

Table of Contents

CHAPTER 1. WHY CARE ABOUT FEDERAL RULEMAKING?

§ 1:1 Introduction

CHAPTER 2. DEFINITIONS

§ 2:1 Rule
§ 2:2 Rulemaking
§ 2:3 “Legislative” rules
§ 2:4 Interpretive rules
§ 2:5 Procedural rules
§ 2:6 Policy statements
§ 2:7 Guidance documents & manuals
§ 2:8 Formal rules
§ 2:9 Negotiated rules
§ 2:10 Administrative record
§ 2:11 Advisory opinion
§ 2:12 Petitions
§ 2:13 Adjudication
§ 2:14 Judicial branch issuance of rules

CHAPTER 3. AVOIDING RULEMAKING PROCEDURES

§ 3:1 Introduction to rulemaking exceptions
§ 3:2 Statutory rights
§ 3:3 Agency attitudes
§ 3:4 Background of the exceptions
§ 3:5 Experience with the exceptions
§ 3:6 Layout of this chapter
§ 3:7 The good cause exception
§ 3:8 —Read narrowly
§ 3:9 —Important policy reasons
§ 3:10 —Absence of comments
§ 3:11 —Burden on the agency
§ 3:12 —Operational aspects
§ 3:13 —Judicial review aspects
§ 3:14 —Judicial deference to good cause claims
§ 3:15 —Arguing against the agency

| | |
|--------|---|
| § 3:16 | —Environmental harms |
| § 3:17 | —Applying the exception to cases |
| § 3:18 | —The good cause exception for delayed effective date |
| § 3:19 | The proprietary rules exception |
| § 3:20 | The military and foreign affairs exception |
| § 3:21 | The internal management exception |
| § 3:22 | The procedural regulations exception |
| § 3:23 | The benefits exception |
| § 3:24 | The exception for interpretations and policy statements |
| § 3:25 | Defining the categories |
| § 3:26 | Interpretive rules must interpret something |
| § 3:27 | Why exempt interpretations? |
| § 3:28 | Deference |
| § 3:29 | Distinguishing types of rules |
| § 3:30 | Explaining existing law |
| § 3:31 | Inconsistency with existing regulations |
| § 3:32 | Serving as precedents |
| § 3:33 | When the agency has no legislative rulemaking delegation |
| § 3:34 | Interpretive rules can create new duties |
| § 3:35 | Interpretive rules compared to adjudications |
| § 3:36 | Clarifications & changes to existing rules |
| § 3:37 | Role of the interpretive rule |
| § 3:38 | Differentiating interpretative from other rules |
| § 3:39 | Interpretation of defined terms |
| § 3:40 | The distinction is a continuum, not a dichotomy |
| § 3:41 | Litigation |
| § 3:42 | When interpretive rules cannot be used |
| § 3:43 | Suspension of rules |
| § 3:44 | Guidance to states and regulated persons |
| § 3:45 | Manuals |
| § 3:46 | Policy statements |
| § 3:47 | Guidance documents |
| § 3:48 | Nonenforceability of rules adopted without notice & comment |
| § 3:49 | Effect of the agency's chosen name for the "rule" |
| § 3:50 | "Per se" exemptions |
| § 3:51 | Rules for specific named persons |
| § 3:52 | Actual notice exceptions from rulemaking |
| § 3:53 | Effects of agency discretion |
| § 3:54 | Commonly heard agency arguments |
| § 3:55 | Standard of judicial review |
| § 3:56 | Remedies |
| § 3:57 | Retroactivity |

TABLE OF CONTENTS

- § 3:58 Binding nature of rules
- § 3:59 The harmless error defense
- § 3:60 Agency advice letters
- § 3:61 Case law drawing distinctions
- § 3:62 Non-“agency” is exempt
- § 3:63 Rulemaking & the postal service exclusion

CHAPTER 4. INITIATION OF A RULE: IDEAS, DIRECTIVES, AND PETITIONS

- § 4:1 Sources of rules
- § 4:2 Petitions seeking adoption of rules
- § 4:3 Agency staff development of rules
- § 4:4 Congressional influences
- § 4:5 Effect of congressional action or inactivity
- § 4:6 Regulatory agendas
- § 4:7 Electronic government provisions

