# Introduction to Rulemaking – Part I

# Learning Objectives for this Module

## Learn the definition of a rule

## Learn how rulemaking simplifies adjudications

## Learn the policy reasons for making rules

## Learn when you do not need to use notice and comment

# Reading Assignment

## Chapter 5 to C. The Procedures for Formal Rulemaking.

# Issues to be addressed

## 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.

## 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

### 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?

### 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?

#### National Highway Traffic Safety Administration

##### Agency makes a rule requiring new cars to provide better protection for side impacts.

##### OK?

#### OSHA

##### Agency says that existing auto paint shop ventilation systems violate the law.

##### OK?

##### What if the agency says they do not provide adequate ventilation going forward and must be modified or other worker protections be provided?

## Rules v. Orders (Adjudications)

### 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)

## 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

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

#### 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.]

## 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.

# 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?