

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

TABLE OF CONTENTS

- § 3:57 Standard of judicial review
- § 3:58 Remedies
- § 3:59 Retroactivity
- § 3:60 Binding nature of rules
- § 3:61 The harmless error defense
- § 3:62 Agency advice letters
- § 3:63 Case law drawing distinctions
- § 3:64 Non-“agency” is exempt
- § 3:65 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 Participating in the rulemaking comment process
- § 6:2 Time period for comments
- § 6:3 Making the most effective comments
- § 6:4 Building the record
- § 6:5 Understand the agency’s needs

- § 6:6 Look for a win/win alternative
- § 6:7 Recognize the imbalance of judicial review power
- § 6:8 Write comments clearly
- § 6:9 Understand the agency’s internal approval stages
- § 6:10 Volume versus precision in comments
- § 6:11 Effective legal arguments in comments
- § 6:12 Effective arguments in comments concerning data and costs
- § 6:13 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

TABLE OF CONTENTS

- § 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
- § 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

TABLE OF CONTENTS

- § 14:2 Refusal to adopt rules
- § 14:3 Delays in rule adoption
- § 14:4 Litigation and process issues

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

- § 15:1 Nonreviewable action—Overview
- § 15:2 —Effect of *Heckler* 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 *Abbott* 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

TABLE OF CONTENTS

- § 15:79 —Burdens on the challenger
- § 15:80 —Adequacy of notice
- § 15:81 —Court-ordered actions
- § 15:82 —Participation in comments
- § 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 *State Farm* 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 Overturning chevron deference—The scope of loper bright
- § 18:2 —Background and the skidmore doctrine
- § 18:3 —Background and chevron deference
- § 18:4 —The *loper bright* decision
- § 18:5 —The limitations of the loper bright decision
- § 18:6 Expanded statute of limitations for loper bright challenges
- § 18:7 Cases reviewing loper bright challenges
- § 18:8 Pre-Loper Bright—Elements of deference under Chevron
- § 18:9 —Development of modern deference under Chevron
- § 18:10 —What agency announcements can receive deference under Chevron?
- § 18:11 —Step one deference under Chevron
- § 18:12 —Step two deference under Chevron
- § 18:13 —When deference is denied under Chevron
- § 18:14 —The Supreme Court’s 2011 *Chevron* norms applied in *Mayo Foundation* under Chevron

TABLE OF CONTENTS

- § 18:15 —Inconsistency and changes of position under Chevron
- § 18:16 —Partial deference under *Skidmore* under Chevron
- § 18:17 —Technical and scientific questions under Chevron
- § 18:18 —Questions of policy and opinion under Chevron
- § 18:19 —Effects of the 2001 *Mead* decision under Chevron
- § 18:20 —Case law of deference under Chevron
- § 18:21 —Deference in face of congressional non-action under Chevron
- § 18:22 —Deference in rules setting rates under Chevron
- § 18:23 —Deference and retroactive effects under Chevron
- § 18:24 —Deference when two agencies interact under Chevron
- § 18:25 —Deference to interpretations of the agency’s own rules under Chevron
- § 18:26 —Deference to adjudication-based interpretations under Chevron
- § 18:27 —Later Supreme Court deference opinions under Chevron
- § 18:28 —Deference, interim rules and preserving the status quo under Chevron
- § 18:29 —Deference issues after the 2011 *Judulang* decision under Chevron
- § 18:30 —Deference & social security acquiescence rulings under Chevron
- § 18:31 —No deference to guidances is required under Chevron
- § 18:32 —Deference & the 2015 *Perez* signals of Supreme Court reconsideration under Chevron

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

TABLE OF CONTENTS

- § 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