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1. [5 USCS § 553](#)

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5 USCS § 553

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United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 5. Administrative Procedure (Subchs. I — V) > Subchapter II. Administrative Procedure (§§ 551 — 559)

§ 553. Rule making

- (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
- (1) a military or foreign affairs function of the United States; or
 - (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
- (1) a statement of the time, place, and nature of public rule making proceedings;
 - (2) reference to the legal authority under which the rule is proposed; and
 - (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

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

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
 - (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [[5 USCS §§ 556](#) and [557](#)] apply instead of this subsection.
- (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
 - (2) interpretative rules and statements of policy; or
 - (3) as otherwise provided by the agency for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

History

HISTORY:

Added Sept. 6, 1966, [P. L. 89-554](#), § 1, [80 Stat. 383](#).

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Explanatory notes:

Other provisions:

Prior law and revision:

5 USCS § 553

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 1003	June 11, 1946, ch 324, §4, 60 Stat. 238 .

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In subsection (a)(1), the words “or naval” are omitted as included in “military”.

In subsection (b), the word “when” is substituted for “in any situation in which”.

In subsection (c), the words “for oral presentation” are substituted for “to present the same orally in any manner”. The words “sections 556 and 557 of this title apply instead of this subsection” are substituted for “the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection”.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Explanatory notes:

A former [5 USC § 553](#) was transferred by Act Sept. 6, 1966, which enacted [5 USCS §§ 101](#) et seq., and now appears as [7 USCS § 2245](#).

Other provisions:

Ex. Or. No. 12044 revoked. Ex. Or. No. 12044 of [Mar. 23, 1978, 43 Fed. Reg. 12661](#), formerly classified to this section, was revoked by § 10 of Ex. Or. No. 12291 of [Feb. 17, 1981, 46 Fed. Reg. 13193](#), which formerly appeared as [5 USCS § 601](#) note. Such Order provided for improving government regulations.

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Exemption from procedural rulemaking requirements in [5 USCS § 553](#) is not superseded by Job Training Partnership Act; § 1579(a) specifically incorporates entire APA, including exemption for rules concerning grants. [Los Angeles v. McLaughlin, 865 F.2d 1084, 1989 U.S. App. LEXIS 269 \(9th Cir. 1989\).](#)

Consideration of state law by Court of Veterans Appeals as one factor of many in defining “willful misconduct” for purpose of denying benefits for injury caused by petitioner’s willful misconduct in automotive injury was not “adoption” of state law but interpretation for purpose of [5 USCS § 553](#). [Yeoman v. West, 140 F.3d 1443, 1998 U.S. App. LEXIS 6757 \(Fed. Cir. 1998\).](#)

Although preamble to regulation was not legally binding because it was not issued in conformity with this section, ALJ was entitled to rely on regulatory preamble to provide understanding of scientific or medical issue because it explained scientific and medical basis for regulations that extended definition of pneumoconiosis. [Peabody Coal Co. v. Dir., Office of Workers' Comp. Programs, 746 F.3d 1119, 2014 U.S. App. LEXIS 5996 \(9th Cir. 2014\).](#)

Government failed to comply with procedural requirements of both Magnuson-Stevens Act, [16 USCS §§ 1801](#) et seq. and Administrative Procedures Act, specifically [5 USCS § 553](#), in enacting regulations limiting number of days at sea (DAS) for commercial fishing vessels; but, even if government lacked power to insert DAS cap using rulemaking authority in [16 USCS § 1855\(d\)](#), it was permitted to make same alteration using interim rulemaking authority in § 1855(c); group’s claims were therefore constitutionally moot. [Associated Fisheries of Me., Inc. v. Evans, 350 F. Supp. 2d 247, 2004 U.S. Dist. LEXIS 25685 \(D. Me. 2004\).](#)

Taxpayers proceeding pro se in United States’ action seeking foreclosure of tax liens were not entitled to judgment on pleadings where [44 USCS § 1507](#) and [5 USCS § 553](#) did not preclude action; [26 USCS § 7403](#) clearly authorized action, and taxpayers failed to describe how § 1507 and § 553 might apply to their circumstances. [United States v Molen, 107 A.F.T.R.2d \(RIA\) 1905 \(ED Cal 2011\).](#)

Taxpayer’s challenge to summonses issued by Internal Revenue Service failed because [26 USCS § 7602](#) was act of Congress and not agency rule and, therefore, did not need to comply with [5 USCS § 553](#); further, whether Internal Revenue Code was enacted into positive law, under [1 USCS § 204\(a\)](#), had no bearing on validity of § 7602. [Bilan v United States, 108 A.F.T.R.2d \(RIA\) 5089 \(ND Cal 2011\).](#)

2. —Title 5

Administrative Procedure Act expressly contemplates that notice and opportunity to comment will be provided prior to agency decisions to repeal rule, since [5 USCS § 551\(5\)](#) defines “rulemaking” as agency process for formulating, amending, or repealing rule. [Consumer Energy Council v. Federal Energy Regulatory Com., 673 F.2d 425, 218 U.S. App. D.C. 34, Util. L. Rep. \(CCH\) ¶12532, 1982 U.S. App. LEXIS 22237 \(D.C. Cir. 1982\)](#), aff’d, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 1983-1 Trade Cas. \(CCH\) ¶165474, 1983 U.S. LEXIS 828 \(1983\)](#), aff’d, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 \(1983\)](#), aff’d, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 \(1983\)](#), cert. denied, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 \(1983\)](#), cert. denied, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 \(1983\).](#)

Federal Register notice requirement does not apply to federal criminal statutes because Congress is not agency within meaning of [5 USCS § 551](#). [United States v. Schiefen, 139 F.3d 638, 1998 U.S. App. LEXIS 5278 \(8th Cir. 1998\).](#)

FTC information gathering programs are not exempted from Administrative Procedure Act’s rulemaking requirements ([5 USCS § 553](#)), even though § 553 does not mention investigations and § 555 does include investigations as ancillary matters, since procedural requirements specified in § 555 do not conflict with those specified in § 553. [A. O. Smith Corp. v. Federal Trade Com., 396 F. Supp. 1125, 1975 U.S. Dist. LEXIS 13303 \(D.](#)

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[Del. 1975](#)), aff'd in part, vacated in part, [530 F.2d 515, 1976-1 Trade Cas. \(CCH\) ¶60730, 1976 U.S. App. LEXIS 12884 \(3d Cir. 1976\)](#).

Even though Department of Interior electrical power rate making function is exempt from requirements of [5 USCS § 553](#) under public property exemption, this does not effect agency's obligation under § 552 to publish description of procedures to be followed in rate making proceedings. [Northern California Power Agency v. Morton, 396 F. Supp. 1187, 5 Env'tl. L. Rep. 20719, 1975 U.S. Dist. LEXIS 13813 \(D.D.C. 1975\)](#), aff'd, [539 F.2d 243, 176 U.S. App. D.C. 241 \(D.C. Cir. 1976\)](#).

3. —Title 42

National Environmental Policy Act ([42 USCS §§ 4321](#) et seq.) cannot serve as basis for substantial revision of carefully constructed rulemaking procedural specifications of Administrative Procedure Act ([5 USCS § 553](#)); under Administrative Procedure Act ([5 USCS § 553](#)) and National Environmental Policy Act ([42 USCS §§ 4321](#) et seq.), Federal Court of Appeals cannot review and overturn Atomic Energy Commission rulemaking proceeding on basis of procedural devices employed, or not employed, by Commission, so long as Commission has employed at least statutory minima. [Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460, 11 Env't Rep. Cas. \(BNA\) 1439, 8 Env'tl. L. Rep. 20288, 1978 U.S. LEXIS 21 \(1978\)](#).

Even though petitioners contended that letters sent to Administrator of Environmental Protection Agency requesting reopening of hearings on air pollution standards was request for initiation of rulemaking under [5 USCS § 553\(e\)](#) and that Administrator's refusal was reviewable under Administrative Procedure Act, sole method of review of air pollution standards is pursuant to § 307 of Clean Air Act, [42 USCS § 1857h-5. Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 169 U.S. App. D.C. 195, 7 Env't Rep. Cas. \(BNA\) 2190, 5 Env'tl. L. Rep. 20481, 1975 U.S. App. LEXIS 13842 \(D.C. Cir. 1975\)](#).

Listing of site on National Priorities List by EPA was invalid where EPA did not obtain written authorization from state governor as required by [42 USCS § 9605. Harbor Gateway Commer. Prop. Owners' Ass'n v. United States EPA, 167 F.3d 602, 334 U.S. App. D.C. 365, 48 Env't Rep. Cas. \(BNA\) 1316, 29 Env'tl. L. Rep. 20584, 1999 U.S. App. LEXIS 2504 \(D.C. Cir. 1999\)](#).

While respondent Environmental Protection Agency argued [5 USCS § 553\(e\)](#), which gave interested person right to petition for issuance, amendment, or repeal of rule, authorized disapproval of state implementation plan, as argued by intervenor power company, that provision, and [5 USCS § 559](#), did not displace procedural requirements of Clean Air Act, [42 USCS §§ 7401](#) et seq., for revisions and error corrections. [Ala. Env'tl. Council v. Adm'r, United States EPA, 711 F.3d 1277, 24 Fla. L. Weekly Fed. C 98, 76 Env't Rep. Cas. \(BNA\) 1105, 43 Env'tl. L. Rep. 20055, 2013 U.S. App. LEXIS 4598 \(11th Cir. 2013\)](#).

Federal courts did not have jurisdiction to hear lawsuit filed by St. Tammany Parish, Louisiana, which alleged that Federal Emergency Management Agency (FEMA) violated Stafford Act, [42 USCS §§ 5170](#) and [5173](#), Federal Tort Claims Act, [28 USCS § 2674](#), and Administrative Procedure Act, [5 USCS § 553](#), when it refused to pay all costs incurred to dredge canals in Parish after Hurricane Katrina; FEMA officials acted within their discretion when they approved only part of funding Parish requested, and their decision was not subject to judicial review, pursuant to [42 USCS § 5148. St Tammany Parish v. FEMA, 2009 U.S. App. LEXIS 1887 \(5th Cir. Jan. 22, 2009\)](#), amended, [556 F.3d 307, 2009 U.S. App. LEXIS 3504 \(5th Cir. 2009\)](#).

Exemption under [5 USCS § 553](#) relating to agency action involving public property or contracts is limited to rulemaking procedures under § 553 and does not apply to activities not constituting administrative rulemaking, such as decision by Atomic Energy Commission to waive government's right to exclusive license on patent under Atomic Energy Act § 152 ([42 USCS § 2182](#)). [Nuclear Data, Inc. v. Atomic Energy Com., 344 F. Supp. 719, 174 U.S.P.Q. \(BNA\) 212, 1972 U.S. Dist. LEXIS 13733 \(N.D. Ill. 1972\)](#).

4. Congressional power to authorize rulemaking

Regulation promulgated under Executive Order 11246, which imposed affirmative action obligation on government contractors, comported with provisions of APA ([5 USCS § 553](#)) and was within contemplation of congressionally delegated authority. [United States v. Mississippi Power & Light Co.](#), 638 F.2d 899, 25 Empl. Prac. Dec. (CCH) ¶31628, 25 Fair Empl. Prac. Cas. (BNA) 250, 1981 U.S. App. LEXIS 19503 (5th Cir.), cert. denied, 454 U.S. 892, 102 S. Ct. 387, 70 L. Ed. 2d 206, 27 Empl. Prac. Dec. (CCH) ¶32146, 26 Fair Empl. Prac. Cas. (BNA) 1688, 1981 U.S. LEXIS 3911 (1981).

Congress may delegate to administrative officials details of regulations which are necessary to implement more general enactments and regulation which carries out congressional policy is valid. [Zanoviak v. Finch](#), 314 F. Supp. 1152, 1970 U.S. Dist. LEXIS 10731 (W.D. Pa. 1970).

Congress can delegate public policy determinations to administrative agencies, including National Association of Securities Dealers, national securities association registered under [15 USCS § 78o-3](#), making it congressionally created regulatory organization governing conduct in over-the-counter securities market. [Harwell v. Growth Programs, Inc.](#), 315 F. Supp. 1184, Fed. Sec. L. Rep. (CCH) ¶ 92694, Fed. Sec. L. Rep. (CCH) ¶92694, 1970 Trade Cas. (CCH) ¶73381, 1970 U.S. Dist. LEXIS 11431 (W.D. Tex. 1970), rev'd, 451 F.2d 240, 1972 Trade Cas. (CCH) ¶73967, 1971 U.S. App. LEXIS 7567 (5th Cir. 1971).

Rulemaking power delegated to president by Congress must be exercised in accordance with Administrative Procedure Act ([5 USCS §§ 551](#) et seq.). [Mast Industries, Inc. v. Regan](#), 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 (Ct. Int'l Trade 1984).

5. Agency power to promulgate rules

Power of administrative agency to administer congressionally created and funded program necessarily requires formulation of policy and making of rules to fill any gap left, implicitly or explicitly, by Congress. [Morton v. Ruiz](#), 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270, 1974 U.S. LEXIS 99 (1974), limited, [EPI Corp. v. Chater](#), 1996 U.S. App. LEXIS 22254 (6th Cir. July 30, 1996).

Absent constitutional constraints or extremely compelling circumstances, administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. [Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.](#), 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460, 11 Env't Rep. Cas. (BNA) 1439, 8 Env'tl. L. Rep. 20288, 1978 U.S. LEXIS 21 (1978).

Promulgation of interpretative guidelines is necessary function of agency which is entrusted with duty of administering statute. [American Newspaper Publishers Assn. v. Alexander](#), 294 F. Supp. 1100, 1 Empl. Prac. Dec. (CCH) ¶9927, 1 Fair Empl. Prac. Cas. (BNA) 447, 69 L.R.R.M. (BNA) 2703, 59 Lab. Cas. (CCH) ¶9170, 1968 U.S. Dist. LEXIS 8712 (D.D.C. 1968), vacated, 1 Empl. Prac. Dec. (CCH) ¶9960, 1 Fair Empl. Prac. Cas. (BNA) 703, 59 Lab. Cas. (CCH) ¶9203 (D.C. Cir. 1969), vacated, 70 L.R.R.M. (BNA) 3118.

6. —Particular cases

Agency's authority to proceed in complex area—such as railroad freight car service regulation by Interstate Commerce Commission—by means of rules of general application entails concomitant authority to provide exemption procedures in order to allow for special circumstances. [United States v. Allegheny-Ludlum Steel Corp.](#), 406 U.S. 742, 92 S. Ct. 1941, 32 L. Ed. 2d 453, 1972 U.S. LEXIS 122 (1972).

Review of 2002 authorization of Rhode Island hazardous waste program makes clear that Environmental Protection Agency (EPA) intended to use its legislative rulemaking authority in authorizing changes to Rhode Island's program; first, EPA subjected authorization to notice and comment, pursuant to [5 USCS § 553\(b\)\(A\)](#). [United States v.](#)

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Southern Union Co., 643 F. Supp. 2d 201, 2009 U.S. Dist. LEXIS 63619 (D.R.I. 2009), aff'd, 630 F.3d 17, 72 Env't Rep. Cas. (BNA) 1262, 41 Env't. L. Rep. 20054, 2010 U.S. App. LEXIS 25982 (1st Cir. 2010).

Administrative agency with rulemaking powers may promulgate in rulemaking proceeding pursuant to **5 USCS § 553** regulations whereby it will refuse to hear applications not conforming to criteria reasonably related to regulatory statute. *Pfizer, Inc. v. Richardson*, 434 F.2d 536, 1970 U.S. App. LEXIS 6667 (2d Cir. 1970).

Intervening transfer of authority from Cost of Living Council to Federal Energy Office, following CLC's notice of proposed deletion of state and local exemption from petroleum price controls, and FEO's subsequent republication of CLC's price control regulations containing exemption, did not terminate pending rule-making proceedings so as to negate FEO's authority to revoke exemption. *California by State Lands Com. v. Simon*, 504 F.2d 430, 1974 U.S. App. LEXIS 7471 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 1021, 95 S. Ct. 496, 42 L. Ed. 2d 294, 1974 U.S. LEXIS 3372 (1974).

Neither Administrative Procedure Act (**5 USCS §§ 551** et seq.) nor due process requires agency to promulgate review regulations for all agency subpoenas. *United States v. Exxon Corp.*, 628 F.2d 70, 202 U.S. App. D.C. 70, 1980 U.S. App. LEXIS 20228 (D.C. Cir.), cert. denied, 446 U.S. 964, 100 S. Ct. 2940, 64 L. Ed. 2d 823, 1980 U.S. LEXIS 1810 (1980).

Denial of applications for permanent alien certifications by Department of Labor under **8 USCS § 1182(a)(14)** for failure of applicants to comply with advertising requirements of implementing regulations (**20 CFR §§ 656.21** et seq.), will be affirmed, since regulations, including advertising requirement, are valid exercise of Secretary of Labor's inherent authority to promulgate rules governing administration of § 1182(a)(14) and were properly adopted pursuant to notice and comment requirements of **5 USCS § 553**. *Production Tool Corp. v. Employment & Training Admin., United States Dep't of Labor*, 688 F.2d 1161, 1982 U.S. App. LEXIS 25522 (7th Cir. 1982).

Issuance of "interpretation" is legitimate exercise of NASD's rulemaking authority. *Harwell v. Growth Programs, Inc.*, 315 F. Supp. 1184, Fed. Sec. L. Rep. (CCH) ¶ 92694, Fed. Sec. L. Rep. (CCH) ¶ 92694, 1970 Trade Cas. (CCH) ¶ 73381, 1970 U.S. Dist. LEXIS 11431 (W.D. Tex. 1970), rev'd, 451 F.2d 240, 1972 Trade Cas. (CCH) ¶ 73967, 1971 U.S. App. LEXIS 7567 (5th Cir. 1971).

Servicemember who was convicted of statutory rape before he enlisted in U.S. Army was properly convicted of violating UCMJ art. 134, **10 USCS § 934**, by failing to register as sex offender after he was transferred to fort in Texas; there was no merit to servicemember's argument that guidelines Attorney General promulgated under SORNA, **18 USCS § 2250**, did not apply to him because they were issued after he was convicted of statutory rape because Attorney General exercised his authority under **42 USCS §§ 16912** and **16913** when he promulgated guidelines in question and guidelines were promulgated according to notice and comment procedures required by **5 USCS § 553**. *United States v. Newton*, 74 M.J. 69, 2015 CAAF LEXIS 158 (C.A.A.F. Feb. 25, 2015).

7. New rules

It is not improper for agency to engage in new rulemaking to supersede defective rulemaking; District Court is without power to preclude such agency reconsideration. *Center for Science in Public Interest v. Regan*, 727 F.2d 1161, 234 U.S. App. D.C. 62, 1984 U.S. App. LEXIS 25734 (D.C. Cir. 1984).

Agency may engage in new rulemaking to supersede defective rulemaking and need not base change on new evidence or changed circumstances; however, agency which chooses to change previously held position must supply reasoned analysis of its decision including explanation for reversal supported by record and discussion of alternatives considered and why rejected. *Center for Science in Public Interest v. Department of Treasury*, 797 F.2d 995, 254 U.S. App. D.C. 328, 1986 U.S. App. LEXIS 27486 (D.C. Cir. 1986).

When Congress constrains agency to issue only those new regulations that are at least as protective as regulations already in force, agency's authority to issue new regulations is limited and agency must discuss how it has complied with such stringency requirements in promulgating new regulations. *Gray Panthers Advocacy Committee v.*

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Sullivan, 936 F.2d 1284, 290 U.S. App. D.C. 227, 1991 U.S. App. LEXIS 12344 (D.C. Cir. 1991), reh'g, en banc, denied, 1991 U.S. App. LEXIS 25414 (D.C. Cir. Sept. 12, 1991).

Example, appearing for first time in final rule, that is direct application of principles agency proposed, is not “new rule” for purpose of **5 USCS § 553**. Chemical Waste Management, Inc. v. United States EPA, 976 F.2d 2, 298 U.S. App. D.C. 54, 35 Env't Rep. Cas. (BNA) 1329, 23 Env'tl. L. Rep. 20024, 1992 U.S. App. LEXIS 23303 (D.C. Cir. 1992), cert. denied, 507 U.S. 1057, 113 S. Ct. 1961, 123 L. Ed. 2d 664, 36 Env't Rep. Cas. (BNA) 1376, 1993 U.S. LEXIS 3116 (1993).

8. Changes in rules, policies or standards

Federal agency, which does not possess inherent power to correct technical errors in regulations, must correct mistakes in regulations by complying with APA's procedural requirements. Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 344 U.S. App. D.C. 382, 51 Env't Rep. Cas. (BNA) 1961, 31 Env'tl. L. Rep. 20447, 2001 U.S. App. LEXIS 1187 (D.C. Cir. 2001).

If new agency policy represents significant departure from long established and consistent practice that substantially affects regulated industry, new policy is new substantive rule and agency is obliged to submit change for notice and comment. Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 151 Oil & Gas Rep. 20, 2001 U.S. App. LEXIS 477 (5th Cir. 2001).

Change of administrative standard may be applied retroactively unless it works upon party affected hardship that is out of proportion to public ends to be accomplished. Seneca Grape Juice Corp. v. United States, 367 F. Supp. 1396, 71 Cust. Ct. 131, C.D. 4486, 1973 Cust. Ct. LEXIS 3349, 1973 Cust. Ct. LEXIS 3865 (Cust. Ct. 1973).

Agency may not rescind outstanding regulations without strict adherence to process of reasoning on record with benefit of informed suggestions from those affected by proposed rescission or amendment, despite agency's conclusion that statutory basis for regulation is void. National Wildlife Federation v. Clark, 577 F. Supp. 825, 20 Env't Rep. Cas. (BNA) 1346, 14 Env'tl. L. Rep. 20227, 1984 U.S. Dist. LEXIS 20606 (D.D.C. 1984).

9. —Reinterpretation

In claim by native village corporation challenging Department of Interior's decision regarding corporation's selection of land, **5 USCS § 553** does not prevent retroactive application of Secretary's order reinterpreting previous order and, in fact, preserves existing rights pursuant to **43 USCS § 1613**. Seldovia Native Ass'n v. Lujan, 904 F.2d 1335, 1990 U.S. App. LEXIS 8615 (9th Cir. 1990).

Announcement of Department of Health and Human Services that 1988 regulation, which had theretofore been construed to strictly prohibit abortion counseling and referral in Title X programs, would thereafter be interpreted to permit doctors to counsel on abortion, effectively amended regulation to significantly alter its meaning as previously interpreted and therefore required notice and comment procedure. National Family Planning & Reproductive Health Ass'n v. Sullivan, 979 F.2d 227, 298 U.S. App. D.C. 288, 1992 U.S. App. LEXIS 28469 (D.C. Cir. 1992).

Because Environmental Protection Agency never previously adopted definitive interpretation of its Resource Conservation and Recovery Act and Hazardous and Solid Waste Amendments of 1984 (RCRA), **42 USCS §§ 6901 et seq.**, Subtitle C regulations, it remained free to change its mind and issue new interpretation of its own regulations without assuming notice and comment obligations. United States v. Magnesium Corp. of Am., 616 F.3d 1129, 71 Env't Rep. Cas. (BNA) 1641, 40 Env'tl. L. Rep. 20223, 2010 U.S. App. LEXIS 17137 (10th Cir. 2010).

