# Chapter 5 - Rulemaking

# 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

# APA 551(4) provides the formal definition of a rule. What are the functional factors that define a rule?

# Review the Londoner/Bi-Metallic Investment test for rules versus adjudications from our discussion of adjudications.

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

### What if there is only one?

### Is this still a rule?

# In the federal system, where do we look to see if an agency has the power to make rules?

# In the enabling legislation for an agency, congress may grant the agency broad, general powers or very specifically delineated powers, as was done in the Americans with Disabilities Act.

## How does the nature of the delegation affect the rules that an agency may issue?

## Why might a general delegation of power require rules before the agency can carry out the law?

# What are the steps in notice and comment rulemaking?

## What are purposes of public participation?

## Is public participation constitutionally required?

## Once a rule is properly promulgated, what is its legal effect?

# Rulemaking is usually discretionary – if you are trying to force the agency to make a rule, what would you look for to support your case??

# What are the advantages for enforcement in making rules?

## How can they reduce administrative costs?

## What is the effect of a rule in an adjudication?

## Think of examples from class.

# May agencies adopt private standards such as building codes through rulemaking and make them enforceable law?

# What is the advantage of using rulemaking to adopt private standards, rather than setting standards through agency work?

# While agencies can make policy through adjudications, why is the process easier to control with rulemaking?

## Can Louisiana agencies subject to the Department of Administrative Law make policy through adjudications?

# Why do agencies often try to avoid notice and comment rulemaking?

## What are the § 553 exceptions to the need to do notice and comment rulemaking?

## Why might an agency use rulemaking to require it to make rules on a subject otherwise exempted by 553?

# Interpretative Rules/Nonlegislative Rules/guidance documents

## How is the legal effect of these different from legislative rules?

## Do federal agencies need legislative authority to issue these?

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

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

# Rule or guidance? How do we tell the difference?

## The EPA example from book – Is This Definition a Rule?

### What do you look for to determine if a definition in a guidance document should be established by a notice and comment rule?

## 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?

## The wild animal fence example

### What tipped this into needing to be a rule?

## Junk in the Park

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

#### Would it need a specific list?

#### How does not having a rule affect enforcement?

## Can guidance change a notice and comment rule?

## Is setting a threshold for enforcement a rule, needing notice and comment?

# General Policy Statements and Procedural Rules

## How do you distinguish these from rules?

## When can a procedural rule sufficiently effect legal rights as to need notice and comment?

### Federal Mine Safety and Health Act Example

#### Why did this not require a rule?

### What about the prosecution guidelines?

## 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?

# Recap - What Triggers the N&C Requirement?

## You have to convince the court that the guideline, policy statement, etc., changes your client’s legal situation – if they have legal effect, they need to be N&C.

## There are several statements of this legal test:

### Substantial impact

### Legally binding

### Force of law

## No practical difference in your proof

# When Do You Need To Re-Notice a Revised Rule?

## What is the logical outgrowth test?

## How did Arizona Public Service Co. v. E.P.A. limit the logical outgrowth case?

# When Does an Incentive Become Coercion?

# Are Compliance Plans Stealth Rules?

## A compliance plan is a corporate document that outlines how a company tries to assure that it complies with the law.

## DOJ issues guidance that a corporate compliance plan for antitrust laws will count as mitigation under the Sentencing Guidelines for criminal antitrust claims.

## 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.

## How did plaintiffs argue that this was a legislative rule, rather than a procedural rule?

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

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

# 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?

# What is Formal Rulemaking?

## Why avoid formal rulemaking?

## When is Formal Rulemaking Required?

## What is the magic statutory language?

# What is Negotiated Rulemaking?

## The negotiation is between interest groups and the agency to develop a rule that will then go through notice and comment.

### The objective is to identify problems and try to find compromises before the notice and comment process.

## The negotiated rule has to be supported and noticed through the regular APA process.

## The representation problem is that some disadvantaged groups may be left out.

# What did Vermont Yankee tell us about constitutional due process rights in rulemaking?

# Ex Parte Communications and Political Influence

## Why is the ex parte problem different in rulemaking than in adjudication?

## Do ex parte contacts matter in rule making?

## Do ex parte contacts even exist in rulemaking?

## What does the Volpe Test suggest you should look for to determine whether a rule may be overturned solely on evidence of Congressional pressure?

## What is the president's role in rulemaking?

## How can an agency protect itself form ex parte communication claims in rulemaking?

# What about bias and prejudgment in rulemaking?

# The Administrative Structure for Executive Review of Rulemaking

# Cost Benefit Analysis (CBA)

## Can congress ban an agency from using CBA?

## Can the agency do CBA even if not required to by its enabling act?

# Acronyms

## What are OMB and OIRA and where are they located?

# Executive Orders Regulating Rulemaking

## What is the president's authority over rulemaking?

## What about for independent agencies?

## What is the rationale for the president (ORIA) to exercise authority over rulemaking?

## Does OIRA review create any judicially enforceable rights?