CHAPTER 5. DEVELOPING THE RULE

- § 5:1 Assembling the proposed rule
- § 5:2 Clarity of terms in the proposed rule
- § 5:3 Policy assertions in rulemaking
- § 5:4 Negotiated rules
- § 5:5 Internal reviews of proposed rule texts
- § 5:6 Advanced Notice of Proposed Rulemaking
- § 5:7 Preparing the preambles for proposed rules
- § 5:8 Adequacy of notice regarding the issues
- § 5:9 Legal effect of rules not adopted
- § 5:10 Advisory committees in rulemaking
- § 5:11 Formal rulemaking hearings
- § 5:12 The old “hybrid rulemaking” model
- § 5:13 Clarity of Drafting Agency Guidance Under the 2010 Plain Writing Act

CHAPTER 6. MAKING, ASSEMBLING, AND RESPONDING TO COMMENTS

- § 6:1 Making the most effective comments
- § 6:2 Building the record
- § 6:3 Understand the agency’s needs
- § 6:4 Look for a win/win alternative
- § 6:5 Recognize the imbalance of judicial review power
- § 6:6 Write comments clearly
- § 6:7 Understand the agency’s internal approval stages
- § 6:8 Volume versus precision in comments

- § 6:9 Effective legal arguments in comments
- § 6:10 Effective arguments in comments concerning data and costs
- § 6:11 The “logical outgrowth” standard

CHAPTER 7. ANALYSIS AND IMPACT REQUIREMENTS

- § 7:1 Analysis requirements and methods
- § 7:2 Effects of executive orders
- § 7:3 Override of agency expertise by political managers
- § 7:4 OMB oversight of impacts
- § 7:5 Litigation over executive order analysis
- § 7:6 Additional impact analysis requirements
- § 7:7 Paperwork Reduction Act
- § 7:8 Regulatory Flexibility Act
- § 7:9 —Outcomes
- § 7:10 —Federal agency required actions
- § 7:11 —Procedures
- § 7:12 —Operations
- § 7:13 —“Small” entities
- § 7:14 —Additional choices
- § 7:15 —OIRA and SBA
- § 7:16 —Weakness of the RFA
- § 7:17 —Litigation experience
- § 7:18 —History
- § 7:19 —Exclusions
- § 7:20 Environmental impact analysis—The statutory scheme of NEPA
- § 7:21 —Coverage definitions
- § 7:22 —Categorical exclusions
- § 7:23 —Context of the rulemaking proceeding
- § 7:24 —Agency mechanisms
- § 7:25 —The three stages of NEPA analysis
- § 7:26 —The environmental assessment stage
- § 7:27 —The environmental impact statement
- § 7:28 —Supplementing statements
- § 7:29 —The finding of no significant impact (FONSI)
- § 7:30 —Perceptions
- § 7:31 —NEPA litigation
- § 7:32 —Procedural issues in litigation
- § 7:33 —Standing to assert NEPA rights
- § 7:34 —The security exception
- § 7:35 —Contrasts to economic analysis
- § 7:36 —State actions

TABLE OF CONTENTS

- § 7:37 —Access to underlying data
- § 7:38 —The role of the council on environmental quality
- § 7:39 —Rule of reason in predicting impacts
- § 7:40 —Consideration of alternatives
- § 7:41 —Review of agency inaction on environmental issues
- § 7:42 Endangered species evaluation of rules

CHAPTER 8. AGENCY HANDLING OF THE RULEMAKING COMMENTS

- § 8:1 Processing the comments
- § 8:2 Impact of legal objections
- § 8:3 Impact of comments making alternative proposals
- § 8:4 Meetings during comment periods
- § 8:5 Duty to respond to comments in preambles
- § 8:6 Analysis under small business impact legislation (SBREFA)
- § 8:7 Comments by other government entities
- § 8:8 Paper trails of the hidden influences upon a rule
- § 8:9 Building the administrative record
- § 8:10 Effect of late-filed comments
- § 8:11 Effects of failure to make comments on issues
- § 8:12 Formal rulemaking hearings & evidence
- § 8:13 Formal rulemaking hearings and cross-examination
- § 8:14 Taking official notice of evidence
- § 8:15 Secret data use in rulemaking
- § 8:16 Reopening the record
- § 8:17 Agency use of its own expertise as support
- § 8:18 Comments on rules received via internet

CHAPTER 9. NEGOTIATED RULES & CONSENT SETTLEMENTS

- § 9:1 Negotiated rulemaking alternatives
- § 9:2 Court-imposed rulemaking
- § 9:3 Consent settlements impacting rules

CHAPTER 10. PREAMBLES & HISTORY OF RULES

- § 10:1 Content of the preamble
- § 10:2 Legal effect of a preamble
- § 10:3 Utility of the preamble on judicial review
- § 10:4 The effect on prior agency rules and guidances
- § 10:5 Impacts of rules on adjudicated case precedents