Department of Interior's new interpretation of regulation governing acceptance of Federal Energy Regulatory Commission's tariff rate for determining value of oil transported through outer continental shelf pipelines, as requiring offshore oil lessees to petition FERC for affirmative statement of jurisdiction after longstanding policy of accepting all tariffs filed with FERC as “approved,” was new substantive rule rather than mere interpretation of rule,

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and, thus, was subject to notice and comment requirements of [5 USCS § 553](#). [Torch Operating Co. v. Babbitt](#), 172 F. Supp. 2d 113, 159 Oil & Gas Rep. 896, 2001 U.S. Dist. LEXIS 18417 (D.D.C. 2001).

Reinterpretation by Bureau of Prisons (BOP) of [18 USCS §§ 3621](#) and [3624](#), which resulted in determination that BOP could not designate inmate to community confinement center for more than 10 percent of underlying prison sentence, was not subject to notice and comment requirements of [5 USCS § 553](#); policy change was interpretive, not substantive, because it merely clarified [18 USCS § 3624\(c\)](#). [Cohn v. Fed. Bureau of Prisons](#), 302 F. Supp. 2d 267, 2004 U.S. Dist. LEXIS 1711 (S.D.N.Y. 2004).

As Medicare Provider Reimbursement Manual § 2534.5, concerning calculation of amount of atypical services exception, significantly altered Department of Health and Human Services' established interpretation of [42 USCS §§ 1395d\(a\)\(2\)](#) and [1395x\(v\)\(1\)\(A\)](#), Department violated Administrative Procedures Act by not following notice and comment procedures of [5 USCS § 553\(b\)\(1\)–\(3\)](#) before enacting § 2534.5. [Montefiore Med. Ctr. v. Leavitt](#), 578 F. Supp. 2d 129, 2008 U.S. Dist. LEXIS 75443 (D.D.C. 2008), dismissed, [2010 U.S. App. LEXIS 9972 \(D.C. Cir. May 14, 2010\)](#).

10. —Particular cases

Circuit Court erred when it found that U.S. Department of Labor's Wage and Hour Division violated APA when it issued administrator's interpretation declaring that mortgage loan officers did not qualify as "administrative employees" under FLSA without notice or opportunity for comment; court of appeals' decision in [Paralyzed Veterans of Am. v. D. C. Arena L. P.](#), 117 F.3d 579, 326 U.S. App. D.C. 25, 1997 U.S. App. LEXIS 16148, that agencies had to use APA's notice-and-comment procedures when they issued new interpretation of regulation that deviated significantly from one previously adopted improperly conflated differing purposes of [5 USCS §§ 551](#) and [553](#). [Perez v. Mortg. Bankers Ass'n](#), 575 U.S. 92, 135 S. Ct. 1199, 191 L. Ed. 2d 186, 25 Fla. L. Weekly Fed. S 127, 45 Env'tl. L. Rep. 20050, 165 Lab. Cas. (CCH) ¶136321, 24 Wage & Hour Cas. 2d (BNA) 529, 2015 U.S. LEXIS 1740 (2015).

Order of Federal Power Commission may not properly be set aside merely because Commission has on earlier occasion reached another result; administrative authorities must be permitted, consistently with obligation of due process, to adapt their rules and policies to demands of changing circumstances. [Permian Basin Area Rate Cases](#), 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312, 28 Oil & Gas Rep. 689, 75 Pub. Util. Rep. 3d PUR) 257, 1968 U.S. LEXIS 2917, reh'g denied, 392 U.S. 917, 88 S. Ct. 2050, 20 L. Ed. 2d 1379, 1968 U.S. LEXIS 1466 (1968).

Civil Aeronautics Board was bound by its past practices to consider intermediary forms of service as well as full or no service in its reevaluation of air traffic needs of two municipalities. [Maine v. Civil Aeronautics Bd.](#), 520 F.2d 1240, 13 Av. Cas. (CCH) ¶17977, 1975 U.S. App. LEXIS 13145 (1st Cir. 1975).

Interstate Commerce Commission may not change long established policy by pure fiat, with no explanation of why change is consistent with statute; failure to give reason for change of course renders administrative behavior arbitrary and capricious. [Illinois v. Interstate Commerce Com.](#), 722 F.2d 1341, 1983 U.S. App. LEXIS 14782 (7th Cir. 1983).

Because Resource Conservation and Recovery Act does not define type of change that qualifies as regulatory change under statute, court will defer to EPA's reasonable interpretation. [New Mexico v. Watkins](#), 969 F.2d 1122, 297 U.S. App. D.C. 122, 35 Env't Rep. Cas. (BNA) 1228, 22 Env'tl. L. Rep. 21262, 1992 U.S. App. LEXIS 15502 (D.C. Cir. 1992).

Repeal by Department of Veteran's Affairs of regulation requiring it to conform to statutes, regulations, and precedents of Department altered none of Department's obligations to follow statutes and regulations and was therefore not substantive change requiring notice and comment prior to appeal. [Paralyzed Veterans of Am. v. West](#), 138 F.3d 1434, 1998 U.S. App. LEXIS 4477 (Fed. Cir. 1998).

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Securities and Exchange Commission's enforcement program was policy statement, not rule, and thus was not subject to Notice and Comment requirements of Administrative Procedure Act. [Gonnella v. United States SEC, 954 F.3d 536, Fed. Sec. L. Rep. \(CCH\) ¶ 100784, 2020 U.S. App. LEXIS 10385 \(2d Cir. 2020\)](#).

New standard for permissible dumping material in historic remediation site was in fact rule rather than being merely advisory, since standard was binding and outcome determinative, and Environmental Protection Agency and Corps of Engineers thus improperly issued rule without complying with statutory notice and comment requirements. [United States Gypsum Co. v. Muszynski, 209 F. Supp. 2d 308, 32 Env'tl. L. Rep. 20826, 2002 U.S. Dist. LEXIS 12538 \(S.D.N.Y. 2002\)](#).

Social Security Administration's decision to no longer issue social security numbers to resident aliens was invalidated where agency failed to use notice and comment procedures before promulgating this significant revision of its regulations. [Iyengar v. Barnhart, 233 F. Supp. 2d 5, 2002 U.S. Dist. LEXIS 22668 \(D.D.C. 2002\)](#).

Amendment by Immigration and Naturalization Service (INS) in 1988 to [8 C.F.R. § 211.1](#), which admittedly granted additional authority to INS to impose fines against airlines when they transported undocumented aliens into United States, was void because INS did not provide notice and comment for change as required when change impacted upon substantive right or obligation of regulated parties. [Air India v. Brien, 261 F. Supp. 2d 134, 2003 U.S. Dist. LEXIS 6504 \(E.D.N.Y. 2003\)](#), reconsideration granted, [239 F.R.D. 306, 2006 U.S. Dist. LEXIS 93435 \(E.D.N.Y. 2006\)](#).

EPA violated Administrative Procedure Act by failing to provide sufficiently clear, cogent and reasoned explanation for its decision to promulgate broad new definition of "navigable waters" under Clean Water Act, [33 USCS §§ 1251 et seq.](#), and offering no indication of which cases it relied on or how it derived support from those cases, thus rendering definition arbitrary and capricious. [API v. Johnson, 541 F. Supp. 2d 165, 67 Env't Rep. Cas. \(BNA\) 1497, 38 Env'tl. L. Rep. 20081, 2008 U.S. Dist. LEXIS 24963 \(D.D.C. 2008\)](#).

Wood processor and trade associations were entitled to preliminary injunction to prevent EPA from requiring them to report emissions from stored wood under [42 USCS § 11023](#), part of Emergency Planning and Community Right To Know Act, because EPA had previously applied articles exemption of [40 CFR § 372.38\(b\)](#) to stored finished wood and then changed its application without notice and comment required under [5 USCS § 553\(c\)](#). [Creosote Council v. Johnson, 555 F. Supp. 2d 36, 67 Env't Rep. Cas. \(BNA\) 1766, 2008 U.S. Dist. LEXIS 39083 \(D.D.C. 2008\)](#).

Where regulations appear to be totally exempted under Food Security Act from notice and requirement provisions of APA and there does not appear to be any substantial change in course from 1983 regulations in 1987 regulations that might require further notice and comment, Secretary was not required to publish "changes." [Associated Milk Producers, Inc. v. United States, 22 Cl. Ct. 682, 1991 U.S. Cl. Ct. LEXIS 80 \(Cl. Ct. Mar. 15, 1991\)](#).

Board of Veterans' Appeals' decision to deny veteran additional non-service-connected pension benefits for dependents under [38 USCS § 1521\(c\)](#) for his 18-year-old son, who was attending state-approved home school, was vacated where Board relied in part on 2000 amendment to [38 C.F.R. § 3.57\(a\)\(1\)\(iii\)](#), which was substantive change in law because it established criteria for entitlement to benefits for children who were over 18 but Secretary of Veterans Affairs had not complied with notice-and-comment requirements of [5 USCS § 553](#) when adopting amendment. [Theiss v. Principi, 18 Vet. App. 204, 2004 U.S. App. Vet. Claims LEXIS 486 \(U.S. App. Vet. Cl. July 27, 2004\)](#).

FCC is not barred from considering propriety of fairness doctrine on ground that it is agency rule which cannot be modified or eliminated except through notice and comment procedures prescribed by [5 USCS § 553](#), since fairness doctrine was never promulgated as agency regulation pursuant to notice and comment rulemaking process, but was developed over period of time through statements of policy without notice and comment and through case-by-case adjudications. *Syracuse Peace Council v Television Station WTVH, FCC 87-266 (Adopted August 4, 1987)*.

11. Rule vs. investigative order

Investigation for purpose of determining whether rebates by exporting country on exportation of goods constitutes bounty or grant within meaning of Tariff Act ([19 USCS § 1303](#)) is in nature of factfinding activity rather than rulemaking under [5 USCS § 553](#). [American Express Co. v. United States, 472 F.2d 1050, 60 C.C.P.A. 86, C.A.D. 1087, 1973 CCPA LEXIS 428 \(C.C.P.A. 1973\)](#).

Order by Secretary of Agriculture (pursuant to authority under Packers & Stockyards Act, [7 USCS § 222](#)) in course of investigation of rates charged by state's stockyard marketing agencies, requiring that state's active marketing agencies file 8-page special report for year, was clearly investigative order, not adjudicatory or rule making process, and hence was not subject to procedures governing rulemaking (Administrative Procedure Act, [5 USCS § 553](#)); and because information required was of type normally kept by agencies, reports were not unduly burdensome. [United States v. W. H. Hodges & Co., 533 F.2d 276, 1976 U.S. App. LEXIS 8574 \(5th Cir. 1976\)](#).

Decision of Interstate Commerce Commission in rate structure investigation that "rate-break" rule which was previously mandatory in district be made voluntary was rulemaking and notice requirements of [5 USCS § 553](#) should have been met. [Chicago, B. & Q. R. Co. v. United States, 242 F. Supp. 414, 1965 U.S. Dist. LEXIS 7761 \(N.D. Ill. 1965\)](#), aff'd, [382 U.S. 422, 86 S. Ct. 616, 15 L. Ed. 2d 498, 1966 U.S. LEXIS 2423 \(1966\)](#).

12. Rules as having force and effect of law

In order for federal regulation to have force and effect of law, regulation must be "substantive" rule affecting individual rights and obligations, quasi-legislative authority to issue regulation must be rooted in grant of such power by Congress and subject to limitations which that body imposes, and promulgation of regulation must conform with any procedural requirements imposed by Congress in Administrative Procedure Act ([5 USCS § 553](#)). [Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208, 26 Cont. Cas. Fed. \(CCH\) ¶183181, 19 Empl. Prac. Dec. \(CCH\) ¶9121, 19 Fair Empl. Prac. Cas. \(BNA\) 475, 4 Media L. Rep. \(BNA\) 2441, 1979 U.S. LEXIS 34 \(1979\)](#).

Regulations enacted in accordance with Administrative Procedure Act ([5 USCS § 553](#)) have force and effect of law. [Stork v. United States, 278 F. Supp. 869, 1967 U.S. Dist. LEXIS 9164 \(S.D. Cal. 1967\)](#), aff'd, [430 F.2d 1104, 11 Av. Cas. \(CCH\) ¶17663, 1970 U.S. App. LEXIS 7973 \(9th Cir. 1970\)](#).

II. RULEMAKING VS. ADJUDICATORY PROCEEDING

A. In General

13. Generally

When federal administrative agency makes law as legislature would, it must follow rulemaking procedure prescribed in Administrative Procedure Act, and when it makes law as court would, it must follow adjudicative procedure prescribed in that act. [NLRB v. A. P. W. Products Co., 316 F.2d 899, 53 L.R.R.M. \(BNA\) 2055, 47 Lab. Cas. \(CCH\) ¶18221, 1963 U.S. App. LEXIS 5467 \(2d Cir. 1963\)](#).

Regulatory agencies may validly dispatch business by rulemaking rather than by individual adjudication. [Pacific & Southern Co. v. Federal Communications Com., 405 F.2d 1371, 132 U.S. App. D.C. 101, 1968 U.S. App. LEXIS 4549 \(D.C. Cir. 1968\)](#).

Notice and comment procedure pursuant to APA, although not required, is appropriate for legal decision made by agency. [Hecla Mining Co. v. United States, 909 F.2d 1371, 32 Env't Rep. Cas. \(BNA\) 1243, 21 Env'tl. L. Rep. 20256, 1990 U.S. App. LEXIS 12607 \(10th Cir. 1990\)](#).

Pursuant to [5 USCS § 553](#), agencies are held accountable to public through formal rulemaking process; where that thorough groundwork has already been completed, agency's later litigating positions can ordinarily be understood

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as resting on its earlier research and consideration. *Price v. Stevedoring Servs. of Am.*, 697 F.3d 820, 2013 A.M.C. 380, 2012 U.S. App. LEXIS 18568 (9th Cir. 2012).

If impact of ruling or decision affects entire class rather than particular members of group, adjudicatory proceeding is unnecessary and rulemaking process may be properly invoked. *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889, 1965 U.S. Dist. LEXIS 7745 (D.D.C. 1965).

Rulemaking is legislative rather than judicial process, and agency performing function need not proceed on evidence formally presented but may also act on basis of data contained in own files, information informally gained, or its own expertise, views, or opinions. *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889, 1965 U.S. Dist. LEXIS 7745 (D.D.C. 1965).

Marked change in industry practice making prior policy untenable seems to be ideally suited for rulemaking procedure of [5 USCS § 553](#), even where change is not in rule previously enunciated but in an important issue of application; however, under *SEC v Chenery Corp.* (1947) 332 US 194, 91 L Ed 1995, 67 S Ct 1575, court may generally not reverse agency for opting for “ad hoc litigation” instead of rulemaking. *Aacon Auto Transport, Inc. v. United States*, 345 F. Supp. 101, 1972 U.S. Dist. LEXIS 12884 (S.D.N.Y. 1972).

An agency may choose to announce rule, whether or not it is type of substantive regulation governed by [5 USCS § 553](#), in course of adjudication rather than by formal rule making, since there is no requirement that agency formulate its substantive rules by rule making process; case-by-case or adjudicative approach is permissible. *North American Van Lines, Inc. v. United States*, 412 F. Supp. 782, 1976 U.S. Dist. LEXIS 15494 (N.D. Ind. 1976).

14. Discretion of agency

Choice made by administrative agency between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in informed discretion of administrative agency, and that its action without first promulgating general rule may have retroactive effect is not necessarily fatal to its validity. *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995, 1947 U.S. LEXIS 2988, reh'g denied, 332 U.S. 783, 68 S. Ct. 26, 92 L. Ed. 367, 1947 U.S. LEXIS 1980 (1947).

Agency is not precluded from announcing new principles in adjudicative proceeding and choice between rulemaking and adjudication lies in first instance within agency's discretion. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S. Ct. 1757, 40 L. Ed. 2d 134, 85 L.R.R.M. (BNA) 2945, 73 Lab. Cas. (CCH) ¶14465, 1974 U.S. LEXIS 35 (1974), overruled in part, *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 102 S. Ct. 216, 70 L. Ed. 2d 323, 108 L.R.R.M. (BNA) 3105, 92 Lab. Cas. (CCH) ¶13098, 1981 U.S. LEXIS 146 (1981).

When federal administrative agency makes law as legislature would, it must follow rulemaking procedure prescribed in Administrative Procedure Act, and when it makes law as court would, it must follow adjudicative procedure prescribed in that act; whether to use one method of lawmaking or other is question of judgment, not of power. *NLRB v. A. P. W. Products Co.*, 316 F.2d 899, 53 L.R.R.M. (BNA) 2055, 47 Lab. Cas. (CCH) ¶18221, 1963 U.S. App. LEXIS 5467 (2d Cir. 1963).

Choice between rulemaking and adjudication lies in first instance within agency's discretion. *NLRB v. St. Francis Hospital*, 601 F.2d 404, 101 L.R.R.M. (BNA) 2943, 86 Lab. Cas. (CCH) ¶11464, 1979 U.S. App. LEXIS 13093 (9th Cir. 1979).

Decision whether to proceed by rulemaking or adjudication lies within Commission's discretion, regardless of whether decision may affect agency policy and have general prospective application. 749 F.2d 804, 242 U.S. App. D.C. 126.

Agency cannot articulate new principles through adjudication if it would be abuse of discretion or would circumvent APA's requirement; National Transportation Safety Board's good cause policy for late briefs is not abuse of

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discretion where Board uniformly applied policy for 6 years. [Union Flights, Inc. v. Administrator, Federal Aviation Admin., 957 F.2d 685, 1992 U.S. App. LEXIS 2170 \(9th Cir. 1992\)](#).

Secretary has broad discretion to formulate interpretations of regulations through process of adjudication rather than rulemaking; choice between rulemaking or adjudication as method of developing interpretations of statutory standards is one that lies primarily in informed discretion of administrative agency; novelty of interpretation does not convert agency's interpretive behavior into rulemaking. [New York Eye & Ear Infirmary v. Heckler, 594 F. Supp. 396, 1984 U.S. Dist. LEXIS 23644 \(S.D.N.Y. 1984\)](#).

It was not error for Small Business Administration to determine through adjudication, as opposed to rulemaking process, that employee with deferred income could not be considered when evaluating income requirements for eligibility as Historically Underutilized Business Zone small business concern; SBA did not go beyond its own regulations, and issues presented in adjudication were appropriate method for interpretation of SBA's regulations. [Aeolus Sys., LLC v. United States, 79 Fed. Cl. 1, 2007 U.S. Claims LEXIS 346 \(Fed. Cl. Oct. 31, 2007\)](#).

15. Hearings

Hearing requirements of [5 USCS § 554](#) do not apply to rulemaking, even where sharply contested issues of fact are involved. [Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 48-2 U.S. Tax Cas. \(CCH\) ¶9414, 1949 U.S. App. LEXIS 4272 \(9th Cir.\)](#), cert. denied, 338 U.S. 860, 70 S. Ct. 101, 94 L. Ed. 527, 1949 U.S. LEXIS 1816 (1949), reh'g denied, 339 U.S. 945, 70 S. Ct. 793, 94 L. Ed. 1360, 1950 U.S. LEXIS 2105 (1950).

Rule by Federal Aviation Agency that no person over age of 60 may serve as pilot on any aircraft while engaged in air carrier operations has character of legislative enactment carried out on administrative level, and each pilot affected is not entitled to adjudicatory hearing, even though his license may be modified or terminated pursuant to rule. [Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 1 Empl. Prac. Dec. \(CCH\) ¶19663, 9 Fair Empl. Prac. Cas. \(BNA\) 1027, 46 L.R.R.M. \(BNA\) 2022, 40 Lab. Cas. \(CCH\) ¶166459, 1960 U.S. App. LEXIS 4768 \(2d Cir. 1960\)](#), app. after remand, [286 F.2d 319, 9 Fair Empl. Prac. Cas. \(BNA\) 1031, 47 L.R.R.M. \(BNA\) 2571, 42 Lab. Cas. \(CCH\) ¶16785, 1961 U.S. App. LEXIS 5346 \(2d Cir. 1961\)](#).

Licensing pickup and delivery services in a particular area which determination is available to all other air carriers and air freight forwarders is function for which adversary hearing is not needed, since under such circumstances, proceeding is rule-making proceeding and not adjudication of competing carrier's rights. [Law Motor Freight, Inc. v. Civil Aeronautics Board, 364 F.2d 139, 65 Pub. Util. Rep. 3d \(PUR\) 423, 1966 U.S. App. LEXIS 5417 \(1st Cir. 1966\)](#), cert. denied, 387 U.S. 905, 87 S. Ct. 1683, 18 L. Ed. 2d 622, 1967 U.S. LEXIS 2788 (1967).

In determining whether hearing is required in administrative proceedings, classifications such as rule-making as distinguished from adjudication do not automatically foreclose right to evidentiary hearing; it is basic scope of proceeding rather than its classification that determines the right, including importance of issues before agency and kind of questions involved; if resulting administrative action, whether regarded as rule-making or otherwise, is individual in impact and condemnatory in purpose, or when issue presented possesses great substantive importance or is usually complex or difficult to resolve on basis of pleadings and argument, evidentiary hearing before final administrative action is appropriate, but if public hearing would appear unnecessary because of other available procedures or because only question of law without dispute on facts is presented, prior hearing may be dispensed with. [Appalachian Power Co. v. EPA, 477 F.2d 495, 5 Env't Rep. Cas. \(BNA\) 1222, 3 Env'tl. L. Rep. 20310, 1973 U.S. App. LEXIS 10573 \(4th Cir. 1973\)](#), disapproved, [Union Electric Co. v. EPA, 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474, 8 Env't Rep. Cas. \(BNA\) 2143, 6 Env'tl. L. Rep. 20570, 1976 U.S. LEXIS 108 \(1976\)](#).

Even though Bank Holding Company Act ([12 USCS § 1843](#)) does not include clause requiring that Federal Reserve Board determinations be "on record," this does not mean that informal rulemaking requirements of [5 USCS § 553](#) apply and provision for hearing may be satisfied by evidentiary submission in written form only, since determination of public benefits and adverse effects of permitting bank holding company to form mortgage lending subsidiary is

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essentially adjudicative in nature. [*Independent Bankers Asso. v. Board of Governors of Federal Reserve System*, 516 F.2d 1206, 170 U.S. App. D.C. 278, 1975 U.S. App. LEXIS 13397 \(D.C. Cir. 1975\)](#).

[5 USCS § 553](#) applies only to rulemaking and is therefore inapplicable to Nuclear Regulatory Commission licensing hearings. [*Union of Concerned Scientists v. United States Nuclear Regulatory Com.*, 920 F.2d 50, 287 U.S. App. D.C. 119, 118 Pub. Util. Rep. 4th \(PUR\) 512, 1990 U.S. App. LEXIS 20732 \(D.C. Cir. 1990\)](#).

Order of Interstate Commerce Commission redefining and extending commercial zone of city of Charleston, South Carolina, was proper exercise of commission's rule-making power and was not void because adjudicatory hearing thereon was not held. [*George A. Rehamn Co. v. United States*, 133 F. Supp. 668, 1955 U.S. Dist. LEXIS 3875 \(D.S.C. 1955\)](#).

16. —Evidentiary hearings

FCC could use rulemaking proceeding to make general rules regarding presunrise broadcasting by radio stations of various classes and was not required under Communications Act ([47 USCS § 316](#)) to grant each station evidentiary hearing where new policy is based upon general characteristics of industry; adjudicatory hearing serves important function only when agency bases decision on particular situation of individual parties. [*WBEN, Inc. v. United States*, 396 F.2d 601, 1968 U.S. App. LEXIS 6983 \(2d Cir.\)](#), cert. denied, 393 U.S. 914, 89 S. Ct. 240, 21 L. Ed. 2d 200 (1968).

