**LAW 3220**

**STUDY NOTES**

**Chapter 17: *The Regulatory Process***

**Slide #2: Read over this quote from an early case, talking of the powers that these regulatory agencies have.**

**Slide #3: Outlines the issues that will covered in the chapter.**

**Slide #4: This slide gives a history of the rise of administrative agencies in the U.S. However, you do not need to know dates and specifics on this slide, but do note that when a new issue or technology occurred, Congress created statutes and set up agencies to create regulation conforming to the purposes of the statutes.**

**Slide #5: This slide indicates the “set-up” of agencies. Note that Congress creates a statute, and then “delegates the power” (through an “enabling statute) to the agency to create regulations to conform with the purposes of a congressional statute. Know the terms on this slide for the exam, and how they work.**

**Slide #6: This information will NOT be on the exam.**

**Slide #7: This reviews some of the information on the previous slides, but do note the Administrative Procedures Act (APA) of 1946. This act creates a framework for how an agency will be set up, so that there is uniformity in how different industries are treated by different agencies.**

**Slide #8: Look at the vast powers that one administrative agency has over the regulation of industries in an area of the law.**

**Slide #9: Know the different rules of an administrative agency – the “Substantive and Legislative Rules” and the force of law that they have; the “Interpretive Rules” that sometimes agencies will set out to companies to help companies understand how the agency will enforce the substantive rules; and the “Procedural Rules” of how the agency operates and deals with enforcement, investigation and adjudicatory review over companies.**

**Slides #10 and #11: What a case the *Perez v. Mortgage Bankers Association* was about! This deals with the Fair Labor Standards Act and exemptions granted to financial institutions for overtime pay of general managerial positions in a company. Notice that there was a back-and-forth change in the exemptions of this overtime pay for mangers in the administration’s opinion letters and interpretive rules over a period of time. The crux of this case is whether an opinion letter or an interpretive rule must be given notice to companies for their comment. That is true of substantive rules, but as this case indicates, the notice and comment requirement is NOT applicable to opinion letters or interpretive rules. Therefore, in this case, the agency did a lot of waffling back and forth about the exemptions, but they can do this in these circumstances when there are opinion letters and interpretive rules sent to companies.**

**Slide #12: Know the information on this slide for the exam. It shows the steps that an administrative agency must go through to have an enforceable regulation over a company.**

**See the Chevron case on Slides 13 & 14: This is about the Clean Air Act and the “Bubble Concept” that the regulatory agency promulgated. Note the reasoning of the court in upholding that Bubble Concept. Specifically, if Congress grants an agency such as the EPA the right to regulate but leaves “gaps” concerning specifics of carrying out the statute (here the Clean Air Act), the Agencies are allowed to fill gaps left by Congress. Further if an agency “fills gaps” left open by a statute, the regulations filling those gaps are valid unless the agency decisions are “arbitrary, capricious or manifestly contrary” to statute. Here they were not. And lastly courts will usually defer to the administrative interpretations of a Congressional statute.**

**Slide #15: Know the information on this slide in how an agency can enforce its rules.**

**Slide #16: Know the information concerning the fact that there is NO 5th Amendment protection to business entities regarding concerning “self-incrimination”. The 5h Amendment applies only to persons.**

**See Slide # 17. Study the *Dow Chemical* case in the book and on the PP slides in regarding the kind of evidence that a regulatory agency can lawfully obtain. (Note that you can monitor from the outside and take photographs, even with infrared cameras. However, you CANNOT penetrate walls with listening devices.)**

**Slide #18: Know examples of “closely regulated industries” that DO NOT require a warrant to search business premises (under the 4th Amendment). These are things that can “blow up” like nuclear power plants, chemical plants, refineries, etc. However, simple manufacturing plants like clothing and shoe producing facilities are not “closely regulated industries, and the administrative agencies must have warrant to enter the premises.**

**Slide #19: Know the enforcement powers that a regulatory agency can use. See also the examples of the formal vs. the informal procedures that agencies use.**

**Slides #20 and #21: Know the *Black Beauty Coal Company* case on these slides. In this case, an MSHA inspector entered the Black Beauty mine and smelled burning coal. In checking things out, he found the conveyor belt problem as indicated on the slide and in the book. When a supervisor of the Black Beauty refused to shut down the belts (when the investigator demanded it) the investigator issued a citation for “high negligence” Then review the high fine imposed on Black Beauty. Know the outcome of this case on Slide #21 and that Black Beauty lost the case as the court denied a review of the fine and let the high fine stand. Note also that Black Beauty had previous violations and a lack of fixing problems, thus the “high negligence” fine was imposed on the coal company.**

**Slides #22 and #23: Know that regulatory agencies must provide basic constitutional procedures when dealing with businesses when assessing if there has been a violation by the business. Slide #22 discusses that “due process” is guaranteed at an Administrative Law Hearing, but there is NO right to trial by jury. (Slide # 23)**

**Slide #24: This slide deals with the judicial review (appeals) from decisions of regulatory agencies and how that review occurs. Under the “ripeness doctrine” the company that deals with the administrative agency must have completed all the appeals within the agency (exhaustion of remedies doctrine) and the agency must give a final determination of the case. Then a party can appeal that agency decision in court. Standing is very important for a court to review an agency decision. Standing means that a party has an interest in the administrative decision that the court will recognize and that the administrative decision has affected a given party. The *Lujan* case on slide #26 speaks to this issue.**

**Slide #25: Notice how different the Japanese regulatory agencies function from the U.S. regulatory agencies. It’s interesting that theoretically businesses are not forced to comply with what a Japanese agency wants of them or asks of them. However, if a company doesn’t comply as requested or ordered or warned, the agency will be subtle in the difficulty it will make for the business to do its work, for instance in re-licensing some activities of the business.**

**Slide #26 is the *Lujan* case. Know this case for the exam. Especially note that The Defenders of Wildlife did not have “standing” to pursue a court remedy under these circumstances due to the fact that the actions in Egypt were too “remote” and that disagreement with a U.S. foreign policy did not create a harm to The Defenders. There was no “injury in fact” to this group. However, The Defenders would have had standing if the U.S. governmental actions affected something that occurred WITHIN the U.S.**

**Slides #27 and 28: Will NOT be on the exam.**

**Slides #29 and #30: See this rather hilarious case (that happened at my oil and gas company when I worked there) about horse manure and the interpretation of the regulation regarding “polluting in Wilderness Areas”. Remember this is an interpretive rule, not a new regulation.**

**Slide #31 is straightforward regarding the concept of “reviewability” of agency actions by courts.**

**Slide #32: Will not be on the exam.**

**Slide #33: In the *Lone Mountain* case, see what the company did and that it wanted to reopen civil penalties from the final decision of the administrative agency in its appeal to the court. The court allowed a review of the case and ordered the Commission to reopen it. The basis for siding in favor of Lone Mountain was “abuse of the Commission’s discretion” without explanation. Prior leniency in other cases was never discussed by the Commission and therefore the Commission’s decision was “arbitrary and capricious”.**

**Slide # 34: See the governmental controls over the administrative agency. As indicated in the book, citizens can know how a company is treated under the FOIA (Freedom of Information Act). However, the citizens do NOT have the ability to know the trade secrets under the Privacy Act.**

**Slide #35: Will NOT be on the exam.**