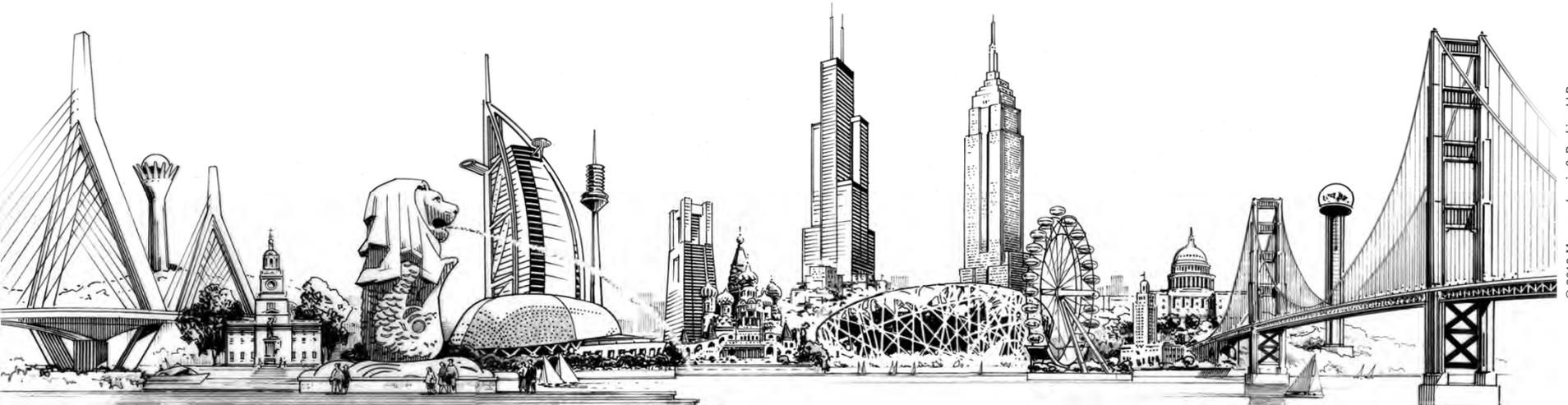


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A-Z OF FEDERAL RULEMAKING

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Traditional Process for Establishing Government Policy

- Congress debates and eventually approves legislation and the president signs it into law
- The agency charged with implementing the law initiates the rulemaking process and eventually adopts a final rule that carries out congressional intent
- The “losing party” can challenge the final rule in court, arguing that the implementing agency failed to follow congressional intent or improperly followed the procedures outlined in the Administrative Procedures Act (APA)

What's Changed?

- Congress passes legislation that fails to clearly articulate congressional intent, often leaving the implementing agency to substitute its judgment on an appropriate policy
- Congress inserts legislative language at the 11th hour that may not have had public input through committee hearings or even a formal committee report that would elaborate on congressional intent
- Congress fails to pass legislation addressing important public policy issues, thus allowing the Executive Branch to use whatever authorities it may have to address those issues
- Congress utilizes its authority under the Congressional Review Act (CRA) to nullify an agency rule

What's Changed?

- The use of Executive Orders (EOs) by the president to launch new policy initiatives or reverse/negate prior administrations' policies
- Utilizing the review process of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to challenge an agency cost/benefit analysis of a proposed rule

What's Changed?

- Individual states or groups of like-minded states are moving into the policy arena to address issues previously viewed as within the purview of the federal government
- State Attorneys General likewise are initiating court challenges to federal policies they oppose or filing briefs in support of policies they support

The APA: Basic Purposes

- Requires agencies to keep the public informed of their organizations, procedures, and rules
- Provides for public participation in the rulemaking process, notably through public commenting
- Establishes uniform standards for the conduct of formal rulemaking (and adjudication)
- Defines the scope of judicial review

APA Section 551 – Definition of “Agency”

- An Agency is “each authority of the Government of the United States, whether or not it is within or subject to review by another agency”
- Excludes several enumerated authorities, including Congress, federal courts, and governments of territories or possessions of the United States
- The president is not an Agency under the APA: *Franklin v. Massachusetts*, 505 U.S. 788 (1992)

APA

- APA emphasizes formal rulemaking as the process to announce a new policy
 - But federal Agencies frequently issue “sub-regulatory guidance”
- APA Section 551(4) defines “rule” broadly
- APA Section 553 sets out the process for “notice and comment rulemaking”

APA Section 551(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 . . .

