# Rulemaking – When do you need notice and comment?

# Learning Objectives for this Module

## Learn when notice and comment is required.

## Learn which rules are exempt from notice and comment.

## Learn to argue the distinction between an interpretative rule and a legislative rule.

## Learn to how to analyze a general policy statement.

## Learn why formal rulemaking is disfavored.

# Reading Assignment

## Chapter 5 to 179.

# Issues to be addressed

## The key questions in rulemaking:

### Is it a rule or adjudication?

### If it is a rule, do you have to have notice and comment?

### What is necessary for effective notice and comment?

### Why avoid notice and comment?

#### What did The Regulators tell us about notice and comment rulemaking?

##### What is the risk to the agency if it issues guidance without notice and comment, and the court finds the guidance to be a rule requiring notice and comment?

#### What is the benefit to the regulated parties of interpretive rules and guidance?

##### What if the agency is prevented from providing guidance documents?

## 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;

### General Applicability?

#### Londoner v. City and County of Denver, 210 U.S. 373 (1908)

##### The City of Denver paved the road in front of plaintiff’s property. Under the law at that time, property owners were liable for the cost of such improvements.

##### Plaintiff’s individual assessment was based on specific factors about this property.

##### The court found that plaintiff was entitled to present evidence and be heard on his objections to facts on which his assessment was based.

##### This was an adjudication because it depended on specific facts about a specific party to resolve.

##### Adjudications result in orders to specific parties based on individual facts.

#### Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915)

##### The State Board of Equalization determined that property was undervalued in Colorado and imposed a rule that all evaluations be increased by 40%.

##### This was not a reevaluation of each piece of property, but a uniform and mechanical increase in the individually determined valuations.

##### The court found that there is no right to a hearing for rules of general applicability.

##### Assume the EPA makes a rule that applies to copper smelters which are located more than 5,000 above sea level.

###### What is there is only one?

###### Is this still a rule?

#### Choosing Rulemaking or Adjudication

##### If an agency has rulemaking power, it is free to choose which to use in a given situation.

##### If the subject involved a lot of individualized determinations, it makes more sense to use a rule.

###### In Bi-Metallic, Colorado could have use individual adjudications to set the rates, but it would have been time consuming and expensive compared to using a rule.

###### The NLRB decides complex, often nationwide issues that depend on specific facts. It usually uses adjudications to make policy.

##### The Effect of a Rule in an Adjudication

###### The FCC is concerned that concentrated ownership of TV stations is not in the public interest.

###### Licensing is an adjudication, i.e., the applicant is entitled to a hearing if his license is turned down.

###### The FCC issues a rule that no one can own more than five stations.

Does an applicant with 5 stations get a hearing when he is turned down based on the rule?

Why or why not?

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)

###### While SSD claimants are entitled to a hearing, in most cases the regulations determine whether they have a disability without an individualized disability determination.

### Future Effect?

#### In Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), HHS changed the reimbursement rules for care that had already been rendered.

##### Why is that problem for a rule?

#### Can Congress fix this or is it a constitutional issue?

#### Can there be laws with retroactive effect?

##### Superfund?

##### When judges find new tort theories?

##### What about in criminal law?

## Exemptions to Notice and Comment Requirements (does 553 apply at all?)

### Important note – do not confuse this section with the section on interpretative rules. These are rules with full legal effect that are binding on the agency and the public. They are exempt from notice and comment for public policy reasons.

### § 553. Rule making

#### (a) This section applies, according to the provisions thereof, except to the extent that there is involved -

##### (1) a military or foreign affairs function of the United States; or

##### (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

### 553(a)(1) - Military and Foreign Affairs

#### These are construed narrowly.

#### Military

##### Uniformed personnel

##### Military operations

##### Does not include domestic civilian matters, such the employment of civilians and contracting for supplies.

#### Foreign affairs

##### Anything to do with foreign policy or international agreements.

##### Domestic issues such as immigration are not covered unless they have international implications.

###### Limiting the term of residence for Iranian nationals after the hostage incident was found to be an extension of foreign policy toward Iran.

#### How would you argue these?

##### Extending asylum to persons subject to reproductive restrictions in China?

##### Deporting young Muslin men with visa problems?

##### Rules on domestic surveillance for counterterrorism?

### 553(a)(2) Agency management, public property, and benefits

#### This exemption reflected the view at the time of the adoption of the APA that critical regulatory issue was curtailment of the rights of regulated parties.

##### Government contracting and benefits have expanded dramatically since this provision was adopted.

##### This would exempt Social Security benefits, everything to do with public lands, and many other areas of regulation.

