take considerably longer. Expect other stakeholders to push their own competing views at the same time!

2. DRAFTING THE PROPOSED RULE

Work with the appropriate agency to formulate the proposed rule or rule rescission. This can be complicated, because the rule may be required by statute, a judicial decision, or a settlement. It can result from the agency's own initiative, or you can formally petition the agency to initiate a rulemaking. Bear in mind that in many instances, there are no hard deadlines for action.

3. COMMENTING ON THE PROPOSAL

Once a rule or rule rescission has been proposed, it's open for public comment—from anyone in the world—through public hearings and written comments directed to the agency through www.regulations.gov.

4. FINALIZING THE AGENCY ACTION

After considering public comments, the agency prepares a draft final action. Problems with the draft final rule can be addressed through OIRA, which, after a review process involving all interested federal agencies, may bounce it back to the proposing agency for further review and change. OIRA will meet with stakeholders during this process to hear their views, but will not express its own.

5. PUBLISHING THE FINAL ACTION

After the public and interagency comments have been considered, the agency publishes its final action (either a rule, a rule rescission, or a decision not to issue a final rule), together with a response to all public comments and all required technical support documents. Notice of the agency's final action is published in the Federal Register. Supporting documents are available at www.regulations.gov.

6A. JUDICIAL REVIEW

New regulations, decisions not to regulate, and rescission actions all can spawn litigation. Those affected by agency final action can seek the court's review of whether the agency's action is authorized by statute and whether its conclusions are supported by the record it developed. There is generally no discovery; the agency's record serves as the evidence. Regulations may also be stayed under special circumstances pending judicial review. If the Supreme Court grants review, that can add another full year of litigation.

7. IMPLEMENT, REVISE, RESCIND

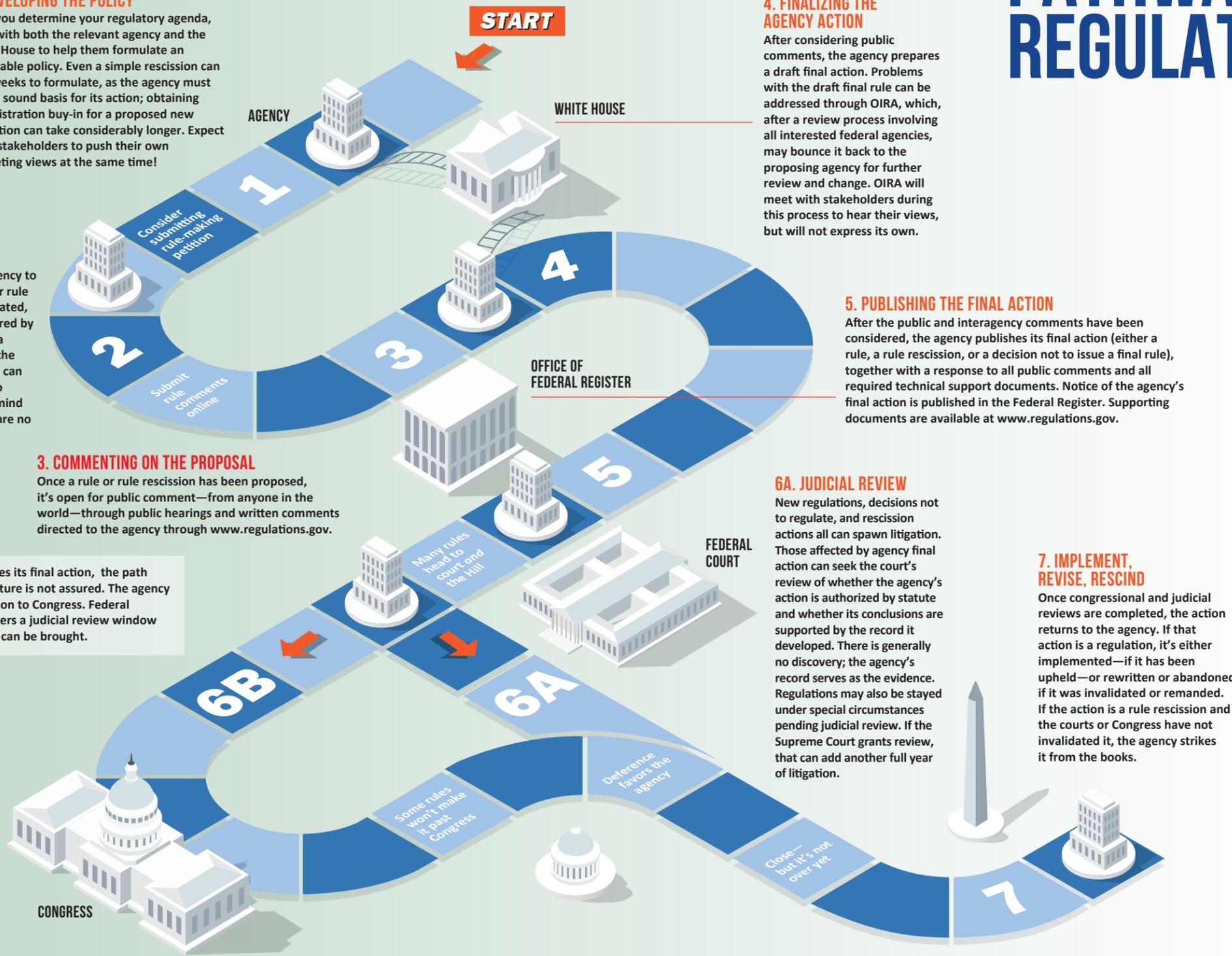
Once congressional and judicial reviews are completed, the action returns to the agency. If that action is a regulation, it's either implemented—if it has been upheld—or rewritten or abandoned, if it was invalidated or remanded. If the action is a rule rescission and the courts or Congress have not invalidated it, the agency strikes it from the books.



Even after the agency publishes its final action, the path continues, and the action's future is not assured. The agency must provide notice of its action to Congress. Federal Register publication also triggers a judicial review window during which legal challenges can be brought.

6B. CONGRESSIONAL REVIEW ACT AND APPROPRIATIONS

"Major" regulations (those with \$100M or greater effect on the economy) are generally subject to review by Congress for a period of 60 legislative days under the CRA. Regulations subject to the CRA may be voided by a simple majority vote of both houses, subject to presidential veto. If a rule is voided through the CRA, the agency cannot adopt a "substantially similar" rule without express congressional authorization. Older regulations can be neutered through the appropriations process, by cutting off funds for implementing the rules.



As the business community, encouraged by the Trump administration's pro-business policies, anticipates the review and possible repeal or revision of regulations that have hampered their ability to operate and grow, it's important to understand the complex process by which regulations both come into being and cease to be. The process—which is virtually the same whether you're proposing the development or the dismantling of a regulation—is as straightforward as anything you learned in middle school civics. Yet, at the same time, there's nothing straightforward about it. The seemingly simple path shown in the diagram is actually rife with pitfalls, potholes, and detours. A proposal or rescission can be changed or derailed at many points: during policy formulation or the public comment period, during interagency review (run by the Office of Information and Regulatory Analysis, a little-known yet very powerful arm of the White House's Office of Management and Budget), in ensuing litigation, or through congressional review. Above all, the process takes time, lots of time, including a 30- to 60-day waiting period before implementation, even after the final rule is issued. "Anyone who believes a new rule can be put in place, or an old one rescinded, in days or weeks is in for a surprise," says Crowell & Moring partner Dan Wolff. "Stakeholders should be prepared for a lengthy process involving development and presentation of positions on favored outcomes, submission of comments once a rule or rule rescission is proposed, and likely litigation over any final agency action."