APA Section 553(a) Exemptions

- APA does not apply where 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

Types of Rules: Legislative Rules

- **Legislative (sometimes called “Substantive”) Rules**
- Give congressional authority in the organic statute to the Agency to issue rules
- Create legally binding rights and obligations for the Agency and the public
- If they are adopted by an administrative agency, have the force of law and impose new duties on affected parties
- Impose fresh rights and obligations on the public
- Creates a substantial impact on the people to whom the rules apply and are binding on all individuals and courts
- Have the effect of law and can be enforced in courts
- Do not leave the Agency free to exercise discretionary power, although the Agency can interpret its own legislative rules

Types of Rules: Nonlegislative Rules

- **Interpretive Rules** interpret or clarify the meaning of statutes or legislative rules that the Agency administers
- Usually issued when there is confusion or disagreement about the meaning of a statute and the ambiguity should be clarified
- Does not create a new law or modify existing ones

Types of Rules: Nonlegislative Rules

- **Policy Statements** tell the public how the Agency plans to exercise some discretionary power that it has
- Agency policy statements are not enforceable and have no binding effect
 - But parties may rely on the policies, and courts may defer (see later slides)

Informal or Sub-Regulatory Guidance

- Examples:
 - Opinion Letters, Directives, Bulletins, FAQs, agency nonenforcement policies
 - On October 9, two new Executive Orders addressed agency sub-regulatory guidance:
 1. Promoting the Rule of Law Through Improved Agency Guidance Documents: <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/>
 - Requires Agencies to post their guidance on easily accessible websites and requires OMB and Agencies to develop procedures for issuing guidance
 2. Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication: <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/>
 - Imposes new requirements before Agencies can rely on guidance in enforcement/adjudication

Types of Rules: Organizational and Procedural Rules

- These “housekeeping” rules describe the Agency’s structure and the way in which its determinations are made
 - For example, such rules may delegate authority to make certain decisions to a particular sub-agency within the Agency, or create or alter the procedure for parties appearing before the Agency
- Procedural rules do not change the Agency’s basic regulatory standards

Notice and Comment Not Required

- Interpretive Rules, statements of policy, and organizational/procedural rules
- Or when the Agency for **good cause** finds that notice and public procedure thereon are “impracticable, unnecessary, or contrary to the public interest”
 - E.g., The Department of Labor, Office of Federal Contractor Compliance relied on “good cause” to amend its regulations to implement EO 13672 adding sexual orientation and gender identity to nondiscrimination obligations for federal contractors

What Triggers the Rulemaking Process?

- The Agency may be commanded to act by Congress or EO
- Agency may determine that it needs rules or wants to revise/rescind them
- Sometimes private citizens ask for a rule
- Section 553(e) gives an “interested person the right to petition for the issuance, amendment or repeal of a rule”

Examples

- “Presidential Memorandum on Fiduciary Duty Rule” (Feb. 2017)
 - Ordered the Department of Labor (DOL) to review the Fiduciary Rule and consider whether to rescind or revise it (using notice and comment procedures)
- Congress amended the Fair Labor Standards Act “tip” provision in the March 2018 budget, making employer retention of tips illegal
 - DOL proposed a rule to implement the amendment

How Can Employers Learn When an Agency Is Considering Rulemaking?

- Review EOs and congressional activity:
 - Not just bills – monitor oversight requests, hearings/testimony
- Public statements by political Agency leadership – town halls, speeches
- Spring/Fall Regulatory Agenda (OMB)
- Pressure from stakeholders

What Is required for the Proposed Rule?

