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A Brief Overview of Rulemaking and Judicial Review

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Summary

The Administrative Procedure Act (APA), which applies to all agencies of the federal government, 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 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. In addition, this report addresses the legal standards applicable to the repeal or amendment of existing rules.

There is substantial case law regarding APA procedures and agency rulemakings. This report summarizes both the procedural and substantive standards that reviewing courts use to discern whether agency rules have been validly promulgated, amended, or repealed. Additionally, the report highlights the numerous exceptions to the APA's general procedural requirements, including the "good cause" standard, and the rules regarding agency issuance of policy statements, interpretive rules, and rules of agency procedure.

This report also briefly addresses the requirements of presidential review of agency rulemaking under Executive Order 12866 and its successors, as well as the recently established requirement to offset costs under Executive Order 13771. The report does not, however, discuss 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.

Contents

Introduction 1
Types of Rulemaking 1
Informal/Notice-and-comment/Section 553 2
Formal 3
Hybrid 4
Direct Final 4
Negotiated 5
Exceptions to the APA's Section 553 Rulemaking Requirements 6
Wholly Exempt 6
Exceptions to the Notice-and-comment Procedures 6
Exceptions to the 30-Day Delayed Effective Date 9
Procedures for Amending or Repealing Rules 9
Delaying Implementation of Final Rules 10
Rulemaking Procedures and Requirements Imposed by Executive Order 11
Judicial Review of Agency Rulemaking 13
Arbitrary and Capricious Review Explained 14
Judicial Review of Rule Repeals or Other Changes in Agency Policy 15
Deference to Agency Statutory Interpretations 16

Contacts

Author Information 17

Introduction

The Administrative Procedure Act (APA), which applies to all executive branch and independent agencies,[1] prescribes procedures for agency rulemakings and adjudications, as well as standards for judicial review of final agency actions.[2] This report provides a brief overview of the APA's core rulemaking and judicial review provisions. After addressing the various methods through which agencies may promulgate rules, the report highlights the numerous exceptions to the APA's general procedural requirements, including the "good cause" standard, and the rules regarding agency issuance of policy statements, interpretive rules, and rules of agency procedure. The report then briefly describes two executive orders that place additional rulemaking requirements on executive branch agencies. The report concludes with a discussion of judicial review of agency action, with a focus on the arbitrary and capricious test, and the review of rule repeals and other changes in agency policy.

Types of Rulemaking

The APA describes rulemaking as the "agency process for formulating, amending, or repealing a rule."[3] A "rule," for purposes of the statute, is defined expansively to include any "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] Rules that are issued in compliance with certain legal requirements, and that fall within the scope of authority delegated to the agency by Congress, have the force and effect of law.[5]

Federal agencies may promulgate rules through various methods. Although the notice-and-comment rulemaking procedures of § 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.[6] In addition, the APA contains whole or partial exceptions to the statute's otherwise applicable procedural rulemaking requirements.

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[1] 5 U.S.C. § 551(1). The APA broadly defines agency as "each of authority of the Government of the United states ...," but specifically exempts certain entities including "Congress" and the "courts of the United States." *Id*.

[2] *Id.* at 701-06; The APA also governs agency adjudications. *See* 5 U.S.C. §§ 555-57; 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* 42 U.S.C. § 7607(d).

[3] 5 U.S.C. § 551(5).

[4] *Id.* at § 551(4); For a non-legal discussion of federal rulemaking, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[5] Rules that carry the force and effect of law are known as legislative rules. These rules are to be distinguished from non-legislative rules, such as interpretive rules and policy statements, which lack the force and effect of law. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020, (D.C. Cir. 2000) ("Only 'legislative rules' have the force and effect of law ... A 'legislative rule' is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act."); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014) ("Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment.").

[6] For a discussion of the application of judicial deference to various types of agency action, see CRS Report R43203,

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. § 553.[7] 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.[8] Although the APA sets the minimum degree of public participation the agency must permit, the legislative history of the APA suggests that "[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."[9]

The requirement under § 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*.[10] 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."[11] Generally speaking, the notice requirement of § 553 is satisfied when the agency "affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[12]

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."[13] 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.[14]

Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes, by Daniel T. Shedd and Todd Garvey, at 9-10.

[7] 5 U.S.C. § 553.

[8] *Id.* at § 553 (b)-(c).

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

[10] 5 U.S.C. § 553(b). Such publication, however, is not strictly required where interested parties are identified and have "actual notice." *Id.* Other exceptions are discussed *infra. See* "Exceptions to the APA's Section 553 Rulemaking Requirements."

