Participating in Rulemaking
How Your Organization Can Influence Federal Policy

BY LISA D. EKMAN

With the current climate in Washington, D.C., and Congress seemingly having more votes to repeal laws than there are to enact them, many people are wondering if getting active and involved to try to influence federal policy makes any difference. The answer to that question is a resounding yes. Attempting to get legislation passed and signed into law has become increasingly difficult lately, but that does not mean that a lot of federal policy is not being made. Rather, it means that the bulk of changes in and improvements on federal programs and grants is occurring through regulatory and subregulatory policy making, rather than through the introduction and passage of legislation.

Take the Patient Protection and Affordable Care Act as an example.1 It was signed into law in 2010, but, like most federal statutes, the law itself includes only the basic outlines of how its provisions are to be implemented. And, like most other federal statutes, it requires the secretary of the federal agency, or agencies, charged with overseeing the implementation of the law to promulgate regulations to spell out the details, as is the case with the Affordable Care Act.2 Several federal agencies, such as the U.S. Department of Health and Human Services and the Internal Revenue Service, have proposed and finalized a large number of regulations to implement the law; these regulations are putting the meat on the bones of the Act. These agencies have issued answers to frequently asked questions, letters, and bulletins to clarify ambiguities in the law and others to explain how the new law will interact with current policies and regulations.

The issuing of federal regulations is governed by a statutory framework, which all federal agencies must follow. The federal statute that governs rulemaking is the Administrative Procedure Act.3

The notice-and-comment rulemaking process, through which federal regulations are proposed and finalized, and the more informal process through which subregulatory guidance is developed and issued are significant opportunities for people who advocate on behalf of or provide services to people living in poverty or both to help shape the programs that have an effect on their clients and customers. Here I give a brief legal overview of the federal regulatory process and the restrictions on organizations that receive Legal Services Corporation (LSC) funds from engaging in that process. I focus on practical tips for writing effective comments in response to proposed regulations and for influencing subregulatory policy, prepared by policymakers outside the regulatory notice-and-comment rulemaking process.

The Legal Landscape of Federal Regulations

The federal regulatory process is governed by the Administrative Procedure Act, a major federal statute, and federal agencies receive a great deal of deference in their interpreting statutes through regulation. Advocacy programs receiving LSC funds must follow certain requirements in rulemaking.

The issuing of federal regulations is governed by a statutory framework, which all federal agencies must follow. The federal statute that governs rulemaking is the Administrative Procedure Act.3 The Act defines a rule as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...”4 The Act requires that federal agencies give notice when they intend to promulgate a rule and allow interested parties “an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”5 This is referred to as notice-and-comment rulemaking. Rules issued through notice-and-comment rulemaking have the force of law and cannot be changed or repealed without going through another notice-and-comment rulemaking process. Rules issued through notice-and-comment rulemaking are referred to as substantive rules.

Agencies generally follow nine steps when making a rule: (1) occurrence of an initiating event; (2) determination of whether a rule is needed; (3) preparation of proposed rulemaking; (4) Office of Management and Budget (OMB) review; (5) publication of proposed rule; (6) opportunity for public comments; (7) preparation of final rule; (8) second OMB review; and (9) publication of final rule.6

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2 See, e.g., id. § 1302(b)(1) (requiring secretary of health and human services to define essential health benefits).
4 Id. § 551(a).
5 Id. § 553(b).
Step 6 is the point at which your organization has an opportunity to comment on the proposed rule. A proposed rule is published in the Federal Register at step 5, and this publication is commonly referred to as a Notice of Proposed Rulemaking. Proposed rules are also listed on eRulemaking Program, www.regulations.gov.

Subregulatory policy, also known as interpretive rules, is not bound by notice-and-comment rulemaking procedures and not governed by the Administrative Procedure Act. Interpretive rules are not binding on the agency and generally do not have a legal effect on the agency. They serve to clarify agency policy spelled out in regulations or to resolve ambiguities in statutes, regulations, or policy. An agency can change an interpretive rule at any time without notice and without any opportunity for the public to comment.

The practical effect of _Chevron_ deference is that challenging final regulations on the basis that an agency interpretation is incorrect is very difficult, if not impossible.

