

General Regulatory Process – Colombia

*THIS PROCESS ONLY APPLIES TO REGULATIONS THAT REQUIRE THE PRESIDENT'S SIGNATURE
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SOURCES OF AUTHORITY TO REGULATE

1) Legislation

Article 189(11) of the Constitution grants to the President of the Republic the ability to exercise regulatory power by issuing decrees, resolutions, and orders necessary to effectuate the laws.

A regulator can propose and adopt regulations under its general authority.

A law can also require a regulator to regulate in a specific area, typically without providing detailed guidance on how to do so.

- Note: The National Development Plan is a law enacted every four years to codify the campaign promises/agenda of an incoming President. It is our understanding that, generally speaking, each regulator is allocated articles in the Plan to, in essence, task itself with promulgating specific regulations necessary to develop policies within the regulator's jurisdiction. The process for developing the Plan varies depending on the political alignment of the executive and legislative branches.
- Note: the Colombian Congress may also ask a regulatory agency to provide a formal opinion on proposed bills that would authorize regulation.

2) Judiciary

In addition, a court order may require a regulator to modify, clarify, or draft a regulation. (Note: this applies primarily to human rights regulations.)

STEP 1: Developing a Draft Regulation

Before the first draft is developed, the regulator can informally request comments from interested stakeholders, including the private sector. This is not an obligation, but it occurs in the majority of cases.

1) The regulator develops a draft regulation.

- The regulation is drafted by the regulatory agency's technical staff and lawyers.
- The regulator has the discretion to decide whether the regulation will be a Decree or a Resolution. Decrees refer to acts requested by the President, which serve to administer the law. Resolutions are acts requested by different entities that do not have the President's signature. They typically administer decrees. Both decrees and resolutions have the force and effect of law, but decrees have greater priority/hierarchy over resolutions.

2) The regulator is required to perform an analysis of the draft regulation.

- The analysis must include the following "Publication Documents":

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- a) A list of existing regulations in the area of the proposed regulation, a justification for the proposed regulation, and an explanation of how the proposed regulation will be implemented.
- b) Preliminary Studies performed by the regulator:
 - i) Analysis of the judicial feasibility of the proposed regulation. This includes:
 - A detailed analysis of the regulatory agency's legal authority to propose the regulation;
 - A list of the regulations that will be modified, replaced or repealed by the proposed regulation; and
 - A review and analysis of judicial decisions that may impact or are relevant to the implementation of the proposed regulation;
 - ii) Economic Impact Analysis (including the costs or savings of implementing the proposed regulation);
 - iii) Environmental Impact Analysis; and
 - iv) Cultural Impact Analysis (when necessary)
- c) A Regulatory Impact Manifest (when a draft regulation adds or modifies an administrative burden). This includes:
 - i) Justification for the additional or modified administrative burden(s);
 - ii) An estimate of the proposed agency budget and staffing required to implement the burden;
 - iii) A flow chart or description of the process that details the steps, conditions, and timing considerations that the regulated party will need to take once the administrative burden is implemented; and
 - iv) The cost of the administrative burden on the regulated party with a justification for the cost.

Note: The Regulatory Impact Manifest is not a Regulatory Impact Analysis ("RIA"). A Decree is being drafted by Colombia's Office of Regulatory Improvement (Oficina de Mejora Regulatoria) that will likely supplement the obligation to prepare the Preliminary Studies with an obligation for regulators to prepare an RIA for rules that are characterized as "high impact" under DNP's methodology. DNP would review each RIA and issue a non-binding opinion; if the regulator decided to issue the rule without following some or all of DNP's opinion, it would need to document its decision to do so.

STEP 2: Publication of the Proposed Regulation for Public Comment

- The regulator must publish, on its website:
 - a) The draft regulation; and

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- b) The Publication Documents (as defined in Step 1).
- The regulator must request public comment for at least 15 calendar days for proposed Decrees.
 - a) Note: Resolutions are not required to be made available for public comment before their adoption, but they are generally made available for comment by the regulator for at least 15 calendar days, unless the regulator has adopted different internal requirements for comment periods. Under Decree 2698 of 2004, Regulatory Commissions, which are independent entities, also generally make proposed regulations available for public comment for at least 30 calendar days.
 - b) Comments from the public may be submitted in person, via email, or, if the regulator has the capability, directly to its website.
- Note: Interested stakeholders can register with the regulator to receive e-mail alerts when it publishes a proposed regulation on its website. The public comment process for all acts issued by the executive branch will eventually occur through a new website called the Sistema Unico de Consulta Pública (“SUCOP”), which is anticipated to roll out by the end of 2018.

