A Brief Overview of Rulemaking and Judicial Review

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Summary

The Administrative Procedure Act (APA), which applies to all agencies, provides the general procedures for various types of rulemaking. The APA details the rarely used procedures for formal rules as well as the requirements for informal rulemaking, under which the vast majority of agency rules are issued. This report provides a brief legal overview of the various methods by which agencies may promulgate rules, which include formal rulemaking, informal (notice-and-comment or §553) rulemaking, hybrid rulemaking, direct final rulemaking, and negotiated rulemaking.

There is substantial case law regarding APA procedures and agency rulemakings. This report concisely mentions the standards that reviewing courts will use to discern whether agency rules have been validly promulgated. Additionally, inquiries regarding the APA often concern agency actions that involve exceptions to APA requirements or additional steps that agencies voluntarily have taken or imposed upon themselves that are not required by the APA. For example, adversely affected parties may contest agency uses of the "good cause" exceptions to the APA procedural requirements to promulgate an interim final rule. Another frequent topic of inquiry is whether an agency guidance document should have been issued as a legislative rule under APA notice-and-comment procedures.

This report does not address the requirements of presidential review of agency rulemaking under Executive Orders 12866 and 13563 or other statutes that may impact particular agency rulemakings, such as the Regulatory Flexibility Act, the National Environmental Policy Act, the Congressional Review Act, or the Unfunded Mandates Reform Act. Additionally, issues of standing, ripeness, finality of agency action, or exhaustion of administrative remedies may arise. As this brief report does not address these potentially applicable statutes or legal issues in depth, the authors may assist with legal questions regarding such requirements or agency-specific rules.

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Introduction

The Administrative Procedure Act (APA) applies to all executive branch agencies, including so-called independent regulatory agencies.[1] The APA prescribes procedures for agency actions such as rulemaking, as well as standards for judicial review of agency actions.[2] Rulemaking is the "agency process for formulating, amending, or repealing a rule,"[3] where a rule is defined as "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."[4] This report provides a brief legal overview of APA rulemaking.

Types of Rulemaking

Federal agencies may promulgate rules through various methods. Although the notice-and-comment rulemaking procedures of Section 553 of the APA represent the most commonly followed process for issuing legislative rules, agencies may choose or may be required to use other rulemaking options, including formal, hybrid, direct final, and negotiated rulemaking. The method by which an agency issues a rule may have significant consequences for both the procedures the agency is required to undertake and the deference with which a reviewing court will accord the rule. In addition, the APA contains whole or partial exceptions to the statute's otherwise applicable rulemaking requirements.

Informal/Notice-and-Comment/Section 553

Generally, when an agency promulgates legislative rules, or rules made pursuant to congressionally delegated authority, the exercise of that authority is governed by the informal rulemaking procedures outlined in 5 U.S.C. Section 553.[5] In an effort to ensure public participation in the informal rulemaking process, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content.[6] Although the APA sets the minimum degree of public participation the agency must permit, "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[7]

[1] 5 U.S.C. §551(a).

[2] 5 U.S.C. §§551(a), 701-06. Under the Clean Air Act, Congress removed certain Environmental Protection Agency (EPA) rulemaking activities from the APA's coverage and instead established a separate set of similar procedures that the agency must follow in promulgating specific rules and regulations. *See* Clean Air Act §307(d) (codified at 42 U.S.C. §7607(d)).

[3] 5 U.S.C. §551(5).

[4] 5 U.S.C. §551(4). For a non-legal discussion of federal rulemaking, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by (name redacted).

[5] 5 U.S.C. §553.

[6] 5 U.S.C. §553 (b)-(c).

[7] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 259 (1946); CHARLES H. KOCH JR., 1 ADMINISTRATIVE LAW AND PRACTICE 329-30 (2010 ed.).