#### As the regulatory state developed, there was pressure to repeal this provision.

##### To defuse this, agencies adopted rules requiring notice and comment rulemaking in several of these areas.

##### Congress has suspended this section in many enabling laws.

##### You have to look at the agency’s own rules and enabling act to see if 553 has been waived.

#### Government property

##### Assume that the National Park Service has issued rules governing cruise ship docking at a national park on Key West. The neighbors are concerned about tourists from the ship flooding their neighborhood.

###### How would you argue this under the APA and what is the likely result? (Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1 (D.D.C. 1994).)

#### Agency Procedures

##### Like the code of civil procedure

###### Does not change the substantive rights of the parties

###### Does not change the regulated behavior, only the process in agency procedures

##### Thus no need for public participation.

#### Implications of no notice and comment.

##### You will learn that you have to go through notice and comment with all the delays and challenges to change a notice and comment rule.

##### How is this changed for rules under 553(a)(1)&(2)?

### 553(b) - Exceptions to Notice Requirements

#### 1) Interpretative rules, general statements of policy, and rules of agency organization, procedure, and practice; and

#### [The question with these is whether they are rules at all, in the sense of affecting private rights.]

#### 2) Rules when the agency finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

#### [These are rules that affect private rights, but for other reasons are exempt from notice and comment.]

#### [No notice means no comment under 553(c)]

## Understanding 553(b)(1)

### Rules of agency organization, procedure, and practice are exempt from notice and comment because they only affect internal agency functions or are procedural and not substantive.

### Interpretative rules and general statements of policy are different from that of the other exceptions to the need for notice and comment. The other exceptions deal with rules that change legal rights or procedures, but for policy reasons have been excluded from 553’s requirement for notice and comment.

### Interpretative rules and general statements of policy do not affect private rights or procedure because they are only statements about powers that the agency already has. An interpretative rule can explain what the agency thinks a statute or regulation means, but it cannot change the meaning of the statute or regulation. They are like commentaries on the civil law. A general statement of policy explains how the agency will exercise discretionary powers that it already has.

### The materials in Chapter 5 analyze interpretative rules and statements of policy by looking at how you decide if they affect legal rights and thus are really rules and not interpretative rules or statements of policy.

### Looking back to your constitutional law class, and forward to Chapter 6, which covers standing, you can also look at the question of whether something is an interpretative rule or policy statement as a standing question. If the agency has not done something that changes the law or private rights, there is no case or controversy at issue, and thus no standing. Without standing, the plaintiff cannot get into court to request that the rule be suspended until notice and comment has been carried out.

### In administrative law, this is called the final agency action requirement. Until the agency does something that affects the plaintiff’s rights, there is no standing to sue the agency. Keep this standing/finality analysis in mind as you work through the tests for whether something affects private rights and thus triggers the right to sue for notice and comment.

## Does the definition of a rule apply to interpretive rules?

### Agencies can only make legislative rules if the legislature delegates this power to the agency through statute.

### Since interpretative rules (guidelines, etc.) do not have legal effect, does an agency need statutory authorization to issue non-legislative rules?

### Why does the ban on retroactive rules not apply to interpretive rules?

#### How do judges change the law retroactively?

#### If interpretive rules cannot change legal rights, does retroactive really mean anything for nonlegislative rules?

## How does the nature of the enabling act affect rulemaking?

### Very general laws

#### Limited detail in the statute

#### Any interpretative rule is likely to been seen as a legislative rule because it will provide more limits than the statute.

### Very specific laws - like the ADA

#### No room for legislative rules.

#### Everything is guidance.

## Distinguishing an interpretative rule from a (legislative) rule

### EPA example

#### EPA says that the term “waters of the United States” (which defines the jurisdiction of EPA under the Clean Water Act) includes wetlands that potentially provide habitat to migratory birds.

#### What do we need to know to tell if this is the EPA just saying what it things the CWA means or whether this is creating a new definition with legal implications?

##### If this is adopted with notice and comment, it clearly establishes a legal standard.

##### If this new standard expands EPA has jurisdiction over a wetland, it will become expensive or impossible to drain or develop the area.

#### But what if the EPA does not use notice and comment and says it is interpretative and thus just explains what the CWA already means?

##### Even if EPA says this is nothing new, how might a clear statement of the definition affect the value of the wetlands?

