



ADMINISTRATIVE LAW

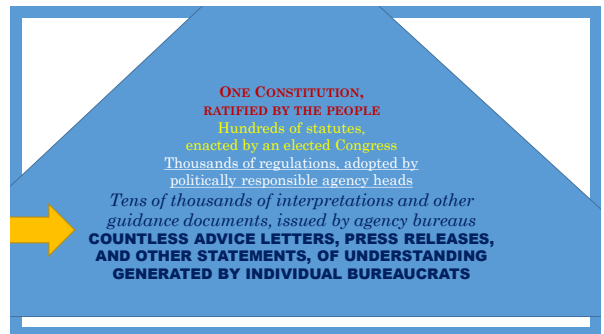
WEEK FIVE (First Part)
Tuesday, Sept. 21, 2021
Professor Julia M. Glencer

AGENDA

6:00 to 6:25	Rule-Making Basics
6:25 to 7:25	<i>Hands-On Case Study:</i> NPRM ▶ Comments ▶ Final Rule ▶ C.F.R.
7:25 to 7:35	—Break—
7:35 to 8:35	Interpretations of Section 553 “No More than Section 553 Requires” (<i>Vermont Yankee</i> & the “Paper Hearing”)
8:35 to 9:00	Getting Started with the Exceptions to Section 553’s N & C Process



RULE-MAKING BASICS



UNDERSTANDING THE APA

- APA is built on two KEY distinctions:
 - Rule-making & adjudication (activities)
 - Formal v. informal (descriptors)
 - Formal tends to mean trial-like
- These combine to create 4 models of activity:

Formal rule-making	Formal adjudication
Informal rule-making	Informal adjudication

Rulemaking

APA § 553

This is *informal* rule-making.

(Don't make the mistake of thinking that the
provisions of § 553 somehow
"formalize" this process.)

***U.S. v. Florida East Coast Railway Co.,*
410 U.S. 224 (1973).**

Under a statute that required a “hearing” as part of the authorization for issuing regulations, Supreme Court authorized the admin agency’s procedural choice to permit only written submissions, as opposed to oral presentation.

CHAPTER 4

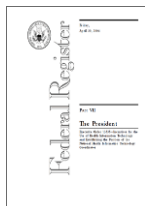
Sec. 1 – Introduction

Sec. 2 – The Requirements of § 553 Notice & Comment Rulemaking

- No more than 553 requires?
- Notice
- An Opportunity to Comment and a Concise General Statement of the Rule’s Basis and Purpose

Sec. 3 – Exceptions to § 553 Notice & Comment Rulemaking

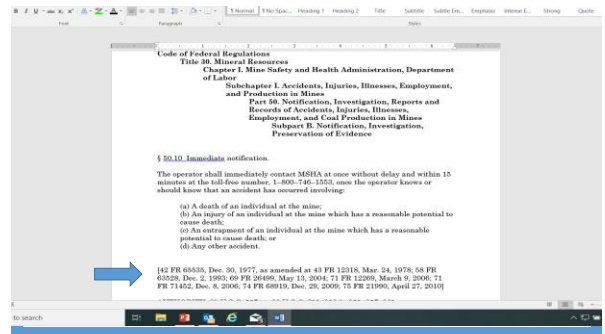
- The Good Cause Exception (Recorded lecture next week)
- The Exception for Interpretative Rules, Guidance & Policy Statements [We read for next week; guest speaker]
- The Other Exceptions [We skip]



54 Fed. Reg. 16,042 (Apr. 20, 1989)



20 C.F.R. § 639.3(a)(4) (2019)



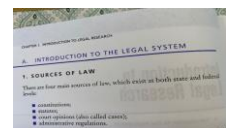
BLACK LETTER!

“If **authorized by statute**, *consistent with the Constitution*, and **adopted through the required procedures**, regulations have *legally binding effect* on the government and citizens alike, **UNLESS displaced by statute** or other validly adopted regulations.”

ADMIN LAW at 280.

FOUR MAIN SOURCES OF LAW

- (1) Constitutions
- (2) Statutes
- (3) Cases [*a.k.a. court opinions, decisions*]
- (4) Administrative regulations



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CONTEXTUAL WORLD . . .

- All admin agency activity (including rule making) occurs in a highly contextual world.
- You need to know to look for and potentially consider:
 - Constitution
 - Organic statutes/enabling statutes
 - Statute or act the admin agency is administering
 - The APA
 - Admin agency's own regulations (as they too *may* impact the rule-making process)
 - Judicial decisions interpreting *any* of the foregoing

CONTEXTUAL WORLD . . .