[11] *Id.* at § 553(b)(1)-(3).

[12] *See, e.g.*, Forester v. CPSC, 559 F.2d 774, 787 (D.C. Cir. 1977).

[13] 5 U.S.C. § 553(c).

[14] *See* N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 770 (4th Cir. 2012) ("Our conclusion that the Department did not provide a meaningful opportunity for comment further is supported by the exceedingly short duration of the comment period. Although the APA has not prescribed a minimum number of days necessary to allow for adequate comment, based on the important interests underlying these requirements ... the instances actually warranting a 10-day comment period will be rare."). 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).

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.[15] 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."[16] The agency is not required to include in the final rule a response to every comment received. Instead, the agency is obligated only to respond to what the courts have characterized as "significant" comments.[17] 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.[18]

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 § 556 and § 557 apply.[19] 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."[20]

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."[21] 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."[22] Formal rulemaking procedures also prohibit ex parte communications between interested persons outside the agency and agency officials involved in the rulemaking process.[23] 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."[24]

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[15] 5 U.S.C. § 553(c).

[16] *APA Legislative History*, *supra* note 9, at 225. 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. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 376 (4th ed. 2006).

[17] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). At least one court has described "significant comments" as "those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992).

[18] The APA does, however, create three exceptions (discussed *infra*) to the 30-day advanced publication requirement. 5 U.S.C. § 553(d)(1)-(3).

[19] *Id.* § 553(c).

[20] United States v. Florida E. Coast Ry., 410 U.S. 224, 251 (1973).

[21] 5 U.S.C. § 556(d).

[22] *Id.* § 556(c)-(d).

[23] *Id.* § 557(d)(1).

[24] *Id.* § 556(d).

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.[25] 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.[26] These statutes generally create a rulemaking process with more flexibility than the formal rulemaking procedures under § 556 and § 557 and more public participation than informal rulemaking procedures under § 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.[27] Hybrid rulemaking is only required where expressly directed by Congress, and such statutes were frequently enacted in the 1970s.[28]

Direct Final

Federal agencies have developed a process known as direct-final rulemaking in order to quickly and efficiently finalize rules for which the agency does not expect opposition.[29] 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.[30] 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.[31] 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

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[25] Federal courts may not impose procedural requirements beyond what Congress has provided for in the APA. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. 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.").

[26] *See, e.g.*, Magnuson-Moss Warranty Federal Trade Commission (FTC) Improvement Act, P.L. 93-637, 88 Stat 2183 (codified at 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).

[27] *See id.* at § 57a(c).

[28] LUBBERS, *supra* note 16, at 308-09.

[29] *See* Sierra Club v. EPA, 99 F.3d 1551, 1554, (10th Cir. 1996) ("A direct final rule becomes effective without further administrative action, unless adverse comments are received within the time limit specified in the proposed rule. If adverse comments are received, the [] Agency withdraws its direct final rule and issues a final rule that addresses those comments.").

[30] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATION 95-4, PROCEDURES FOR NONCONTROVERSIAL AND EXPEDITED RULEMAKING 1 (1995) http://www.law.fsu.edu/library/admin/acus/305954.html. An "adverse comment" is any comment that raises an "objection." *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1-2 (1995).

[31] *Id.*

justified under the "unnecessary" portion of the APA "good cause" exception, discussed *infra*, as well as the informal notice-and-comment rulemaking procedures.[32]

Negotiated

Negotiated rulemaking represents a supplement to traditional informal rulemaking procedures that allows agencies to consult with interested persons and interest groups at the developmental stages of the rulemaking process.[33] 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.[34] 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.[35]

Under the Negotiated Rulemaking Act (the Act),[36] the head of an agency is authorized to "establish a negotiated rulemaking committee to negotiate and develop a proposed rule if … the use of the negotiated rulemaking procedure is in the public interest."[37] The Act lays out a number of mandatory considerations for determining whether a negotiated rule would be in the public interest.[38] 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.[39] The negotiated rulemaking committee generally consists of a maximum of 25 members, with at least one agency representative.[40] The public must have an opportunity to comment on the proposal to create the committee and the proposed membership.[41]

If the committee achieves consensus on a proposed rule, the committee issues a report outlining the proposed rule.[42] If the committee does not achieve a consensus, the committee may issue a report with any negotiated positions on which it did reach consensus.[43] The report and the committee's conclusions are not binding on the agency. 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.... "[44]

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[32] *Id.* at 2.