**COURT DECISIONS—CHEVRON DEFERENCE.**

As you are probably aware, federal agencies receive a great deal of deference in interpreting statutes through regulations. In _Chevron U.S.A. Incorporated v. National Resources Defense Council_, the U.S. Supreme Court decided that courts should defer to agency interpretations as long as the interpretation of the statute is reasonable. When there is another interpretation of the statute, the court must defer to the agency interpretation even if the court finds that the other interpretation is better as long as the agency’s interpretation is reasonable. The Supreme Court held that “regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

The Supreme Court established a very high level of deference to federal agencies when acting with authority from Congress to promulgate regulations. The practical effect of _Chevron_ deference is that challenging final regulations on the basis that an agency interpretation is incorrect is very difficult, if not impossible in many cases. Challenging an agency interpretation successfully requires that you show not only that there is ambiguity in the statute but also that the interpretation is manifestly contrary to the statute or that the interpretation is unreasonable because it is arbitrary and capricious. Because agencies are, when challenged in court, afforded such latitude in interpreting statutory provisions, trying to persuade an agency to alter its interpretation before finalizing regulations gives a greater opportunity for success. Agencies can often be persuaded to change parts of their regulatory interpretations through the comment process even when their overall interpretation remains the same despite attempts to change it.

**RESTRICTIONS ON LSC-FUNDED ORGANIZATIONS.** Because many readers might work for organizations that receive LSC funding, note that LSC recipients are prohibited from using LSC funds to participate in or attempt to influence any rulemaking. This does not mean that it is impossible for LSC funding recipients to get involved in rulemaking activities, provided that such recipients use only non-LSC funds and follow all of the rules for segregating funding. LSC recipient organizations are permitted to engage in rulemaking activities using non-LSC funds, specifically to “provide oral or written comment to an agency or its staff in a public rulemaking proceeding.”

**Practical Tips for Influencing Federal Policy**

Advocates can influence federal policy by two key means. They can engage in the rulemaking process. And, through good working relationships with agency personnel, they may be able to influence the content of regulations and subregulatory guidance.

**REGULATIONS.** As mentioned above, some initiating event (step 1 in the notice-and-comment process) causes an agency to decide that a rule is needed. An agency issues a regulation for several reasons: the regulation is required by statute or by court decision; the agency does it on its own initiative based on policy goals or politics and, on very rare occasions, because of a petition.

Staying informed about which regulations will be proposed and when can take significant effort. This can be time-consuming, especially when monitoring federal policy is not your primary role in your organization or when your areas of interest cross more than one agency. Each agency is required by statute and executive order to publish semiannually in the Federal Register a regulatory agenda including information on the regulations it intends to propose and when it plans to do so. Keeping an eye on the regulatory agenda for the agency or agencies that have oversight of relevant programs can be helpful and reduce the time needed to ensure that you have the opportunity to comment on a proposed regulation of particular interest to your organization.

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9 _Chevron_, 467 U.S. at 844.
10 Id.
11 45 C.F.R. § 1612.3(b) (2011).
13 45 C.F.R. § 1612.3(b) (2011).
However, one of the most effective ways to influence federal policy and ensure that you never miss an important policy development is to develop strong working relationships with employees of the agency (or agencies) with responsibility over your policy areas of interest. Before drafting proposed regulations or issuing subregulatory guidance, agency personnel often discuss policy ideas and directions with their trusted external allies. To be considered an expert or the go-to person or organization by people within the agency can be extremely helpful. Being one of the people to whom agency employees turn for input and discussion before they develop or issue guidance or both gives you a unique opportunity to affect policy direction before a notice of proposed rulemaking is issued. Note that some regulations are not included in the regulatory agenda because the need for them arises between the publication of agendas.

In the remainder of this section I outline practical tips for responding to notices of proposed rulemaking and tailoring your comments for maximum impact.

Select an Approach to Your Comments. The first thing to decide when responding to a notice of proposed rulemaking is to determine the tactics for formulating the comments. If the regulation is implementing a new law or provision, examining the overall approach of the regulation often makes sense. Are the statutory provisions that the regulation is implementing open to more than one interpretation? If so, is the approach in the regulations the best one or has the agency missed the boat? Does the interpretation advance the stated or unstated goals of the statute and the program that the regulation is implementing? Does the interpretation in the proposed regulation make sense in light of the existing programs and regulations with which the new one will interact? Does an alternative interpretation of the statutory provisions make more sense in the overall policy context?

Once you have answered these questions, you can decide whether you want to comment on the overall approach or just particular provisions. If you find that the underlying approach is sound, state that briefly in your comments. Explain why you think that the agency takes the right approach because other commenters will likely think that another interpretation is better and will submit comments stating that. Supporting the agency’s interpretation to be a counter-weight to opposing comments is important.

If you think the overall approach represents the wrong approach, give a detailed analysis why. Starting with the goals of the legislation can help explain why an alternate interpretation is correct. Committee reports and other legislative history can give background information and, in many cases, explicit reference to the goals. The reports often include detailed information on the problem the legislation was designed to address; this can be used to support the reasons why the alternate interpretation is preferable.

In the event that your organization is supportive of the overall interpretation outlined in the proposed regulation, the bulk of your comments will likely discuss the individual proposed regulatory provisions. Remember to start with the statute. Whenever possible, ground in the statutory language or history your argument for why your interpretation of the regulatory provision is better. Cite the statutory sections that best make your case, and include the statutory language when applicable. Lay out the possible unintended consequences of the regulations as proposed, as well as details of the impact that the flawed interpretation will have on your clients.