- Notice of the proposed rule
- Solicitation of comments from all interested persons
- Agency must accept comments
- Most submissions are in writing
- Sometimes there are oral hearings

Notice of Proposed Rulemaking Process – How the Sausage Is Made

- The Agency drafts the proposed rule – this can take weeks, months, years
- The agency lawyers (should) work closely with the Agency throughout the process
- The proposal has to be cleared internally by legal, policy, and other sub-agency heads impacted
- “Red folder” for Secretary’s review and signature

The Sausage . . .

- Rule is sent to Office of Information & Regulatory Affairs (OIRA) (an office within OMB, within the White House)
 - This fact is public, but contents are not
 - “Significant” rules more than \$100M
 - Other significant rules
- OIRA has up to 90 days to review
- OIRA conducts interagency review
 - Comments go back to Agency/negotiation ensues

Publication

- OIRA sends to *Federal Register*
- Proposal is public and open for comments
- OIRA EO 12866 meetings
- Agency personnel may talk about the proposal – describe it, explain the policy behind it
- This is a good time to engage the agency in either stakeholder meetings (ask for one) or EO 12866 meetings

To Comment or Not to Comment?

- Review the preamble, which includes the economic analysis
- Do you agree with the analysis?
- Do you have a position?
- Do you want to be on the record on this issue?
- Do you want to go through a third party (e.g., trade association or law firm)?
- Do you have data, studies, or even anecdotes that support or disagree with the Agency's assumptions, findings, or conclusions?
- Submit comments – go through the reg.gov portal or Agency portal to be safe

To Comment or Not to Comment?

- Comments ideally should include a thorough analysis of the scientific or other supporting data for a proposed rule
 - makes the case for the Agency to act on your comment
 - also creates a record that can be used later to challenge the rule, particularly if the agency does not rebut or provide reliable data to support the rule, which in turn helps a reviewing court determine how much deference to give to the Agency's determination

One Final Thought

- The need to comment is even more urgent than usual, since litigation over rulemaking is more prevalent – the need to rely on the Administrative Record becomes essential
- Comments to rules – while they may feel futile today – will be useful down the road as lawyers seek to use the rulemaking record in their cases

Post-Comment Period

- What does an Agency do with the comments?
- What does the APA term “consider” really mean?
- Good-faith requirement
- Agency is not bound by comments
- Agency may invoke its experience

Final Rule

- This step completes the rulemaking process
- Two important steps:
 - Step 1: The agency must prepare after consideration of the comments and other matter in the rulemaking record “a concise general statement of [the] basis and purpose” of the final rule
 - Step 2: The rule goes into effect no earlier than 30 days after the rule’s publication

Final Rule

- Exceptions to Section 553(d) 30-day delay period:
 - a rule that provides an exemption or relieves a restriction
 - interpretative rules and statements of policy
 - finding of good cause

CRA 5 U.S.C. § 801(b)(2)

- Congress has 60 *legislative* days to review and overrule by joint resolution a new regulation
- Once a rule is repealed under the CRA, the Agency is prohibited from reissuing a substantially similar rule
- Legislative days are days that Congress is actually in session, which makes it hard to predict the exact window of time for disapproval

CRA

- Prior to January 2017, CRA was used only once (DOL's ergonomic rule) (OSHA)
- In the 115th Congress, 14 resolutions repealing Obama administration rules were passed and signed into law for rules issued as far back as May 2016
- Something to watch for in final rules issued in spring 2020 . . .