The requirement under Section 553 to provide the public with adequate notice of a proposed rule is generally achieved through the publication of a notice of proposed rulemaking in the *Federal Register*.[8] The APA requires that the notice of proposed rulemaking include "(1) the time, place, and nature of public rulemaking 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."[9] Generally speaking, the notice requirement of Section 553 is satisfied when the agency "affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[10]

Once adequate notice is provided, the agency must provide interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written "data, views, or arguments."[11] The comment period may result in a vast rulemaking record as persons are permitted to submit nearly any piece of information for consideration by the agency. While there is no minimum period of time for which the agency is required to accept comments, in reviewing an agency rulemaking, courts have focused on whether the agency provided an "adequate" opportunity to comment—of which the length of the comment period represents only one factor for consideration.[12]

Once the comment period has closed, the APA directs the agency to consider the "relevant matter presented" and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final rule.[13] The general statement of basis and purpose should "enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules."[14] The final rule, along with the general statement must be published in the *Federal Register* not less than 30 days before the rule's effective date.[15]

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[8] 5 U.S.C. §553(b). Such publication, however, is not strictly required where interested parties are identified and have "actual notice." 5 U.S.C. §553(b). Other exceptions to the publication requirement include an agency's use of the "good cause" exception, and if the rule is an "interpretive rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice." *Id.*

[9] 5 U.S.C. §553(b)1-3.

[10] *See, e.g.*, Forester v. Consumer Product Safety Commission, 559 F.2d 774, 787 (D.C. Cir. 1977).

[11] 5 U.S.C. §553(c).

[12] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 296 (4th ed. 2006) (citing Fla. Power & Light Co. v. U.S., 846 F.2d 765, 772 (D.C. Cir. 1988)). However, some statutes require minimum comment periods. *See, e.g.*, 42 U.S.C. §6295(p)(2). Additionally, Executive Order 12866, which provides for presidential review of agency rulemaking via the Office of Management and Budget's Office of Information and Regulatory Affairs, states that the public's opportunity to comment, "in most cases should include a comment period of not less than 60 days." Exec. Order No. 12866, §6(a), 58 Fed. Reg. 51735 (October 4, 1993). This portion of Executive Order 12866 does not apply to independent regulatory agencies. *Id.* at §3(b).

[13] 5 U.S.C. §553(c).

[14] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 225 (1946). In practice such statements tend to be lengthy preambles to the final rules, which agencies use "to advise interested persons how the rule will be applied, to respond to questions raised by comments received during the rulemaking, and as a 'legislative history' that can be referred to in future applications of the rule," as well as by reviewing courts. LUBBERS, *supra* note 12, at 376.

[15] The APA does, however, create three exceptions (discussed infra) to the 30-day advanced publication requirement. 5 U.S.C. §553(d)1-3. If a final rule that is subject to the 30-day requirement is not published in the *Federal Register*, a person may not be adversely affected by the unpublished rule unless the person has "actual and timely notice" of the rule's terms. 5 U.S.C. §552(a)(1).

Formal

Although rules are typically promulgated through the informal rulemaking process, in limited circumstances, federal agencies must follow formal rulemaking requirements. Under the APA, "when rules are required by statute to be made on the record after opportunity for an agency hearing" the formal rulemaking requirements of Section 556 and Section 557 apply.[16] The Supreme Court has interpreted this language very narrowly, determining that formal rulemaking requirements are only triggered when Congress explicitly requires that the rulemaking proceed "on the record."[17]

When formal rulemaking is required, the agency must engage in trial-like procedures. The agency, therefore, must provide a party with the opportunity to present his case through oral or documentary evidence and "conduct such cross-examination as may be required for a full and true disclosure of the facts."[18] Formal rulemaking proceedings must be presided over by an agency official or Administrative Law Judge who traditionally has the authority to administer oaths, issue subpoenas, and exclude "irrelevant, immaterial, or unduly repetitious evidence."[19] Formal rulemaking procedures also prohibit ex parte communications between interested persons outside the agency and agency officials involved in the rulemaking process.[20] The agency or proponent of the rule has the burden of proof, and such rules must be issued "on consideration of the whole record … and supported by … substantial evidence."[21]

Hybrid

In providing rulemaking authority to an agency, Congress may direct the agency to follow specific procedural requirements in addition to those required by the informal rulemaking procedures of the APA. [22] Hybrid rulemaking statutes typically place additional procedural rulemaking requirements on agencies that may be found in the adjudicative context, but fall short of mandating that an agency engage in the APA's formal rulemaking process.[23] These statutes generally create a rulemaking process with more flexibility than the Section 556 and Section 557 formal rulemaking procedures and more public participation than informal rulemaking procedures

[16] 5 U.S.C. §553(c).