CHAPTER 11. POLITICAL INFLUENCE ON FINAL RULES

- § 11:1 Agency management
- § 11:2 White House influence
- § 11:3 OMB oversight
- § 11:4 Congressional influences
- § 11:5 State influence

CHAPTER 12. MAKING A RULE “FINAL” AND “EFFECTIVE”

- § 12:1 When is this rule final & effective?
- § 12:2 Effects of changes from the proposal
- § 12:3 Timing of rulemaking
- § 12:4 Effective dates of final rules
- § 12:5 Interim final rules
- § 12:6 Administrative record
- § 12:7 Retroactive rules
- § 12:8 Enforcement of the final rule
- § 12:9 Waivers and exceptions
- § 12:10 Abandoning a proposed rule
- § 12:11 Duty to reopen for additional comments

CHAPTER 13. HOW DO COURTS REVIEW FINAL RULES?

- § 13:1 Pre-enforcement review of rules under the APA
- § 13:2 Review by injunction or declaratory relief
- § 13:3 Records for review
- § 13:4 Jurisdiction for review of rules
- § 13:5 De novo review
- § 13:6 Vacating the invalidated final rule
- § 13:7 Review can be statutory or nonstatutory
- § 13:8 Appellate review of remand decisions in district court
- § 13:9 Harmless error in review

CHAPTER 14. COURTS RESPOND TO DELAYS IN RULEMAKING OR REFUSALS TO ADOPT RULES

- § 14:1 Judicial review of inactivity
- § 14:2 Refusal to adopt rules
- § 14:3 Delays in rule adoption
- § 14:4 Litigation and process issues

TABLE OF CONTENTS

**CHAPTER 15. PROCEDURAL DEFENSES
AGAINST RULEMAKING LITIGATION**

| | |
|---------|---|
| § 15:1 | Nonreviewable action—Overview |
| § 15:2 | —Effect of <i>Heckler</i> decision |
| § 15:3 | —Nonreviewability is rare |
| § 15:4 | —Presidential action is nonreviewable |
| § 15:5 | —Presumption favoring reviewability |
| § 15:6 | —Some generally nonreviewable rules are reviewable |
| § 15:7 | —Legislative intent |
| § 15:8 | —Agency assertion of nonreviewability |
| § 15:9 | —Nonreviewability and exhaustion |
| § 15:10 | —Committed to discretion where there is “no law to apply” |
| § 15:11 | —Funding termination & allocation |
| § 15:12 | —Other issues |
| § 15:13 | —Information Quality Act |
| § 15:14 | Review requests must be timely |
| § 15:15 | Finality |
| § 15:16 | Ripeness for review—Overview |
| § 15:17 | —No review of proposed actions |
| § 15:18 | —Judicial economy |
| § 15:19 | —Constitutional reasons |
| § 15:20 | —When rules are subject to review |
| § 15:21 | —Issues of law are ripe |
| § 15:22 | —Ripeness after the <i>Abbott</i> decision |
| § 15:23 | —Ripeness and exhaustion |
| § 15:24 | —Remedies |
| § 15:25 | —Particular ripeness claims |
| § 15:26 | —Policy manuals and letters |
| § 15:27 | —Preventing court entanglement in premature issues |
| § 15:28 | —Procedural aspects of ripeness claims |
| § 15:29 | —Consummation and consequences |
| § 15:30 | —Ripeness won by agencies |
| § 15:31 | —Announcement of future intentions |
| § 15:32 | —Balancing interests |
| § 15:33 | —Facial or as-applied challenges to rules |
| § 15:34 | —Proof of harm and hardship |
| § 15:35 | Venue |
| § 15:36 | Standing to litigate a rule—Overview |
| § 15:37 | —Rulemaking context for standing determinations |
| § 15:38 | —Constitutional issues |
| § 15:39 | —Organizational standing |