Comment on the Good as Well as the Bad. Some organizations comment only on proposed regulations with which they disagree. If a regulation is introduced and the organization is happy with everything, the organization might not take the time to develop and submit comments. That is not necessarily a good approach. What makes sense is always to give positive comments.

Rules issued through notice-and-comment rulemaking have the force of law and cannot be changed or repealed without going through another notice-and-comment rulemaking process.
on the parts of the proposed rule you like, including that you are supportive of the entire regulation as written. Remember that the agency might receive comments from many other people and organizations that disagree with the overall approach or individual provisions or both. Although the actual provisions and language that end up in the final rule are not entirely dependent on how many comments come in on each side, positive comments often help agency officials keep your preferred interpretation in the final rule.

Give Evidence to Support Your Comments. Whenever possible include evidence, both qualitative and quantitative, to support your comments. Evidence can strengthen your case substantially. The agency can use it to refute points made in other comments that support an interpretation alternative to the one you prefer. Comments that include evidence of the potential impact of proposed interpretations (both positive and negative) on real people (such as your clients) can be very persuasive. Be sure to protect the confidentiality of your client’s identity, but give evidence of the way in which real people might be affected, especially by using past examples; these can draw attention to your comments and set them apart.

Make It Easy on the Agency. An agency will have spent many months (and sometimes years) working on a proposed regulation by the time you see a notice of proposed rulemaking published in the Federal Register. It will have been vetted by many departments within the agency (e.g., programmatic staff, budget staff, general counsel), other agencies if applicable, and the Office of Management and Budget for approval. Suppose you think the agency has gotten it wrong and your organization makes a very persuasive case, so persuasive, in fact, that the agency wants to adopt your interpretation of the overall approach or the specific provisions. Make it as easy as possible for the agency to do that. Consider including in your comments alternative language that the agency could adopt, especially if you are asking for only a few provisions to be replaced or modified. However, exercise caution when doing so. Make sure the language is carefully crafted so that there is only one interpretation and that it will lead to the outcome you desire. Be sure you understand how courts will interpret the language you write, and consider consulting an attorney who specializes in administrative law. If you are concerned about drafting particular language, make your recommendations on what a new or modified provision should contain as specific as possible.

One effective way to influence federal policy and ensure that you never miss a policy development is to develop strong working relationships with employees of the agency with responsibility over your policy areas.

Remember that There Is Power in Numbers. Consider partnering with other organizations when submitting comments on proposed regulations. This can be a very good idea for a number of reasons. First, the tackling of writing the comments to a proposed regulation may become less daunting. The work can be split up among several organizations, and this can make weighing in easier on more policy issues of relevance to your organization. Second, by combining the expertise and experience of the different organizations, the comments can improve. Although you may be partnering with organizations that share your vision or mission, other organizations might have more experience dealing with a particular issue raised in one provision in the regulation whereas your organization might have more expertise responding to the underlying interpretation, for example. And, third, agencies may give more weight to comments from more than one organization than comments from one. However, this is not a hard-and-fast rule and can vary from agency to agency and even from department to department within an agency. Although joining with other organizations may or may not give comments more impact, it certainly will not give them less weight; your organization can realize the first and second benefits nonetheless.

Don’t Reinvent the Wheel. To copy, crib, cut and paste, and otherwise submit the same comments as other organizations is perfectly acceptable. In fact, many national advocacy organizations publish template comments designed for others to copy and written in a way that allows people to use parts and disregard other parts. As described above, since
work will show through in your comments when you focus on how the provisions you want the agency to change (or keep) will help or hurt your clients. Zeroing in on particular people you have served can help you hone your arguments, sharpen your comments, and increase the likelihood of them having sway over the final regulation.

LSC recipients are prohibited from using LSC funds to participate in or attempt to influence any rulemaking. This does not mean that it is impossible for LSC funding recipients to get involved in rulemaking activities.

**SUBREGULATORY GUIDANCE.** As mentioned before, one of the most effective ways to influence federal policy is to develop strong working relationships with employees of the agency that has responsibility over policy areas of interest. This is even more important in the area of subregulatory guidance. Unlike with regulations, there is no website, agency agenda, or schedule to let you know when subregulatory guidance might be issued; nor are there statutory requirements to give a heads-up that such guidance will be forthcoming. Without any relationships with the federal employees who have responsibility over the programs that matter to you, you are not likely to know that guidance is being developed or when it might be issued. The relationships often work both ways—people and organizations that have good working relationships and are known as experts in the subject area can often convince an agency of the need for guidance in the first place and influence the content of that guidance as well. When agency employees first hear of a potential issue, they often turn to trusted sources to verify its existence, determine its scope, and discuss potential ways to solve the problem.