[17] United States v. Florida East Coast Railway, 10 U.S. 224 (1973).

[18] 5 U.S.C. §556(d).

[19] 5 U.S.C. §556(c)-(d).

[20] 5 U.S.C. §557(d)(1).

[21] 5 U.S.C. §556(d).

[22] Federal courts have no authority to impose procedural requirements beyond what Congress has provided for in the APA. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978) ("In short, all of this leaves little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed.").

[23] *See, e.g.,* Magnuson-Moss Warranty – Federal Trade Commission (FTC) Improvement Act, 15 U.S.C. §57a. For example, under Magnuson-Moss, before the FTC may issue a notice of proposed rulemaking (NPRM), the agency must publish an advance notice of proposed rulemaking (ANPRM) in the *Federal Register* that contains particular information and invites comments and alternative suggestions. The FTC must submit its ANPRM to certain Senate and House committees. Additionally, the agency must "make a determination that unfair or deceptive acts or practices are prevalent," and the FTC can only make that determination under either of two specified conditions: (1) "it has issued cease and desist orders regarding such acts or practices" or (2) "any other information available to the FTC indicates a widespread pattern of unfair or deceptive acts or practices." Finally, 30 days before the FTC publishes its NPRM, the agency must submit the NPRM to the same congressional committees. 15 U.S.C. §57a(b).

under Section 553. Hybrid rulemaking statutes may require that the agency: hold hearings; allow interested persons to submit oral testimony; and grant participants opportunities for cross examination or questioning.[24] Hybrid rulemaking is only required where expressly directed by Congress, and such statutes were frequently enacted in the 1970s.[25]

Direct Final

Federal agencies have developed a process known as direct-final rulemaking in order to quickly and efficiently finalize rules that the agency views as "routine or noncontroversial."[26] Under direct-final rulemaking, the agency publishes a proposed rule in the *Federal Register*. In contrast to informal rulemaking, however, the notice will include language providing that the rule will become effective as a final rule on a specific date unless an adverse comment is received by the agency.[27] If even a single adverse comment is received, the proposed rule is withdrawn, and the agency may issue its proposed rule under the APA's informal notice-and-comment requirements.[28] In this manner, the agency can efficiently finalize unobjectionable rules while avoiding many of the procedural delays of the traditional notice-and-comment rulemaking requirements. Although there is no express statutory authorization for direct-final rulemaking, this type of rulemaking has been justified under the "unnecessary" portion of the APA "good cause" exception, discussed infra, as well as the informal notice-and-comment rulemaking procedures.[29]

Negotiated

Negotiated rulemaking represents an alternative to traditional informal rulemaking procedures that allows agencies to consult with interested persons and interest groups at the developmental stages of the rulemaking process.[30] The goal of the negotiated rulemaking process is to increase administrative efficiency and decrease subsequent opposition to a promulgated rule by engaging the participation of outside groups with significant interest in the subject matter of the rule.[31] In principle, negotiated rulemaking allows the agency and other involved interests to reach consensus in the early rulemaking stages so as to produce a final rule that is more likely to be acceptable to all parties.[32]

Under the Negotiated Rulemaking Act (the Act),[33] the head of an agency is authorized to "establish a negotiated rulemaking committee to negotiate and develop a proposed rule if … the

[24] *See, e.g.,* Toxic Substances Control Act, 15 U.S.C. §2605.

[25] LUBBERS, *supra* note 12, at 308-09.