- § 15:40 —Statutory designation of parties with standing
- § 15:41 —Standing in public actions
- § 15:42 —The zone of interests protected by the statute
- § 15:43 —Showing of injury to the litigant
- § 15:44 —Redressability
- § 15:45 —Procedural violations as basis for standing
- § 15:46 —Standing of states
- § 15:47 —Standing in private enforcement of rules
- § 15:48 —Procedure in asserting plaintiff's standing
- § 15:49 —Reasons for denying standing
- § 15:50 —Ideological and lost opportunities claims
- § 15:51 —Remedies sought
- § 15:52 —Standing to challenge procedural errors
- § 15:53 —Aesthetic harm claims
- § 15:54 —Prudential standing
- § 15:55 —Environmental enjoyment loss as “harm” for standing purposes
- § 15:56 —Electoral challenges
- § 15:57 —Showing a personal harm
- § 15:58 —Establishing causation of harm
- § 15:59 —Claimed injury denied
- § 15:60 —Denial of standing because of mootness
- § 15:61 —Standing for environmental claims
- § 15:62 —Relationship to statutory purpose
- § 15:63 —Competitive status of plaintiff
- § 15:64 —Standing in “safe harbor” cases
- § 15:65 —Standing in the procedural rights cases
- § 15:66 Exhaustion of remedies—Overview
- § 15:67 —Subsets of exhaustion
- § 15:68 —Where review is discretionary
- § 15:69 —Why require exhaustion
- § 15:70 —Effects of delay
- § 15:71 —Waiver by not commenting
- § 15:72 —Rulemaking context contrasted to adjudication
- § 15:73 —Waiver of exhaustion for futility
- § 15:74 —Petitions and policy statements
- § 15:75 —When challengers lose exhaustion arguments
- § 15:76 —Constitutional issues
- § 15:77 —Exhaustion and ripeness
- § 15:78 —Exhaustion where agency can correct its error
- § 15:79 —Burdens on the challenger
- § 15:80 —Adequacy of notice
- § 15:81 —Court-ordered actions
- § 15:82 —Participation in comments

TABLE OF CONTENTS

| | |
|----------|--|
| § 15:83 | —Waiver |
| § 15:84 | —Declaratory relief |
| § 15:85 | —Where no exhaustion is required |
| § 15:86 | —Burden on claimant re exhaustion |
| § 15:87 | —Benefits cases |
| § 15:88 | —Statutes requiring exhaustion |
| § 15:89 | —Notice to the persons affected |
| § 15:90 | —Petitions for reconsideration |
| § 15:91 | —Courts can impose exhaustion |
| § 15:92 | —Factors to be considered |
| § 15:93 | Mootness |
| § 15:94 | Primary jurisdiction |
| § 15:95 | Stays of rules |
| § 15:96 | Jurisdiction of the appellate court |
| § 15:97 | Remedies in lieu of vacating the rule |
| § 15:98 | Res judicata & collateral estoppel defenses |
| § 15:99 | Importance of the 2013 Arlington decision |
| § 15:100 | Supplementing the administrative record in court is disfavored |
| § 15:101 | Limits on judicial notice in rulemaking appeals |

CHAPTER 16. WHEN IS A RULE ARBITRARY OR OTHERWISE VULNERABLE TO REVERSAL?

| | |
|---------|--|
| § 16:1 | Overview |
| § 16:2 | The Supreme Court’s <i>State Farm</i> standard |
| § 16:3 | The history & evolution in case law |
| § 16:4 | Test 1: factors & sources |
| § 16:5 | Test 2: relationship to the statute |
| § 16:6 | Test 3: explanations |
| § 16:7 | Test 4: factual bases |
| § 16:8 | Test 5: important aspect ignored |
| § 16:9 | Test 6: inconsistency |
| § 16:10 | Test 7: consideration of alternatives |
| § 16:11 | Test 8: inadequate response to comments |
| § 16:12 | Test 9: rational connection of rule to problem |
| § 16:13 | The abuse of discretion term |
| § 16:14 | Courts will not substitute judgment |
| § 16:15 | Contrasted to substantial evidence review |
| § 16:16 | Presumptions of validity |
| § 16:17 | Modification and withdrawal of rules |
| § 16:18 | Costs and benefits factors |
| § 16:19 | Explanatory statements & discovery |
| § 16:20 | Predictive models and forecasts |

- § 16:21 Inclusion, exclusion and scope factors
- § 16:22 When experts disagree
- § 16:23 Retroactive application
- § 16:24 Rules impacted by new legislation
- § 16:25 “Otherwise not in accordance with law”
- § 16:26 The importance of articulating agency rationales

CHAPTER 17. REVIEWING RULES FOR SUBSTANTIAL EVIDENCE SUPPORT

- § 17:1 The substantial evidence standard
- § 17:2 Rationale
- § 17:3 “Substantial”
- § 17:4 Defining the standard
- § 17:5 Merger of standards is not complete
- § 17:6 Disappearance of formal rulemaking
- § 17:7 Remedy

CHAPTER 18. WHEN WILL COURTS DEFER TO AGENCY CHOICES IN RULEMAKING?