[33] 5 U.S.C. § 561.

[34] *See* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33 (2000) (suggesting that negotiated rulemaking "has been remarkably successful in fulfilling its promise.") *But see*, Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 386 (2001) (asserting that negotiated rulemaking "neither saves time nor reduces litigation.").

[35] *See* 5 U.S.C. § 566.

[36] *Id*. at §§ 561-70.

[37] *Id*. at § 563(a).

[38] *Id*.

[39] *Id*. at §§ 564, 565.

[40] *Id*. at § 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.").

[41] *Id*. at § 564(c).

[42] *Id*. at § 566(f).

[43] *Id.*

[44] *See* KOCH, *supra* note 9 at 295; *see also* CRS Report RL32452, *Negotiated Rulemaking*, by Curtis W. Copeland.

Although agencies are authorized, at their discretion, to engage in negotiated rulemaking pursuant to the Act, in limited instances Congress requires an agency to comply with negotiated rulemaking procedures in issuing specific rules.[45]

Exceptions to the APA's Section 553 Rulemaking Requirements

The APA has carved out a number of exceptions to the default notice-and-comment rulemaking requirements. Depending on the substance or nature of the rule, some, all, or none of the § 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 § 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."[46] 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.[47] The military and foreign affairs exception is not just limited to rules issued by the Department of Defense or Department of State, and applies to qualifying actions of any agency.[48] The agency management exception only applies where the rule in question would not affect parties outside the agency.[49] 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."[50]

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."[51] Rules that have been promulgated through the notice-and-comment process have the force and effect of law and are known as legislative rules.[52] The exceptions to the notice-and-

[45] *See, e.g.,* 20 U.S.C. § 1098a ("[T]he Secretary shall prepare draft regulations implementing this title and shall submit such regulations to a negotiated rulemaking process.").

[46] 5 U.S.C. § 553(a).

[47] Hamlet v. United States, 63 F.3d 1097, 1105 (Fed. Cir. 1995).

[48] *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].

[49] *See* Stewart v. Smith, 673 F.2d 485, 498 (D.C. Cir. 1982) ("[A] rule may not be characterized as one of 'management' or 'personnel' if it has a substantial effect on persons outside the agency.").

[50] *See* Santa Clara v. Andrus, 572 F.2d 660, 674 (9th Cir. 1978) (noting that § 553 "manifests a clear legislative intent to permit *ad hoc* decision making in the distribution of public property.").

[51] 5 U.S.C. § 553(b)(A); For a discussion of legal issues associated with these types of agency pronouncements, see CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey.

[52] Legislative 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 48, at 30 n.3. A rule has also been defined as legislative if "in the absence of the rule there would not be an adequate

comment process for legislative rules depend on whether the agency has "good cause" to dispense with the notice-and comment procedures.[53]

Non-legislative Rules: Rules of Agency Procedure, Interpretative Rules, and General Statements of Policy

Agency procedural rules are exempt from the notice-and-comment requirements of § 553. Much like the "agency management" exception, agency procedural rules must have an intra-agency impact.[54] 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."[55] 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."[56] 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.[57]

The APA's notice-and-comment requirements also do not apply to interpretive rules and general statements of policy.[58] These rules are generally referred to as non-legislative rules, in that they do not carry the force and effect of law.[59] 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 what can be the lengthy and burdensome notice-and-comment process.[60]

An interpretive rule is generally characterized as a rule in which an agency announces its interpretation of a statute in a way that "only reminds affected parties of existing duties."[61] These rules allow agencies "to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."[62] Interpretive rules do not "effect[] a substantive change in the regulations."[63] General statements of policy are "statements issued by an agency to advise the

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legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

[53] 5 U.S.C. § 553(b)(B).

[54] Pickus v. United States Bd. 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.").

[55] *Id.* at 1113-14.

[56] *Id*. at 1114.

[57] Rules of "agency organization, procedure, or practice" are only exempt from the notice and comment "subsection" of § 553. 5 U.S.C. § 553(b)(3)(A).

[58] *Id.*

[59] 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.").

[60] KOCH, *supra* note 9, at 268-269.

[61] Gen. 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 48, at 30.