[26] LUBBERS, *supra* note 12, at 115 (noting that direct final rulemaking was first developed by EPA "to speed up the process for approving revisions to state implementation plans under the Clean Air Act.").

[27] Administrative Conference of the United States Recommendation (ACUS) 95-4, http://www.law.fsu.edu/library/admin/acus/305954.html.

[28] *Id.*

[29] LUBBERS, *supra* note 12, at 116; ACUS Recommendation 95-4, *supra* note 28.

[30] LUBBERS, *supra* note 12, at 172.

[31] *Compare* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. L.J. 32 (2000), *with* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. L.J. 386 (2001).

[32] *See* 5 U.S.C. §566.

[33] 5 U.S.C. §§561-70.

use of the negotiated rulemaking procedure is in the public interest."[34] The Act lays out a number of mandatory considerations for determining whether a negotiated rule would be in the public interest.[35] Once an agency has made the decision to establish a negotiated rulemaking committee, the agency must follow the Federal Advisory Committee Act with regard to the committee and must publish a notice in the *Federal Register* detailing the duties of the committee and the committee's proposed membership.[36] The negotiated rulemaking committee generally consists of a maximum of 25 members, with at least one agency representative.[37] The public must have an opportunity to comment on the proposal to create the committee and the proposed membership.[38]

If the committee achieves consensus on a proposed rule, the committee will issue a report outlining the proposed rule.[39] If the committee does not achieve a consensus, the committee may issue a report with any negotiated positions on which it did reach consensus.[40] The report and the committee's conclusions are not binding on the agency.[41] Indeed, any proposed rule that arises as a result of the deliberations of a negotiated rulemaking committee must subsequently "be finalized through ordinary notice-and-comment procedures …"[42]

Exceptions to the APA's Section 553 Rulemaking Requirements

The APA has carved out a number of exceptions to the statute's informal procedural rulemaking requirements. Depending on the substance or nature of the rule, some, all, or none of the Section 553 procedural requirements may apply. The various exceptions are discussed below.

Wholly Exempt

The APA exempts rules relating to specific subject matter areas from all of the procedural rulemaking requirements of Section 553. This exception covers rules pertaining to (1) "a military or foreign affairs function of the United States," (2) "a matter relating to agency management or personnel," or (3) a matter relating to "public property, loans, grants, benefits, or contracts."[43] Although rules pertaining to these areas need not satisfy the APA's informal rulemaking requirements, such rules still have the force and effect of law.[44] The military and foreign affairs exception has been narrowly construed, but is not limited to rules issued by the Department of

[34] 5 U.S.C. §563(a).

[35] *Id*.

[36] 5 U.S.C. §§564, 565.

[37] 5 U.S.C. §565(b). ("The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership.").

[38] 5 U.S.C. §564(c).

[39] 5 U.S.C. §566(f).

[40] *Id.*

[41] *See* LUBBERS, *supra* note 12, at 172 (citing USA Group Loan Servs. v. Riley, 82 F.3d 708 (7th Cir. 1996)).

[42] *See* KOCH, *supra* note 7 at 295; *see also* CRS Report RL32452, *Negotiated Rulemaking*, by (name redacted).

[43] 5 U.S.C. §553(a).

[44] Hamlet v. United States, 63 F.3d 1097 (Fed. Cir. 1995).

Defense or Department of State.[45] The military and foreign affairs exception, therefore applies to qualifying actions of any agency. The agency management exception only applies where the rule in question would not affect parties outside the agency.[46] Finally, the term "property" in the third subject matter exception does not extend to all rules pertaining to public lands, rather the exception has been interpreted as limited to the "distribution of property."[47]

Exceptions to the Notice-and-Comment Procedures

The APA provides exceptions to the notice-and-comment rulemaking procedures for both legislative and non-legislative rules, which are discussed in detail below. Non-legislative rules are "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice."[48] Rules that have been promulgated through the notice-and-comment process have the force and effect of law and are known as legislative rules.[49] The exceptions to the notice-and-comment process for legislative rules depend on whether the agency has "good cause" to dispense with the notice-and comment procedures.[50]

