# Introduction to Rulemaking

# Learning Objectives for this Module

## Learn the definition of a rule

## Learn how rulemaking simplifies adjudications

## Learn the policy reasons for making rules

## Learn the drawbacks of rulemaking

## Learn the basic framework for notice and comment rulemaking

# Reading Assignment

## Chapter 5 to page 150, 179-183.

# Issues to be addressed

## Definition of a Rule

### APA 551(4)

#### (4) 'rule' means the whole or a part of 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

### LA Definition

#### 6) "Rule" means each agency statement, guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency and those purporting to adopt, increase, or decrease any fees imposed on the affairs, actions, or persons regulated by the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency.

#### "Rule" includes, but is not limited to, any provision for fines, prices or penalties, the attainment or loss of preferential status, and the criteria or qualifications for licensure or certification by an agency. A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class. The term includes the amendment or repeal of an existing rule but does not include declaratory rulings or orders or any fees.

### A rule is legislation.

#### General applicability, as opposed to specific parties

#### Prospective

#### Binding on the agency as well as on the public

### Jargon Alert

#### Rule, legislative rule, or regulation

##### They all mean the same thing

##### Has the same effect as a statute passed by the legislature

#### Non-Legislative rule

##### Has no legal effect, but shows what the agency thinks the law is

##### Many names - interpretive rule, guidelines, guidance document, anything but rule or regulation

## The Power to Make Rules

### The power to make rules must be delegated by the legislature.

#### If the enabling legislation (the legislation creating an agency) is silent, the agency cannot make rules

### The delegation may be broad, allowing the agency great discretion, or very narrow.

#### We will look at the standards for reviewing this delegation later in the course

## Must the Agency Make Rules?

### If the agency has the power to make rules, it has the discretion on what rules to make and when to make them.

### The legislature can put provisions in the agency legislation requiring that certain rules be made, and the timeframe for making them.

#### The Clean Air Act required rulemaking to flesh out detailed technical standards

### Unless there is a legislative directive, it is difficult to get the courts to force an agency to make rules

#### Not impossible, as we will see latter.

## Why Make Rules?

### Many statutes have too little detail to be enforced without additional rules.

#### The Clean Air Act could not be enforced until the agency established allowable emissions levels for the major pollutants.

### Rules can be used to tailor a statute to new circumstances.

#### Food sanitations regulations should have been revised when it was found that sprouts were a source of food borne illness.

### Rules provide a chance for the for the public to participate in the regulatory process.

#### The agency can learn from the public’s concerns.

#### There is more buy in to the rule if the public has been allowed to participate.

### Once promulgated, a rule is binding on every party, eliminating the need for a factual determination of the issue resolved by the rule.

#### Once an allowable level of sulfur dioxide is established, the agency only needs to show that the emissions exceeded the threshold.

#### Without the rule setting an emissions limit, the safe level of emission would have to be re-determined in each enforcement action.

#### In disability cases, rules can be used to establish what constitutes a disability, rather than making it as case by case determination.

### Uniformity

#### Rules set up a general framework that treats all parties uniformly

#### Rules are the fairest way to make big regulatory changes

#### If the agency does not have rules, it can change enforcement policy from case to case, and is also at the mercy of judges to accept or reject agency standards

### National standards can be adopted through agency rules, harmonizing practice across jurisdictions.

#### National building codes.

#### CDC guidelines on food sanitation.

#### Recommendations of the Advisory Committee on Immunization Practices.

#### This also saves the governmental entity the cost of independently establishing and defending the standard during rulemaking.

### Agency Oversight

#### You can control the outcome of rulemaking much easier than that of adjudications

##### Not dependent on ALJs (administrative law judges)

##### This especially important in LA

#### More input from across the agency

##### Input from the public as well

#### Allows oversight by the President through OIRA in the federal system.

## The Politics of Rulemaking

### Congress often dodges the hardest issues and leaves them to agency rulemaking

### Most of these involve cost-benefit analysis

#### How do you trade off automobile safety with price and fuel efficiency?

#### Are you more worried about delaying the entry of new drugs or the about allowing the sale of a drug with dangerous side-effects?

#### Do you want cheap power at the cost of lots of asthma and the Grand Canyon full of smoke?

## Downside of Rulemaking

### Trials (adjudications) involving single parties can be more flexible in the individual cases

### Adjudications are useful when you are not sure what the rule should be and need more info and a chance to experiment

### Rules can be so abstract or overbroad that they are expensive or difficult to follow

#### Like statutes

### Agencies can promulgate rules that Congress would never pass - Green House Gas Regulations.

## Rulemaking Ossification

### The courts and legislatures have increased the burden on rulemaking, especially in states

#### Rulemaking has gotten so complex and time consuming it has lost some of its value

#### Complicated by regulatory conflict and incompetent agency practice

### Rulemaking can go on for years

#### What is the legal value of a proposed rule that has not been finalized?

#### The Medicare anti-kickback regulations were delayed for years between the proposed rule and the final rule

## APA Informal (Notice-and-Comment) Rulemaking

### APA 553

#### http://biotech.law.lsu.edu/Courses/study\_aids/adlaw/553.htm

### The proposed rule must be posted in the Federal Register (Louisiana Register), along with the statement of legal authority and other supporting information.

#### Electronic Notice is also given, but the official notice is still the notice in the register.

##### http://www.regulations.gov

### The public is allowed to submit written comments (email as well).

#### Public participation has great political benefit in broadening the acceptability of the rules.

#### Public comments can identify technical and legal problems with the rules

#### Publication of proposed rules allows politicians to become involved to protect the interests of their constituents

#### Public participation limits executive power and makes it more palatable to the courts to have agencies making laws

#### While the agency may take comments at public hearings, it is usually done in writing.

### The agency must consider and answer the comments by class.

#### The rule may be re-proposed with a new comment period if extensive changes are made in response to the comments.

#### The final rule may be changed from original rule without additional comments if the change is a logical extension of the original rule. (Discussed latter)

### Once a rule has been properly promulgated through notice and comment, it can only be attacked by attacking the published basis for the rule, and that must be done relatively soon after promulgation.

# Evaluation Questions

## There are no evaluation questions for this introduction.