Challenging a Rule

- Two mechanisms to challenge or invalidate:
 - (1) attack its substantive provisions or
 - (2) modify the procedure by which it was promulgated
 - If a rule is defective on either ground, it will not be placed into effect

The “Logical Outgrowth” Doctrine

- One procedural argument is that the revisions are not a “logical outgrowth” of the proposed rule
- The final rule need not be identical to the proposed rule to satisfy the notice requirement, but courts have said that the final rule must be a “logical outgrowth” of the proposed rule to satisfy the notice requirement

Judicial Review and Deference

- *Chevron* deference – defer to reasonable Agency interpretations of ambiguous statutes accepted (unless arbitrary/capricious)
- *Skidmore* deference – agency interpretation is entitled to "respect proportional to its power to persuade"
- *Auer/Seminole Rock* deference – strong deference afforded to an Agency's interpretations of its own regulations

Other APA Rulemaking Tools

- Advance Notice of Proposed Rulemaking (NPRM)
- Request for Information (RFI)
- Direct Final Rule (DFR)

EO 13771 (Jan. 2017)

- Directs all Agencies to repeal at least two existing regulations for each new regulation issued in FY 2017 and thereafter
- Directs agencies that the “total incremental costs of all regulations should be no greater than zero” in FY 2017
- For FY 2018 and beyond, the director of the [OMB](#) is to provide agencies with a total amount of incremental costs that will be allowed

HYBRID RULEMAKING

The Occupational Safety and Health Act (OSHA)

OSHA'S Hybrid Rulemaking Process: How It Works

- OSHA Hybrid Rulemaking Procedures are set forth in 29 C.F.R. Section 1911.15 to 1911.18
- OSH Act Section 6(b)(3) and 6(f) suggests congressional expectation “that the rulemaking would be on the basis of a record to which a substantial evidence test, where pertinent, may be applied in the event an informal hearing is held” Section 1911.15(a)(2)
- The oral hearing “shall be legislative in type” and “fairness may require an opportunity for cross-examination on crucial issues”
- “The essential intent is to provide an opportunity for effective oral presentation by interested persons which can be carried out with expedition and in the absence of rigid procedures which might unduly impede or protract the rulemaking process” Section 1911.15(a)(3)

OSHA's Hybrid Rulemaking Process: How It Works

- Role of Presiding Officer (DOL ALJ) *See* 29 C.F.R. Section 1911.16
 - Regulate the course of the proceedings
 - Dispose of procedural requests, objections, and comparable matters
 - Confine the presentations to the issues specified in the NPRM and/or to matters pertinent to the proposed rule
 - Regulate the conduct of those present at the hearing
 - Permit cross-examination of any witness
 - Take official notice of material facts not appearing in the evidence in the record as long as parties are entitled to respond
 - Keep the record open for a “reasonable” time to receive “written recommendations, and supporting reasons, and additional data, views, and arguments from any person who has participated in the oral proceeding”
 - Certify the record of the hearing, including exhibits and post-hearing comments, to the OSHA Assistant Secretary
 - *See* 29 C.F.R. Section 1911.17

OSHA's Hybrid Rulemaking Process: How It Works

- This hybrid hearing process allows OSHA to consider the best available evidence by providing stakeholders and/or any interested person the opportunity to present data and evidence in support of their position, with the opportunity for cross-examination. *See* 29 CFR Section 1911.15.
- Public hearings are part of rulemaking record, in contrast to stakeholder meetings conducted in pre-rule stage. *See* 29 CFR Section 1911.15(b)(3).
- Public hearings are overseen by a DOL ALJ
 - ALJ and Office of Solicitor issue a guidelines letter to participants outlining the procedural and administrative aspects of the public hearing process
 - Role of ALJ – 29 CFR Section 1911.16 and 1911.17
 - Role of Office of Solicitor – ensures that process complies with statutory requirements and provides legal counsel

QUESTIONS?

Biography



Susan Harthill

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Susan Harthill represents employers in the full range of employment law and Employee Retirement Income Security Act (ERISA) matters, with a focus on counseling, compliance, litigation, and audits and investigations. Susan advises employers on statutory and regulatory compliance and conducts trainings, including harassment and discrimination training. Before joining Morgan Lewis, Susan served as deputy solicitor for national operations at the US Department of Labor (DOL), where she oversaw the legal activities performed for all DOL programs in the National Office by attorneys in all 10 program divisions.