###### Would this be a “substantial impact” in a common sense meaning?

###### Under the old substantial impact test, courts would likely find that this needed notice and comment.

##### The substantial impact test has now been mostly abandoned in favor of the “legally binding” test.

### The “Legally Binding” or “Force of Law” Test

#### Can the agency enforce the law without the rule?

##### Continuing with the previous wetlands example

###### Is the agency required to define wetlands before enforcing the statute?

###### Was the agency doing enforcement before this rule?

###### If so, does this change the enforcement?

###### What does tell us about whether it is legally binding?

##### Assume a statute allows the agency to define toxic substances that cannot be dumped into lakes.

###### Would a list of these substances need notice and comment?

###### Could the law be enforced without the list?

##### A statute requires the agency to adopt rules for the safe housing of dangerous animals

###### Agency uses notice and comment to promulgate a rule requiring that “reasonable precautions” be taken to prevent the escape of the animals

###### Agency then issues guidance saying that a reasonable precaution would be an 8 foot fence.

###### How does this guidance change the proof of facts in the enforcement adjudication?

Can the animal’s owner establish that a 4 foot fence is high enough to restrain his dangerous turtle?

Hoctor v. USDA, 82 F.3d 165 (7th Cir. 1996)

##### Can the agency use notice and comment to promulgate a legislative rule that says that the agency can add other requirements in specific situations without notice and comment?

###### Why or why not?

###### What if the rule says that nothing can be brought to the park that would be disruptive or impede public access?

Would it need a specific list of disruptive items?

Junk in the Park: United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989)

### Other factors which can be used when arguing the status of an interpretative rule.

#### Is the interpretive rule consistent with the legislative rule it is interpreting?

##### If not, then it is either wrong or an attempt to change the legislative rule without notice and comment.

##### In either case, the interpretation will be invalid.

#### Does the interpretative rule attempt to change a long standing interpretation?

##### Logically, this makes no sense because the long standing interpretation has no legal effect, thus changing it should have not legal effect.

##### The DCC has argued, when the interpretation is longstanding and important that there is a reliance issue and that notice and comment should be used to be fair to the parties who have relied on the rule. This becomes another argument that can be used if the court wants to block the change.

#### Did the agency say it was interpretation when it was issued?

##### While this, along with publication in the register, should not matter legally, it reinforces the agency’s claim that it is an interpretation.

#### Does the person issuing the interpretation have the authority to bind the agency?

##### This will come up again in deciding if there is final agency action.

##### If the interpretation does not come from the secretary or commission or someone delegated their power to bind the agency, then it does not have legal effect and cannot be a rule.

## General Policy Statements and Procedural Rules

### General Policy or Specific Requirements?

#### Remember, 553(b) does not require notice and comment for general policy statements or procedural rules.

#### Assume the statute says that in licensing actions, a physician must reply to agency request for information in a reasonable time.

##### How would you argue that a 7 day answer period is a substantive change, not just a procedural requirement?

##### Why does the inclusion of specific factual information (deadline periods, fence heights) undermine the claim that it is a general policy statement?

### Federal Mine Safety and Health Act Example

#### Secretary has the statutory right to sue both the mine owner and the mine operator for violations of the Act.

#### Secretary publishes a policy statement explaining that the agency can and will sue both of them for infractions, depending on the nature of the infraction.

##### Does this require notice and comment?

##### Why?

### Enforcement Manual

#### The Coast Guard is authorized to investigate and enforce against certain types of oil pollution in the waters of the United States under the Clean Water Act.

##### To aid its officers engaged in these functions it has created a Marine Safety Manual.

##### That Manual gives guidance as to what appropriate penalties might be for various types of pollution incidents.

##### The range of penalties is specified in statutes.

#### Legislative rule or prosecution policy?

##### What is the key?

### Corps of Engineers Example

#### Corps issues a guidance document providing examples of ways to mitigate wetlands damage.

##### One way is to promise to restore 2X as much wet land as you fill.

#### Does this need notice and comment?

##### Why or why not?

#### What if the Corps will only issue permits to people who agree to this?

##### How would you prove this?

### Setting a Threshold for Prosecution

#### The FDA issues a policy statement that it will not take enforcement actions against candy bars unless they have more than 5 insect parts per bar.

##### There is no statutory standard.

#### You represent Consumers Disgusted by Bug Parts, Inc.

##### What is your argument that this is really a rule?

##### Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987)

###### This case has been heavily criticized. One reason is that the action level did not stop the agency from prosecuting for lower levels in the future, and that it also did not make higher levels automatically illegal. Thus it was not binding in any real sense.

###### Another criticism was that it encouraged wink and nod statements that made it difficult to know what the agency was thinking.