When administrative agency develops general policy applicable on prospective basis, evidentiary hearing is unnecessary, even though policy questions are of special importance or complexity, and while court is not overly concerned with drawing bright line between adjudication and rule making, it will assure that procedures utilized assure due process of law. [*Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1974 U.S. App. LEXIS 6918 \(3d Cir. 1974\)](#), cert. denied, [422 U.S. 1026, 95 S. Ct. 2620, 45 L. Ed. 2d 684, 1975 U.S. LEXIS 2049 \(1975\)](#).

Agency is not allowed to conduct what is in fact adjudicative proceeding without giving affected parties opportunity for evidentiary hearing just by calling proceeding informal rulemaking. [*United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1985-2 Trade Cas. \(CCH\) ¶66704, 1985 U.S. App. LEXIS 31444 \(7th Cir. 1985\)](#).

B. Particular Agencies and Activities

17. Civil Aeronautics Board

Proceeding in which Civil Aeronautics Board issued policy statement regulation providing that only all-cargo carriers, and not combination carriers (carriers authorized to carry persons as well as property and mail) may provide "block space service" (sale of space on flights at wholesale rates when blocked or reserved by user on agreement to use specified amount of space) is properly rulemaking proceeding under [5 USCS § 553](#) and not adjudicative proceeding. [*American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 123 U.S. App. D.C. 310, 1966 U.S. App. LEXIS 7014 \(D.C. Cir.\)](#), cert. denied, 385 U.S. 843, 87 S. Ct. 73, 17 L. Ed. 2d 75, 1966 U.S. LEXIS 2775 (1966).

Proceeding by Civil Aeronautics Board in which it found that town was within city's pickup and delivery area so that all air carriers and air freight forwarders could operate surface transportation service between town and city's airport is rulemaking proceeding, even though competing truck line's authority was affected, and CAB properly complied with requirements of [5 USCS § 553](#). [*Law Motor Freight, Inc. v. Civil Aeronautics Board*, 364 F.2d 139, 65 Pub. Util. Rep. 3d \(PUR\) 423, 1966 U.S. App. LEXIS 5417 \(1st Cir. 1966\)](#), cert. denied, 387 U.S. 905, 87 S. Ct. 1683, 18 L. Ed. 2d 622, 1967 U.S. LEXIS 2788 (1967).

18. Energy and power

Federal Power Commission proceeding in which it adjusted natural gas price ceilings was review of previous rule setting price ceilings, and Commission was continuing to exercise its rule making authority and was not engaging in

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“adjudication” or “licensing” as defined in Administrative Procedure Act, [5 USCS § 551](#). [Mobil Oil Corp. v. Federal Power Com.](#), 469 F.2d 130, 152 U.S. App. D.C. 119, 44 Oil & Gas Rep. 124, Util. L. Rep. (CCH) ¶11346, 1972 U.S. App. LEXIS 7276 (D.C. Cir. 1972), cert. denied, 412 U.S. 931, 93 S. Ct. 2749, 37 L. Ed. 2d 159, 1973 U.S. LEXIS 2233 (1973).

Criteria of Nuclear Regulatory Commission, which would apply to only one thorium tailings site, is not improper under § 553; claim that “rule making” that potentially will apply only to one site is in effect “adjudication” cannot be sustained; licensing adjudication under § 554, pursuant to [42 USCS § 2239](#), does not require formal procedural protections of § 556 and 557. [Quivira Mining Co. v. United States Nuclear Regulatory Com.](#), 866 F.2d 1246, 29 Env't Rep. Cas. (BNA) 1055, 19 Env'tl. L. Rep. 20778, 1989 U.S. App. LEXIS 649 (10th Cir. 1989).

Federal Energy Regulatory Commission could interpret its enabling statute on case-by-case basis through exercise of its adjudicatory function and was not subject to Administrative Procedure Act's notice-and-comment procedures. [ANR Pipeline Co. v. Federal Energy Regulatory Com.](#), 870 F.2d 717, 276 U.S. App. D.C. 303, Util. L. Rep. (CCH) ¶13499, 1989 U.S. App. LEXIS 3625 (D.C. Cir. 1989).

Federal Energy Regulatory Commission's (FERC) interpretation of [18 C.F.R. § 11.2](#), specifically FERC Order No. 469, which established new methodology for assessing annual rental fees for hydropower projects occupying federal land using schedule published by Forest Service for so-called linear rights-of-way across National Forest System lands, improperly divorced regulation's text from both rulemaking process and underlying statutory scheme, making it plainly erroneous and inconsistent with regulation; moreover, FERC nowhere disputed fact that rental fees listed in its 2009 update were product of significant changes in Forest Service's methodology for valuing linear rights-of-way; because FERC previously approved and used old Forest Service methodology, its implicit acceptance of new methodology in 2009 Update marked change in its own regulations; for FERC to make such change, APA § 553 required notice-and-comment rulemaking, which FERC failed to provide. [City of Idaho Falls v. FERC](#), 629 F.3d 222, 393 U.S. App. D.C. 424, 2011 U.S. App. LEXIS 13 (D.C. Cir. 2011).

19. Federal Communications Commission

Development by Federal Communications Commission of nationwide master plan for television channel allocation constitutes rulemaking, even though plan adopted may be determinative of specific situations arising in future, since FCC would automatically dismiss all applications for licenses not conforming to overall plan. [Logansport Broadcasting Corp. v. United States](#), 210 F.2d 24, 93 U.S. App. D.C. 342, 1954 U.S. App. LEXIS 4581 (D.C. Cir. 1954).

Decision whether to proceed by rulemaking or adjudication lies within Commission's discretion, regardless of whether decision may affect agency policy and have general prospective application; Federal Communications Commission decision to issue declaratory ruling pre-empting state and local regulation of satellite master antenna television does not amount to abuse of discretion; to remand solely because Commission labeled action declaratory ruling would be to engage in empty formality where commission gave adequate notice and received comments. 749 F.2d 804, 242 U.S. App. D.C. 126.

FCC's interpretation of “substantial accordance” of base station construction with parameters specified in station authorization, which arose in context of adjudication of petitioners' applications for violation-finder's fee preference, and agency may announce new principles in adjudicative proceeding without holding notice and comment proceedings. [Cassell v. FCC](#), 154 F.3d 478, 332 U.S. App. D.C. 156, 1998 U.S. App. LEXIS 22092 (D.C. Cir. 1998).

FCC's 50% impermissible-relationship rule and 10-year bidding-credit repayment schedule were adopted without proper notice or comment, so they were vacated; but rescinding auctions of electromagnetic spectrum held under impermissible rules could seriously disrupt existing or planned phone service and negatively affect public interest implications. [Council Tree Communs., Inc. v. FCC](#), 619 F.3d 235, 2010 U.S. App. LEXIS 17667 (3d Cir. 2010), cert. denied, 563 U.S. 903, 131 S. Ct. 1784, 179 L. Ed. 2d 653, 2011 U.S. LEXIS 2468 (2011).

20. Federal Reserve System

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Legislative facts are those that affect industry as whole and agency may resolve legislative questions through rulemaking, but adjudicative facts are those that immediately affect only specific litigants and questions of adjudicative fact must be resolved on basis of evidentiary submissions of parties; thus, where bank holding company asked for determination as to whether it had controlling influence over subsidiary within meaning of [12 USCS § 1841](#), it raised disputed questions of adjudicative fact particular to its relationship with its subsidiary and is entitled to hearing. [Patagonia Corp. v. Board of Governors of Federal Reserve System, 517 F.2d 803, 1975 U.S. App. LEXIS 14631 \(9th Cir. 1975\)](#).

Federal reserve board statement, in connection with ruling on application for acquisition of industrial loan company, that institution which both offers NOW accounts and commercial loans is “bank” constitutes improper attempt to impose legislative policy by adjudicative order; court rejects contention that statement is interpretive rule and therefore exempt from rulemaking provisions of [5 USCS § 553](#) since statement involves significant policy change. [First Bancorporation v. Board of Governors of Federal Reserve System, 728 F.2d 434, 1984 U.S. App. LEXIS 25323 \(10th Cir. 1984\)](#).

Even though Federal Reserve Board Regulation G represents brand new rule in area not heretofore regulated, fact that Regulation G will have substantial and material impact on lenders’ business does not convert exercise of rulemaking power into quasi-judicial act or process. [Collateral Lenders Committee v. Board of Governors, 281 F. Supp. 899, Fed. Sec. L. Rep. \(CCH\) ¶ 92167, Fed. Sec. L. Rep. \(CCH\) ¶92167, 1968 U.S. Dist. LEXIS 10178 \(S.D.N.Y. 1968\)](#).

21. Interstate Commerce Commission/Surface Transportation Board

In case of good-faith exercise of administrative rulemaking authority, Interstate Commerce Commission in adopting new rules for determining geographic boundaries of commercial zones and terminal areas, is not obliged to proceed by adjudication, with all procedural formalities mandated by [5 USCS § 554](#), merely because its action affects carriers individually and in some cases adversely. [Short Haul Survival Committee v. United States, 572 F.2d 240, 1978 U.S. App. LEXIS 12127 \(9th Cir. 1978\)](#).

Hearing required in rate making proceedings by Interstate Commerce Act (49 USCS § 316(g)) is not equivalent of hearing for rules “made on record” under Administrative Procedure Act ([5 USCS § 553 \(c\)](#)), and in such circumstances Interstate Commerce Commission’s decision is product of informal rule-making rather than adjudication. [Food Marketing Institute v. Interstate Commerce Com., 587 F.2d 1285, 190 U.S. App. D.C. 388, 1978 U.S. App. LEXIS 8392 \(D.C. Cir. 1978\)](#).

Adjudication was not converted into informal rulemaking because Interstate Commerce Commission requested and entertained public comments pursuant to [5 USCS § 553](#). [General American Transp. Corp. v. ICC, 872 F.2d 1048, 277 U.S. App. D.C. 78, 1989 U.S. App. LEXIS 4985 \(D.C. Cir.\), reh’g denied, 883 F.2d 1029, 280 U.S. App. D.C. 85, 1989 U.S. App. LEXIS 9418 \(D.C. Cir. 1989\)](#), cert. denied, 493 U.S. 1069, 110 S. Ct. 1112, 107 L. Ed. 2d 1019, 1990 U.S. LEXIS 680 (1990).

Interstate Commerce Commission decision removing “truckload lot” restrictions from all carriers’ certificates then containing them could properly be made in rulemaking proceeding under [5 USCS § 553](#), and individual adjudicatory proceedings are not necessary. [Regular Common Carrier Conference v. United States, 307 F. Supp. 941, 1969 U.S. Dist. LEXIS 10858 \(D.D.C. 1969\)](#).

When Interstate Commerce Commission formulates licensing policy, Administrative Procedure Act does not bar it from employing procedural format most appropriate to task, and while Administrative Procedure Act may require adjudication for disposition of individual license applications, it permits rulemaking for declaration of prospective licensing criteria which will govern later licensing applications. [Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 6 Env’t Rep. Cas. \(BNA\) 1129, 1973 U.S. Dist. LEXIS 10553 \(D. Del. 1973\)](#).

22. Labor and employment

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Department of Labor discretion to announce rules and interpretation of statutes in course of adjudication does not insulate from judicial review new agency interpretations of statute (Labor Management Reporting and Disclosure Act) rendered in context of decision not to take enforcement action where plaintiff had standing, interpretation was final agency action, and challenge of interpretation was ripe for review. [Int'l Union, UAW v. Brock, 783 F.2d 237, 251 U.S. App. D.C. 239, 121 L.R.R.M. \(BNA\) 2685, 104 Lab. Cas. \(CCH\) ¶11808, 1986 U.S. App. LEXIS 22170 \(D.C. Cir. 1986\)](#).

Merit Systems Protection Board's new interpretation of [5 USCS § 7521](#) as requiring actual physical separation from employment as administrative law judge and not encompassing constructive removal was permissible and reasonable, but prior conflicting interpretation was codified in [5 C.F.R. § 1201.142](#), so overturning regulation through adjudication violated Administrative Procedure Act. [Tunik v. MSPB, 407 F.3d 1326, 2005 U.S. App. LEXIS 8241 \(Fed. Cir. 2005\)](#).

Department of Labor Bulletin requiring initiation of proceedings concerning coal mining company's potential responsibility for black lung benefits was not substantive "rule" falling outside administrative scheme of Black Lung Benefits Act, [30 U.S.C.S. §§ 901-945](#); Bulletin did not impose any liability on company or dispose of any claim on merits. [Arch Coal, Inc. v. Acosta, 888 F.3d 493, 435 U.S. App. D.C. 172, 48 Envtl. L. Rep. 20070, 2018 U.S. App. LEXIS 10719 \(D.C. Cir. 2018\)](#).

23. —National Labor Relations Board

National Labor Relations Board rule requiring employer to furnish union with list of names and addresses of employees who will be eligible to vote in representation election falls short of substance of rulemaking requirements of Administrative Procedure Act ([5 USCS § 553](#)), where (1) Board's adoption of this rule in adjudicatory proceeding was not applied to parties, but was given prospective effect only, (2) Board gave notice of its hearing involving rule to selected organizations only, instead of publishing in Federal Register notice of hearing and proposed rule, and (3) Board did not publish rule in Federal Register after rule was adopted. [NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709, 70 L.R.R.M. \(BNA\) 3345, 60 Lab. Cas. \(CCH\) ¶10032, 1969 U.S. LEXIS 3101 \(1969\)](#).

In determining whether some types of buyers of employer are "managerial employees," National Labor Relations Board is not bound to proceed by rulemaking rather than by adjudication; Board is not precluded from announcing new principles in adjudicative proceeding and choice between rulemaking and adjudication lies in first instance within Board's discretion; this is so even if determination of this question would be contrary to Board's prior decisions and would presumably be in nature of general rule designed to fit all cases at all times. [NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 94 S. Ct. 1757, 40 L. Ed. 2d 134, 85 L.R.R.M. \(BNA\) 2945, 73 Lab. Cas. \(CCH\) ¶14465, 1974 U.S. LEXIS 35 \(1974\)](#), overruled in part, [NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 102 S. Ct. 216, 70 L. Ed. 2d 323, 108 L.R.R.M. \(BNA\) 3105, 92 Lab. Cas. \(CCH\) ¶13098, 1981 U.S. LEXIS 146 \(1981\)](#).

Where National Labor Relations Board, while acting as court, adjudicating controversy between parties before it, adopted formula for eligibility for voting in representation elections which was devised for particular election, and which was devised for a particular election, and which did not purport to be inviolate standard to regulate future situations, Board did not engage in rule-making within meaning of Administrative Procedure Act, notwithstanding formula may have been departure from prior Board practice. [NLRB v. Hondo Drilling Co., 428 F.2d 943, 74 L.R.R.M. \(BNA\) 2616, 63 Lab. Cas. \(CCH\) ¶10966, 1970 U.S. App. LEXIS 8679 \(5th Cir. 1970\)](#).

In determining formula as to who is eligible to vote in representation election, NLRB developed eligibility formula adapted to specific facts in case and applied it to election therein; NLRB could also apply that formula in another case where there was no significant difference in facts, and NLRB was not promulgating rule without regard to requirements of [5 USCS § 553](#). [NLRB v. Moran Oil Producing & Drilling Corp., 432 F.2d 746, 75 L.R.R.M. \(BNA\) 2304, 63 Lab. Cas. \(CCH\) ¶11191, 1970 U.S. App. LEXIS 7152 \(10th Cir. 1970\)](#), cert. denied, 401 U.S. 941, 91 S. Ct. 941, 28 L. Ed. 2d 221, 76 L.R.R.M. (BNA) 2576, 64 Lab. Cas. (CCH) ¶11539, 1971 U.S. LEXIS 3659 (1971).

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National Labor Relations Board is not precluded from announcing new principles in adjudicative proceeding, and choice between rulemaking and adjudication lies in first instance within Board's discretion; fact that Board created binding policy by adjudication, and did not follow procedures for agency rulemaking as delineated in [5 USCS § 553](#), does not affect policy's validity especially where it covers area in which Board is permitted to act pursuant to its discretion under [29 USCS § 159\(b\)](#). *NLRB v. St. Francis Hospital*, 601 F.2d 404, 101 L.R.R.M. (BNA) 2943, 86 Lab. Cas. (CCH) ¶11464, 1979 U.S. App. LEXIS 13093 (9th Cir. 1979).

24. Miscellaneous

Order arising out of investigation by Federal Maritime Commission into whether rules, regulations and practices contained in ship lines' tariffs violated Shipping Act (46 USCS §§ 814–816) was adjudicatory rather than rulemaking proceeding and not subject to procedures specified in [5 USCS § 553](#); thus, shipping lines were properly advised of nature and purpose of proceeding in notice of investigation and notice need not have been published in Federal Register. *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Com.*, 389 F.2d 962, 129 U.S. App. D.C. 1, 1968 U.S. App. LEXIS 8374 (D.C. Cir. 1968).

Determination of specific factual question already prescribed by statute is order, to be formulated by adjudication, and [5 USCS § 554](#) rather than [5 USCS § 553](#) is governing section where Environmental Protection Agency makes determination under § 316 of Federal Water Pollution Control Act Amendments of 1962 ([33 USCS § 1326](#)) relating to discharge of heated water into sea. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 11 Env't Rep. Cas. (BNA) 1358, 8 Env't. L. Rep. 20207, 1978 U.S. App. LEXIS 12595 (1st Cir.), cert. denied, 439 U.S. 824, 99 S. Ct. 94, 58 L. Ed. 2d 117, 12 Env't Rep. Cas. (BNA) 1081, 1978 U.S. LEXIS 2625 (1978).

Adoption of interpretation of regulation by Secretary of Health and Human Services during course of administrative adjudication of case does not constitute promulgation of substantive rule requiring adherence to rulemaking procedures of [5 USCS § 553](#), since Secretary has broad discretion to formulate interpretations through adjudicatory process rather than rulemaking. *Cheshire Hosp. v. New Hampshire-Vermont Hospitalization Serv.*, 689 F.2d 1112, 1982 U.S. App. LEXIS 25558 (1st Cir. 1982).

Federal Trade Commission's interpretation of rule governing methods by which retailers are to make warranty information available to consumers constitutes amendment of rule without resort to rulemaking procedures rather than adjudicatory restatement of rule, where rule calls only for signs "in prominent locations in store or department," calling attention to availability of warranty information, while FTC's order goes beyond that and requires retailer to post signs in each department. *Montgomery Ward & Co. v. Federal Trade Com.*, 691 F.2d 1322, 1982-83 Trade Cas. (CCH) ¶65030, 1982 U.S. App. LEXIS 24194 (9th Cir. 1982).

Proceeding had characteristics of rulemaking rather than adjudication where plaintiff began by petitioning copyright office for rulemaking under [5 USCS § 553](#) and attached "proposed rules," and where Office issued notice of inquiry, gave opportunity to be heard, and published final "rule." *Motion Picture Ass'n v. Oman*, 969 F.2d 1154, 297 U.S. App. D.C. 154, Copy. L. Rep. (CCH) ¶26939, 23 U.S.P.Q.2d (BNA) 1447, 1992 U.S. App. LEXIS 15695 (D.C. Cir. 1992).

Where Department of Veterans Affairs issued letter, requiring manufacturers of drugs covered by health care benefits program of Department of Defense (DOD) to refund to DOD difference between drugs' wholesale commercial price and their federal ceiling prices, [5 USCS § 552\(a\)\(1\)](#) and [§ 552](#) applied to letter; letter was substantive rule, and not order or interpretative rule, because it changed existing law and affected individual obligations. *Coalition for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 2006 U.S. App. LEXIS 23079 (Fed. Cir. 2006).

[5 USCS § 554](#) applies only to adjudications required by statute to be determined on record after opportunity for agency hearing, [5 USCS § 553\(a\)](#), and nothing in Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 625 (2001), or Department of Homeland Security Appropriations Act, Pub. L. No. 108-334, 118 Stat. 1298

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(2004), requires such hearing. [Southwest Airlines Co. v. Transp. Sec. Admin., 554 F.3d 1065, 384 U.S. App. D.C. 325, 2009 U.S. App. LEXIS 1884 \(D.C. Cir. 2009\)](#), modified, [2009 U.S. App. LEXIS 29759 \(D.C. Cir. Apr. 10, 2009\)](#).

Agency policy can be developed either by adoption of general rules or through case-by-case adjudication, and when agency chooses rulemaking alternative, compliance with pre-adoption notice and comment procedures of Administrative Procedure Act ([5 USCS § 553\(b\)\(A\)](#)) is mandatory prerequisite. [Dow Chemical, USA v. Consumer Product Safety Com., 464 F. Supp. 904, 9 Env'tl. L. Rep. 20307, 26 Fed. R. Serv. 2d \(Callaghan\) 1304, 1979 U.S. Dist. LEXIS 14474 \(W.D. La. 1979\)](#).

The importer of white sauce stated claim against U.S. Customs and Border Protection (Customs) for failure to comply with notice requirements of statutory provision pertaining to revocation of classification rulings, [19 USCS § 1625\(c\)](#); however, rulemaking notice pursuant to [5 USCS § 553](#) was not mandated. [Int'l Custom Prods. v. United States, 549 F. Supp. 2d 1384, 32 Ct. Int'l Trade 302, 2008 Ct. Intl. Trade LEXIS 36 \(Ct. Int'l Trade 2008\)](#).

Administrative law judge's use of new American Medical Association standards for determining hearing loss, which standards have not been formally adopted as rule under Administrative Procedure Act ([5 USCS § 553](#)), constituted adjudication; admissibility of standards was supported by 2 expert witnesses, did not violate due process and was reasonable exercise of judge's authority to use variety of techniques for measuring disabilities. [Moore v Newport News Shipbuilding and Drydock Co., 15 BRBS 28 \(1982\)](#).

In action by U.S. Solar Industry companies relating to agency's reversal of imposition of safeguard duties imposed through Presidential Proclamation, plaintiff had standing because it fell within zone of interests of § 201 of the Trade Act of 1974 where it suffered an actual, imminent injury fairly traceable to proclamation withdrawal, which could be redressed by injunctive relief. Further, court granted plaintiff's motion for preliminary injunction barring implementation because, inter alia, Office of the U.S. Trade Representative was agency covered by APA. Further, because exclusion was rulemaking under APA and not adjudication, withdrawal was also rulemaking, and it was likely arbitrary and capricious. [Invenergy Renewables LLC v. United States, 422 F. Supp. 3d 1255, 2019 Ct. Intl. Trade LEXIS 154 \(Ct. Int'l Trade 2019\)](#).

III. APPLICABILITY AND EXCEPTIONS TO APPLICABILITY [[5 USCS § 553\(a\)](#)]

A. Applicability

1. In General

25. Generally

"Agency action" contemplates vast range of administrative activities; administrative characterization of rule as "staff instruction" rather than as agency "regulation" is not determinative; legal characterizations of agency action cannot be accomplished merely by semantic play, and court cannot approve agency actions contrary to congressional or administrative mandates despite characterization as "staff instruction." [Payne v. Block, 721 F.2d 741, 1983 U.S. App. LEXIS 14388 \(11th Cir. 1983\)](#), vacated, remanded, 469 U.S. 807, 105 S. Ct. 65, 83 L. Ed. 2d 15, 1984 U.S. LEXIS 2980 (1984).

Agency failure to act cannot undermine or supersede explicit congressional requirements, and where Congress has mandated by statute particular accounting scheme whose legality is not contingent upon promulgation of implementing regulations, implementation without full compliance with Administrative Procedures Act ([5 USCS § 553](#)) is without consequence. [Zaharakis v. Heckler, 744 F.2d 711, 1984 U.S. App. LEXIS 17975 \(9th Cir. 1984\)](#).