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

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

public prospectively of the manner in which the agency proposes to exercise a discretionary power."[64] These statements provide agencies with the opportunity to announce their "tentative intentions for the future" in a non-binding manner.[65]

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.[66] 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."[67]

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 as publication and public availability provisions.[68] 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*.[69]

Good Cause

Section 553(b)(B) specifically authorizes federal agencies to dispense with the APA's requirements for notice-and-comment under certain circumstances.[70] 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."[71] Each of these three terms or phrases has a specific meaning.[72] 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.[73] Courts, however, have traditionally held that these exceptions will be "narrowly construed and reluctantly countenanced."[74] 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."[75]

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[64] AG MANUAL, *supra* note 48, at 30 n.3.

[65] Pacific Gas and Elec. Co. v. Fed. Power Comm., 506 F.2d 33, 38 (D.C. Cir. 1974).

[66] *See* AG MANUAL, *supra* note 48, at 30.

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

[68] 5 U.S.C. § 552(a).

[69] *Id.* at §§ 553(e), 552(a)(1)(D), 552(a)(2)B).

[70] For a legal discussion of the "good cause" exception, see CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole.

[71] 5 U.S.C. § 553(b)(B).

[72] *APA Legislative History*, *supra* note 9, at 200.

[73] ACUS Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements* (1983) at 1.

[74] Am. Fed. of Gov't Emp. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting N.J. v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

[75] Action on Smoking and Health v. Civil Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983); *see also* Nat. Res. Def. Council v. Evans, 316 F.3d 904, 906 (9th Cir. 2003) (stating that "good cause requires some showing of exigency

A common use of the good cause exception is in the issuance of interim final rules.[76] 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.[77] In issuing the rule, the agency generally reserves the right to modify the rule through a post-promulgation comment period. However, agencies must assert a valid "good cause" exception in issuing any interim final rule.[78] Unlike non-legislative rules, interim final rules are considered final rules that carry the force and effect of law.[79]

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."[80] 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,"[81] these rules are also excused from the APA's 30-day delayed effective date requirement.[82] 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."[83] Moreover, as noted below, because the repeal of a rule, either in whole or in part, often amounts to the removal of a "restriction," such an action may be exempt from the delayed effective date requirement.[84] Rules that qualify for any of these established exceptions may be considered effective upon the publication of the final rule.

Procedures for Amending or Repealing Rules

Agencies are generally empowered to amend or repeal existing rules that were issued pursuant to discretionary authority.[85] In order to do so, however, the agency must comply with the default

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beyond generic complexity of data collection and time constraints").

[76] 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).

[77] 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).

[78] *See* Coalition for Parity v. Sebelius, 709 F. Supp. 2d 10, 19-24 (D.D.C. 2010).

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

[80] *APA Legislative History*, *supra* note 9, at 201.

[81] Agencies must include an explanation of the reasons for invoking the good cause exemption. 5 U.S.C. § 553(d)(3) ("[F]or good cause found and published with the rule.")

[82] *Id.* at § 553(d)(3).

[83] *Id.* at § 553(d)(1).

[84] *See infra* "Procedures for Amending or Repealing Rules."

[85] Encino Motorcars, LLC v. Navarro, --- U.S. ---, 136 S. Ct. 2217, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). An agency may not be permitted to repeal rules that are mandated either by statute or judicial order as such actions would not be "in accordance with law." 5 U.S.C. § 706 ("The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law ..."). This section addresses only the procedural requirements for repealing a rule. The substantive standards for judicial review of such repeals are discussed *infra*. *See* "Judicial Review of Rule

requirements of the APA, which defines "rulemaking" to be the "process for formulating, *amending*, or *repealing* a rule."[86] Therefore, in order to amend or repeal an existing legislative rule, an agency generally must comply with the same notice-and-comment rulemaking procedures, outlined in § 553 of the APA, that governed the original promulgation of the rule.[87] In cases where a statute specifically requires alternative procedures for the initial promulgation of a specific legislative rule, the agency may be required to engage in those same procedures to amend or repeal that rule.[88]

Rule repeals, which are often deregulatory in nature, may be excused from the APA's delayed effective date requirement if they are deemed to "relieve a restriction."[89] As previously noted, the APA requires that a rule may not take effect until 30 days after the date of publication of the final rule.[90] That requirement, however, is subject to various exceptions, including when an agency finds that there is "good cause" for the rule to take immediate effect, or where the rule "grants or recognizes an exemption or relieves a restriction."[91] It would therefore appear that although an agency is generally required to comply with the notice-and-comment requirements of § 553 in repealing a rule, to the extent the repeal removes a previously existing requirement on regulated entities, the rule could be given immediate effect upon publication of the final repeal.[92]

Policy statements, interpretive rules, agency rules of procedure, and other informal agency pronouncements that were not subject to notice-and-comment during their initial promulgation and that lack the force and effect of law may be altered immediately and without public participation.[93] Even long-standing agency positions that have been implemented through non-legislative rules may generally be reversed without compliance with notice-and-comment procedures.[94]

Delaying Implementation of Final Rules

An agency generally may not simply suspend the effectiveness of an existing rule.[95] However, agencies have previously implemented temporary delays of new rules that have been published as

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Repeals or Other Changes in Agency Policy."