- Two broader issues almost always lurking:
 - (1) What kinds of procedures *should* be required for rule making v. what we actually do have?
 - (2) What roles *should* all of the different institutions play v. what role they do play?
 - President/Congress/Courts
 - State/local governments
 - Regulated entities & regulatory beneficiaries
 - Experts & private/non-governmental bodies with useful info
 - Individuals
 - The admin agencies themselves

WHAT IS A RULE?

(4) “**rule**” means *the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing*;

(5) “**rule making**” means *agency process* for formulating, amending, or repealing a **rule**;

WHAT IS A RULE?

- “Rule” is not limited to measures promulgated under notice & comment (informal) or formal rule-making.
- Can be *battles over characterization of something as a rule. [Hallmarks?]*
- Can be *even bigger* battles over what KIND of a *rule* it is because that categorization may exempt it from Sec. 553 notice & comment process.

WHAT IS A RULE?

- Differentiate in your mind between a “regulation” & “rule.”
- **Regulations are rules; not all rules are regulations.**
- Some rules are exempt from the notice & comment rulemaking process that creates a regulation.
- The key question is always what the “effect” of the “rule” will be.

BLACK LETTER!



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ADMIN LAW at 280.

§ 553(a)

(a) **This section applies**, according to the provisions thereof, except to the extent that there is involved—

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

§ 553(b)

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. **The notice shall include—**

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, **this subsection does not apply—**

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

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- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

§ 553(c)

(c) After notice required by this section, the agency shall give interested persons **an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation**. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted **a concise general statement of their basis and purpose**. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

[§ 556 = Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.]

[§ 557 Initial decisions; conclusiveness, review by agency; submission by parties; contents of decisions, record.]

§ 553(d)

(d) The **required publication** or service of a **substantive rule** shall be made not less than 30 days before its effective date, **except—**

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) **interpretative rules and statements of policy**; or
- (3) as otherwise provided by the agency **for good cause found** and published with the rule.

§ 553(e)

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

To be read in conjunction with § 555(e), which provides:

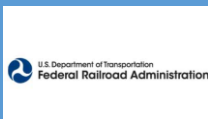
(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

RULE-MAKING REIGNS

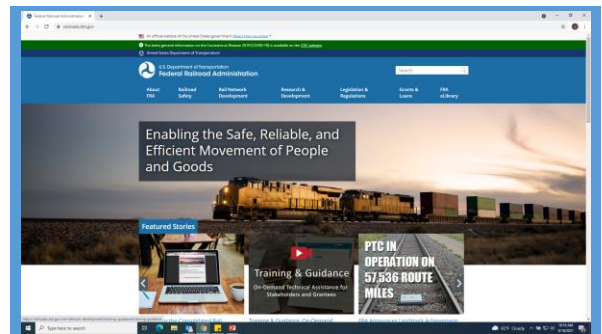


- Courts tend to be permissive in finding rule-making authority for admin agencies in generally worded statutory provisions.
- “Canon of construction” for this?

“Unless the legislative history reveals a clear intent to the contrary, courts should resolve any uncertainty about the scope of agencies rule-making authority in favor of finding a delegation of the full measure of power to the agency.” Textbook at 294.



CASE STUDY: Federal Railroad Administration (FRA) *NPRM, Comments, & Final Rule*



- Any collision, derailment, or **passenger train** incident resulting in at least one fatality
- Any railroad-related accident resulting in death to an on-duty railroad employee
- Any **highway-rail grade crossing** accident resulting in death to persons in a school bus
- Accidents involving grade crossing signal failures
- Any non-casualty train accident resulting in **derailment & extensive property damage**.
- Any train incident involving runaway or rollaway equipment
- Any other train accident/incident likely to generate considerable public interest
- Most **Amtrak** accidents/incidents



COMMENTING

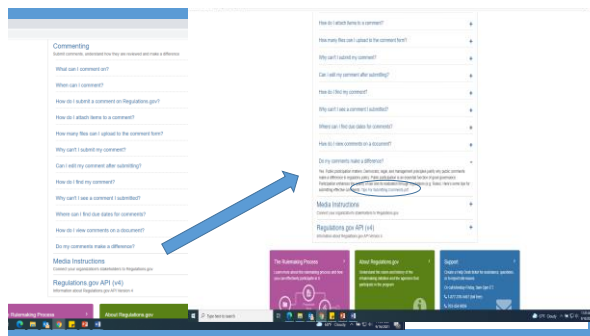
Who can comment?
Length of comment period?
Effect of failure to comment?
Strategic submission?
Costs of commenting?