###### This will get interesting because CNI is a major precedent in the Texas v. US immigration case.

### Coercion: Chamber of Commerce v. U.S. DOL, 174 F.3d 206 (D.C. Cir. 1999)

#### DOL made a policy statement that it would reduce inspections of workplaces that adopted an OSHA suggested safety plan that exceeded federal minimums

##### Is this really voluntary?

##### What happens if you do not comply?

##### Does coercion make this a binding rule?

#### What about DOJ guidance that a corporate compliance plan will count as mitigation under the Sentencing Guidelines?

##### Does it affect law abiding companies?

### Substantial Impact Test for Procedural Rules

#### The Department of Health and Human Services changed the method by which home health providers could obtain reimbursement for expenses under the Medicare Program. In particular it required that they submit their requests in a new format and to regional intermediaries, rather than to HHS directly.

#### What was the impact on them of the change?

##### How would plaintiffs argue that this impact made this a legislative rule, rather than a procedural rule?

### Inspection or Prosecution Guidelines

#### OSHA adopts a plan for deciding which employers to inspect.

#### A selected employer contests the rule, saying that OSHA inspections are expensive and time consuming, thus this has a substantial impact.

#### Is this a successful argument?

##### Why, or why not?

##### How is this different from the coercion case?

### ‘‘Encoding a Substantive Value Judgment’’ Test.

#### The D.C. Circuit uses what it described as asking whether an agency’s rule ‘‘encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.’’

##### Is this really a different standard than substantial effect?

##### Does this look like the standard for guidelines, such as in the Hoctor case?

#### Limited to the DC Cir. and does not seem to make much difference.

### Substantial Impact Test for Procedural Rules and Policy Statements – Wrap-up

#### Same analysis as substantial impact or legally binding test for substantive rules.

#### What is the actual impact on your client?

##### Will compliance costs significantly increase – Medicare case?

##### Does it change their legal options – shortened period to reply to complaint?

##### Does it actually change substantive requirements – requiring new information for a benefit determination?

#### We will revisit this when we look at standing.

### Consistency, the Hobgoblin of Interpretative Rules

#### What is the result if an interpretative rule is inconsistent with a legislative rule?

##### Using an interpretative rule to change a calculation established by a rule

#### Some courts have found that an interpretative rule cannot be changed with a subsequent interpretative rule, but can only be modified by a legislative rule

##### Why is logically inconsistent?

##### This is not widespread.

### Interpretive Rule or Legislative Rule Wrap Up

#### Does it force regulated parties to change their actions?

#### Does the agency treat it as binding?

##### Does it allow exceptions?

#### Is it necessary to enforce the statute?

##### List of pollutants, for example.

#### Does it provide specific details which limit the action of regulated parties?

## Notice and Public Procedures Are Impracticable, Unnecessary, or Contrary to the Public Interest

### Actions where Secrecy is Important

#### Wage and price controls

#### Bidding on contracts

#### Negotiations on land purchases and sales

### Emergencies and Impracticality

#### Emergency Rules

##### <http://doa.louisiana.gov/osr/emr/emr.htm>

##### Misused in LA

##### This GAO Report indicates that the feds may also misuse this exception.

#### Interim Final Rules

##### Published and in effect, but will be modified after comments are in.

### Time Constraints

#### The GAO found that agencies frequently skip notice and comment when they have to make a rule with a short timeframe.

##### Usually statutory deadlines, or a version of emergencies.

##### Classic would be hunting seasons.

#### How would this have helped in the Regulators?

##### How did notice and comment improve the rule?

#### Should the agency be able to use this exception if has delayed rulemaking?

### Technical Corrections

#### Calculations and other non-discretionary rules

#### Technical corrections

##### Can require notice and comment if the correction causes a different result.

#### Theory is that these are mechanical and thus notice and comment would not add any new information.

## Formal Rulemaking

### What is Formal Rulemaking?

#### A rulemaking conducted as a trial type hearing

##### The agency support for the rule must be presented at the hearing

##### Interested parties may present and cross-examine evidence

#### History - grew out of rate making in the early 20th century.

##### Rate making affects a small number of parties

##### The courts thought they should get due process

### Why avoid formal rulemaking?

#### The peanut hearings (FDA must do formal rulemaking in some situations)

##### Should peanut butter have 87 or 90% peanuts?

##### 10 years and 7,736 pages of transcript

#### What was the concern in Shell Oil v. FPC?

##### Formal rulemaking was impossibly time consuming to use for regulating something changeable such as natural gas rates.