Rules of Agency Organization, Procedure, or Practice

Agency procedural rules are exempt from the notice-and-comment requirements of Section 553. Much like the "agency management" exception, agency procedural rules must have an intra-agency impact.[51] Courts have defined agency procedural rules as the "technical regulation of the form of agency action and proceedings … which merely prescribes order and formality in the transaction of … business."[52] The exception does not include any action "which is likely to have considerable impact on ultimate agency decisions," or that "substantially affects the rights of those over whom the agency exercises authority."[53] If the proposed procedural rule will have a substantive impact, then the agency must promulgate the rule through notice-and-comment rulemaking. However, even if a rule qualifies as a "procedure or practice," the agency must still satisfy the APA's publication and 30-day delayed effective date requirements.[54]

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[45] *See* TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 26 (1947), http://www.law.fsu.edu/library/admin/1947iii.html [hereinafter AG MANUAL].

[46] *See* KOCH, *supra* note 7 at 295. ("[T]he exception does not cover agency rulemaking which has some impact on those outside the agency.").

[47] *Id*.

[48] 5 U.S.C. §553(b)(A). The statute refers to "interpretative" rules, but commentators tend to use the term "interpretive" rules.

[49] Legislative, or substantive, rules have been described by courts as rules through which an agency "intends to create a new law, rights or duties," General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), or rules that are "issued by an agency pursuant to statutory authority and which implement the statute." AG MANUAL, *supra* note 45, at 30 n.3. A rule has also been defined as substantive if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

[50] 5 U.S.C. §553(b)(B).

[51] Pickus v. United States Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974)("This category … should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercise authority.").

[52] *Pickus*, 507 F.2d at 1113-14.

[53] *Id*. at 1114.

[54] Rules of "agency organization, procedure, or practice" are only exempt from the notice and comment "subsection" of (continued...)

Non-legislative Rules

The APA's notice-and-comment requirements also do not apply to interpretive rules and general statements of policy.[55] These rules are generally referred to as non-legislative rules, in that they do not carry the force and effect of law.[56] The APA created the exception for non-legislative rules principally to allow agencies to efficiently perform routine day-to-day duties, while encouraging agencies to provide the public with timely policy guidance without having to engage in the lengthy, at times, burdensome notice-and-comment process.[57]

An interpretive rule has been defined as a rule in which the agency states what it "thinks the statute means and 'only reminds affected parties of existing duties.'"[58] These rules allow agencies "to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."[59] Interpretive rules do not "effect[] a substantive change in the regulations."[60] General statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[61] These statements provide agencies with the opportunity to announce their "tentative intentions for the future" in a non-binding manner.[62]

Determining whether an agency action, such as a guidance document, is properly characterized as a legislative or non-legislative rule may be difficult. However, the determination has significant consequences for both the procedures the agency is required to follow in issuing the rule and the deference with which a reviewing court will accord the rule. In categorizing a rule, an agency must determine whether the action in question simply interprets existing law or results in a substantive change to existing law.[63] As the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has suggested: "an agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment."[64]

Still, even non-legislative rules must comply with certain aspects of the APA's procedural requirements. For example, the agency must comply with the APA's petition requirements as well

(...continued)

§553. 5 U.S.C. §553(b)(3)(A).

[55] 5 U.S.C. §553(b)(3)(A).

[56] William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001)("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

[57] KOCH, *supra* note 7, at 268-269.

[58] LUBBERS, *supra* note 12, at 80-81 (quoting General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)). The *Attorney General's Manual on the Administrative Procedure Act* defined an interpretive rule as one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." AG MANUAL, *supra* note 45, at 30.

[59] American Hosp. Ass'n. v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[60] Warder v. Shalala, 149 F.3d 73, 80 (1st Cir. 1998)(quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)).

[61] AG MANUAL, *supra* note 45, at 30 n.3.

[62] Pacific Gas and Elec. Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974).

[63] *See* AG MANUAL, *supra* note 45, at 30.

