# Chapter 5 - Rulemaking

We will get additional information and questions on rulemaking in Chapters 2, 6 and 7.

## 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 legal challenges are always available?

### What is a non-legislative/interpretive rule?

#### What else are these called?

#### What is the legal effect of an interpretive rule?

#### 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 the benefit to the regulated parties of having interpretive rules?

#### What is the downside of preventing agencies from using interpretive rules?

#### Can a non-legislative rule modify a legislative rule?

##### What is the result if they conflict?

### What factors do the courts consider when determining whether an interpretive rule is really a legislative rule, requiring notice and comment?

#### What is the "substantial impact" test?

##### What is it for procedural rules?

##### Can you get an example?

#### What is the "legally binding effect" test?

#### How does "substantial impact" test differ from the "legally binding effect" test?

##### Can you illustrate this with an example?

#### 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?

##### What about the mine safety case?

#### 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?

#### Negotiated Rulemaking

##### What is this?

##### Why is often used in environmental rulemaking?

##### What are the advantages?

##### What are the public participation issues?

### 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?

## 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?

## Formal Rulemaking

### What is a formal rulemaking?

### When is it required?

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

## Informal (notice and comment) Rulemaking

### 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?

### 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?

### When the agency relies on scientific evidence to support the record for a rule, what must be published in the register?

#### Is the public entitled to the raw data behind the study the agency relies on?

#### What is the significance of the Shelby Amendments?

### 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?

## *Vermont Yankee*

### What sort of agency action is permitting?

#### What are the two permits that are necessary to build and operate a nuclear power plant?

#### What was done recently to streamline the process for permitting a nuclear power plant?

#### How did anti-nuclear activists use the administrative process to attack nuclear power plant construction?

### Nuclear waste

#### Why is nuclear waste disposal a big issue for NEPA?

#### Did the NRC or the nuclear industry have a good solution in 1971?

#### What would this mean about the completeness of the EIS?

#### Why does the NRDC want the agency to explain in the EIS about the long term environmental impact of the reactor?

#### How did the NRC attempt to limit attacks on reactor permitting based on nuclear waste disposal?

#### What was the NRC’s technical solution?

### How did the lower court want to modify the rulemaking process the NRC used for the waste disposal rule?

#### Why was this modification called hybrid rulemaking?

### The United States Supreme Court opinion

#### What did the NRC argue was a separation of powers issue?

#### What did the United States Supreme Court hold about the role of the APA?

#### What did the United States Supreme Court rule about the authority of the courts to impose additional process requirements on rulemaking?

##### Why?

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

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

## Cost Benefit Analysis

### What is CBA?

#### Why not prevent all possible risks?

### Why is CBA sometimes very controversial, especially for environmental regulations?

#### What are the most cost effective regulations?

### 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?

### *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?