# 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 when you do not need to use notice and comment

# Reading Assignment

# Issues to be addressed

## 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?

## 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

### 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?

## Formal Rulemaking

### What is a formal rulemaking?

### When is it required?

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