# Introduction to Rulemaking – Chapter 5, Administrative Law Fall 2018 – Richards - LSU

# 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.

## Learn how to distinguish legislative rules and guidance.

## Learn when coercion can trigger notice and comment requirements.

## Learn the basic requirements for notice and comment rulemaking.

## Learn when you can supplement the record for rulemaking.

## Learn how to manage ex parte contacts in rulemaking.

## Learn that the statutory framework for rulemaking preempts additional judicial procedural requirements.

## Learn the basic structure of the framework for executive branch review of rulemaking.

# Reading Assignment

## Chapter 5 and other materials on class blog

# 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 of the legislature versus the agency?

### How does the nature of the act being enforced affect the latitude of the agency to make rules, i.e., acts that give broad delegations of authority to the agency versus acts that are detailed and provide specific direction to the agency?

#### 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 Social Security disability law?

##### From our discussion of restaurant 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 would retrospective rules 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?

##### Does the Constitution require you to 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?

##### Does the Constitution require you to get a hearing to contest the valuation?

#### What are the key factors to argue in determining 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 APA rulemaking?

##### Is this constitutionally required?

##### What would be a counterexample?

## Legislative Rule or Interpretive Guidance?

### Legislative rules

#### 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’s notice and comment requirements, 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 on announcing the policy that both mine owners and operators would be prosecuted for violations?

## 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 OSHA 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 if 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?

#### Given the legal status of interpretive rules, does it matter if the notice is ineffective?

## Formal Rulemaking

### What is a formal rulemaking?

### When is it required?

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

## What are the requirements for notice and comment (informal) rulemaking?

### What has to be published in the register?

### What does the agency have to do with the comments?

### How might the courts look at the comment process in reviewing whether a rule has been properly promulgated?

### Why can’t the record in rulemaking be supplemented in most cases when the rule is challenged in court?

#### When can it be supplemented?

## When does the APA allow legislative rules to be made without notice and comment? (Exclude formal rulemaking.)

### What does this tell us about whether there is a constitutional right to participate in rulemaking?

### What are the options for getting comments for emergency rules?

## What are the requirements for proving proper notice of the contents of a rule?

### Be specific, using *Chocolate Manufacturers Ass'n v. Block* as an example

#### Can the agency successfully claim that comments taken during notice and comment provide notice to other parties about potential changes in the final rule?

### How was this modified by *Arizona Public Service*?

#### What was at issue in the case?

#### Why should parties have been aware of the potential modification of the final rule?

## How does the notice provision in rulemaking change the issues in ex parte communications as compared to adjudications or Article III trials?

### How does the notice requirement eliminate the ex parte communications issues for communications before the promulgation of the rule?

### When are *ex parte* communications an issue in rulemaking?

### Discuss the limitations on *ex parte* communications and political influence in rulemaking.

#### What was the issue in *Volpe* and how was the ex parte issue resolved on appeal?

### Are contacts with the President *ex parte* contacts?

#### Are they improper?

#### How did the court resolve the issue in *Sierra Club v. Costle*?

#### What if the contacts are with an independent agency?

## How are the problems of bias and prejudice different in rulemaking as opposed to adjudications?

### What is the standard for disqualifying the secretary for bias in rulemaking?

### Is this likely to happen?

## Separation of powers issues in rulemaking

### What did Vermont Yankee tell us about the power of courts to change the procedures for rulemaking?

## Executive Review of Rulemaking

### In broad terms, what does Executive Order 12866 require an agency to consider when making rules?

### How is presidential review of independent agencies different from control over non-independent agencies? (Remember OIRA.)

### Can Congress give the president review power over independent agencies?

### What is OIRA?

#### What is its role in rulemaking?

#### Which agencies is it able to control?

#### Which agencies are beyond its control and why?

### Why are there different standards for reviewing rules that affect small businesses?

#### What are the problems with this special concern for small business from a consumer/individual citizen’s point of view?

### After *Chadha* eliminated the legislative veto, how did Congress assure it would have advance notice of new rules?

#### What must Congress do if it wants to legally block or change a new rule?

### What is an unfunded mandate?

#### Why are these politically controversial?

#### What are examples?

#### Could the government function if it had to pay for all the costs of complying with regulations?

#### Where would that money have to come from?