[64] Fertilizer Inst. v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

as publication and public availability provisions.[65] As non-legislative rules are exempt from the APA's notice-and-comment requirements, as well as the delayed effective date requirement, they are effective immediately upon publication in the *Federal Register*.[66]

Good Cause

Section 553(b)(B) specifically authorizes federal agencies to dispense with the APA's requirements for notice and comment under certain circumstances. To qualify for the good cause exception, the agency must find that the use of traditional procedures is "impracticable, unnecessary, or contrary to the public interest."[67] Each of three terms or phrases has a specific meaning.[68] In addition, the agency must give supporting reasons for invoking the good cause exception. Whether the agency's use of the good cause exception is proper is a fact-specific inquiry that generally includes an evaluation of whether immediate action is necessary, the consequences of inaction, and whether advance notice would defeat the regulatory objective.[69] Courts, however, have traditionally held that these exceptions will be "narrowly construed and reluctantly countenanced."[70] For example, the D.C. Circuit has stated that "[b]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures."[71]

A common use of the good cause exception is in the issuance of interim final rules.[72] Interim final rules are used by agencies to promulgate rules without providing the public with notice and an opportunity to comment before publication of the final rule, while reserving the right to modify the rule through a post-promulgation comment period.[73] However, agencies must assert a valid "good cause" exception in issuing any interim final rule.[74] Unlike non-legislative rules, interim final rules are considered final rules that carry the force and effect of law.[75]

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[65] 5 U.S.C. §552(a).

[66] 5 U.S.C. §§553(e), 552(a)(1)(D), 552(a)(2)B); See, LUBBERS, *supra* note 12, at 73.

[67] 5 U.S.C. §553(b)(B).

[68] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 200 (1946).

[69] ACUS Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*.

[70] American Fed. of Gov't Employees v. Block , 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

[71] Action on Smoking and Health v. Civil Aeronautics Board, 713 F.2d 795, 800 (D.C. Cir. 1983); *see also* NRDC v. Evans, 316 F.3d 904, 906 (9th Cir. 2003) (stating that "good cause requires some showing of exigency beyond generic complexity of data collection and time constraints").

[72] Congress has specifically authorized agencies to issue interim final rules for certain programs. *See, e.g.,* Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, title IV, pt. 2, §4039(g), 101 Stat. 1330 (1987) (codified as amended at 42 U.S.C. §1395hh (2006)) (authorizing the use of interim final regulations for a Medicare program).

[73] While there are numerous examples of the use of interim final rules prior to 1995, the practice of post-promulgation comments appears to have its genesis in a 1995 recommendation of ACUS, which suggested the procedure whenever the "impracticable" or "contrary to the public interest" prongs of the "good cause" exemption were invoked. *See* ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (1995); *see also* Michael R. Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN L. REV. 703 (1999).

[74] *See* LUBBERS, *supra* note 12, at 114-15.

[75] *See,* Career College Ass'n v. Riley, 74 F.3d 1265 (D.C. Cir. 1996).

Exceptions to the 30-Day Delayed Effective Date

The APA's 30-day waiting period between the publication of the final rule and the rule's effective date was designed principally to "afford persons affected a reasonable time to prepare for the effective date of the rule."[76] In addition to the APA's notice-and-comment exceptions for interpretive rules, policy statements, and legislative rules for which the agency finds "good cause,"[77] agencies also are authorized to dispense with the APA's 30-day delayed effective date requirement for such rules.[78] Additionally, the APA also has an exception from the 30-day delayed effective date requirement for "a substantive rule which grants or recognizes an exemption or relieves a restriction."[79] Qualifying rules may therefore be considered effective upon the publication of the final rule.

Judicial Review

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action."[80] This presumption is embodied in the APA, which provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[81] The APA excludes judicial review in two situations—instances where (1) other "statutes preclude judicial review" or where (2) "agency action is committed to agency discretion by law."[82] However, judicial review of an unreviewable determination may occur if there is a constitutional issue.[83]

The APA provides several types of judicial review that apply unless otherwise specified by statute.[84] With regard to the standards of judicial review of agency action that a court will use to evaluate whether an agency's action is valid,[85] the APA states:

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[76] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 201 (1946).