[86] 5 U.S.C. § 551(5) (emphasis added).

[87] *See id.* at § 553 (establishing default notice and comment requirements for "rulemaking").

[88] This would be the case if the statute establishing alternative procedures either explicitly required such procedures or incorporated by reference the APA definition of "rule" or "rulemaking," which would arguably ensure that any reference to "rulemaking" in the statute would cover not only the initial issuance of the rule, but also the process of "amending, or repealing a rule." *Id.* at § 551(5). *See, e.g.*, 20 U.S.C. § 6571 (requiring the Department of Education to issue certain rules through negotiated rulemaking).

[89] *Id.* at § 553(d)(1).

[90] *Id.* at (d).

[91] *Id.* at (d)(1)-(3).

[92] An agency action that repeals an *exemption* would not, however, be permitted to take effect immediately. See Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288, 1292 (D.D.C. 1973).

[93] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1206 (2015) (holding that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."); *See, e.g.*, U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDU., *Dear Colleague Letter* (Feb. 22, 2017), http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf (immediately revoking previously issued guidance).

[94] *Perez*, 135 S. Ct. at 1206-07.

[95] An agency may, however, postpone the effectiveness of a rule that is the subject of a pending legal challenge. 5 U.S.C. § 705 ("When an agency finds that justice so requires, it may postpone the effective date of action taken by it,

final rules but, often due to the 30-day delayed effective date requirement, have not yet taken effect.[96] These delays frequently occur during the early days of a new presidential Administration and have generally been implemented without providing the public with notice or an opportunity to comment.[97] For example, the last three Presidents have directed agencies to delay the effective dates of all finalized but not yet effective rules by 60 days in order to provide the new Administration with time to review the rule.[98]

Whether agencies may postpone the effective date of a finalized rule that has not yet taken effect without first engaging in notice-and-comment is a legal question that has not been definitively resolved. Despite the uncertainty associated with agency authority in this area, and perhaps because such delays are typically short in duration, agencies have generally been successful in implementing these delays without notice-and-comment.[99] Nevertheless, some federal courts have suggested that such a delay could amount to a substantive amendment to the rule and thus cannot be implemented without first engaging in the notice-and-comment process.[100] These cases have similarly rejected claims that a delay created as a result of a presidential transition qualifies for the good cause exception.[101] It should be noted that courts have been more willing to permit agencies to delay, without notice-and-comment, the effective date of a rule that is subject to a pending legal challenge.[102] This acceptance is likely due to language in the APA providing that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[103]

Rulemaking Procedures and Requirements Imposed by Executive Order

Recent Presidents, through executive order, have also imposed a number of non-statutory requirements on the executive branch rulemaking process. Two such orders include those relating to centralized rulemaking review and a new executive order issued by President Trump requiring agencies to offset costs of new rules by repealing existing rules. Both executive orders apply only to executive branch agencies and do not cover independent agencies.[104]

A series of executive orders, beginning with those issued by President Reagan, have established a process by which the White House has an opportunity to review and clear proposed regulatory

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pending judicial review."

[96] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-370R, DELAY OF EFFECTIVE DATES OF FINAL RULES SUBJECT TO ADMINISTRATION'S JANUARY 20, 2001, MEMORANDUM (2002).

[97] *Id*.

[98] See CRS Insight IN10611, *Can a New Administration Undo a Previous Administration's Regulations?*, by Maeve P. Carey (discussing presidential regulatory postponements).

[99] CRS Legal Sidebar WSLG1719, *What Can the New President Do About the Effective Dates of Pending Regulations?*, by Todd Garvey.

[100] *See* Nat. Res. Def. Council v Abraham, 355 F. 3d 179, 204-206 (2d Cir. 2004); Nat. Res. Def. Council v. EPA, 683 F.2d 752, 765 (3d Cir. 1982).