Biography



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Tim Lynch directs all activities, including the strategic and operational functions, of the Washington Strategic Government Relations and Counseling Practice. He monitors legislative and political trends and developments, as well as managing lobbying registration and reporting, visits to government officials, and relationships with trade associations. In addition, Morgan Lewis's clients seek his advice on government relations and public policy issues.

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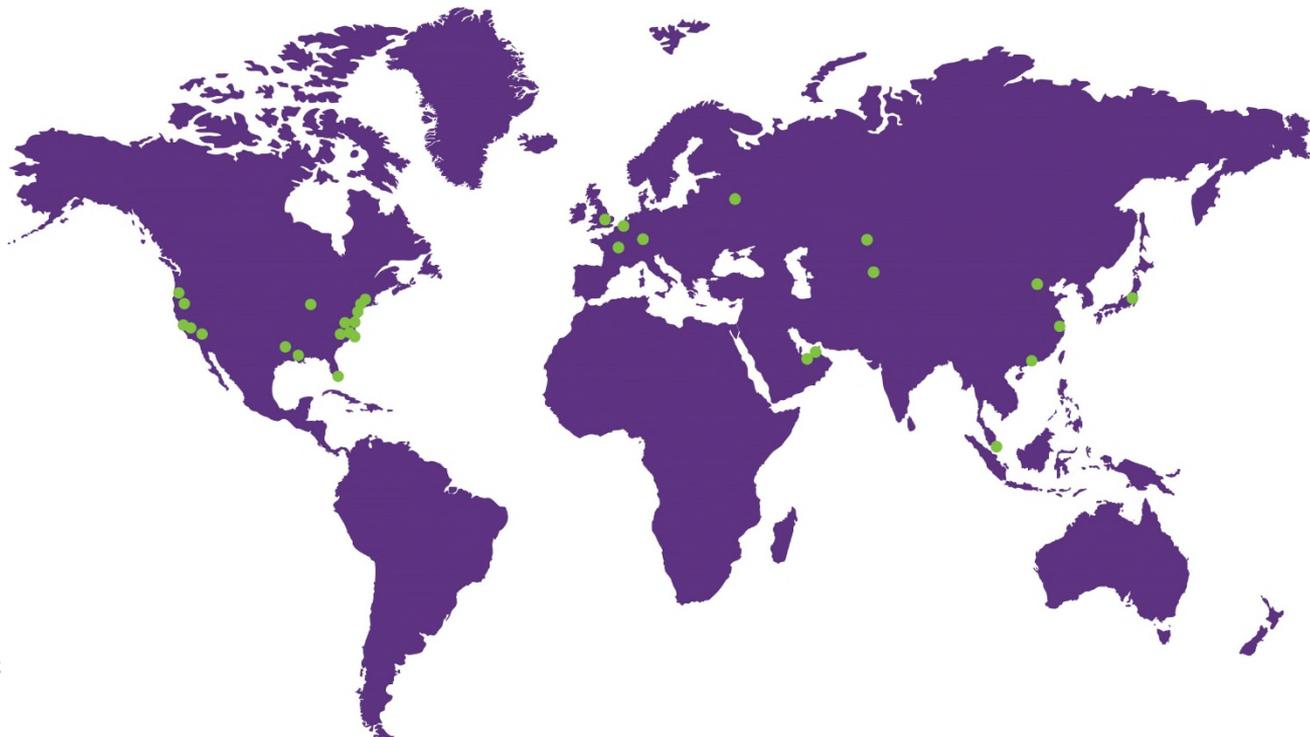
Jon Snare brings the perspective of a former US Department of Labor (DOL) official to his practice, which focuses on labor-related legislative, regulatory, and administrative issues at local, state, and federal levels. Leader of the firm's occupational safety and health practice, Jon advises on workplace safety and health issues involving enforcement, compliance, workplace investigations, and emergency response matters, including disputes before the Occupational Safety and Health Administration (OSHA), Chemical Safety Board, Mine Safety and Health Administration (MSHA), and OSHA state plan departments.

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North America

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