[5 USCS § 553](#) is applicable only to proceedings for promulgation of substantive rules with force of law, and requires formal rulemaking proceedings. [Human Resources Management, Inc. v Weaver, 442 F. Supp. 241 \(DC Dist Col 1977\)](#).

2. Particular Agencies and Activities

26. Agriculture

Institution of direct connection between Department of Agriculture news service and ultimate users of information, bypassing private news services, constitutes adoption of “rule” within meaning of Administrative Procedure Act and Department must comply with rulemaking requirements of [5 USCS § 553](#). *P. A. M. News Corp. v. Hardin*, [440 F.2d 255, 142 U.S. App. D.C. 227, 1971 U.S. App. LEXIS 11965 \(D.C. Cir. 1971\)](#), app. after remand, [514 F.2d 272, 168 U.S. App. D.C. 376, 1975 U.S. App. LEXIS 14336 \(D.C. Cir. 1975\)](#).

Announcement of peanut price differentials for price support purposes by Department of Agriculture is exercise of informal rulemaking powers. *Arlington Oil Mills, Inc. v. Knebel*, [543 F.2d 1092, 1976 U.S. App. LEXIS 6138 \(5th Cir.\)](#), reh'g denied, [545 F.2d 168 \(5th Cir. 1976\)](#).

Procedures used in adoption of speculative limits contemplated in Commodity Exchange Act ([7 USCS § 6a\(1\)](#)) must satisfy rules of Administrative Procedure Act regarding informal agency rule-making ([5 USCS § 553](#)). *Commodity Futures Trading Com. v. Hunt*, [591 F.2d 1211, 1979 U.S. App. LEXIS 17799 \(7th Cir.\)](#), cert. denied, [442 U.S. 921, 99 S. Ct. 2848, 61 L. Ed. 2d 290, 1979 U.S. LEXIS 2392 \(1979\)](#).

Despite exemption from rulemaking procedures for grant and benefit programs, food stamp regulations must be promulgated in accordance with rulemaking procedures of [5 USCS § 553](#). *Levesque v. Block*, [723 F.2d 175, 1983 U.S. App. LEXIS 14292 \(1st Cir. 1983\)](#).

27. —Farmers Home Administration

Regulations of Farmer's Home Administration that implement debt restructuring and loan servicing provisions of Agricultural Credit Act require state director approval of proposed buyout, but Administration's failure to meet this procedural requirement did not divest Administration of jurisdiction. *Kinion v. United States*, [8 F.3d 639, 1993 U.S. App. LEXIS 28575 \(8th Cir. 1993\)](#).

Agriculture Department's interpretation of statute apparently providing for moratorium on farm foreclosures resulting in substantive rule of general applicability constitutes rulemaking and is subject to general notice, publication, and opportunity for comment procedures pursuant to [5 USCS § 553](#). *Matzke v. Block*, [564 F. Supp. 1157, 1983 U.S. Dist. LEXIS 17166 \(D. Kan. 1983\)](#), aff'd in part and rev'd in part, [732 F.2d 799, 1984 U.S. App. LEXIS 23223 \(10th Cir. 1984\)](#).

28. —Marketing orders

The provisions of [5 USCS § 553](#) apply to regulations issued pursuant to terms of marketing order promulgated under [7 USCS § 608c](#). *Walter Holm & Co. v. Hardin*, [318 F. Supp. 521, 1970 U.S. Dist. LEXIS 9778 \(D.D.C. 1970\)](#), modified, [449 F.2d 1009, 145 U.S. App. D.C. 347, 1971 U.S. App. LEXIS 11280 \(D.C. Cir. 1971\)](#).

Interpretations and applications of order provisions of [7 USCS § 608c](#) are not rules within meaning of Administrative Procedure Act ([5 USCS §§ 551, 553](#)) requiring rulemaking procedures. *Re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7 (1982).

29. Bureau of Prisons

Federal Bureau of Prisons was not required to comply with notice and comment requirements set forth in [5 USCS § 553](#) of Administrative Procedure Act before terminating inmate boot camp program. *Serrato v. Clark*, [486 F.3d 560, 2007 U.S. App. LEXIS 10920 \(9th Cir. 2007\)](#).

Federal Bureau of Prisons (BOP) reversal of its prior policy, based on deputy attorney general's opinion that designations of offenders to community confinement were forbidden as matter of law in spite of long-established BOP policy and practice of adopting judicial recommendations to place nonviolent inmates in such facilities to serve short terms of imprisonment, was substantive rule change that should have occurred only pursuant to

5 USCS § 553

Administrative Procedures Act. [Monahan v. Winn, 276 F. Supp. 2d 196, 2003 U.S. Dist. LEXIS 14091 \(D. Mass. 2003\)](#).

Provisions of [5 USCS § 553](#) are fully applicable to regulations promulgated under [18 USCS § 3621](#). [Crowley v. Fed. Bureau of Prisons, 312 F. Supp. 2d 453, 2004 U.S. Dist. LEXIS 4088 \(S.D.N.Y. 2004\)](#).

Bureau of Prison's determination that federal inmate was not entitled to sentence reduction did not violate [5 USCS §§ 702](#) and 70, part of Administrative Procedure Act because Act's requirements did not apply to interpretive rules under [5 USCS § 553\(b\)\(3\)\(A\)](#) in that statutory basis for eligibility was clearly set forth in [18 USCS § 3621\(e\)](#) and program statements had no effect on broad discretionary authority of Bureau of Prisons. [Kotz v. Lappin, 515 F. Supp. 2d 143, 2007 U.S. Dist. LEXIS 75020 \(D.D.C. 2007\)](#).

Federal inmate's allegations that Bureau of Prisons violated his due process and equal protection rights by raising prison telephone rates and commissary prices were not cognizable under Administrative Procedures Act's notice and comment provisions, [5 USCS §§ 553](#), and [706](#), because res judicata barred previously litigated telephone rate claims, and he had no constitutional right to fixed commissary prices. [Harrison v. Fed. Bureau of Prisons, 611 F. Supp. 2d 54, 2009 U.S. Dist. LEXIS 37394 \(D.D.C. 2009\)](#).

Where plaintiff inmate argued that defendant Federal Bureau of Prison (BOP) officials were required to promulgate regulations along with notice and comment period setting forth procedures for equal access to health care by inmates, BOP's program statements generally were considered internal policy statements under [5 USCS § 553\(b\)\(3\)\(A\)](#), (d)(2), rather than enforceable legislative rules to which Administrative Procedure Act applied. [Gonzalez v. Holder, 763 F. Supp. 2d 145, 2011 U.S. Dist. LEXIS 12005 \(D.D.C. 2011\)](#), transferred, [2012 U.S. Dist. LEXIS 33382 \(W.D. Tex. Mar. 12, 2012\)](#).

Unpublished decision: Where inmate challenged Bureau of Prisons' new 10-percent policy regarding community confinement under [18 USCS § 3621\(b\)](#) and [18 USCS § 3624\(c\)](#), inmate was not entitled to habeas relief because, inter alia, enactment without notice did not violate Administrative Procedure Act since new policy was interpretive rather than substantive. [Norrito v. DeRosa, 2004 U.S. Dist. LEXIS 28789 \(D.N.J. Aug. 11, 2004\)](#).

Unpublished decision: Regulations by Federal Bureau of Prisons that categorically excluded inmates that had weapons related convictions from receiving early release consideration after completing drug abuse program was not arbitrary or capricious when Bureau articulated valid reasons for excluding such felons from early release consideration. [Snell v. Fed. Bureau of Prisons, 2009 U.S. Dist. LEXIS 75190 \(D.N.J. Aug. 21, 2009\)](#).

Unpublished decision: Decision of Bureau of Prisons (BOP) to categorically deny early release credit to offenders who were convicted of weapons offenses after offenders completed drug rehabilitation program, as set forth in [28 CFR § 550.58](#) and BOP program statements was upheld because decision was based on rational basis to protect public safety, and decision was not arbitrary or unreasonable. [Banks v. Grondolsky, 2009 U.S. Dist. LEXIS 84156 \(D.N.J. Sept. 11, 2009\)](#).

Unpublished decision: Inmate was not eligible for early release due to his completion of Residential Drug Abuse Program, and inmate was not entitled to habeas corpus relief, because [28 CFR § 550.58](#) was valid, and that under that regulation, inmate was ineligible for early release because his offense involved carrying, possession, or use of firearm; inmate had pled guilty to being felon in possession of firearm and ammunition, [18 USCS § 922\(g\)\(1\)](#). Bureau of Prisons had articulated sufficient rationale for [28 CFR § 550.58\(a\)\(1\)\(vi\)\(B\) \(2000\)](#) to satisfy "arbitrary and capricious" standard set forth in [5 USCS § 706\(2\)\(A\)](#). [Bruce v. Grondolsky, 2010 U.S. Dist. LEXIS 65 \(D.N.J. Jan. 4, 2010\)](#).

Unpublished decision: Administrative Procedure Act (APA) required that general notice of proposed regulation be published in Federal Register and that interested persons be given opportunity to comment on proposed regulation pursuant to [5 USCS § 553](#); however, APA applied only to legislative rules, which were rules that imposed new duties upon regulated party; APA did not apply to Bureau of Prisons (BOP) Prohibited Acts Code (PAC) 108

5 USCS § 553

because PAC 108 was interpretive rule. [Hall v. Zickefoose, 448 Fed. Appx. 184, 2011 U.S. App. LEXIS 21420 \(3d Cir. 2011\)](#).

30. Energy and power

Regulation promulgated by Atomic Energy Commission in 1963 relating to entry and introduction of explosives into AEC facilities was within exemption of [5 USCS § 553\(a\)\(2\)](#) from public notice and participation requirement as matter relating to public property, including its provisions as to publication and posting and subsequent designation notices published and posted at nuclear facility, and remained exempt, notwithstanding that incorporation of AEC into Department of Energy in 1977 was accompanied by statutory provision that exception would not be available. [United States v. Thompson, 687 F.2d 1279, 1982 U.S. App. LEXIS 18289 \(10th Cir. 1982\)](#).

Hearing and comment provisions of [5 USCS § 553](#) were not applicable to Energy Information Administration guidelines for disclosure of financial and operational data obtained from energy producing companies in that guidelines came within exception for interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice under [5 USCS § 553\(b\)\(A\)](#) since they required nothing of companies' or other regulated entities and did not alter companies' rights or duties in any way. [Shell Oil Co. v. Department of Energy, 477 F. Supp. 413, 1979 U.S. Dist. LEXIS 10315 \(D. Del. 1979\)](#), aff'd, [631 F.2d 231, 1980-2 Trade Cas. \(CCH\) ¶63525, 1980 U.S. App. LEXIS 14270 \(3d Cir. 1980\)](#).

31. —Federal Energy Administration

Provisions of [5 USCS § 553](#) are fully applicable to Federal Energy Administration; Administration's rule relating to all product costs would be invalid where Administration (1) never complied with procedural requirements, (2) did not give notice that rule required all product cost first sequence for recoument of increased product and nonproduct costs, (3) did not furnish advance notice of subject matter or issues presented by such rule, (4) did not provide public with required opportunity for presentation of written comments (5) nowhere furnished to public required opportunity for oral argument (despite rule's enormous impact) and (6) did not publish any statement of basis and purpose for such rule. [Amoco Oil Co. v. Zarb, 402 F. Supp. 1001, 1975 U.S. Dist. LEXIS 15711 \(D.D.C. 1975\)](#).

Legislative history does not establish conclusively whether Congress intended notice, comment, and publication provisions of Administrative Procedure Act ([5 USCS § 553](#)) to apply to Federal Energy Administration, and since case did not require court to decide whether such provisions applied rule-making process by that Agency (since Federal Energy Administration Act of 1974 ([15 USCS § 766](#)) was applicable) it would be unnecessary and unwise to decide whatever additional impact Administrative Procedure Act exerted on activities of Federal Energy Administration. [Shell Oil Co. v. Federal Energy Administration, 440 F. Supp. 876, 1977 U.S. Dist. LEXIS 14105 \(D. Del. 1977\)](#), aff'd, [574 F.2d 512, 1978 U.S. App. LEXIS 11854 \(Temp. Emer. Ct. App. 1978\)](#).

32. —Natural gas

Section 5 of Natural Gas Act ([15 USCS § 717\(d\)](#)) and its "substantial evidence" standard of review are satisfied by informal notice and comment proceedings; hence "substantial evidence" does not require additional procedural safeguards. [Wisconsin Gas Co. v. Federal Energy Regulatory Com., 770 F.2d 1144, 248 U.S. App. D.C. 231, Util. L. Rep. \(CCH\) ¶13056, 1985 U.S. App. LEXIS 21282 \(D.C. Cir. 1985\)](#), cert. denied, [476 U.S. 1114, 106 S. Ct. 1969, 90 L. Ed. 2d 653, 1986 U.S. LEXIS 3038 \(1986\)](#).

Guidelines issued by Secretary of Energy regarding definition of "public interest" as relating to natural gas imports did not constitute "rule" within meaning of [5 USCS § 553\(a\)](#) and are therefore not subject to rulemaking procedures, where Economic Regulatory Administration did not treat guidelines as establishing binding precedent, and where, even though ERA looked to guidelines for presumptions and burdens of proof, ERA responded fully to all arguments without merely relying on force of guidelines. [Panhandle Producers & Royalty Owners Asso. v. Economic Regulatory Admin., 847 F.2d 1168, 1988 U.S. App. LEXIS 8796 \(5th Cir. 1988\)](#).

33. Environmental Protection Agency

5 USCS § 553

Promulgation of implementation plans under Clean Air Act by Environmental Protection Agency is rulemaking and requirements of [5 USCS § 553](#) must be met. [Maryland v. EPA, 530 F.2d 215, 8 Env't Rep. Cas. \(BNA\) 1105, 5 Env'tl. L. Rep. 20651, 1975 U.S. App. LEXIS 12697 \(4th Cir. 1975\)](#), vacated, [431 U.S. 99, 97 S. Ct. 1635, 52 L. Ed. 2d 166 \(1977\)](#).

Environmental Protection Agency's promulgation of attainment designation is procedure subject to [5 USCS § 553\(c\)](#). [PPG Industries, Inc. v. Costle, 630 F.2d 462, 15 Env't Rep. Cas. \(BNA\) 1097, 10 Env'tl. L. Rep. 20877, 1980 U.S. App. LEXIS 13600 \(6th Cir. 1980\)](#).

Imminence of deadline or urgent need for action is not sufficient to constitute good cause within meaning of Administrative Procedure Act, where it would have been possible for Environmental Protection Agency to comply with both Administrative Procedure Act and statutory deadline. [Natural Resources Defense Council, Inc. v. U. S. EPA, 683 F.2d 752, 17 Env't Rep. Cas. \(BNA\) 1721, 12 Env'tl. L. Rep. 20833, 1982 U.S. App. LEXIS 17611 \(3d Cir. 1982\)](#).

Agency's disapproval of state implementation plan in failing to impose construction ban under Clean Air Act ([42 USCS §§ 7401](#) et seq.) constitutes rulemaking, and adjudicatory hearing is not required when only determinative fact is not in dispute. [Dressman v. Costle, 759 F.2d 548, 22 Env't Rep. Cas. \(BNA\) 1707, 15 Env'tl. L. Rep. 20434, 1985 U.S. App. LEXIS 30283 \(6th Cir. 1985\)](#).

Procedural challenge by petitioners, several states, counties, and industrial entities, failed because respondent Environmental Protection Agency's authority for promulgating Rule and Memo under Clean Air Act was [42 USCS § 7407\(d\)\(1\)\(B\)\(i\)](#), and Administrative Procedure Act's [5 USCS § 553](#) notice-and-comment requirements did not apply; under [42 USCS § 7607\(d\)\(9\)\(a\)](#), Rule and Memo were not in excess of agency's statutory authority because § 7407(d)(6)(B), when read in conjunction with § 7407(d)(6)(A), showed that § 7407(d)(6) did not itself authorize promulgation of designations and rather, § 7407(d)(6) merely governed timing of such designations, which were made under authority contained in § 7407(d)(1)—provision that § 7407(d)(2)(B) expressly exempted from notice-and-comment requirements. [Catawba County v. EPA, 571 F.3d 20, 387 U.S. App. D.C. 20, 69 Env't Rep. Cas. \(BNA\) 1033, 39 Env'tl. L. Rep. 20143, 2009 U.S. App. LEXIS 14948 \(D.C. Cir. 2009\)](#).

Exceptions under [5 USCS § 553](#) must be narrowly construed and only reluctantly countenanced; District of Columbia Circuit doubts that requirement under § 401 of Clean Water Act (CWA), [33 USCS §§ 1251](#) et seq., that states provide for notice and comment regarding proposed conditions constitutes requisite plain expression of congressional intent to supersede Administrative Procedures Act's requirements. [Lake Carriers' Ass'n v. EPA, 652 F.3d 1, 397 U.S. App. D.C. 269, 73 Env't Rep. Cas. \(BNA\) 1870, 41 Env'tl. L. Rep. 20250, 2011 U.S. App. LEXIS 14996 \(D.C. Cir. 2011\)](#).

Environmental Protection Agency (EPA) did not give addendum "conclusive effect," nor could it, as EPA did not score petitions on Department of Energy's (DOE) matrix, but rather, EPA did as Congress directed; EPA said DOE's analysis was "primary factor" in EPA's decision, and EPA also independently analyzed pipeline disruption and oil company's blending capacity, projected RFS-compliance costs, and financial position. [Lion Oil Co. v. EPA, 792 F.3d 978, 81 Env't Rep. Cas. \(BNA\) 1034, 2015 U.S. App. LEXIS 11725 \(8th Cir. 2015\)](#).

Conference between state, local, and federal pollution control agencies concerning polluter's activities provided for by Clean Air Act ([42 USCS § 1857d](#)) was not rule-making hearing within meaning of [5 USCS § 553](#). [United States v. Bishop Processing Co., 287 F. Supp. 624, 1 Env't Rep. Cas. \(BNA\) 1004, 1968 U.S. Dist. LEXIS 10060 \(D. Md. 1968\)](#), aff'd, [423 F.2d 469, 1 Env't Rep. Cas. \(BNA\) 1013, 1970 U.S. App. LEXIS 10480 \(4th Cir. 1970\)](#).

Environmental Protection Agency follows notice and comment rulemaking procedures set forth in [5 USCS § 553](#) for modification of minimum state National Pollutant Discharge Elimination System program elements. USEPA GCO 77-11.

34. Federal Trade Commission

5 USCS § 553

Federal Trade Commission Act ([15 USCS § 46\(b\)](#)) does not obligate Federal Trade Commission to observe Administrative Procedure Act rulemaking procedures when exercising its authority to require corporations to file informational reports regarding company's organization, business, conduct, practices, management, and relation to other corporations, nor does any section of Federal Trade Commission Act prescribe other procedural prerequisites to exercise of Commission's authority to require reporting. [Appeal of FTC Line of Business Report Litigation, 595 F.2d 685, 193 U.S. App. D.C. 300 \(App DC 1978\)](#).

FTC had no obligation to adhere to notice-and-comment rulemaking procedures before imposing liability in its adjudicatory proceeding against maker of pomegranate-based products because its decision did not involve major substantive legal addition to its substantiation standards. [POM Wonderful, LLC v. FTC, 777 F.3d 478, 414 U.S. App. D.C. 111, 2015-1 Trade Cas. \(CCH\) ¶79044, 2015 U.S. App. LEXIS 1489 \(D.C. Cir. 2015\)](#), reh'g denied, [2015 U.S. App. LEXIS 8944 \(D.C. Cir. May 28, 2015\)](#), reh'g, en banc, denied, [2015 U.S. App. LEXIS 8946 \(D.C. Cir. May 28, 2015\)](#), cert. denied, [136 S. Ct. 1839, 194 L. Ed. 2d 839, 2016 U.S. LEXIS 2991 \(2016\)](#).

Rulemaking procedures specified in Administrative Procedure Act ([5 USCS § 553](#)) tentatively apply to implementation of Federal Trade Commission's Line of Business Reporting Program. [A. O. Smith Corp. v. Federal Trade Com., 396 F. Supp. 1125, 1975 U.S. Dist. LEXIS 13303 \(D. Del. 1975\)](#), aff'd in part, vacated in part, [530 F.2d 515, 1976-1 Trade Cas. \(CCH\) ¶60730, 1976 U.S. App. LEXIS 12884 \(3d Cir. 1976\)](#).

One-time decisions on specific transactions (as opposed to substantive rules) are exempt from Administrative Procedure Act notice and comment requirements under [5 USCS § 553\(b\)\(3\)](#); Defense National Stockpile Center's one-time decision to exercise its authority under Strategic Critical Materials Stock Piling Act, [50 USCS §§ 98](#) et seq., by selling 6,000 LT of quebracho did not represent change in law or policy; moreover, allowing for notice and comment regarding each potential sale of stockpiled material would be near logistical impossibility as agency is responsible for determining appropriate quantity of approximately fifty different materials for release each year. [Chamber of Argentine-Paraguayan Producers of Quebracho Extract v. Holder, 391 F. Supp. 2d 65, 2005 U.S. Dist. LEXIS 18884 \(D.D.C. 2005\)](#), aff'd, [181 Fed. Appx. 4, 2006 U.S. App. LEXIS 32399 \(D.C. Cir. 2006\)](#).

35. Health and human services

Secretary of Health and Human Services violates Administrative Procedure Act, [5 USCS § 553](#), by changing experimental program, which created role for Social Security Administration representative in disability hearing adversarial process, into Adjudicatory Improvement Project, which expanded role of representatives, creating new bureaucracy and greatly changing manner in which claims are handled, merely by internal memoranda and rules revisions, because such changes should have been advertised in Federal Register pursuant to rulemaking procedures. [Salling v. Bowen, 641 F. Supp. 1046, 1986 U.S. Dist. LEXIS 22744 \(W.D. Va. 1986\)](#), dismissed, [679 F. Supp. 596, 1987 U.S. Dist. LEXIS 13017 \(W.D. Va. 1987\)](#).

36. —Medicare and Medicaid

Retroactive application of cost limit rules applicable to providers of routine inpatient hospital Medicare services, enacted as legislative rules pursuant to notice and comment procedures of § 553, was improper where rules were applied to cost accounting periods that were, by virtue of court ruling invalidating earlier issuance of rule on procedural grounds, governed by former rule since express terms of Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) and integrity of rulemaking process demand that corrected rule, like all other legislative rules, be prospective in effect only. [Georgetown University Hospital v. Bowen, 821 F.2d 750, 261 U.S. App. D.C. 262, 1987 U.S. App. LEXIS 8166 \(D.C. Cir. 1987\)](#), cert. granted, [485 U.S. 903, 108 S. Ct. 1073, 99 L. Ed. 2d 232, 1988 U.S. LEXIS 1047 \(1988\)](#), aff'd, [488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493, 1988 U.S. LEXIS 5554 \(1988\)](#).

Requirements of [5 USCS § 553\(c\)](#) are not applicable to Medicare regulation which disallows reimbursement for bedside telephones provided to Medicare beneficiaries; pursuant to [5 USCS § 553\(a\)\(2\)](#), rulemaking relating to "benefits" is exempt from Administrative Procedure Act's requirements. [Greater Cleveland Hospital Asso. Group Appeal v. Schweiker, 599 F. Supp. 1000, 1984 U.S. Dist. LEXIS 18225 \(N.D. Ohio 1984\)](#).