[101] *Abraham*, 355 F.3d at 205-06.

[102] *See, e.g.*, Sierra Club v. Jackson, 833 F. Supp. 2d 11, 28-9 (D.D.C. 2012).

[103] 5 U.S.C. § 705.

[104] Independent agencies may voluntarily comply with presidential orders relating to the rulemaking process. *See* Exec. Order No. 12866 § 3 (1993) (defining "agency" to exclude "independent regulatory agencies"); Exec. Order No. 13579 (2011) (encouraging independent regulatory agencies to comply with rulemaking review orders).

actions of federal agencies.[105] Under these orders, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) reviews "significant" regulatory actions at both the proposed and final rule stage.[106] An agency is prohibited, "except to the extent required by law," from issuing a rule while OIRA review is pending.[107] In addition, these orders direct agencies to perform a cost-benefit analysis for certain regulatory actions and "adopt a regulation only upon a reasoned determination that the benefits" of the rule "justify its costs."[108]

Executive Order 13771 (Order), recently issued by President Trump, requires agencies to offset the costs of any new rule issued during fiscal year 2017 by repealing existing rules.[109] The Order generally directs that "the total incremental cost of all new regulations, including repealed regulations ... shall be no greater than zero."[110] This regulatory cost cap is implemented by requiring that any costs resulting from new rules "shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."[111]

The Order, and the guidance issued by the OMB implementing the Order, establishes a number of general exceptions to the offset requirement. First, the Order applies only during fiscal year 2017.[112] Second, the Order applies to "significant" regulatory actions, a term defined generally as those that have an economic impact of $100 million or more, interfere with actions of other agencies, materially alter entitlements, or raise novel legal or policy issues.[113] Third, the Order explicitly exempts rules related to military, national security, or foreign affairs functions of the United States, rules of agency organization, and "any other category of regulations exempted by the Director."[114] Fourth, because the Order requires a regulatory offset "unless otherwise required by law," an agency may proceed with mandated rules "that need to be finalized in order to comply with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance."[115]

It should be noted that Executive Order 13771 does not, and cannot, permit an agency to dispense with statutorily imposed procedural requirements when repealing or amending rules in order to implement the Order's cost-offset requirement.[116] Any such alterations to agency rules must be made in compliance with the APA.[117]

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[105] *See, e.g.*, Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993); Exec. Order No. 13563, 75 Fed. Reg. 3821 (2011).

[106] Exec. Order No. 12866 §§ 3, 6 58 Fed. Reg. 51738, 51740 (defining "significant" regulatory actions).

[107] *Id*. at § 8.

[108] *Id*. at § 1(b).

[109] Exec. Order No. 13771, 82 Fed. Reg. 9339 (2017). The order is currently subject to legal challenge. *See* Compl. for Declar. and Inj. Relief, Public Citizen, Inc., v Trump, Case No 1:17-cv-00253 (D.D.C. Feb. 8, 2017).

[110] Exec. Order No. 13771 at § 2(b).

[111] *Id*. at § 2(c).

[112] *Id*. at §2 (establishing a "Regulatory Cap for Fiscal Year 2017").

[113] OMB, *Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs."* at 2 (Feb. 2, 2017) (hereinafter *OMB Guidance*), https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017.

[114] Exec. Order No. 13771 § 4.

[115] *OMB Guidance* at 5.

[116] Exec. Order No. 13771 § 2(c) ("Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.").

[117] *Id.*

Judicial Review of Agency Rulemaking

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action."[118] 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."[119] 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."[120]

The APA provides that courts may hold unlawful and set aside agency actions under a number of circumstances.[121] Specifically, the APA states:

> 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.[122]

This provision indicates that the type of judicial review may differ depending on whether the court is reviewing formal or informal rulemakings. Specifically, cases subject to § 556 and § 557 are subject to "substantial evidence" review, whereas other agency actions are subject to "arbitrary and capricious" review.[123] Congress has sometimes, however, required informal, notice-and-comment rulemakings to be reviewed under the substantial evidence test.[124] However, some have argued that the two standards are the same, and commentators have stated that "the

[118] Bowen v. Mich. Acad. of Family Phys. 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. Comm. Nutrition Inst., 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.*

[119] 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. *Id*. at § 702. This brief report does not discuss issues of standing, ripeness, finality of agency action, or exhaustion of administrative remedies.

[120] *Id*. at § 701(a); *see* Sackett v. EPA, 566 U.S. 120, 126-31 (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").