[77] When asserting the good cause exemption, agencies must include an explanation of the reasons for dispensing with the APA's requirements. 5. U.S.C. §553(d)(3)("[F]or good cause found and published with the rule.")

[78] 5 U.S.C. §553(d)(3).

[79] 5 U.S.C. §553(d)(1).

[80] Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986); *see also* Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 424 (1995)(quoting *Bowen*, 476 U.S. at 670). "The presumption favoring judicial review of administrative action ... may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). "The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it ... or from the collective import of legislative and judicial history behind a particular statute," or from "inferences of intent drawn from the statutory scheme as a whole." *Id.*

[81] 5 U.S.C. §§702, 704. Judicial review may be invoked under the APA if a plaintiff is "adversely affected or aggrieved" by any final agency action "within the meaning" of the statute at issue. 5 U.S.C. §702. This brief report does not discuss issues of standing, ripeness, finality of agency action, or exhaustion of administrative remedies.

[82] 5 U.S.C. §701(a); *see* Sackett v. Environmental Protection Agency, 566 U.S. __ (2012)(holding that the Clean Water Act does not preclude judicial review under the APA of an EPA compliance order, which the court found was a "final agency action for which there is no adequate remedy other than APA review," and noting that the Court does "not look 'only [to] [a statute's] express language'" in determining whether "a particular statute precludes judicial review").

[83] *See* Webster v. Doe, 486 U.S. 592 (1988); Oestereich v. Selective Service System, 393 U.S. 233 (1968).

[84] LUBBERS, *supra* note 12, at 469.

[85] *Id.*

> The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be –
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.[86]

This provision indicates that the type of judicial review may differ depending on whether the court is reviewing formal or informal rulemakings—respectively "substantial evidence" or "arbitrary and capricious."[87] Congress has sometimes required informal, notice-and-comment rulemakings to be reviewed under the substantial evidence test.[88] However, some have argued that the two standards are the same, and commentators have stated that "the substantial evidence and arbitrary and capricious tests have tended to converge" in judicial review of informal rulemaking.[89]

The standard of judicial review that concerns congressional delegations of legislative authority to administrative agencies addresses whether an agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[90] The Supreme Court has stated that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[91] Courts grant varying levels of deference to agency interpretations of statutes when examining questions such as whether an agency's action exceeds its congressionally delegated statutory authority.[92] A detailed discussion of the types of deference that a court may accord to an agency's interpretation of a statutory provision is beyond the scope of this brief report.[93]

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[86] 5 U.S.C. §706(2).

[87] *See* LUBBERS, *supra* note 12, at 470-71.

[88] *See, e.g.*, 15 U.S.C. §57a(e)(3)(A).

[89] *See* LUBBERS, *supra* note 12, at 475, 532 (citing Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541 (1986) and Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 935 n.138 (1973)); KOCH, *supra* note 7, at 437-38.

[90] 5 U.S.C. §706(2)(C); *see* LUBBERS, *supra* note 12, at 490.

[91] Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 151 (2000). While agencies generally fall within the executive branch of government, it is Congress that generally determines, in an act establishing the agency or subsequent statutes, the powers of the agency: "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[92] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27(2001); LUBBERS, *supra* note 12, at 490-91. Judicial deference is the degree to which a court will uphold and respect the validity of an agency's interpretation of a statutory provision during judicial review of the agency's decisions. The amount of deference that an agency interpretation of its own statute will receive from a reviewing court "has been understood to vary with the circumstances." United States v. Mead Corp., 533 U.S. 218, 228, 236-37 (2001).

[93] For a detailed discussion, see pages 3-6 of CRS Report R41305, *Supreme Court Nominee Elena Kagan: Administrative Law and the Nondelegation Doctrine* , by (name redacted), which addresses the following Supreme Court cases: *Skidmore v. Swift & Co.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *United States* (continued...)

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v. Mead Corporation, and *Barnhart v. Walton*.