

Rulemaking Exceptions

Administrative Law

Penn State Dickinson Law

February 12, 2026

Rulemaking exceptions

5 U.S.C. § 553

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.

Two kinds of “good cause” exceptions

Interim Final Rules

- agency invokes good cause, issues a rule that takes effect immediately, and then holds a post-promulgation comment period.
- if persuaded by any of the comments, agency amends rule in light of them.

Direct Final Rules

- agency promulgates what it deems a routine or noncontroversial rule directly, without prior notice, but establishes time period in which it will accept comments.
- if no adverse comments received, rule takes effect “as-is.” If agency receives substantial adverse comments, it withdraws rule and proceeds with notice and comment process.

Distinguishing Legislative and Non-legislative rules

Attorney General's Manual on the APA:

Substantive rules—*rules, other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute Such rules have the force and effect of law.*

Interpretative rules—*rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.*

General statements of policy—*statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.*

Is it a legislative rule?

legislative rule or **procedural rule?**

Air Transport Ass'n

legislative rule or **interpretative rule?**

Am. Mining Congress

Hector

Syncor

legislative rule or **general statement of policy?**

PG&E

Community Nutrition

US Telephone Ass'n

American Mining Congress

Mine Accident, Injury and Illness Report		U.S. Department of Labor		Mine Safety and Health Administration	
● Section A— Identification Data			Approved for Use Through September 30, 2002; OMB Number 1219-0007		
MSHA ID Number	Contractor ID	Report Category	<input type="checkbox"/> Check here if report pertains to contractor.		
		<input type="checkbox"/> Metal/Nonmetal Mining	<input type="checkbox"/> Coal Mining		
Mine Name	Company Name				
● Section B— Complete for Each Reportable Accident Immediately Reported to MSHA					

30 CFR §50.20

The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§50.20-1 through 50.20-7. If an occupational illness is **diagnosed** as being one of those listed in §50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in §§50.10

Am. Mining Cong. v. Mine Safety & Health Admin.

Diagnosing lung disease

Simple Silicosis



normal chest x-ray



simple silicosis

The legal effects test

Am. Mining Cong. v. Mine Safety & Health Admin.,
995 F.2d 1106, 1112 (D.C. Cir. 1993)

“[I]nsofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has ‘legal effect’, which in turn is best ascertained by asking (1) whether 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, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.”

Legislative v. Interpretative

The test from American Mining Congress

[I]nsofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has “legal effect,” which in turn is best ascertained by asking (1) whether 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, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Hoctor v. USDA: cast of characters

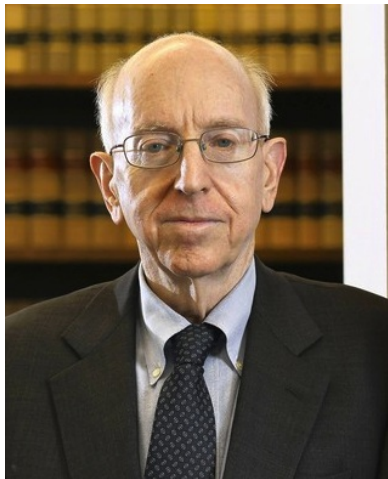


Figure 1: Judge Richard Posner



Figure 2: A liger

Interpretative or Legislative Rule?

9 C.F.R. § 3.125(a)

“the facility [housing the animals] must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.”

The Department issued an internal memorandum addressed to its force of inspectors in which it said that all “dangerous animals,” defined as including, among members of the cat family, lions, tigers, and leopards, must be inside a perimeter fence at least eight feet high.

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Rulemaking Revisited

5 U.S.C. §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 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 U.S.C. §551(5)

“rule making” means agency process for formulating, amending, or repealing a rule;

Rulemaking Exceptions: Policy Statements; Good Cause

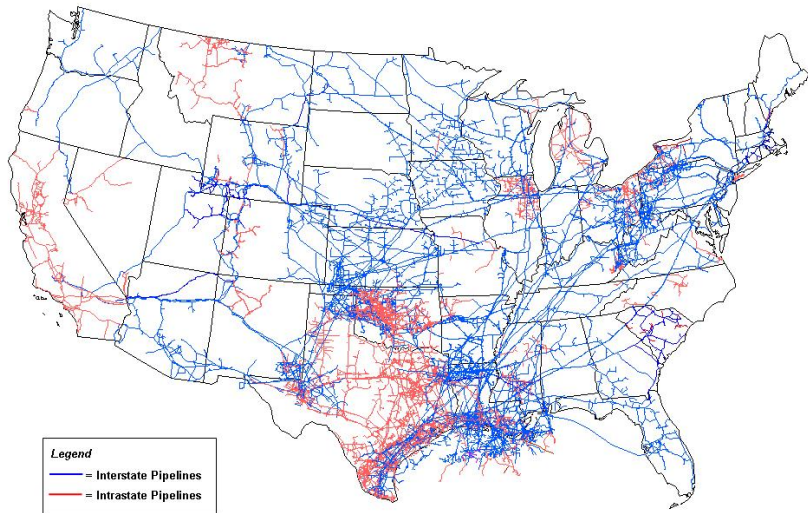
Administrative Law

Penn State Dickinson Law

March 3, 2026

Pacific Gas and Electric Company

Natural Gas Lines in the United States



Source: Energy Information Administration, Office of Oil & Gas, Natural Gas Division, Gas Transportation Information System

Legislative and Non-legislative rules

interpretative rule	general statement of policy	rule of agency organization, procedure, or practice	legislative rule
Amer. Mining Cong.	PG&E Young (diss.)	Air Transport Ass'n (diss.)	Air Transport Ass'n (maj.) Hoctor Syncor Young (maj.) U.S. Telephone

U.S. Telephone Ass'n v. FCC: FCC's penalty schedule

For Educational Use Only

In the Matter of Standards for Assessing Forfeitures, 6 FCC Rcd. 4695 (1991)

6 FCC Rcd. 4695 (F.C.C.), 69 Rad. Reg. 2d (P & F) 823, 6 F.C.C.R. 4695, 1991 WL 643088

Federal Communications Commission (F.C.C.)
Policy Statement

IN THE MATTER OF STANDARDS FOR ASSESSING FORFEITURES

FCC 91-217
Adopted: July 11, 1991
Released: August 1, 1991

*4697 APPENDIX

STANDARDS FOR ASSESSING FCC FORFEITURES

I. BASE AMOUNTS FOR SECTION 503 FORFEITURES

Violation	% of Stat. Max. ¹	BC/CABLE (\$25,000)	CC (\$100,000)	Other (\$10,000)
Misrepresentation/lack of candor	80%	20,000	80,000	8,000
Failure to comply with prescribed	80%	20,000	80,000	8,000

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Unauthorized emissions	50%	12,500	50,000	5,000
Using unauthorized frequency	50%	12,500	50,000	5,000
EBS equipment not installed or operational	50%	12,500	n.a.	n.a.
Transmission of indecent/obscene material	50%	12,500	n.a.	5,000
Violation of broadcast EEO rules	50%	12,500	n.a.	n.a.
Violation of political rules: reasonable access, lowest unit charge, equal opportunities and discrimination	50%	12,500	n.a.	n.a.
Unauthorized discontinuance of service	40%	10,000	40,000	4,000
Use of unauthorized equipment	40%	10,000	40,000	4,000
Violation of children's television commercialization or programming requirements	40%	10,000	n.a.	n.a.