[121] 5 U.S.C. §§ 701-706.

[122] *Id*. at §706(2).

[123] Id. For further discussion of judicial review under the APA, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

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

substantial evidence and arbitrary and capricious tests have tended to converge" in judicial review of informal rulemaking.[125]

Arbitrary and Capricious Review Explained

The most common standard of review that courts apply in challenges to agency action is the "arbitrary and capricious" standard.[126] This "catch-all" review standard of the APA applies to factual determinations made during informal rulemaking proceedings such as notice-and-comment rulemaking and most other discretionary determinations an agency makes.[127] Given the broad scope of federal agency actions that are subject to this type of review, whether an agency decision is arbitrary and capricious is largely a fact-based and situation-specific question.[128]

The contours of "arbitrary and capricious" review were perhaps most clearly articulated in the Supreme Court's decision of *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*.[129] In *State Farm*, the Court explained that in applying this "narrow" standard of review, "a court is not to substitute its judgment for that of the agency."[130] Rather, a court should only invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for [the] action including a 'rational connection between the facts found and the choice made.'"[131] When reviewing that determination, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[132] In general, the Court noted that an agency decision is arbitrary and capricious:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[133]

Fundamentally, the arbitrary and capricious standard requires only that an agency demonstrate that it engaged in reasoned decisionmaking by providing an adequate explanation for its decision.[134] The agency must be able to provide the "essential facts upon which the administrative

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[125] *See* LUBBERS, *supra* note 16, 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 9, at 437-38. *But see* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763–64 (2008) ("[I]t is sometimes thought that review for substantial evidence is somewhat more searching.").

[126] 5 U.S.C. § 706(2)(A).

[127] *See* Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984).

[128] *See* Troy Corp. v. Browner, 120 F.3d 277, 284 (D.C. Cir. 1997) ("As always, of course, the question of sufficiency of an agency's stated reasons under the arbitrary and capricious review of the APA is fact-specific and record-specific.").

[129] 463 U.S. 29, 42-44 (1983).

[130] *Id*. at 43.

[131] *Id*. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

[132] *Id*. (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[133] *Id*. Courts and commentators often refer to this doctrine as "hard look" review. *See, e.g.*, Miles & Sunstein, *supra* note 125, at 763 ("In its seminal decision in *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*., the Court entrenched hard look review and clarified its foundations.").

[134] *State Farm*, 463 U.S. at 52 ("In this case, the agency's explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decision making.") (emphasis

decision was based" and explain what justifies the determination with actual evidence beyond a "conclusory statement."[135] An agency decision that is the product of "illogical" or inconsistent reasoning;[136] that fails to consider an important factor relevant to its action, such as the policy effects of its decision or vital aspects of the problem in the issue before it;[137] or that fails to consider "less restrictive, yet easily administered" regulatory alternatives,[138] will similarly fail the arbitrary and capricious test.

Judicial Review of Rule Repeals or Other Changes in Agency Policy

Agencies are generally accorded the flexibility to depart from previously established positions by altering or repealing rules or other agency pronouncements.[139] Administrative decisions are not "carved in stone," but rather vary on a nearly "continuing basis ... in response to changed factual circumstances, or a change in administrations."[140] Yet in executing a significant policy change or other reversal, the agency is required to comply with applicable APA procedural requirements.[141] Thus, in regard to amending or repealing rules, the agency generally may implement such a change only through notice-and-comment rulemaking.[142]

In addition to these procedural requirements, an agency rule that implements a policy change by amending or repealing an existing rule is also subject to arbitrary and capricious review.[143] Although the precise application of that review to an agency change in position is subject to some debate,[144] the Supreme Court has stated that judicial review is not heightened or more stringent simply because an agency's action alters its prior policy. Specifically, the Court has held that there is "no basis in the [APA] or in our opinions for a requirement that all agency change be subjected to more searching review" or that "every agency action representing a policy change

in original); Petroleum Commc'ns, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[135] United States v. Dierckman, 201 F.3d 915, 926 (7th Cir. 2000) (quoting Bagdonas v. Dep't of the Treasury, 93 F.3d 422, 426 (7th Cir. 1996)); Allied-Signal, Inc. v. Nuclear Reg. Comm'n, 988 F.2d 146, 152 (D.C. Cir. 1993).

[136] Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Labor Relations Auth., 470 F.3d 375, 380 (D.C. Cir. 2006).

[137] Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1124 (9th Cir. 2012).