**Creating a Problem to Solve.** Remember that the decision to issue subregulatory guidance is something that an agency makes on its own. There is no statutory requirement to do so. The agency has to believe that the guidance is necessary to prevent regulations from being improperly implemented or being interpreted in a way that is unacceptable. At a very practical level, this means an agency often requires a problem to solve before it issues guidance. That is where your organization can have a significant impact.

As a frontline organization implementing the agency’s regulations (or dealing directly with the effects of that implementation), you can help “create” a problem for the agency. The first step in helping create the circumstances under which an agency will issue guidance is something that your organization is probably already doing: documenting the need for guidance. One way to do that is to show the agency that a particular regulation or regulatory provision is open to a number of different interpretations and is leading to inequitable treatment for your clients. For example, suppose you work with a number of different agencies that are all receiving funding through the same grant program. And each agency is interpreting the controlling regulations in a slightly different way that results in disparate application of the rules, putting some clients in a better position than others. By documenting that and bringing it to the attention of the federal officials with whom you have a relationship, your organization can start the process of an agency deciding whether issuing a guidance is necessary. Check with other organizations that do similar work to see if they are also having the same problem. The more evidence you can give of the need for guidance, the more likely the agency will initiate fact-finding activities that can lead to the issuance of guidance.

Another potential “problem” that might need to be solved through the issuance of subregulatory guidance is one where a regulation or previous guidance is being interpreted consistently by organizations but the interpretation is an erroneous one. Based on conversations with agency employees, your organization might know that the interpretation is in error. Or perhaps the provision in question is being implemented in that incorrect manner only in your state but is being implemented correctly in other states. Perhaps the preamble to the regulation provides strong evidence that the agency intended an approach different from the one being implemented and it is in a way that disadvantages your clients.

And there may be a statutory provision that does not require the formulation of regulations for its implementation at all. Although Congress might have thought that the provision was clear, state agencies and other organizations charged with its implementation might be unclear as to how they are supposed to proceed. For example, when the Affordable Care Act was passed, it included a maintenance-of-effort provision that prohibited states from passing more restrictive eligibility requirements for the state Medicaid program before the implementation of the Medicaid expansion.15 The secretary of health and human services was not required by statute to promulgate regulations to implement this provision, and, because it was in effect only until 2014, the secretary chose not to issue any regulations on the maintenance-of-effort provision. States, however, had a lot of questions on exactly what the provision meant. Could they increase premiums if such an increase might mean someone could not afford to pay it? Could a state drop optional services as long as no one became ineligible as a result? In

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15 Patient Protection and Affordable Care Act, supra note 1, § 2001(b).
this case the state Medicaid agencies and other state government officials raised so many questions that the Center for Medicare and Medicaid Services issued a State Medicaid Directors Letter and other guidance to answer the questions states were asking.16

Documenting the Need—Now What? Be sure you have researched and understood all of the regulations that govern the applicable program or policy area so that you can put the stories or evidence you have gathered into the context of the existing policy framework. Due diligence requires confirming that no existing guidance covers the topic in question or that, if guidance does exist, you have read and referred to existing guidance and explained why it does not resolve the issue. Find the place or places in the regulation (or its implementation) or the previous guidance that is open to more than one interpretation. Be as specific as you can about the guidance or regulatory provision that is being interpreted in different ways or why the interpretation (if only one is being made) is incorrect.

In many cases you will have a suggestion about what the guidance that you hope a federal agency will issue will say. In others, you won’t. If there are different interpretations to the existing regulation, each interpretation possibly has advantages and disadvantages to your clients. Your organization might not have a preference for which interpretation is selected, but you might just want it settled so that you can predict how a client will be treated and that all clients are treated fairly and equitably. In that case you would not want to make any suggestions on what the guidance should say. However, one interpretation might be better than another, and you would want to suggest that the agency adopt the better one. When making the case to the agency to adopt the preferred interpretation, be sure to explain why the interpretation you prefer is supported by the statute, regulation, or other guidance. As with regulations, you can offer draft language for the guidance, but be certain about what the language means and how it will be interpreted. This applies to guidance as well as regulations.

A significant amount of federal policy is made through the promulgation and implementation of regulations and subregulatory guidance from federal agencies. Although federal statutes outline the basic structure of programs and policies, the details and nitty-gritty of how the programs work are created by agencies through the regulatory process. Getting involved in the federal policy process by commenting on proposed regulations gives organizations an opportunity to represent their clients through improving the programs that serve them and the policies that protect them. Keeping clients front and center and joining with like-minded organizations when drafting comments or suggesting guidance can improve the content of those comments and increase the likelihood that the comments influence the final outcome.

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