STEP 3: Analysis of Public Comments

- The regulator must prepare a matrix that compiles and summarizes the comments received during the comment period.
- The regulator must prepare and publish on its website a global report (Informe Global) responding to all comments.
 - The regulator is permitted to organize the comments into categories and themes, and then respond to similar comments in the aggregate.

STEP 4: Preparing the Final Regulation for the President's Signature

- The regulator must prepare the following documents before sending a final Decree to the President for approval and signature:
 - a) A report detailing the regulatory agency's available budget and staff to implement the regulation;
 - b) A separate report (called the "Memoria Justificativa" ("MJ")) that includes:
 - i) A list of the existing regulations in the same area;
 - ii) A justification for the regulation;
 - iii) An explanation of how the regulation will be implemented;

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- iv) The Preliminary Studies;
 - v) The Regulatory Impact Manifest (only when required; as explained in Step 1); and
 - vi) Proof of publication of the proposed regulation, Publication Documents, comment matrix, and the report with agency responses to public comments on the agency's website.
- c) The final regulation that includes the signature of the head of the regulatory agency.

FLOATING STEP: The Draft Regulation is Sent to Additional Authorities

During the regulatory development process, the regulatory agency's lawyers analyze the draft regulation and determine whether it: 1) will have international implications and/or is a technical regulation ("RT"); 2) will impact competition in the market; and/or 3) will add or modify an administrative burden.

1) International Implications and/or is a RT:

- If the regulator determines that the draft regulation has international implications and/or is an RT, the draft is sent to the office of the Director of Regulation within the Ministry of Commerce, Industry, and Tourism (Ministerio de Comercio, Industria y Turismo or "MINCIT") for review.
 - MINCIT's opinion on the draft regulation is binding on the regulator.

2) Market Competition

- If the regulator determines that the draft regulation will impact competition in the market, the draft is sent to Colombia's Industry and Commerce "Superintendencia" ("SIC").
 - SIC performs a competition review of the draft regulation and has ten (10) business days to prepare its opinion, called the "Abogacía de la Competencia."
 - SIC's opinion about the draft regulation is not binding on the regulator, but the regulator must provide an explanation if it chooses not to follow it.

3) Administrative Burden

- If the regulator determines that the draft regulation will add or modify an administrative burden, the draft and its corresponding Regulatory Impact Manifest are sent to the Administrative Department of Public Services (Departamento Administrativo de la Función Pública or "Función Pública").
 - Based on the draft regulation and its Manifest, Función Pública has thirty (30) business days to prepare an opinion about the administrative burden that the proposed regulation would add or modify.

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- Función Pública's opinion and recommendations about the administrative burden are binding.

STEP 5: The Draft Regulation is Notified to the WTO (If It Is an RT)

With respect to RTs, once the domestic process has been completed, the regulator must also provide an international comment period (to meet Colombia's World Trade Organization ("WTO") notification requirements). The comment period must be open for at least ninety (90) calendar days.

MINCIT, which operates Colombia's WTO TBT Enquiry Point, makes the notifications. It analyzes the comments received through the WTO notification process; sends any comments to the regulator that, in MINCIT's estimation, the regulator needs to review; and discusses the comments with the regulator. The regulator may revise the regulation based on the comments. MINCIT then provides responses to the comments through the relevant WTO TBT Enquiry Point(s).

STEP 6: The Final Regulation Reaches the Office of the President

The lawyers in the Office of the President must receive from the regulator:

- 1) The MJ (as discussed in Step 4);
 - Note: the MJ also includes the Regulatory Impact Manifest and Función Pública's opinion (when required).
- 2) The draft final regulation signed by the head of the regulatory agency;
- 3) SIC's opinion (Abogacía de la Competencia) (when required); and
- 4) MINCIT's opinion (when required).

The office of the President reviews the documents and the constitutionality of the draft final regulation. If the draft final regulation does not require modifications, the President signs it. If the draft final regulation requires minor modifications, the regulator makes them and submits it back to the office of the President. If the draft final regulation requires significant modifications, the regulator must make them and re-start the process at Step 1.

STEP 7: The Final Regulation is Published in Colombia's Official Gazette and Enters Into Force