37. Interstate Commerce Commission/Surface Transportation Board

Motor carrier industry's reliance on 40-year-old practice of Interstate Commerce Commission of notifying existing competing carriers of pending emergency temporary authority applications was not unjustified, and change in such practice by Commission had substantial impact on motor carrier industry; thus, promulgation by Commission of notice of elimination of notification to competing carriers of applications for emergency temporary authority was controlled by notice and comment requirements of [5 USCS § 553](#). *Brown Express, Inc. v. United States*, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 (5th Cir. 1979).

Where contract rates policy statement is clearly intended to apply to rate agreements which were in effect before statement was first promulgated, it cannot be said to impose flat rule inflexibly governing exercise of Commission discretion; contract rates policy statement imposes no new obligations which might invoke requirement of rulemaking under Administrative Procedure Act. *Cleveland Cliffs Iron Co. v. Interstate Commerce Com.*, 664 F.2d 568, 1981 U.S. App. LEXIS 15844 (6th Cir. 1981).

Interstate Commerce Act's requirement of hearing before changes can be made in classification system (former [49 USCS § 10704](#)) requires no higher level process than is provided for by [5 USCS § 553](#) which governs informal rulemaking proceedings; there is strong presumption that procedural guarantees of [5 USCS § 553](#) are sufficient unless Congress specifically indicates to contrary. *National Classification Committee v. United States*, 765 F.2d 1146, 246 U.S. App. D.C. 393, 1985 U.S. App. LEXIS 31419 (D.C. Cir. 1985).

38. Labor and employment

Office of Personnel Management's change in methodology for computing cost of living adjustments for federal employees falls within definition of rule making and is subject to rule making procedures of [5 USCS § 553](#). *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1984 U.S. App. LEXIS 14863 (Fed. Cir. 1984).

30 USCS § 656, providing for inapplicability of Administrative Procedure Act, was intended to make Administrative Procedure Act inapplicable to mine safety compliance inspections, accident investigations, and sanction adjudications, and was not intended to revolve complaint that agency unjustifiably delayed in proceedings to consider establishment of permissible levels of dangerous substances to which miners may be exposed. *Oil, Chemical & Atomic Workers International Union v. Zegeer*, 768 F.2d 1480, 248 U.S. App. D.C. 47, 15 *Env'tl. L. Rep.* 20894, 1985 O.S.H. Dec. (CCH) ¶27346, 1985 U.S. App. LEXIS 20785 (D.C. Cir. 1985).

Regulation implementing Title VII of Civil Rights Act and expressly excluding active-duty service members from coverage of Act, was validly promulgated where EEOC was simply making explicit what was already implicit in legislative history of Title VII. *Hodge v. Dalton*, 107 F.3d 705, 97 *Cal. Daily Op. Service* 1112, 97 *D.A.R.* 1713, 69 *Empl. Prac. Dec.* (CCH) ¶44523, 73 *Fair Empl. Prac. Cas.* (BNA) 269, 1997 U.S. App. LEXIS 2821 (9th Cir.), cert. denied, 522 U.S. 815, 118 S. Ct. 62, 139 L. Ed. 2d 25, 74 *Fair Empl. Prac. Cas.* (BNA) 1792, 1997 U.S. LEXIS 4688 (1997).

39. —National Labor Relations Board

NLRB's promulgation of rule declining to take jurisdiction over labor relations in horse racing and dog racing industries and subsequent refusal to repeal or amend rule are governed by provisions of Administrative Procedure Act ([5 USCS §§ 551](#) et seq.). *New York Racing Asso. v. NLRB*, 708 F.2d 46, 113 *L.R.R.M.* (BNA) 2746, 97 *Lab. Cas.* (CCH) ¶10151, 1983 U.S. App. LEXIS 28099 (2d Cir.), cert. denied, 464 U.S. 914, 104 S. Ct. 276, 78 L. Ed. 2d 256, 114 *L.R.R.M.* (BNA) 2776, 98 *Lab. Cas.* (CCH) ¶10488, 1983 U.S. LEXIS 1970 (1983).

Guidelines for agency disclosure of information requested under Freedom of Information Act ([5 USCS § 552](#)) which are promulgated in complete disregard of mandates of Administrative Procedure Act ([5 USCS § 553](#)) do not provide basis upon which to conclude that agency refusal to disclose has reasonable basis in law for purpose of determining entitlement of successful requester to attorney fees. *Seegull Mfg. Co. v. NLRB*, 735 F.2d 971, 116

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[L.R.R.M. \(BNA\) 2569, 101 Lab. Cas. \(CCH\) ¶11049, 1984 U.S. App. LEXIS 21938 \(6th Cir.\)](#), vacated, sub. op., [741 F.2d 882, 117 L.R.R.M. \(BNA\) 2160, 101 Lab. Cas. \(CCH\) ¶11162, 1984 U.S. App. LEXIS 19124 \(6th Cir. 1984\)](#).

40. Legal Services Corporation

Although not required to engage in notice and comment rulemaking under APA, National Legal Services Corporation is required to engage in such rulemaking by [42 USCS § 2996g](#); thus, although not agency of federal government, Congress intended that it be treated like agency. [Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 291 U.S. App. D.C. 254, 1991 U.S. App. LEXIS 17197 \(D.C. Cir. 1991\)](#).

Legislation creating Legal Services Corporation provides that Corporation shall not be considered agency of Federal Government ([42 USCS § 2996d\(e\)\(1\)](#)), and it is therefore exempt from general coverage of Administrative Procedure Act, including rule-making provisions of [5 USCS § 553](#). [Neighborhood Legal Services, Inc. v. Legal Services Corp., 466 F. Supp. 1148, 1979 U.S. Dist. LEXIS 15055 \(D. Conn. 1979\)](#).

41. National Highway Traffic Safety Administration

National Highway Traffic Safety Administration's rescission of requirement in motor vehicle safety standard that new automobiles be equipped with air bags or detachable or nondetachable passive seat belts is arbitrary and capricious where agency failed to present adequate basis and explanation for rescinding requirement as to each of 3 passive restraint options, and where agency failed to supply requisite reasoned analysis for its actions; agency must therefore consider matter further or adhere to or amend standard along lines which its analysis supports. [Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443, 13 Env'tl. L. Rep. 20672, 1983 U.S. LEXIS 84 \(1983\)](#), cert. denied, [New York v. Dole, 480 U.S. 951, 107 S. Ct. 1616, 94 L. Ed. 2d 800, 1987 U.S. LEXIS 1488 \(1987\)](#).

Pursuant to Motor Vehicle Safety Act ([15 USCS §§ 1381](#) et seq.), motor vehicle safety standards are to be promulgated under informal rulemaking procedures of [5 USCS § 553](#), and agency's action in promulgating such standards may therefore be set aside if found to be arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law pursuant to [5 USCS § 706\(2\)\(A\)](#). [Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443, 13 Env'tl. L. Rep. 20672, 1983 U.S. LEXIS 84 \(1983\)](#), cert. denied, [New York v. Dole, 480 U.S. 951, 107 S. Ct. 1616, 94 L. Ed. 2d 800, 1987 U.S. LEXIS 1488 \(1987\)](#).

Authority for regulations issued by National Highway Traffic Safety Administration establishing uniform tire quality grading standards for pneumatic passenger car tires as required by National Traffic & Motor Vehicle Safety Act ([15 USCS §§ 1381](#) et seq.) was governed by informal rule-making procedures authorized under [5 USCS § 553](#). [B. F. Goodrich Co. v. Department of Transp., 541 F.2d 1178, 1976 U.S. App. LEXIS 7280 \(6th Cir. 1976\)](#), cert. denied, [430 U.S. 930, 97 S. Ct. 1549, 51 L. Ed. 2d 773, 1977 U.S. LEXIS 2103 \(1977\)](#).

42. Postal Service

[39 USCS § 410\(a\)](#) exempts Postal Service from procedural requirements that agencies publish notice of proposed rulemaking and provide opportunity for interested persons to submit written comments. [National Easter Seal Soc. for Crippled Children & Adults v. United States Postal Service, 656 F.2d 754, 211 U.S. App. D.C. 165, 1981 U.S. App. LEXIS 13597 \(D.C. Cir. 1981\)](#).

Agency's exemption from provisions of Administrative Procedure Act does not negate applicability of common-law review principles that pre-existed and operate apart from subsequent codification; exemption of Postal Service from all federal law dealing with public or federal contracts pertains only to independent nature of operations and does not reach governmental limitations contained in Postal Service's own regulations, and exemptions in [39 USCS § 410](#) do not manifest congressional intent to foreclose all judicial review of alleged violations by Postal Service's procurement regulations. [Peoples Gas, Light & Coke Co. v. United States Postal Serv., 658 F.2d 1182 \(CA7 Ill 1981\)](#).

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Postal regulation requiring commercial mail receiving agencies and customers to file forms disclosing information including names and addresses of customers and agents, authorized by USPC Domestic Mail Manual to further goal of promoting more efficient and business-like practices on part of reorganized postal system, was exempted from procedures for rule-making, including public comment, established by Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) where form was authorized by internal operations and managerial functions of postal service and represented proper exercise of business discretion afforded to USPC by congressional mandate. [Kuzma v. United States Postal Service](#), 798 F.2d 29, 1986 U.S. App. LEXIS 27498 (2d Cir. 1986), cert. denied, 479 U.S. 1043, 107 S. Ct. 906, 93 L. Ed. 2d 856, 1987 U.S. LEXIS 230 (1987).

Congress directed Postal Regulatory Commission to serve as more than just rubber stamp of Postal Service's proposed rate increases; Postal Accountability Enhancement Act established robust rulemaking process for Commission, subjecting rate-change proposals to deliberative and participatory process of notice-and-comment rulemaking under APA, and by failing to consider relevant statutory objectives and factors and declining to respond to significant public comments, Commission violated APA when it approved stamp price hike. [Carlson v. Postal Regulatory Comm'n](#), 938 F.3d 337, 443 U.S. App. D.C. 384, 2019 U.S. App. LEXIS 27630 (D.C. Cir. 2019), reh'g denied, [2019 U.S. App. LEXIS 33642 \(D.C. Cir. Nov. 8, 2019\)](#).

Rules promulgated by Post Office providing that all categories of mail are to be routed abroad by most expeditious air service, without regard to type of aircraft used, are not within exemption to Administrative Procedure Act ([5 USCS § 553](#)) as relating solely to internal management of agency, because they affect outside parties. [Seaboard World Airlines, Inc. v. Gronouski](#), 230 F. Supp. 44, 1964 U.S. Dist. LEXIS 8013 (D.D.C. 1964).

Action by operator of private mail forwarding service against Postal Service challenging postal regulation requiring individual customers to complete information forms is dismissed, where operator alleged promulgation was done in violation of Administrative Procedures Act (APA) ([5 USCS § 553](#)), because regulation was substantively unchanged from former Post Office 1960 regulation continued in effect by Postal Reorganization Act ([39 USCS §§ 101](#) et seq.), and further because Postal Service is generally exempt from provisions of APA under [39 USCS § 410\(a\)](#) unless proposed change has nationwide effect requiring approval of Postal Rate Commission under [39 USCS § 3661](#), and instant regulation did not have impact contemplated by § 3661. [Shane v. Buck](#), 658 F. Supp. 908, 1985 U.S. Dist. LEXIS 18414 (D. Utah 1985), aff'd, [817 F.2d 87](#), 1987 U.S. App. LEXIS 5622 (10th Cir. 1987).

43. State and local agencies

Proceeding before state agency on state plan for implementation of federal ambient air quality standards is not controlled by Administrative Procedure Act ([5 USCS § 553](#)); where, however, challenge rests apparently on due process grounds, requirements of due process are satisfied if provisions of Administrative Procedure Act are complied with. [Appalachian Power Co. v. Environmental Protection Agency](#), 579 F.2d 846, 8 Env'tl. L. Rep. 20681, 1978 U.S. App. LEXIS 10732 (4th Cir. 1978).

State bureau of disability determinations was not required to comply with APA's notice, comment, and publication requirements in establishing criteria to apply in determining whether claimants' impairments were to be deemed severe for benefits under Social Security act. [Day v. Shalala](#), 23 F.3d 1052, 1994 FED App. 0145P, [Unemployment Ins. Rep. \(CCH\) ¶ 17828](#), [Unemployment Ins. Rep. \(CCH\) ¶17828A](#), 44 Soc. Sec. Rep. Service 417, 1994 U.S. App. LEXIS 10612 (6th Cir. 1994).

44. Treasury and internal revenue

Secretary of Treasury, in making findings of dumping, is administrative agency; his findings constitute rule making, and statutory rule-making procedure must precede making of finding. [Elof Hansson, Inc. v. United States](#), 178 F. Supp. 922, 43 Cust. Ct. 627, 1959 Cust. Ct. LEXIS 20 (Cust. Ct. 1959), rev'd, [296 F.2d 779](#), 48 C.C.P.A. 91, C.A.D. 771, 1960 CCPA LEXIS 184 (C.C.P.A. 1960), rev'd, [United States v. Elof Hansson Inc.](#), 48 C.C.P.A. 91, C.A.D. 771 (C.C.P.A. 1960).

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Department of Treasury cannot use interim provisions and stop-gap regulations, intended to ease transition from 1939 to 1954 Internal Revenue Code, and not promulgated in accordance with rulemaking and notice provisions of Administrative Procedure Act ([5 USCS § 553](#)) as basis of indictment for conduct occurring in 1962. [United States v. Vail, 252 F. Supp. 823, 17 A.F.T.R.2d \(RIA\) 1545 \(SD Ohio 1966\)](#).

45. Miscellaneous

Javits-Wagner-O'Day Act (41 USCS §§ 46–48) provides that additions of commodities to procurement list must follow rulemaking procedure of § 4 of Administrative Procedure Act ([5 USCS § 553\(b\)–\(e\)](#)), and if rational basis exists for agency action, agency's decision must be affirmed. [Barrier Industries, Inc. v. Eckard, 584 F.2d 1074, 190 U.S. App. D.C. 93, 1978 U.S. App. LEXIS 9546 \(D.C. Cir. 1978\)](#).

Consumer Product Safety Commission cannot amend flammability standard for children's sleepwear simply by complying with rule-making provisions of Administrative Procedure Act, but must comply with Flammable Fabrics Act, [15 USCS § 1193](#), which requires Commission to make initial finding on basis of investigation or research that amendment is needed to protect public against unreasonable risk of fire, and then conduct proceedings to determine whether amendment is appropriate. [National Knitwear Mfrs. Asso. v. Consumer Product Safety Com., 666 F.2d 81, 1981 U.S. App. LEXIS 15268 \(4th Cir. 1981\)](#).

Federal Communication Commission's decision to eliminate or modify existing regulations and to adopt new rules and polices in their stead is product of informal rulemaking procedures governed by [5 USCS § 553](#). [Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 228 U.S. App. D.C. 8, Util. L. Rep. \(CCH\) ¶12707, 1983 U.S. App. LEXIS 28132 \(D.C. Cir. 1983\)](#).

Imposition of quotas by Committee For Implementation of Textile Agreements is exempt from Administrative Procedure Act notice-and-comment provision under § 553(a)(1) exemption for matters involving foreign affairs, in light of possible exacerbation of market disruption. [American Ass'n of Exporters & Importers-Textile & Apparel Group v. United States, 751 F.2d 1239, 3 Fed. Cir. \(T\) 58, 1985 U.S. App. LEXIS 14685 \(Fed. Cir. 1985\)](#).

Army Corps of Engineers' assertion of jurisdiction respecting residential development in wetlands was within its authority and not ultra vires. [Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 38 Env't Rep. Cas. \(BNA\) 1179, 24 Env'tl. L. Rep. 20169, 1993 U.S. App. LEXIS 30885 \(Fed. Cir. 1993\)](#).

In action that environmental groups brought pursuant to [30 USCS § 1276\(a\)\(1\)](#) to challenge Secretary of Interior's approval of amendments to state's regulatory program for surface coal mining, judicial review provisions of Administrative Procedure Act (APA), [5 USCS §§ 500](#) et seq., were applicable pursuant to [5 USCS § 704](#) because (1) [5 USCS § 701\(a\)\(1\)](#)'s exception to coverage did not apply where [30 USCS § 1292\(a\)](#) explicitly disclaimed any intent to preempt statutes with overlapping provisions; (2) notice requirements in [30 USCS § 1253\(c\)](#) did not conflict with APA's notice and rule making procedures; and (3) Secretary's approval of amendments pursuant to [30 USCS § 1211\(c\)](#) constituted rule making under [5 USCS §§ 551\(5\)](#) and [553](#). [Ohio River Valley Env'tl. Coalition, Inc. v. Kempthorne, 473 F.3d 94, 63 Env't Rep. Cas. \(BNA\) 2033, 36 Env'tl. L. Rep. 20247, 2006 U.S. App. LEXIS 30419 \(4th Cir. 2006\)](#).

In case where defendant failed to register as sex offender, Attorney General properly exercised his authority to specify applicability of requirements of Sex Offender Registration and Notification Act to sex offenders convicted before enactment of this chapter no later than August 1, 2008, effective date of Sentencing, Monitoring, Apprehending, Registering, and Tracking Guidelines. Attorney General satisfied notice and comment requirements of Administrative Procedure Act rulemaking. [United States v. Manning, 786 F.3d 684, 2015 U.S. App. LEXIS 8478 \(8th Cir.\), cert. denied, 577 U.S. 911, 136 S. Ct. 278, 193 L. Ed. 2d 203, 2015 U.S. LEXIS 5773 \(2015\)](#).

Court would not apply standards contained in [5 USCS § 553](#) to rulemaking by Secretary of Agriculture of Commonwealth of Puerto Rico, since under § 551, governments of possessions and territories are excluded from

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application of Administrative Procedure Act. [Nestle Products, Inc. v. United States, 310 F. Supp. 792, 64 Cust. Ct. 158, C.D. 3976, 1970 Cust. Ct. LEXIS 3192 \(Cust. Ct. 1970\).](#)

Department of Commerce standard that dumping margins of less than .5 percent ad valorem may be regarded as de minimis is not rule promulgated under Administrative Procedure Act ([5 USCS §§ 500](#) et seq.) nor “interpretive rules” or “general statements of policy” under [5 USCS § 553](#) where: (1) .5 percent threshold determines rights and duties of parties to antidumping and countervailing duty proceedings, and (2) standard has present, not merely prospective, effect. [Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States, 634 F. Supp. 419, 10 Ct. Int'l Trade 301, 1986 Ct. Int'l Trade LEXIS 1237 \(Ct. Int'l Trade 1986\).](#)

Food and Drug Administration’s (FDA) failure to conduct [5 USCS § 553](#) notice-and-comment rulemaking procedures before issuing Import Alert # 66-14 under [21 USCS § 381](#) violates [5 USCS § 706\(2\)\(D\)](#) and renders Alert unlawful, because (1) Alert not only binds FDA, but also imposes new and substantive obligations on importers, (2) evidence indicates degree of discretion afforded agency under Alert is miniscule, and (3) language of Alert indicates intent that it be directive rather than mere guidance. [Bellarno International, Ltd. v. Food & Drug Admin., 678 F. Supp. 410, 1988 U.S. Dist. LEXIS 2043 \(E.D.N.Y. 1988\).](#)

Because applicable water control plans required notification to district office of emergency deviations “as soon as practicable,” altering of water regulating schedules by defendant Army Corps of Engineers was not subject to rule making provisions of APA. [Miccosukee Tribe of Indians v. United States, 420 F. Supp. 2d 1324, 19 Fla. L. Weekly Fed. D 412, 62 Env't Rep. Cas. \(BNA\) 1783, 2006 U.S. Dist. LEXIS 10595 \(S.D. Fla. 2006\).](#)

Unpublished decision: Because proceeding granting exemption was not one for granting, suspending, revoking or amending of any license or for issuance or modification of rules and regulations dealing with activities of licensees, and such proceedings were only ones for which Atomic Energy Act (AEA), [5 USCS §§ 701](#) et seq., granted right to hearing, plaintiffs’ contention that United States Nuclear Regulatory Commission was required to hold hearing under AEA and Administrative Procedure Act, [5 USCS §§ 701](#) et seq., before granting exemption, failed. [Brotsky v. United States NRC, 507 Fed. Appx. 48, 76 Env't Rep. Cas. \(BNA\) 1041, 2013 U.S. App. LEXIS 339 \(2d Cir. 2013\).](#)

Phrase in Housing Assistant Payments contract entered into under Section 8 of Housing Act, [42 USCS § 1437f](#), stating that parties are bound by “applicable regulations,” does not oblige HUD, when calculating annual rent adjustments, to comply with HUD regulations that track requirements of APA ([5 USCS §§ 551](#) and [553](#)); rather, reference to “applicable regulations” appears to refer to requirements listed on page one of contract. [National Leased Hous. Ass'n v. United States, 32 Fed. Cl. 762, 1995 U.S. Claims LEXIS 34 \(Fed. Cl. Feb. 17, 1995\), aff'd, 105 F.3d 1423, 1997 U.S. App. LEXIS 1612 \(Fed. Cir. 1997\).](#)

Decision by Civil Aeronautics Board to delegate authority need not be proposed for public comment prior to its adoption under [5 USCS § 553\(a\)\(3\) \(a\)](#). ASH, Rulemaking and Procedure 81-2-18, CAB Adv Dig, Feb. 1981, p. 19.

Formal public proceedings on issuance of instructions to Comsat by State Department, FCC, and NTIA are not required under Administrative Procedure Act. Re Communications Satellite Corp., Participation in INTELSAT’s Planned Domestic Services, FCC 88-358 (Adopted November 3, 1988).