[138] Cin. Bell Tel. Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995).

[139] *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2217, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

[140] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone."); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). *See also*, *State Farm*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances.").

[141] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1206 (2015) (holding that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

[142] *See supra* "Procedures for Amending or Repealing Rules."

[143] *State Farm*, 463 U.S. at 41.

[144] For example, the majority opinion in *Encino Motorcars, LLC v. Navarro* arguably applied a slightly more stringent review of an agency change in position by requiring the agency in question to provide a "more reasoned explanation for its decision to depart from its existing enforcement policy. --- U.S. ---, 136 S. Ct. 2117, 2126 (2016). Justice Ginsburg felt compelled to issue a concurring opinion clarifying that nothing in the majority opinion should be read as disturbing the "well-established" principle that "where an agency has departed from a prior position, there is no 'heightened standard' of arbitrary-and-capricious review." *Id.* at 2128 (Ginsburg, J., concurring). Justice Ginsburg further stated that "[i]ndustry reliance may spotlight the inadequacy of an agency's explanation. [] But reliance does not overwhelm good reasons for a policy change." *Id.* (citations omitted).

must be justified by reasons more substantial than those required to adopt a policy in the first instance."[145] Instead, arbitrary and capricious review requires only that the agency provide a "reasoned analysis for the change."[146]

The Supreme Court's 2009 decision of *FCC v. Fox Television Stations* established a series of more detailed, but not overly demanding, principles that elucidate the standard for judicial review of agency change.[147] First, an agency must "display awareness" that it is changing its position.[148] An agency action that departs from a prior policy without acknowledging the change, or that creates an "unexplained inconsistency" with prior policy is generally viewed as arbitrary and capricious. [149] Second, an agency "need not demonstrate ... that the reasons for the new policy are better than the reasons for the old one ..."[150] It is enough for the agency to show that there are "good reasons" for the change and that the "new policy is permissible under the statute."[151] Third, the court identified two scenarios in which an agency may be required to provide a "more detailed justification" for a change in policy: when the "new policy rests upon factual findings that contradict those which underlay its prior policy"; or where the previous policy has "engendered serious reliance interests that must be taken into account."[152] In each instance, the Court noted that it would be arbitrary and capricious to "ignore" or "disregard" such matters.[153]

The Court revisited the question of judicial review of agency change, and the principle of "serious reliance interests" specifically, in *Encino Motorcars, LLC v. Navarro*.[154] In that case, the Court held that a rule reflecting the agency's altered statutory interpretation was arbitrary and capricious because the agency failed to provide the required "reasoned explanation" for the change.[155] The Court stated that while a "summary discussion " of an agency's reasons for changing its position "may suffice in other circumstances," when there has been "decades" of "industry reliance" on a prior policy, an agency must present a "more reasoned explanation" for "why it deemed it necessary to overrule its previous position."[156] That requirement, the Court concluded, could not be met—especially when "serious reliance interests are at stake"—when an agency offers "almost no reasons at all" or only "conclusory statements" for its decision to change course.[157]

Deference to Agency Statutory Interpretations

The standard of H.R. 1 judicial review that concerns congressional delegations of legislative authority to administrative agencies addresses whether an agency action is "in excess of statutory

[145] FCC v. Fox Television Stations, 556 U.S. 502, 514 (2009).

[146] *State Farm*, 463 U.S. at 42.

[147] *Fox Television*, 556 U.S. at 515-16.

[148] *Id*. at 515.

[149] *Brand X*, 545 U.S. at 981.

[150] *Fox Television*, 556 U.S. at 515.

[151] *Id*.

[152] *Id*. at 515-16; The principle that an agency may be required to provide a "more detailed justification" when "serious reliance interests" are involved was further clarified in the Court's 2016 decision of *Encino Motorcars,* 136 S. Ct. 2117, 2125 (2016).

[153] *Fox Television*, 556 U.S. at 516.

[154] *Encino Motorcars*, 136 S. Ct. at 2126-27.

[155] *Id*. at 2127.

[156] *Id*. at 2126.

[157] *Id*. 2126-27 ("Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all.").

jurisdiction, authority, or limitations, or short of statutory right."[158] 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."[159] 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.[160] A detailed discussion of the types of deference that a court may accord to an agency's interpretation of a statutory provision is available in CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey.

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[158] 5 U.S.C. § 706(2)(C).

[159] FDA 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).

[160] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); LUBBERS, *supra* note 16, 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).