A TRUISM . . .

“Americans rarely exercise their right to comment on Federal policies and when they do, they often do not engage with process effectively.”

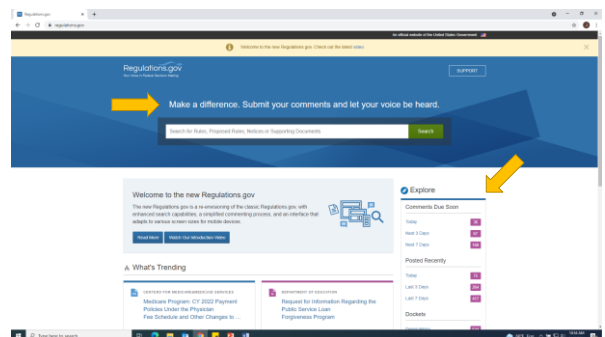
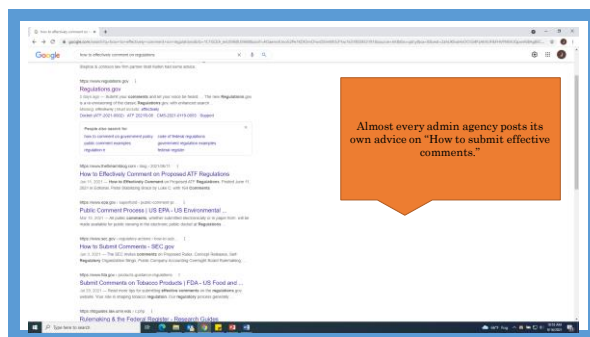
Adam Looney, HOW TO EFFECTIVELY COMMENT ON REGULATIONS
(Aug. 2018)(Brooking Institute) https://www.brookings.edu/wp-content/uploads/2018/08/ES_20180809_RegComments.pdf

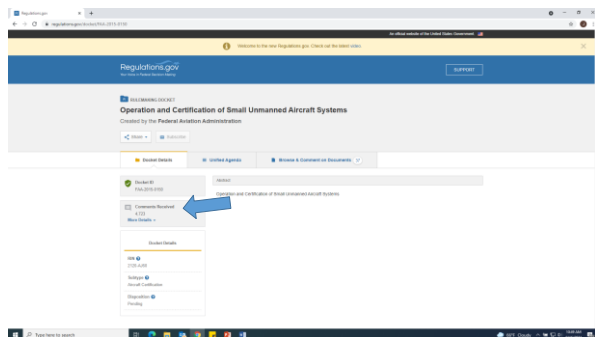


EFFECTIVE COMMENTING

- Use a discernable structure such as *Introduction, Background, Analysis, Conclusion*
- Pay attention/be responsive to questions & request for data in the NPRM
- Explain why you are interested in the regulation, highlight experience/credentials to distinguish your comment from others
- Clearly identify the issues being commented on, list recommendations upfront
- Make a logical detailed argument and use support/citation
- Identify flaws or where the admin agency has undervalued/ignored evidence
- Highlight unique situations, individual behavior, value-based judgments on policy
- Suggest alternatives & evaluate how they compare

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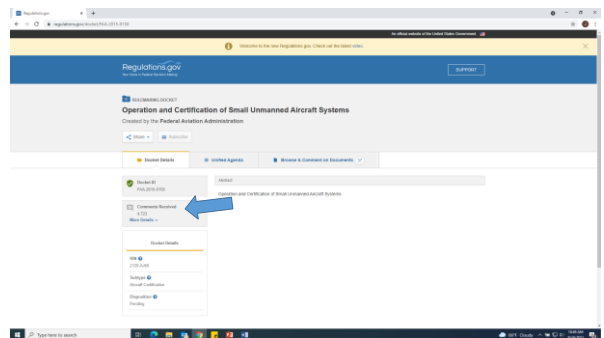
COMMENTS on the COMMENTS?



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FINAL RULE in the FEDERAL REGISTER

(c) . . . After **consideration** of the relevant matter presented, the agency shall incorporate in the rules adopted **a concise general statement of their basis and purpose**. . . .

§ 553(c)

FINAL RULE in the FEDERAL REGISTER

- Executive Summary which now covers the *intervening events* (between NPRM date Nov. 22 and Jan. 2, 2020).
- Entire Sec. II devoted to the *Comments* & the Conclusions drawn from them.
 - **[How many comments did FRA count?]**
- Read *Sec. III* (Section-by-Section Analysis)
- Skip to page D-5 & see the *text of the Final Rule*

FINAL RULE (fed into) the C.F.R.