B. Exceptions to Applicability

1. In General

46. Generally

[5 USCS § 553\(a\)\(2\)](#), exempting regulations relating to grants from notice requirements of § 553, is constitutional. [Rodriguez v. Swank, 318 F. Supp. 289, 14 Fed. R. Serv. 2d \(Callaghan\) 1076, 1970 U.S. Dist. LEXIS 10145 \(N.D. Ill. 1970\), aff'd, 403 U.S. 901, 91 S. Ct. 2202, 29 L. Ed. 2d 677, 1971 U.S. LEXIS 1710 \(1971\).](#)

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Exemption from requirements of § 4 of Administrative Procedure Act ([5 USCS § 553](#)) should be allowed only where strong congressional intent to that effect exists or when matter fits within [5 USCS § 553\(a\)](#) or [§ 553\(b\)\(A\)](#) and (B). [Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 12 Env't Rep. Cas. \(BNA\) 1088, 8 Env'tl. L. Rep. 20748, 1978 U.S. Dist. LEXIS 15274 \(D.D.C. 1978\).](#)

47. Construction

Even construed narrowly, [5 USCS § 553\(a\)\(2\)](#) is broad exemption from safeguards generally imposed on agency action; its literal reach is circumscribed somewhat by relevant legislative history, but nonetheless broad domain is preserved for its operation, and more specifically to extent that any one of enumerated categories is clearly and directly involved in regulatory effort at issue, Act's procedural compulsions are suspended. [Humana of South Carolina, Inc. v. Califano, 590 F.2d 1070, 191 U.S. App. D.C. 368, 1978 U.S. App. LEXIS 8986 \(D.C. Cir. 1978\),](#) app. after remand, [758 F.2d 696, 244 U.S. App. D.C. 376, 1985 U.S. App. LEXIS 28528 \(D.C. Cir. 1985\).](#)

Exemptions of [5 USCS § 553\(a\)\(2\)](#) must be narrowly read. [New York v. Diamond, 379 F. Supp. 503, 8 Empl. Prac. Dec. \(CCH\) ¶9577, 8 Fair Empl. Prac. Cas. \(BNA\) 533, 1974 U.S. Dist. LEXIS 7458 \(S.D.N.Y. 1974\),](#) disapproved, [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\).](#)

Exemption from requirements of § 4 of Administrative Procedure Act ([5 USCS § 553](#)) should be allowed only where strong congressional intent to that effect exists or when matter fits within [5 USCS § 553\(a\)](#) or [§ 553\(b\)\(A\)](#) and (B). [Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 12 Env't Rep. Cas. \(BNA\) 1088, 8 Env'tl. L. Rep. 20748, 1978 U.S. Dist. LEXIS 15274 \(D.D.C. 1978\).](#)

Exemptions from rulemaking procedures are construed narrowly and granted reluctantly. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\).](#)

48. Estoppel against asserting exception

After Department of Labor stated that regulation prohibiting cities from applying own rules with regard to equal employment would be exempt from notice and publication requirements because notice was impracticable, unnecessary, or contrary to public interest, and did not raise exemptions under [5 USCS § 553\(a\)\(2\)](#), it was estopped from subsequently arguing that regulation came within broader exception of § 553(a)(2). [New York v. Diamond, 379 F. Supp. 503, 8 Empl. Prac. Dec. \(CCH\) ¶9577, 8 Fair Empl. Prac. Cas. \(BNA\) 533, 1974 U.S. Dist. LEXIS 7458 \(S.D.N.Y. 1974\),](#) disapproved, [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\).](#)

Agency, in promulgating rulemaking procedures, is barred from relying upon blanket exemptions of [5 USCS § 553\(a\)\(2\)](#), where agency initially relies upon different exemptions provided for in Administrative Procedure Act. [New York v. Diamond, 379 F. Supp. 503, 8 Empl. Prac. Dec. \(CCH\) ¶9577, 8 Fair Empl. Prac. Cas. \(BNA\) 533, 1974 U.S. Dist. LEXIS 7458 \(S.D.N.Y. 1974\),](#) disapproved, [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\).](#)

Economic Development Administration's voluntary publication in Federal Register and permissive invitation for public comment with respect to proposed regulations did not work estoppel against application of exemption under [5 USCS § 553\(a\)\(2\)](#). [Lewis v. Richardson, 428 F. Supp. 1164, 1977 U.S. Dist. LEXIS 17653 \(D. Mass. 1977\).](#)

49. Waiver of exception

Since Department of Agriculture has announced in Federal Register that procedural requirements of Administrative Procedure Act would be applicable to all rule making relating to "public property, loans, grants, benefits or contracts," issuance of allotment regulations under food stamp program, which would otherwise be exempt matter under [5 USCS § 553](#), is subject to rule making requirements of § 553. [Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 168 U.S. App. D.C. 387, 1975 U.S. App. LEXIS 14267 \(D.C. Cir. 1975\).](#)

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Where Administrative Conference of United States recommends that governmental agencies agree to follow rule making procedures even if subject matter would fall within exceptions for grants, benefits and contracts, and Department of Interior subsequently adopts such recommendation, it has expressly recognized that advantages of public participation in policy decisions affecting public benefits outweigh disadvantages, and exceptions therefor do not apply to decision by Bureau of Indian Affairs to transfer school lunch program, which provides free lunches to Indian children, to Department of Agriculture, which would provide free lunches only for needy children. [Vigil v. Andrus, 667 F.2d 931, 1982 U.S. App. LEXIS 22925 \(10th Cir. 1982\).](#)

Agency waiver of exemption to matters relating to grants, benefits or contracts is binding, and rulemaking requirements are therefore applicable to school lunch program. [Alcaraz v. Block, 746 F.2d 593, 1984 U.S. App. LEXIS 17086 \(9th Cir. 1984\).](#)

Small Business Administration waived exemption under [5 USCS § 553\(a\)\(2\)](#) by publication of notice of waiver in Federal Register. [Duke City Lumber Co. v Butz, 382 F. Supp. 362, 7 Env't Rep. Cas. \(BNA\) 1104, 5 Env'tl. L. Rep. 20080 \(DC Dist Col 1974\).](#)

Although Department of Housing and Urban Development guide book prescribing alternatives to foreclosure on federally funded mortgages arguably is exempt from Administrative Procedure Act rule making requirements, Department's announcement at [24 CFR § 10.1](#) of intention to follow policy of voluntarily publishing all rules and regulations, even where not required to do so, required Department to publish all binding rules and regulations, and guide book which was not published was not binding on Department. [Brown v. Lynn, 392 F. Supp. 559, 1975 U.S. Dist. LEXIS 13872 \(N.D. Ill. 1975\).](#)

Agency election to abide by rulemaking procedures of [5 USCS § 553](#) requires agency to comply with notice and comment provisions in statement of policy, and obligations under Administrative Procedures Act ([5 USCS §§ 551](#) et seq.) are not discretionary with agency. [Herron v. Heckler, 576 F. Supp. 218, 1983 U.S. Dist. LEXIS 12135 \(N.D. Cal. 1983\).](#)

50. —Health and Human Services Department

Although Secretary of Health Education and Welfare in 1971 waived exemption from rulemaking requirements of rules relating to "benefits," regulations issued prior to 1971 waiver remain exempt and are not required to have contemporaneous administrative record justifying regulation. [Holy Cross Hospital-Mission Hills v. Heckler, 749 F.2d 1340, 1984 U.S. App. LEXIS 15723 \(9th Cir. 1984\).](#)

Injunction by District Court prohibiting state implementation of Secretary of Health and Human Service's directive that income of siblings be included in determination of Medicaid eligibility, which resulted in loss of benefits to prior recipients, was reviewable as substantive rule with force and effect of law notwithstanding Secretary voluntarily waived "benefits exemption", thereby imposing upon agency procedural requirements not required by law, since waiver did not overrule or otherwise abrogate § 553, thus, fact that directive was not promulgated in accordance with Administrative Procedure Act ([5 USCS § 551](#) et seq.) did not preclude court from concluding directive to be substantive rule. [Vance v. Hegstrom, 793 F.2d 1018, 1986 U.S. App. LEXIS 26651 \(9th Cir. 1986\).](#)

Since Secretary of Health, Education and Welfare concedes that portions of memorandum represented change in policy, and HEW has promulgated regulation making procedural requirements of [5 USCS § 553](#) applicable to all its rulemaking relating to public property, loans, grants, benefits, or contracts, changes in policy relating to approved plans for rendering social services require compliance with procedural requirements for rulemaking. [Florida v. Weinberger, 401 F. Supp. 760, 1975 U.S. Dist. LEXIS 16761 \(D.D.C. 1975\).](#)

Even though Department of Health, Education and Welfare Indian Health Service policy would be exempt from rule making requirements of [5 USCS § 553](#) under exemption relating to public property, loans, grants, benefits, or contracts, IHS is still required to meet rule making requirements of § 553 since HEW has, by regulation, placed

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itself under procedural requirements of § 553 in all its rule making relating to public property, loans, grants, benefits, or contracts. [Lewis v. Weinberger, 415 F. Supp. 652, 1976 U.S. Dist. LEXIS 14886 \(D.N.M. 1976\)](#).

Although social security administration, in 1971, waived exemption from rulemaking requirements as to rules relating to benefits, lack of administrative record concerning regulation promulgated in 1966 does not render regulation arbitrary and capricious. [Bedford County General Hospital v. Heckler, 574 F. Supp. 943, 1983 U.S. Dist. LEXIS 11861 \(E.D. Tenn. 1983\)](#), aff'd, [757 F.2d 87, 1985 U.S. App. LEXIS 29688 \(6th Cir. 1985\)](#).

Secretary's election to promulgate rule is not waiver of exemption under grants and benefits exception, and agency is therefore not bound to follow notice and comment procedures before repealing such rule. [Washington Hospital Center v. Heckler, 581 F. Supp. 195, 1984 U.S. Dist. LEXIS 20701 \(D.D.C. 1984\)](#).

51. —Labor Department

Waiver by Department of Labor of "benefits" exception to notice and comment provision in voluntary reimposition of rules does not amount to "procedural requirement imposed by Congress" and department therefore did not have to publish letters for notice and comment to give them force of law. [Cosby v. Ward, 843 F.2d 967, Unemployment Ins. Rep. \(CCH\) ¶21889, Unemployment Ins. Rep. \(CCH\) ¶21889, 1988 U.S. App. LEXIS 3377 \(7th Cir. 1988\)](#).

Department of Labor, by [29 CFR § 2.7](#) effective July 10, 1971, expressly waives applicability of all [5 USCS § 553\(a\)\(2\)](#) exemptions to its rulemaking, except those pertaining to agency management and personnel. [New York v. Diamond, 379 F. Supp. 503, 8 Empl. Prac. Dec. \(CCH\) ¶19577, 8 Fair Empl. Prac. Cas. \(BNA\) 533, 1974 U.S. Dist. LEXIS 7458 \(S.D.N.Y. 1974\)](#), disapproved, [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\)](#).

Department of Labor's waiver of exemptions under [5 USCS § 553](#) to rule making requirements for public contracts is not to be applied retroactively, and Executive Order relating to public contracts adopted 6 years before waiver was not subject to notice and hearing procedures of § 553. [Crown Zellerbach Corp. v. Marshall, 441 F. Supp. 1110, 24 Cont. Cas. Fed. \(CCH\) ¶81793, 15 Empl. Prac. Dec. \(CCH\) ¶7898, 15 Fair Empl. Prac. Cas. \(BNA\) 1628, 1977 U.S. Dist. LEXIS 13301 \(E.D. La. 1977\)](#).

2. Military Function of United States

52. Generally

Military function exception to rule-making requirements must be construed narrowly, and District Court erred in granting summary judgment against union challenging Department of Energy's application of rule to its unions members who were hired by contractor to guard nuclear test site; record failed to disclose that these guards performed any function directly related to manufacture or development of military weapons for Department. [Independent Guard Ass'n, Local No. 1 v. O'Leary, 57 F.3d 766, 95 Cal. Daily Op. Service 4414, 95 D.A.R. 7607, 1995 U.S. App. LEXIS 14432 \(9th Cir.\)](#), amended, reh'g denied, [69 F.3d 1038, 95 Cal. Daily Op. Service 8700, 95 D.A.R. 15057, 1995 U.S. App. LEXIS 31810 \(9th Cir. 1995\)](#).

Specifying security zone seemed no less directly related to military action than identifying targets or establishing time for artillery exercises; thus, proposed temporary security zone in ocean waters adjacent to Camp Garcia, on island of Vieques, Puerto Rico, was well within concept of military function. [United States v. Ventura-Melendez, 321 F.3d 230, 2003 U.S. App. LEXIS 3407 \(1st Cir. 2003\)](#).

Rule designed to render safe and feasible performance of military function by preventing interference on part of civilians necessarily serves military function as well as civilian one. [United States v. Ventura-Melendez, 321 F.3d 230, 2003 U.S. App. LEXIS 3407 \(1st Cir. 2003\)](#).

Where defendant appealed his conviction for failing to register as sex offender under [18 U.S.C.S. § 2250](#), Secretary of Defense did not violate Administrative Procedures Act in designating military offenses as sex offenses since sex

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offenses fell within the military affairs exception in [5 U.S.C.S. § 553\(a\)\(1\)](#). [United States v. Mingo, 964 F.3d 134, 2020 U.S. App. LEXIS 21168 \(2d Cir. 2020\)](#).

Administrative Procedure Act ([5 USCS §§ 501](#) et seq.) is inapplicable to determination of death of serviceman made by Secretary of Army, Navy, or Air Force because it involved military affairs and public benefits, both of which are specifically excepted from application of rule-making provisions of Act by § 553(a)(1) and (2). [McDonald v. McLucas, 371 F. Supp. 837, 1973 U.S. Dist. LEXIS 12400 \(S.D.N.Y. 1973\)](#).

Since it is specifically provided that rule making relating to military function of United States ([5 USCS § 553\(a\)\(1\)](#)), and that rules of agency organization, procedure or practice ([5 USCS § 553\(b\)\(3\)\(A\)](#)), are exempt from notice and comment requirements, such rules, including delegations and reservations, can be effective regardless of publication in Federal Register or Code of Federal Regulations. [Nolan v. United States, 44 Fed. Cl. 49, 1999 U.S. Claims LEXIS 118 \(Fed. Cl. May 28, 1999\)](#).

Formal public proceedings on issuance of instructions to Comsat by State Department, FCC, and NTIA are not required because such instructions process relates to military or foreign affairs function of United States. Re Communications Satellite Corp., Participation in INTELSAT's Planned Domestic Services, FCC 88-358 (Adopted November 3, 1988).

3. Foreign Affairs Function of United States

53. Generally

Notice issued by State Department, which designated as "benefit" under Foreign Missions Act, [22 USCS §§ 4301](#) et seq., exemption from local real property taxes for foreign embassies in New York City that housed employees and their families, was procedurally proper because it fell within "foreign affairs function" exception to notice and comment under [5 U.S.C. § 553\(a\)\(1\)](#). [City of New York v. Permanent Mission of India, 618 F.3d 172, 2010 U.S. App. LEXIS 17127 \(2d Cir. 2010\)](#), cert. denied, 564 U.S. 1046, 131 S. Ct. 3056, 180 L. Ed. 2d 902, 2011 U.S. LEXIS 4951 (2011).

Notice and hearing requirements of Administrative Procedure Act do not apply to publication of Iranian Project Telegrams regarding status of Iranian students in United States, since such telegrams were clearly issued to carryout president's Iranian policy which is foreign affairs function. [Akbari v. Godshall, 524 F. Supp. 635, 1981 U.S. Dist. LEXIS 15250 \(D. Colo. 1981\)](#).

Foreign affairs exception applies only to extent that accepted subject matter is clearly and directly involved in foreign affairs function. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\)](#).

Formal public proceedings on issuance of instructions to Comsat by State Department, FCC, and NTIA are not required because such instructions process relates to military or foreign affairs function of United States. Re Communications Satellite Corp., Participation in INTELSAT's Planned Domestic Services, FCC 88-358 (Adopted November 3, 1988).

54. Immigration matters

Interim rule concerning asylum eligibility was likely promulgated without following proper notice-and-comment procedures where a reference in the rule to the southern border with Mexico was not sufficient to invoke the foreign affairs exception, and the connection between negotiations with Mexico and the immediate implementation of the rule was not apparent on this record. [E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 2018 U.S. App. LEXIS 37150 \(9th Cir. 2018\)](#).

Interim rule concerning asylum eligibility was not exempt from both notice-and-comment procedures and the 30-day grace period under the APA's good cause exceptions. [5 U.S.C.S. § 553\(b\)\(B\)](#) and (d)(3), where the rule, standing

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alone, did not change eligibility for asylum for any alien seeking to enter the United States; that change was not effected until the rule was combined with a presidential proclamation. The government's contention that the very announcement of the rule itself would give aliens a reason to surge across the southern border in numbers greater than was currently the case was simply too speculative. [E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 2018 U.S. App. LEXIS 37150 \(9th Cir. 2018\).](#)

Administrative Procedure Act is not applicable to deportation proceedings, since immigration matters are within foreign affairs exception to Administrative Procedure Act ([5 USCS § 553](#)). [Yiakoumis v. Hall, 83 F. Supp. 469, 1949 U.S. Dist. LEXIS 2886 \(D. Va. 1949\).](#)

Repeal by Immigration and Naturalization Service of regulation allowing student exemption from labor certification before seeking adjustment of status to permanent resident was not matter involving "foreign affairs of United States" nor mere "interpretive" regulation exempt from procedural requirements of Administrative Procedure Act, [5 USCS § 553](#). [Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288, 1973 U.S. Dist. LEXIS 12818 \(D.D.C. 1973\).](#)

Immigrant, who was arrested in wake of September 11 for overstaying his visa, did not have strong likelihood of succeeding on his claim that Government's closure of his deportation proceedings violated claim under Administrative Procedures Act, [5 USCS § 551](#) et seq., to extent that Creppy directive was viewed as amending Act; although Creppy directive appeared to have been final agency rule generally requiring adherence to Act's notice-and-comment procedures, "foreign policy" exception set forth in [5 USCS § 553\(a\)\(1\)](#) applied to exempt it from those requirements. [Haddad v. Ashcroft, 221 F. Supp. 2d 799, 31 Media L. Rep. \(BNA\) 1209, 2002 U.S. Dist. LEXIS 17990 \(E.D. Mich. 2002\)](#), remanded, [76 Fed. Appx. 672, 2003 U.S. App. LEXIS 19768 \(6th Cir. 2003\).](#)

Rule challengers showed likelihood of prevailing on claim that DHS was arbitrary and capricious in enacting immigration rule that would expand definition of "public charge" because they showed DHS likely understood individuals would disenroll from public benefits even though they were not subject to public charge determination, yet DHS refused to consider that cost. [City & Cty. of S.F. v. United States Citizenship & Immigration Servs., 408 F. Supp. 3d 1057, 2019 U.S. Dist. LEXIS 177379 \(N.D. Cal. 2019\)](#), aff'd, [2020 U.S. App. LEXIS 37602 \(9th Cir. Dec. 2, 2020\).](#)

55. Treaties and agreements

Foreign affairs exception to notice requirements of Administrative Procedure Act ([5 USCS § 553](#)) applies to negotiation of agreement with Canada regulating presunrise operation of daytime radio stations, and radio station was not entitled to notice of negotiations, even though its presunrise power was limited by agreement. [WBEN, Inc. v. United States, 396 F.2d 601, 1968 U.S. App. LEXIS 6983 \(2d Cir.\)](#), cert. denied, 393 U.S. 914, 89 S. Ct. 240, 21 L. Ed. 2d 200 (1968).

Federal Highway Administration's rule implementing accord between Mexico and U.S., which requires commercial drivers of both nations to pass test meeting joint standards and grants recognition to licenses issued by other nations, involves "foreign affairs function" within meaning of [5 USCS § 553\(a\)](#). [Bellsouth Corp. v. FCC, 17 F.3d 1487, 305 U.S. App. D.C. 134, 1994 U.S. App. LEXIS 4532 \(D.C. Cir. 1994\)](#), dismissed, [1994 U.S. App. LEXIS 4822 \(D.C. Cir. Mar. 15, 1994\).](#)

Negotiation of trade agreements with foreign governments clearly and directly involves foreign affairs function and when president defines, modifies, or violates terms of international agreement, or directs that his subordinates do so, action is clearly and directly involved within foreign affairs function; customs interim regulations issued pursuant to presidential direction and going directly to purpose of trade agreements are exempt from prior notice and comment provisions. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\).](#)

4. Agency Management or Personnel

56. Generally

5 USCS § 553

Administrative Procedure Act requirements contained in [5 USCS §§ 553–554](#) that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to decision of Secretary of Transportation to approve construction of interstate highway through public park, because § 553 excludes from rulemaking process all matters relating to government agency management or personnel. [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136, 2 Env't Rep. Cas. \(BNA\) 1250, 1 Env'tl. L. Rep. 20110, 1971 U.S. LEXIS 96 \(1971\).](#)

Department of Justice drug-free workforce plans adopted pursuant to Executive Order are all matters which relate to agency management or personnel under [5 USCS § 553\(a\)\(2\)](#), and thus are exempt from procedural requirements. [Harmon v. Thornburgh, 878 F.2d 484, 278 U.S. App. D.C. 382, 4 I.E.R. Cas. \(BNA\) 1001, 1989 O.S.H. Dec. \(CCH\) ¶28590, 1989 U.S. App. LEXIS 9415 \(D.C. Cir. 1989\)](#), cert. denied, 493 U.S. 1056, 110 S. Ct. 865, 107 L. Ed. 2d 949, 4 I.E.R. Cas. (BNA) 1888, 1990 U.S. LEXIS 609 (1990).

United States Court of Federal Claims had subject matter jurisdiction over employees' pay conversion action under [5 USCS § 5334\(b\)](#) to recover pay lost due to government's failure to provide them with two-step pay increase upon their transfer because 1996 Personnel Management System clearly qualified as regulation under [28 USCS § 1491](#); indeed, it was specifically authorized by statute and was not in conflict with General Schedule (GS) system compensation provisions or any other law; it was promulgated by administrator as directed by Congress; as regulation dealing with matter relating to agency management or personnel, formal rulemaking was not required under [5 USCS § 553\(a\)\(2\)](#); and agency's statement, in mandatory language, of its intention to continue to pay employees under GS scale plainly reflected intention to be bound by compensation policy set forth in regulation. [Brodowy v. United States, 482 F.3d 1370, 181 L.R.R.M. \(BNA\) 2878, 2007 U.S. App. LEXIS 8374 \(Fed. Cir. 2007\)](#), reh'g denied, [2007 U.S. App. LEXIS 16034 \(Fed. Cir. June 22, 2007\)](#), cert. denied, 552 U.S. 1097, 128 S. Ct. 879, 169 L. Ed. 2d 725, 2008 U.S. LEXIS 68 (2008).

Department of Army grievance procedures are matters relating to internal management of agency within meaning of [5 USCS § 553](#). [American Federation of Government Employees v. McNamara, 291 F. Supp. 286, 69 L.R.R.M. \(BNA\) 2505, 1968 U.S. Dist. LEXIS 8396 \(M.D. Pa. 1968\).](#)

Even if memorandum by Assistant Secretary of Interior for Fish and Wildlife and Parks expressing his opinion that proposed master plan for national park was unsatisfactory was rule involving agency action, it is excepted from requirements of Administrative Procedure Act ([5 USCS § 553](#)) as matter relating to agency management or personnel. [Friends of Yosemite v. Frizzell, 420 F. Supp. 390, 10 Env't Rep. Cas. \(BNA\) 1159, 7 Env'tl. L. Rep. 20087, 1976 U.S. Dist. LEXIS 13033 \(N.D. Cal. 1976\).](#)

Where officer was disqualified by U.S. Marshal's Service based on color vision deficit, but asserted that Service improperly failed to provide notice and solicit comment prior to adopting medical standards, adoption of standards was exempt from notice and comment requirements under [5 USCS § 553\(a\)\(2\)](#) since medical qualifications were one of most salient considerations of Service's personnel system. [Intl Union, Sec., Police, & Fire Prof'ls of Am. v. United States Marshal's Serv., 350 F. Supp. 2d 522, 176 L.R.R.M. \(BNA\) 3188, 2004 U.S. Dist. LEXIS 25928 \(S.D.N.Y. 2004\).](#)

Designation of waters as state waters for private aids to navigation relates to Coast Guard management and as such is exempt from public notice requirement of [5 USCS § 553](#). G-LMI memo 16518, 4 Aug 80, CGLB, Dec 1981.

57. Civil Service Commission

Regulation of Civil Service Commission exempting participation in political campaigns as or on behalf of independent candidates in partisan election for local office in District of Columbia from otherwise applicable provisions of Hatch Act does not fall within agency personnel exemption of [5 USCS § 553](#), since individuals outside Commission are substantially affected by such regulation. [Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 180 U.S. App. D.C. 281, 1977 U.S. App. LEXIS 10522 \(D.C. Cir. 1977\).](#)

5 USCS § 553

Much of regulatory policy of Civil Service Commission is set forth in Federal Personnel Manual, and not in Code of Federal Regulations, primarily because Congress has specifically exempted matters relating to agency management or personnel from prior notice, comment, and other requirements of rulemaking provisions of Administrative Procedure Act ([5 USCS § 553\(a\)\(2\)](#)). *Newell v. Federal Energy Administration*, 591 F.2d 704, 1979 U.S. App. LEXIS 17774 (Temp. Emer. Ct. App. 1979).

58. Postal Service

Hearing provisions of Administrative Procedure Act ([5 USCS § 553](#)) do not apply to postal rate fixing, as mail rates are within exception relating to agency management or personnel. *Doehla Greeting Cards, Inc. v. Summerfield*, 116 F. Supp. 68, 1953 U.S. Dist. LEXIS 2179 (D.D.C. 1953).