#### Why does just getting the right to be heard at a formal hearing benefit parties that oppose a rule?

### When is Formal Rulemaking Required?

#### Disfavored by the modern courts

#### Must have magic statutory language or be required by the agency's on rules

##### Only when rules are required by statute to be "made on the record after opportunity for an agency hearing"

#### Lawyering tip

##### When would you want to argue that formal rulemaking is required?

##### What do you have to do to support your request?

# Evaluation Questions

## Rulemaking policy

### Why do legislatures authorize agencies to make rules, as opposed to doing everything by statute?

#### What are political reasons to leave it to the agency?

#### What about expertise?

### How does the nature of the act being enforced affect the latitude of the agency to make rules?

#### How does a detailed statute like the Americans with Disabilities Act affect the room for rulemaking?

##### Why might congress not want to give much room for rulemaking?

##### What does the agency use to give direction if there is no room for rulemaking?

#### What is the advantage to giving the agency broad authority?

##### Why would a health agency need broad authority to respond to a public health emergency such as bird flu an example?

##### What are risks to legislative control when the legislature gives the agency broad authority?

### Why is rulemaking favored by the courts?

#### Be specific and explain how rulemaking improves the efficiency of government and makes it easier for regulated industries and individuals to know their duties.

#### How can you use rulemaking to narrow the issues in adjudications?

##### What is an example from disability law?

##### From our discussion of food inspections?

## Rule or Adjudication?

### What are the key parts of the APA definition of a rule?

#### Does the APA allow retrospective rules?

#### Could Congress enable retrospective rules?

##### What legal issues might it raise?

### How do we know whether we are looking at a rule or an adjudication?

#### The city council sets a tax rate for real property.

##### Rulemaking or adjudication and why?

##### Do you get a hearing to contest the rate?

#### The tax assessor’s office sets the value of your house for property tax purposes.

##### Rulemaking or adjudication and why?

##### Do you get a hearing to contest the valuation?

#### What are the key factors to argue in questions of whether a proceeding is an adjudication or a rulemaking?

#### Why is there no right to individual due process in rulemaking?

##### What is the substitute for individual due process in rulemaking?

##### Is this constitutionally required? How would you argue this?

##### What is the democratic control over rulemaking?

## Legislative Rule or Interpretive Guidance?

### What is a legislative rule?

#### What is the legal effect of a legislative rule that has been properly promulgated?

#### After a legislative rule has been in place for several months, are there limits on challenging it in court?

#### What is rulemaking ossification?

##### How does it drive agencies to use more non-legislative rules?

##### What is the risk to the agency if it uses an interpretive rule and the court says it should have been a legislative rule?

### What is a non-legislative/interpretive rule?

#### What else are these called?

#### What is the legal effect of an interpretive rule?

#### Looking back to 553, how would you argue that an interpretive rule is not covered by 553, even though they are mentioned in 553?

#### What is the benefit to the regulated parties of having interpretive rules?

### What factors do the courts consider when determining whether an interpretive rule is really a legislative rule, requiring notice and comment?

#### Rather than worrying about whether the court is using a substantial impact or a legally binding test, explain the factors that you look to in arguing for or against an interpretative rule requiring notice and comment, i.e., that it is really a legislative rule?

#### How do you defend an interpretive rule or guideline when the agency is attacked for always following the guideline, thus making it into a *de facto* rule?

##### What are the other reasons why the agency might be following the guideline?

##### What do the *Hoctor* and *Picciotto* cases tell us about how to argue the distinction between legislative and interpretive rules?

#### General policy statements

##### How is a general policy statement different from an interpretative rule?

##### What is prosecutorial discretion and how does it fit in this analysis?

##### The Marine Safety Manual gives guidance as to penalties for pollution incidents.

###### Legislative rule or prosecution guideline?

###### If it is a prosecution guideline, why doesn’t it require notice and comment?

##### What about the mine safety case?

#### Can a non-legislative rule modify a legislative rule?

##### What is the result if they conflict?

#### What are the limits on providing incentives to comply with non-legislative rules?

##### Why did the court in *Chamber of Commerce v. U.S. Dept. of Labor*, 174 F.3d 206 (D.C. Cir. 1999) find that promising to reduce inspections for complying firms was improper?

##### Could the agency have required compliance if it had promulgated the rule as a legislative rule?

#### Does Publication Matter in Deciding if a Rule is a Legislative Rule?

##### Documents that have ‘‘general applicability and legal effect’’ must be published in the FR.

###### Must interpretative rules be published in the FR?

###### What does failure to publish indicate?

###### What it the rule is published online, but not put in the FR?

###### How would you argue that 553 makes this effective notice as to anyone trying to sue for failure to give notice?

### Negotiated Rulemaking

#### What is this?

#### Why is often used in environmental rulemaking?

#### What are the advantages?

#### What are the public participation issues?

### Formal Rulemaking

#### What is a formal rulemaking?

#### When is it required?

#### Why is it so disfavored by the courts?