- § 18:1 Elements of deference
- § 18:2 Development of modern deference
- § 18:3 What agency announcements can receive deference?
- § 18:4 Step one deference
- § 18:5 Step two deference
- § 18:6 When deference is denied
- § 18:7 The Supreme Court’s 2011 *Chevron* norms applied in *Mayo Foundation*
- § 18:8 Inconsistency and changes of position
- § 18:9 Partial deference under *Skidmore*
- § 18:10 Technical and scientific questions
- § 18:11 Questions of policy and opinion
- § 18:12 Effects of the 2001 *Mead* decision
- § 18:13 Case law of deference
- § 18:14 Deference in face of congressional non-action
- § 18:15 Deference in rules setting rates
- § 18:16 Deference and retroactive effects
- § 18:17 Deference when two agencies interact
- § 18:18 Deference to interpretations of the agency’s own rules
- § 18:19 Deference to adjudication-based interpretations
- § 18:20 Later Supreme Court deference opinions
- § 18:21 Deference, interim rules and preserving the status quo
- § 18:22 Deference issues after the 2011 *Judulang* decision
- § 18:23 Deference & social security acquiescence rulings

TABLE OF CONTENTS

- § 18:24 No deference to guidances is required
- § 18:25 Deference & the 2015 Perez signals of Supreme Court reconsideration

CHAPTER 19. OTHER BASES FOR JUDICIAL REVIEW OF FINAL RULES

- § 19:1 Judicial review of procedural violations
- § 19:2 Judicial review of constitutional issues—Generally
- § 19:3 —Due process issues
- § 19:4 —Judicial aversion to constitutional bases for review
- § 19:5 —History of the constitutional differentiation
- § 19:6 —Applying constitutional norms
- § 19:7 —Claims of excessive delegation
- § 19:8 —Unconstitutional vagueness
- § 19:9 —Equal protection arguments
- § 19:10 —Separation of powers conflicts
- § 19:11 —Property rights claims
- § 19:12 —Preemption conflicts
- § 19:13 —Retroactivity of rules
- § 19:14 —Other constitutional issues
- § 19:15 Judicial review of policy issues—Judicial reluctance
- § 19:16 —Applying the *Morgan* principle
- § 19:17 —Changes in policy
- § 19:18 —Absence of congressional direction
- § 19:19 —Arguments on judicial review
- § 19:20 —Deference on policy choices
- § 19:21 Litigant attorney fee payments
- § 19:22 Policy changes after elections change administrations

CHAPTER 20. EFFECTS OF CONGRESSIONAL CHOICES

- § 20:1 Satisfying Congressional requirements
- § 20:2 Effect of Congressional dislike for a rule
- § 20:3 Effects of Congressional silence
- § 20:4 Effect of individual inputs by members of Congress

CHAPTER 21. PREEMPTION OF STATE ACTIONS BY FEDERAL RULES

- § 21:1 Why preemption of states is important
- § 21:2 Basics of express preemption
- § 21:3 Implied preemption by federal rules
- § 21:4 Other forms of preemptive effects
- § 21:5 Executive order coverage

§ 21:6 Preemption scholarship

CHAPTER 22. RULEMAKING CONTRASTED TO ADJUDICATION

- § 22:1 Choosing adjudication over rules
- § 22:2 Judicial review of agency avoidance of rulemaking
- § 22:3 Supreme court landmark cases
- § 22:4 Changes of interpretations
- § 22:5 Reasons for the choices
- § 22:6 Efficiency rationales
- § 22:7 Loss of stare decisis certainty
- § 22:8 Adjudication insulates against influencers
- § 22:9 Possible trends
- § 22:10 Consequences of the choices
- § 22:11 Burdens of using adjudication
- § 22:12 The discovery advantage in adjudication
- § 22:13 The substantial evidence standard
- § 22:14 Agency leaders' incentives to choose
- § 22:15 Courts require statements re changes
- § 22:16 Benefits of rulemaking
- § 22:17 Due process
- § 22:18 Future issues for adjudication and rulemaking
- § 22:19 Effects of limits on standing
- § 22:20 Other case developments
- § 22:21 Prosecutorial discretion guidance is not a final agency "rule"

APPENDICES

- Appendix I. Administrative Procedure Act (5 U.S.C.A. §§ 551 to 706)
- Appendix II. Paperwork Reduction Act (44 U.S.C.A. §§ 3501 to 3521)
- Appendix III. Presidential Documents
- Appendix IV. Regulatory Flexibility Act (5 U.S.C.A. §§ 601 to 612)
- Appendix V. National Environmental Policy Act (42 U.S.C.A. §§ 4331 to 4335)
- Appendix VI. Significant Commentaries

Table of Laws and Rules

Table of Cases

Index