Rules promulgated by Post Office providing that all categories of mail are to be routed abroad by most expeditious air service, without regard to type of aircraft used, are not within exemption to Administrative Procedure Act ([5 USCS § 553](#)) as relating solely to internal management of agency, because they affect outside parties. *Seaboard World Airlines, Inc. v. Gronouski*, 230 F. Supp. 44, 1964 U.S. Dist. LEXIS 8013 (D.D.C. 1964).

5. Public Property, Loans, Grants, Benefits or Contracts**a. In General****59. Generally**

Practical necessity for public contracts exception of [5 USCS § 553\(a\)\(2\)](#) is apparent in that it would be unreasonable to require agencies of government to publish notice in Federal Register and to hold hearings each time they entered into, rescinded, or canceled government contracts, as burden in time and expense would be extraordinary. *Rainbow Valley Citrus Corp. v. Federal Crop Ins. Corp.*, 506 F.2d 467, 1974 U.S. App. LEXIS 6185 (9th Cir. 1974).

In order to make exception under [5 USCS § 553\(a\)\(2\)](#) operative, excepted subjects must be directly, or clearly and directly, involved, but this does not mean that when excepted subjects are clearly involved, exception reaches only mechanical rules on those subjects. *National Wildlife Federation v. Snow*, 561 F.2d 227, 182 U.S. App. D.C. 229, 7 *Env'tl. L. Rep.* 20022, 1976 U.S. App. LEXIS 6507 (D.C. Cir. 1976).

Rulemaking which involves substantive public policy may be within statutory exceptions of [5 USCS § 553\(a\)\(2\)](#), and exceptions which pertain to public grants also apply to regulations which establish procedures under which grants are to be given. *National Wildlife Federation v. Snow*, 561 F.2d 227, 182 U.S. App. D.C. 229, 7 *Env'tl. L. Rep.* 20022, 1976 U.S. App. LEXIS 6507 (D.C. Cir. 1976).

Where benefits exemption obviates need to comply with informal rulemaking procedures, agency need not state any justification for not affording notice and opportunity to comment on proposed action; although agency is required to state finding of good cause in claiming good cause exemption, no such explanation is required for statutory exemptions. *Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1985 U.S. App. LEXIS 29143 (5th Cir. 1985).

Exemption under [5 USCS § 553](#) relating to agency action involving public property or contracts is limited to rulemaking procedures under § 553 and does not apply to activities not constituting administrative rulemaking. *Nuclear Data, Inc. v. Atomic Energy Com.*, 344 F. Supp. 719, 174 U.S.P.Q. (BNA) 212, 1972 U.S. Dist. LEXIS 13733 (N.D. Ill. 1972).

Exemption relating to agency action involving public property or contracts set forth in [5 USCS § 553](#) is limited to rule making procedures set forth in § 553. *Nuclear Data, Inc. v. Atomic Energy Com.*, 344 F. Supp. 719, 174 U.S.P.Q. (BNA) 212, 1972 U.S. Dist. LEXIS 13733 (N.D. Ill. 1972).

5 USCS § 553

Congress did not intend, by public property exception to [5 USCS § 553](#), to abolish procedural due process by exempting such matters from rule making requirements of Administrative Procedure Act, but rather to enhance it by freeing variegated proceedings from shackles of single, mandatory format. [Northern California Power Agency v. Morton, 396 F. Supp. 1187, 5 Envtl. L. Rep. 20719, 1975 U.S. Dist. LEXIS 13813 \(D.D.C. 1975\)](#), aff'd, [539 F.2d 243, 176 U.S. App. D.C. 241 \(D.C. Cir. 1976\)](#).

Grants and benefits exception does not depend on any test which distinguishes procedural rules from those having substantial impact. [Washington Hospital Center v. Heckler, 581 F. Supp. 195, 1984 U.S. Dist. LEXIS 20701 \(D.D.C. 1984\)](#).

Public property exception is not limited to day to day internal management decisions but encompasses any agency action in which public property is directly involved. [Ono v. Harper, 592 F. Supp. 698, 14 Envtl. L. Rep. 20910, 1983 U.S. Dist. LEXIS 16414 \(D. Haw. 1983\)](#).

b. Particular Agencies and Activities

60. Agriculture

Regulations under Grazing Act, pertaining to grazing privileges on federal ranges, fall within public property exemption to [5 USCS § 553](#). [McNeil v. Seaton, 281 F.2d 931, 108 U.S. App. D.C. 296, 1960 U.S. App. LEXIS 4263 \(D.C. Cir. 1960\)](#).

Decision to reclassify farm area as uninsurable crop-wise, because of its poor risk under [7 USCS § 1508](#), is exempt under [5 USCS § 553\(a\)\(2\)](#) from hearing requirement. [Rainbow Valley Citrus Corp. v. Federal Crop Ins. Corp., 506 F.2d 467, 1974 U.S. App. LEXIS 6185 \(9th Cir. 1974\)](#).

Despite exemption from rulemaking procedures for grant and benefit programs, food stamp regulations must be promulgated in accordance with rulemaking procedures of [5 USCS § 553](#). [Levesque v. Block, 723 F.2d 175, 1983 U.S. App. LEXIS 14292 \(1st Cir. 1983\)](#).

61. —Price supports

Mere notice of agency's invocation of [5 USCS § 552a\(k\)\(2\)](#) to exempt information from Privacy Act of 1974's disclosure requirements, when published under headings indicating that purpose of publication was compliance with routine reporting requirement of statute, was insufficient to constitute kind of notice of proposed rulemaking and invitation to comment that was required by Administrative Procedure Act. [Louis v. United States DOL, 419 F.3d 970, 23 I.E.R. Cas. \(BNA\) 459, 2005 U.S. App. LEXIS 17147 \(9th Cir. 2005\)](#).

Notice of proposed rulemaking, issued by Secretary of Health and Human Services regarding proposed amendment of rule under Health Insurance Portability and Accountability Act of 1996 (HIPAA), *Pub. L. 104-191, 110 Stat. 1936*, to allow covered entities to use and disclose patient health information for "routine uses" without patient consent, satisfied requirements of [5 USCS § 553\(b\)\(3\)](#) where it contained both terms or substance of proposed rule and description of subjects and issues involved. [Citizens for Health v. Leavitt, 428 F.3d 167, 2005 U.S. App. LEXIS 23516 \(3d Cir. 2005\)](#), cert. denied, *549 U.S. 941, 127 S. Ct. 43, 166 L. Ed. 2d 251, 2006 U.S. LEXIS 7416 (2006)*.

Order of Secretary of Agriculture relating to identification of tobacco of certain varieties on auction sale warehouse floor comes within exception to [5 USCS § 553](#) relating to loans, since failure to identify discount varieties may tend to depress tobacco market and depression of market price below support price will result in increase in government loans. [Stroud v. Benson, 155 F. Supp. 482, 1957 Trade Cas. \(CCH\) ¶168841, 1957 U.S. Dist. LEXIS 2963 \(D.N.C. 1957\)](#), vacated, [254 F.2d 448, 1958 U.S. App. LEXIS 4032 \(4th Cir. 1958\)](#).

Rules relating to tobacco price support program are exempt from requirements of [5 USCS § 553](#) as being related to loans, grants, benefits, or contracts. [Lazar v. Benson, 156 F. Supp. 259, 1957 U.S. Dist. LEXIS 2768 \(D.S.C. 1957\)](#).

5 USCS § 553

Determination by Secretary of Agriculture to impose 50 cents per hundredweight deduction from proceeds of sale of all milk marketed commercially by producers, to be remitted to Commodity Credit Corporation to offset portion of cost of milk price support program, is not subject to exemption from rulemaking matters relating to public property, loans, grants, benefits, or contracts in [5 USCS § 553\(a\)\(2\)](#), where Secretary, by regulation promulgated in Federal Register, bound himself to observe notice and comment requirements of § 553 and has never withdrawn from that position. [South Carolina ex rel. Patrick v. Block, 558 F. Supp. 1004, 1983 U.S. Dist. LEXIS 19356 \(D.S.C. 1983\)](#).

62. Economic development

Methods adopted by Secretary of Commerce and Economic Development Administration for administering grants pursuant to Local Public Works Capital Development and Investment Act were matters falling within exemption under [5 USCS § 553](#) pertaining to loans, grants, or benefits. [Lewis v. Richardson, 428 F. Supp. 1164, 1977 U.S. Dist. LEXIS 17653 \(D. Mass. 1977\)](#).

Economic Development Administration is not obligated to notify potential grant applicants of its requirements, since EDA's rulemaking is exempt from Administrative Procedure Act procedural requirements ([5 USCS § 553](#)) as grant matter, and EDA has never adopted any regulation making requirements of § 553 applicable to all its rulemaking activities. [Grand Rapids v. Richardson, 429 F. Supp. 1087, 1977 U.S. Dist. LEXIS 17732 \(W.D. Mich. 1977\)](#).

63. Energy and power

Administrative rules governing allocation of federal hydroelectric power were exempt from operation of this section as matter relating to public property within meaning of [5 USCS § 553\(a\)\(2\)](#). [Santa Clara v. Kleppe, 418 F. Supp. 1243, 9 Env't Rep. Cas. \(BNA\) 1689, 1976 U.S. Dist. LEXIS 13959 \(N.D. Cal.\), modified, 428 F. Supp. 315, 1976 U.S. Dist. LEXIS 12313 \(N.D. Cal. 1976\)](#).

Exemption under [5 USCS § 553](#) relating to agency action involving public property or contracts is limited to rulemaking procedures under § 553 and does not apply to activities not constituting administrative rulemaking, such as decision by Atomic Energy Commission to waive government's right to exclusive license on patent under Atomic Energy Act § 152 ([42 USCS § 2182](#)). [Nuclear Data, Inc. v. Atomic Energy Com., 344 F. Supp. 719, 174 U.S.P.Q. \(BNA\) 212, 1972 U.S. Dist. LEXIS 13733 \(N.D. Ill. 1972\)](#).

Tennessee Valley Authority's fixing of power rates is quasi-legislative in nature and such action constitutes informal rulemaking under [5 USCS § 553\(c\)](#); such action is, however, exempt from informal rulemaking requirements of § 553 by reason of express exception in § 553(a)(2) with respect to matter relating to public property or contracts. [Consolidated Aluminum Corp. v. Tennessee Valley Authority, 462 F. Supp. 464, 1978 U.S. Dist. LEXIS 16868 \(M.D. Tenn. 1978\)](#).

64. Highways

Administrative Procedure Act requirements contained in [5 USCS §§ 553–554](#) that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to decision of Secretary of Transportation to approve construction of interstate highway through public park, because § 553 excludes from rulemaking process all matters relating to public property, loans, grants, benefits, or contracts. [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136, 2 Env't Rep. Cas. \(BNA\) 1250, 1 Env'tl. L. Rep. 20110, 1971 U.S. LEXIS 96 \(1971\)](#).

Clear and direct connection with excepted proprietary subject would excuse Federal Highway Administration from overall statutory obligation to comply with notice and comment procedures in promulgating challenged regulations. [National Wildlife Federation v. Snow, 561 F.2d 227, 182 U.S. App. D.C. 229, 7 Env'tl. L. Rep. 20022, 1976 U.S. App. LEXIS 6507 \(D.C. Cir. 1976\)](#).

Promulgation of Certification Acceptance regulations whereby Federal Highway Administration set standards and procedures by which states could qualify for federal highway grants was exempt from rulemaking requirements of [5](#)

5 USCS § 553

[USCS § 553](#). *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 1976 U.S. Dist. LEXIS 15349 (D.D.C. 1976), remanded, 580 F.2d 689, 188 U.S. App. D.C. 426, 1978 U.S. App. LEXIS 10813 (D.C. Cir. 1978).

65. Housing

A claim by tenants of federally assisted housing project that denial of “trial-type” hearing before FHA with regard to proposed rental increases violates rule-making procedures of [5 USCS § 553](#) is without merit since § 553(a) exempts from rule-making procedures matters relating to public property, loans, grants, benefits, or contracts. *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 1971 U.S. App. LEXIS 8762 (2d Cir. 1971).

Under [5 USCS § 553\(a\)\(2\)](#), HUD regulations which require that leases used by local housing authorities recognize certain minimum rights and obligations of tenants, and which erect procedural and substantive safeguards attendant to settling of tenant grievances, are exempted from notice requirements. *Housing Authority of Omaha v. United States Housing Authority*, 468 F.2d 1, 1972 U.S. App. LEXIS 7377 (8th Cir. 1972), cert. denied, 410 U.S. 927, 93 S. Ct. 1360, 35 L. Ed. 2d 588, 1973 U.S. LEXIS 3337 (1973).

Regulation of Department of Housing and Urban Development requiring local housing authorities to set up due process hearing before taking any action adversely affecting tenant’s rights, duties, welfare or status is regulation of matter relating to contracts and, under Administrative Procedure Act, need not be published. *Brown v. Housing Authority of Milwaukee*, 471 F.2d 63, 1972 U.S. App. LEXIS 6373 (7th Cir. 1972).

Rulemaking provisions of Administrative Procedure Act ([5 USCS § 553](#)) do not apply to agency proceedings involving loans, grants, benefits, or contracts, such as decision of Secretary of Housing and Urban Development to approve urban renewal plan for federal funding. *Powelton Civic Home Owners Asso. v. Department of Housing & Urban Development*, 284 F. Supp. 809, 1968 U.S. Dist. LEXIS 10029 (E.D. Pa. 1968).

HUD properly determined that the assessment tools adopted under the affirmatively further fair housing (AFFH) requirement were subject to the requirements of the Paperwork Reduction Act (PRA), [44 U.S.C.S. § 3501](#) et seq., rather than the APA where the tools were essentially questionnaires that imposed reporting requirements on FHA applicants, and the AFFH Rule specified that the tools were intended to be information-collection devices subject to the requirements of the PRA. *Nat’l Fair Hous. Alliance v. Carson*, 330 F. Supp. 3d 14, 2018 U.S. Dist. LEXIS 139679 (D.D.C. 2018).

66. Interior Department

Order issued by Secretary of Interior which stated Secretary’s decision to issue no more coal prospecting permits until further notice and to reject all pending applications in order to prepare program for orderly development of coal resources with proper regard for protection of environment constituted general application of policy and concerned federal property within meaning of [5 USCS § 553](#). *Hunter v. Morton*, 529 F.2d 645, 1976 U.S. App. LEXIS 13170 (10th Cir. 1976).

Action of Secretary of Interior in freezing 1972 river use and apportioning that use between commercial and noncommercial users was exempt under [5 USCS § 553\(a\)\(2\)](#) from rule-making procedures as matter relating to public property, loans, grants, benefits or contracts. *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 13 *Env’t Rep. Cas. (BNA) 2094*, 9 *Env’tl. L. Rep.* 20769, 1979 U.S. App. LEXIS 9644 (9th Cir. 1979).

Rule-making requirements of [5 USCS § 553](#) do not apply to matters concerning public lands, thus, Secretary of Interior’s requirement that stipulation be filed before vesting of any rights in mining claim pursuant to [43 USCS § 154](#) may support voiding of claims for which no stipulation was filed. *American Colloid Co. v. Babbitt*, 145 F.3d 1152, 1998 *Colo. J. C.A.R.* 2568, 28 *Env’tl. L. Rep.* 21178, 1998 U.S. App. LEXIS 10471 (10th Cir. 1998).

67. —Energy and power

5 USCS § 553

Action by Secretary of Interior, approved by Federal Power Commission, revising rate schedule for sale of federal hydroelectric power related to public property within exemption of 5 USCS § 553. [Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167, 165 U.S. App. D.C. 344, 1974 U.S. App. LEXIS 6028 \(D.C. Cir. 1974\)](#), cert. denied, 423 U.S. 830, 96 S. Ct. 49, 46 L. Ed. 2d 47, 1975 U.S. LEXIS 2377 (1975).

Power generated by federal reclamation projects is public property within meaning of [5 USCS § 553\(a\)\(2\)](#) and Secretary of Interior, in deciding how to allocate California Central Valley Project output, is accordingly not bound to follow procedures mandated by [5 USCS § 553](#). [Santa Clara v. Andrus, 572 F.2d 660, 11 Env't Rep. Cas. \(BNA\) 1777, 8 Env'tl. L. Rep. 20313, 1978 U.S. App. LEXIS 12814 \(9th Cir.\)](#), cert. denied, 439 U.S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 167, 12 Env't Rep. Cas. (BNA) 1338, 1978 U.S. LEXIS 3044 (1978).

Even though Department of Interior electrical power rate making function is exempt from requirements of [5 USCS § 553](#) under public property exemption, this does not affect agency's obligation under § 552 to publish description of procedures to be followed in rate making proceedings. [Northern California Power Agency v. Morton, 396 F. Supp. 1187, 5 Env'tl. L. Rep. 20719, 1975 U.S. Dist. LEXIS 13813 \(D.D.C. 1975\)](#), aff'd, [539 F.2d 243, 176 U.S. App. D.C. 241 \(D.C. Cir. 1976\)](#).

68. —Oil and gas leases

Public property exception of [5 USCS § 553\(a\)\(2\)](#) excludes rulemaking by, among others, National Forest Service, National Park System, Bureau of Land Management, and other agencies dealing with public property, such as Interior Department with its leases of offshore oil properties. [NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709, 70 L.R.R.M. \(BNA\) 3345, 60 Lab. Cas. \(CCH\) ¶10032, 1969 U.S. LEXIS 3101 \(1969\)](#).

Department of Interior regulations pertaining to oil and gas leasing of wildlife refuge lands relate to public property under exemption in [5 USCS § 553](#). [Duesing v. Udall, 350 F.2d 748, 121 U.S. App. D.C. 370, 24 Oil & Gas Rep. 5, 1965 U.S. App. LEXIS 5059 \(D.C. Cir. 1965\)](#), cert. denied, 383 U.S. 912, 86 S. Ct. 888, 15 L. Ed. 2d 667, 1966 U.S. LEXIS 2276 (1966).

69. Labor and employment

[5 USCS § 553\(a\)\(2\)](#) is indicative of concern to avoid application of notice section of Administrative Procedure Act to minimum wage determinations of Department of Labor in connection with public contracts. [Housing Authority of Omaha v. United States Housing Authority, 468 F.2d 1, 1972 U.S. App. LEXIS 7377 \(8th Cir. 1972\)](#), cert. denied, 410 U.S. 927, 93 S. Ct. 1360, 35 L. Ed. 2d 588, 1973 U.S. LEXIS 3337 (1973).

Executive Order prohibiting employment discrimination by government contractors is matter involving public contracts within exemption of [5 USCS § 553](#). [United States v. New Orleans Public Service, Inc., 553 F.2d 459, 14 Empl. Prac. Dec. \(CCH\) ¶7602, 14 Fair Empl. Prac. Cas. \(BNA\) 1734, 1977 U.S. App. LEXIS 13072 \(5th Cir.\)](#), reh'g denied, reh'g, en banc, denied, [559 F.2d 30, 1977 U.S. App. LEXIS 14762 \(5th Cir. 1977\)](#), vacated, 436 U.S. 942, 98 S. Ct. 2841, 56 L. Ed. 2d 783, 16 Empl. Prac. Dec. (CCH) ¶ 8315, 17 Fair Empl. Prac. Cas. (BNA) 897, 1978 U.S. LEXIS 2066 (1978).

Department of Labor letters to state agency as to administration of unemployment compensation programs were not required to be published for notice and comment since insurance benefits are clearly public benefits and payments are pursuant to contract between state agency and Department of Labor which is "public contract" within meaning of [5 USCS § 553\(a\)\(2\)](#). [Cosby v. Ward, 843 F.2d 967, Unemployment Ins. Rep. \(CCH\) ¶ 21889, Unemployment Ins. Rep. \(CCH\) ¶21889, 1988 U.S. App. LEXIS 3377 \(7th Cir. 1988\)](#).

Where officer was disqualified by U.S. Marshal's Service from employment by private company providing courtroom security services based on color vision deficit, but asserted that Service improperly failed to provide notice and solicit comment prior to adopting medical standards, adoption of standards was exempt from notice and comment requirements under [5 USCS § 553\(a\)\(2\)](#) since action set medical standards under Service's contract with private

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company. [Intl Union, Sec., Police, & Fire Prof'ls of Am. v. United States Marshal's Serv., 350 F. Supp. 2d 522, 176 L.R.R.M. \(BNA\) 3188, 2004 U.S. Dist. LEXIS 25928 \(S.D.N.Y. 2004\).](#)

70. Medicare and Medicaid

Promulgation by Secretary of Health, Education and Welfare of section of provider reimbursement manual and related intermediary letter requiring capitalization of interest costs incurred by Medicare provider during construction of new facility were exempt from rulemaking requirements of Administrative Procedure Act under benefit exception provided for in [5 USCS § 553\(a\)\(2\)](#). [Good Samaritan Hospital, Corvallis v. Mathews, 609 F.2d 949, 1979 U.S. App. LEXIS 9726 \(9th Cir. 1979\).](#)

“Benefits” exemption to formal rulemaking requirements is applicable to provider reimbursement regulations promulgated under Medicare Act, despite fact that repeal of regulations have substantial impact on affected parties. [Baylor University Medical Center v. Heckler, 758 F.2d 1052, 1985 U.S. App. LEXIS 29143 \(5th Cir. 1985\).](#)

Medicaid guideline in Regional Office Manual is binding upon government even though promulgated without notice and comment since it is exempt from requirements of Administrative Procedures Act ([5 USCS §§ 551](#) et seq.) as matter relating to benefits. [Cubanski v. Heckler, 781 F.2d 1421, 1986 U.S. App. LEXIS 22092 \(9th Cir. 1986\)](#), cert. granted, [479 U.S. 1083, 107 S. Ct. 1282, 94 L. Ed. 2d 141, 1987 U.S. LEXIS 646 \(1987\)](#), vacated, remanded, [485 U.S. 386, 108 S. Ct. 1200, 99 L. Ed. 2d 402, 1988 U.S. LEXIS 1450 \(1988\).](#)

Department of Health, Education, and Welfare regulations with respect to Medicaid program fall within rule making exemption of [5 USCS § 553](#). [Opelika Nursing Home, Inc. v. Richardson, 356 F. Supp. 1338, 1973 U.S. Dist. LEXIS 15542 \(M.D. Ala. 1973\)](#), app. after remand, [490 F.2d 841 \(5th Cir. 1974\).](#)

Exemption for rulemaking related to benefits includes Medicare regulations; although secretary waived exemption in 1971, regulations issued prior to that date remain exempt; exemption is not limited to notice and comment procedures but includes requirement that agency incorporate concise general statement of basis and purpose of rule. [St. Joseph Hospital v. Heckler, 570 F. Supp. 434, 1983 U.S. Dist. LEXIS 14466 \(N.D. Ind. 1983\).](#)

Pre-1971 Medicare regulations may qualify for exemption under “benefits” exception to [5 USCS § 553\(a\)\(2\)](#); for this exception to apply, agency must cite exception as rationale for failing to use notice and comment procedures. [Baylor University Medical Center v. Schweiker, 571 F. Supp. 374, 1983 U.S. Dist. LEXIS 13842 \(N.D. Tex. 1983\)](#), aff'd in part and rev'd in part, [758 F.2d 1052, 1985 U.S. App. LEXIS 29143 \(5th Cir. 1985\).](#)

71. Military personnel and veterans

Although § 4 of Administrative Procedure Act, [5 USCS § 553](#), by its terms does not apply to matters relating to “benefits,” [38 USCS § 501\(d\)](#) excludes rules and regulations promulgated by Department of Veterans Affairs (VA) from scope of this exception; thus, while VA’s rules relating to benefits are therefore subject to notice and comment requirements of Act, those requirements do not apply to VA’s interpretative rules, general statements of policy, or rules of agency organization, procedure or practice. [Haas v. Peake, 525 F.3d 1168, 2008 U.S. App. LEXIS 9843 \(Fed. Cir.\), reh'g denied, reh'g, en banc, denied, 544 F.3d 1306, 2008 U.S. App. LEXIS 21100 \(Fed. Cir. 2008\)](#), cert. denied, [555 U.S. 1149, 129 S. Ct. 1002, 173 L. Ed. 2d 315, 2009 U.S. LEXIS 788 \(2009\)](#), overruled, [Procopio v. Wilkie, 913 F.3d 1371, 2019 U.S. App. LEXIS 2906 \(Fed. Cir. 2019\).](#)

Administrative Procedure Act ([5 USCS §§ 501](#) et seq.) is inapplicable to determination of death of serviceman made by Secretary of Army, Navy, or Air Force because it involved military affairs and public benefits, both of which are specifically excepted from application of rule-making provisions of Act by § 553(a)(1) and (2). [McDonald v. McLucas, 371 F. Supp. 837, 1973 U.S. Dist. LEXIS 12400 \(S.D.N.Y. 1973\).](#)

Contract exemption from rulemaking requirements contained in [5 USCS § 553](#) does not apply to prescription of contents of future agreements by Office of Civilian Health and Medical Program of Uniformed Services (OCHAMPUS), since OCHAMPUS’s actions amount to policy changes of significant import and statute exhibits

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concern for public input into OCHAMPUS operation. [National Asso. of Psychiatric Treatment Centers for Children v. Weinberger](#), 658 F. Supp. 48, 1987 U.S. Dist. LEXIS 3525 (D. Colo. 1987).

