# 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.

## 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

# Material covered – see the slides and your notes

# 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?

## 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?

### 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 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?

## Constitutional rights in rulemaking

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

### How would you argue that there is no constitutional right to public participation in rulemaking?

## Executive Review of Rulemaking

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

### 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 it do if it wants to legally (as opposed to politically) 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?