Veterans' challenge to Veterans Administration (VA) implementation of Gramm-Rudman-Hollings federal deficit reduction directive is dismissed, where VA summarily adopted policy that pro rata reduced certain veterans' benefits awarded after February 28, 1986, because (1) action involving benefits is expressly exempt from rulemaking requirements by [5 USCS § 553\(a\)\(2\)](#), and (2) action was not unreasonable, arbitrary, capricious, or ultra vires under [5 USCS § 706](#). [Hoerner v. United States Veterans Admin.](#), 675 F. Supp. 999, 1987 U.S. Dist. LEXIS 11896 (D. Md. 1987), aff'd, 859 F.2d 150, 1988 U.S. App. LEXIS 13836 (4th Cir. 1988).

72. Surplus property

[5 USCS § 553](#) exempts all matters relating to public property from rule-making provisions; exemption applies to issuance of guidelines under Federal Property and Administrative Services Act of 1949 (former [40 USCS §§ 571](#) et seq.), governing disposition of surplus federal property. [Northrop University v. Harper](#), 580 F. Supp. 959, 1983 U.S. Dist. LEXIS 15368 (C.D. Cal. 1983).

Property Review Board guidelines concerning policy considerations in determining whether or not to convey surplus federal property is not subject to notice and comment proceedings since [5 USCS § 553](#) exempts from its requirements matters relating to public property. [Conservation Law Foundation, Inc. v. Harper](#), 587 F. Supp. 357, 1984 U.S. Dist. LEXIS 16331 (D. Mass. 1984).

Determination of Federal Property Review Board's denial of no cost public benefit conveyance of federal surplus land is not reviewable under Administrative Procedure Act ([5 USCS § 553](#)). [Ono v. Harper](#), 592 F. Supp. 698, 14 *Env'tl. L. Rep.* 20910, 1983 U.S. Dist. LEXIS 16414 (D. Haw. 1983).

73. Miscellaneous

Provision of Interstate Commerce Act authorizing Interstate Commerce Commission to make specific grants of emergency temporary authority without regard to notice and comment requirements did not exempt notice of elimination of notification to competing carriers of application for emergency temporary authority from notice and comment requirements of [5 USCS § 553](#); it did not follow that because emergency temporary authority could be granted without notice and comment that procedures for granting such authority could be altered or amended without notice and comment. [Brown Express, Inc. v. United States](#), 607 F.2d 695, 1979 U.S. App. LEXIS 10076 (5th Cir. 1979).

Notice and comment requirements of [5 USCS § 553](#) do not apply to policy guidance memorandum of Environmental Protection Agency relating to federal grants under Clean Water Act ([33 USCS §§ 1251](#) et seq.), since (1) all matters relating to federal grants are exempted from notice and comment requirements by § 553(a)(2), and (2) agency regulation making policy guidance memoranda subject to notice and comment procedures when Deputy Assistant Administrator determines it appropriate does not apply, since no such determination was made. [People of California v. United States EPA](#), 689 F.2d 217, 223 U.S. App. D.C. 34, 17 *Env't Rep. Cas. (BNA)* 2057, 12 *Env'tl. L. Rep.* 21055 (D.C. Cir. 1982).

Sentencing Commission's revision of policy statement under USSG § 1B1.10 did not violate Administrative Procedure Act, as notice-and-comment rulemaking did not apply to promulgation of policy statements. [United States v. Berberena](#), 694 F.3d 514, 2012 U.S. App. LEXIS 19046 (3d Cir. 2012), cert. denied, 568 U.S. 1201, 133 S. Ct. 1473, 185 L. Ed. 2d 376, 2013 U.S. LEXIS 1840 (2013).

Hearing provisions of Administrative Procedure Act ([5 USCS § 553](#)) do not apply to postal rate fixing, as mail rates are within exception relating to public property, loans, grants, benefits, or contracts. [Doehla Greeting Cards, Inc. v. Summerfield](#), 116 F. Supp. 68, 1953 U.S. Dist. LEXIS 2179 (D.D.C. 1953).

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In action by large lumber companies challenging legality of 1971 small business timber set-aside program, plaintiffs were not prejudiced by defendant's failure to comply with formalistic requirements of this section, where plaintiffs actively participated in development of program; and inasmuch as matters relating to government contracts and property are specifically exempted from notice and hearing requirements, Small Business Administration was not obligated to give plaintiffs either formal notice or hearing. [Duke City Lumber Co. v Butz, 382 F. Supp. 362, 7 Env't Rep. Cas. \(BNA\) 1104, 5 Env'tl. L. Rep. 20080 \(DC Dist Col 1974\).](#)

Failure of Army Corps of Engineers to follow notice and hearing procedure of [5 USCS § 553](#) in adopting reservoir regulation and manuals did not render manuals and regulations void; such procedure was not required because of public property exemption to general notice and hearing requirements ([5 USCS § 553\(a\)\(2\)](#)). [Oahe Conservancy Sub-District v. Alexander, 493 F. Supp. 1294, 1980 U.S. Dist. LEXIS 14564 \(D.S.D. 1980\).](#)

Procedural requirement of Department of Education concerning manner in which unaccredited educational institution may demonstrate eligibility for student loan support is exempt from rulemaking requirements under "benefits" exemption. [Beth Rochel Seminary v. Bennett, 624 F. Supp. 911, 1985 U.S. Dist. LEXIS 12524 \(D.D.C. 1985\)](#), aff'd, [825 F.2d 478, 263 U.S. App. D.C. 341, 1987 U.S. App. LEXIS 10258 \(D.C. Cir. 1987\).](#)

Plaintiff's motion for preliminary injunction was denied as plaintiff would not suffer harm, government and public faced extensive harm, and contact information requirement did not seek information about identity of speakers featured on website registered on ".us" domain, owned by Department of Commerce and administered by National Telecommunications and Information Administration nor did it regulate content presented therein; Administrative Procedure Act's notice and comment requirements did not apply to governmental action undertaken by contract; and plaintiff did not have standing. [Peterson v. Nat'l Telcoms. & Info. Admin., 505 F. Supp. 2d 313, 2006 U.S. Dist. LEXIS 95804 \(E.D. Va. 2006\)](#), aff'd, [478 F.3d 626, 2007 U.S. App. LEXIS 4260 \(4th Cir. 2007\).](#)

In case arising from U.S. Army contract for procurement of non-standard ammunition for use in Soviet-era weaponry in which defendants moved to dismiss superseding indictment, which alleged conspiracy to violate [18 USCS §§ 1001, 1031, and 1343](#), all in violation of [18 USCS § 371](#), and substantive false statement, major fraud, and substantive wire fraud violations, defendants unsuccessfully asserted that enforcing Defense Federal Acquisition Regulation Supplement Rule 252.225-7007 violated Ex Post Facto Clause of U.S. Constitution; Administrative Procedure Act exempted government procurement contracts from its notice and comment requirements, and rule 252.225-7007, was properly promulgated under requirements of Office of Federal Procurement Policy Act, 41 USCS §§ 401 et seq., and its implementing regulations, Federal Acquisition Regulations, [48 CFR § 1.101](#) et seq. [United States v. AEY, Inc., 603 F. Supp. 2d 1363, 21 Fla. L. Weekly Fed. D 567, 2009 U.S. Dist. LEXIS 24300 \(S.D. Fla. 2009\).](#)

Social Security Administration's Program Operations Manual System (POMS), which were issued without notice and comment, could be considered as final agency action because they were interpretative rules, as opposed to substantive rules, that were used to determine claimants' rights or obligations, and that were entitled to some deference. [Hall v. Sebelius, 689 F. Supp. 2d 10, 153 Soc. Sec. Rep. Service 86, 2009 U.S. Dist. LEXIS 89601 \(D.D.C. 2009\).](#)

IV. NOTICE AND PUBLIC PARTICIPATION [[5 USCS § 553\(b\)](#) and (c)]

A. In General

74. Generally

APA ([5 USCS § 553](#)) requires agency to provide public with notice of proposed rules, opportunity to comment on them, and "a concise general statement of their basis and purpose" that justifies rules in light of comments received. [Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 168 U.S. App. D.C. 387, 1975 U.S. App. LEXIS 14267 \(D.C. Cir. 1975\).](#)

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Administrative Procedure Act's rulemaking procedures were designed to assure fairness and mature consideration of rules of general application, and prior publication and opportunity for comment requirements enable agency promulgating rule to educate itself before establishing rules and procedures which have substantial impact on those regulated. [Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

Administrative Procedure Act expressly contemplates that notice and opportunity to comment will be provided prior to agency decisions to repeal rule, since [5 USCS § 551\(5\)](#) defines "rulemaking" as agency process for formulating, amending, or repealing rule. [Consumer Energy Council v. Federal Energy Regulatory Com., 673 F.2d 425, 218 U.S. App. D.C. 34, Util. L. Rep. \(CCH\) ¶12532, 1982 U.S. App. LEXIS 22237 \(D.C. Cir. 1982\)](#), aff'd, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 1983-1 Trade Cas. \(CCH\) ¶165474, 1983 U.S. LEXIS 828 \(1983\)](#), aff'd, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 \(1983\)](#), aff'd, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 \(1983\)](#), cert. denied, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 \(1983\)](#), cert. denied, [463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 \(1983\)](#).

When Congress authorizes agency to create standards, it is delegating legislative authority rather than setting forth standard that agency may interpret; thus, rule promulgated pursuant to such delegation, if intended to bind, requires notice and comment procedure. [Mission Group Kan. v. Riley, 146 F.3d 775, 1998 Colo. J. C.A.R. 2774, 1998 U.S. App. LEXIS 10917 \(10th Cir. 1998\)](#).

Notice requirements of Administrative Procedure Act (APA), [5 USCS §§ 552\(a\)\(1\), 553\(b\)](#), require that some indication of regulatory intent that overcomes plain language must be referenced in published notices that accompanies rule-making process; otherwise, interested parties would not have meaningful opportunity to comment on proposed regulations that APA contemplates, [5 USCS § 553\(c\)](#), because they would have had no way of knowing what was actually proposed. [Safe Air for Everyone v. United States EPA, 475 F.3d 1096, 63 Env't Rep. Cas. \(BNA\) 1897, 37 Env'tl. L. Rep. 20026, 2007 U.S. App. LEXIS 1965 \(9th Cir.\)](#), reprinted, [488 F.3d 1088, 2007 U.S. App. LEXIS 12361 \(9th Cir. 2007\)](#).

Only after Environmental Protection Agency has made its interpretations of PM2.5 standard final through rulemaking—following requirements of [5 USCS § 553\(b\)](#) and (c)—will they be binding on States and public as matter of law. [NRDC v. EPA, 706 F.3d 428, 403 U.S. App. D.C. 378, 75 Env't Rep. Cas. \(BNA\) 1961, 43 Env'tl. L. Rep. 20001, 2013 U.S. App. LEXIS 214 \(D.C. Cir. 2013\)](#).

Agencies must adhere to Administrative Procedure Act ([5 USCS § 553](#)) when what is involved is notice-and-comment rulemaking technique ordinarily used by federal agencies when they undertake legislative factfinding. [Zotos International, Inc. v. Kennedy, 460 F. Supp. 268, 1978 U.S. Dist. LEXIS 18097 \(D.D.C. 1978\)](#), disapproved, [Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 227 U.S. App. D.C. 151, 1983 U.S. App. LEXIS 28805 \(D.C. Cir. 1983\)](#).

Rulemaking includes agency process for formulating, amending, or repealing rule, and requirements of notice and comment are applicable to all rulemaking, including rejection by agency of rule contended to be invalidly prescribed; agency and department attempts to amend or rescind any regulations without strict adherence to process of reasoning on record with benefit of comment is condemned. [National Wildlife Federation v. Clark, 577 F. Supp. 825, 20 Env't Rep. Cas. \(BNA\) 1346, 14 Env'tl. L. Rep. 20227, 1984 U.S. Dist. LEXIS 20606 \(D.D.C. 1984\)](#).

75. Informal rulemaking

Informal rule-making proceedings conducted under [5 USCS § 553](#) require only that agency involved publish notice of proposed rule-making, present opportunity for presentation of views and comments by interested parties, and, "after consideration of relevant matter presented," incorporate in rules adopted statement of their basis and purpose. [National Petroleum Refiners Asso. v. Federal Trade Com., 392 F. Supp. 1052, 1974-1 Trade Cas. \(CCH\) ¶75119, 1974 U.S. Dist. LEXIS 8046 \(D.D.C. 1974\)](#).

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Solicitation of comments is basis of informal rule-making under [5 USCS § 553](#), because it is means by which public participates in rule-making process; it is also efficient channel through which experts in field and those affected by proposed rules can provide information which may have been overlooked by agency, can point out abstruse effects of proposed rules, and can suggest alternatives. [Dow Chemical, USA v. Consumer Product Safety Com., 459 F. Supp. 378, 9 Env'tl. L. Rep. 20016, 1978 U.S. Dist. LEXIS 14604 \(W.D. La. 1978\)](#).

Secretary of U.S. Department of Interior did not abuse her discretion when she refused to reopen public comments period prior to approving amendments to West Virginia's surface mining regulations pursuant to [30 USCS § 1211\(c\)\(1\)](#) because public comments period was left open for more than 30 days required by [30 C.F.R. § 732.17\(h\)\(3\)](#); pursuant to Vermont Yankee, procedural requirements for informal rule-making were essentially left to discretion of agency. [Ohio River Valley Env'tl. Coalition, Inc. v. Norton, 61 Env't Rep. Cas. \(BNA\) 1301, 2005 U.S. Dist. LEXIS 22265 \(S.D. W. Va. Sept. 30, 2005\)](#), amended, [2005 U.S. Dist. LEXIS 44815 \(S.D. W. Va. Nov. 22, 2005\)](#).

76. "Substantial impact"

One purpose of [5 USCS § 553\(b\)](#) is to enable agency promulgating administrative rule to educate itself before establishing rules which have substantial impact on those regulated. [Lewis--Mota v. Secretary of Labor, 469 F.2d 478, 1972 U.S. App. LEXIS 6685 \(2d Cir. 1972\)](#).

Administrative Procedure Act's rulemaking procedures were designed to assure fairness and mature consideration of rules of general application, and prior publication and opportunity for comment requirements enable agency promulgating rule to educate itself before establishing rules and procedures which have substantial impact on those regulated. [Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

Label placed on rules by agency does not determine whether notice and comment provisions of [5 USCS § 553](#) are applicable; instead, determination must be made in light of basic policy of § 553, which requires that when proposed regulation of general applicability has substantial impact on regulated industry or important class of members or products of industry, notice and opportunity for comment should first be provided. [Pharmaceutical Mfrs. Asso. v. Finch, 307 F. Supp. 858, 1970 U.S. Dist. LEXIS 13179 \(D. Del. 1970\)](#), disapproved, [Rivera v. Becerra, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\)](#).

[5 USCS § 553\(b\)](#) provides opportunity for public participation in rulemaking process, when process results in promulgation of rules or regulations having substantial impact on regulated parties. [American Asso. of Councils of Medical Staffs of Private Hospitals, Inc. v. Mathews, 421 F. Supp. 848, 1976 U.S. Dist. LEXIS 12809 \(E.D. La. 1976\)](#), vacated, [575 F.2d 1367, 1978 U.S. App. LEXIS 10284 \(5th Cir. 1978\)](#).

Under "substantial impact" test, crucial factor in determining applicability of [5 USCS § 553](#) notice and comment procedures is actual effect and impact of regulation in question on public, and if regulation alters rights or obligations of persons affected rather than any formal distinction that may exist between substantive rules and rules of procedure, policy, or interpretation. [Sannon v. United States, 460 F. Supp. 458, 1978 U.S. Dist. LEXIS 15012 \(S.D. Fla. 1978\)](#), remanded, [631 F.2d 1247, 30 Fed. R. Serv. 2d \(Callaghan\) 964, 1980 U.S. App. LEXIS 11720 \(5th Cir. 1980\)](#).

[5 USCS § 553](#) was enacted to give public opportunity to participate in rule-making process, and it also enables agency promulgating rule to educate itself before establishing rules and procedures which have substantial impact on those regulated. [Cerro Metal Products v. Marshall, 467 F. Supp. 869, 7 O.S.H. Cas. \(BNA\) 1125, 1979 O.S.H. Dec. \(CCH\) ¶23373, 1979 U.S. Dist. LEXIS 13934 \(E.D. Pa. 1979\)](#), aff'd, [620 F.2d 964, 29 Fed. R. Serv. 2d \(Callaghan\) 828, 8 O.S.H. Cas. \(BNA\) 1196, 1980 O.S.H. Dec. \(CCH\) ¶24411, 1980 U.S. App. LEXIS 18292 \(3d Cir. 1980\)](#), disapproved, [Donovan v. Red Star Marine Services, Inc., 739 F.2d 774, 1985 A.M.C. 46, 11 O.S.H. Cas. \(BNA\) 2049, 1984 O.S.H. Dec. \(CCH\) ¶26981, 1984 U.S. App. LEXIS 20653 \(2d Cir. 1984\)](#).

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Administrative rules having substantial impact upon private rights may not be made without notice and comment procedures, even if rule is exempt from [5 USCS § 553](#). *Rivera v. Patino*, 524 F. Supp. 136, 2 *Employee Benefits Cas. (BNA)* 1925, 1981 U.S. Dist. LEXIS 16476 (N.D. Cal. 1981).

77. Applicability to defectively promulgated rules

Notice and comment requirements of Administrative Procedure Act apply to defectively promulgated regulations. *Consumer Energy Council v. Federal Energy Regulatory Com.*, 673 F.2d 425, 218 U.S. App. D.C. 34, *Util. L. Rep. (CCH)* ¶12532, 1982 U.S. App. LEXIS 22237 (D.C. Cir. 1982), aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 1983-1 *Trade Cas. (CCH)* ¶65474, 1983 U.S. LEXIS 828 (1983), aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 (1983), aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 (1983), cert. denied, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 (1983), cert. denied, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 (1983).

Where Environmental Protection Agency's letters to Senator had effect of announcing new legislative rules for water treatment processes at municipally owned sewer systems; comments in letters were not "Interpretative rules" or "general statements of policy" that were statutorily exempt from procedural requirements applicable to rule making, pursuant to [5 USCS § 553\(b\)\(3\)\(A\)](#). *Iowa League of Cities v. EPA*, 711 F.3d 844, 76 *Env't Rep. Cas. (BNA)* 1495, 43 *Env'tl. L. Rep.* 20069, 2013 U.S. App. LEXIS 5933 (8th Cir. 2013), reh'g denied, reh'g, en banc, denied, 2013 U.S. App. LEXIS 14034 (8th Cir. July 10, 2013).

Agencies are not permitted unilaterally to repeal regulations dealing with substantive rights by merely declaring that earlier regulations were mistaken, and failure to provide notice and opportunity to comment is not justified merely by fact that regulation to be repealed was allegedly beyond agency's jurisdiction. *National Treasury Employees Union v. Cornelius*, 617 F. Supp. 365, 1985 U.S. Dist. LEXIS 17880 (D.D.C. 1985).

B. Notice**1. In General****78. Purpose**

Notice requirements of [5 USCS § 553\(b\)](#) assure fairness and mature consideration of rules of general application. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709, 70 L.R.R.M. (BNA) 3345, 60 *Lab. Cas. (CCH)* ¶10032, 1969 U.S. LEXIS 3101 (1969).

Purpose of notice is to allow interested parties to make useful comment about proposed rule and not to allow them to assert their right to insist that rule take on particular form. *Pacific Coast European Conference v. United States*, 350 F.2d 197, 1965 U.S. App. LEXIS 6673 (9th Cir.), cert. denied, 382 U.S. 958, 86 S. Ct. 433, 15 L. Ed. 2d 362, 1965 U.S. LEXIS 52 (1965).

Purpose of requirement that notice of proposed rulemaking be published in Federal Register pursuant to [5 USCS § 553\(b\)\(3\)](#) is to insure fairness and mature consideration of rules of general application, and to give affected members of public opportunity to comment; substantive rule is invalid if it is not promulgated in accordance with notice requirements of Administrative Procedure Act. *American Standard, Inc. v. United States*, 602 F.2d 256, 220 *Ct. Cl.* 411, 44 *A.F.T.R.2d (RIA)* 5149 (1979).

Administrative Procedure Act notice and comment procedures exist to insure that unelected administrators, who are not directly accountable to populace, are forced to justify their quasi-legislative rulemaking before informed and skeptical public. *New Jersey v. Department of Health & Human Services*, 670 F.2d 1262, 1981 U.S. App. LEXIS 14934 (3d Cir. 1981).

Purpose of notice and comment procedure is to allow agency to benefit from experience and input of parties who file comments and to see to it that agency maintains flexible and open minded attitude towards its own rule;

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procedure encourages public participation in administrative process and educates agency, thereby helping to insure informed agency decisionmaking. [Chocolate Mfrs. Asso. v. Block, 755 F.2d 1098, 1985 U.S. App. LEXIS 29335 \(4th Cir. 1985\)](#).

Notice requirements of [5 USCS § 553\(b\)](#) protect people's right to present views, provides for interchange of ideas and broader base for intelligent decision making, and promotes greater responsiveness to people. [Kelly v. United States Dep't of Interior, 339 F. Supp. 1095, 1972 U.S. Dist. LEXIS 14985 \(E.D. Cal. 1972\)](#), disapproved, [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\)](#).

Principal purpose of notice and comment provisions is to provide that legislative functions of administrative agencies shall as far as possible be exercised only after public participation on notice; participation by interested parties ensures that agency decisions are based upon relevant information; informal discussion of government officials with some interested parties does not cure failure to provide general notice. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\)](#).

Notice and comment serves purposes of improving quality of agency rulemaking by testing proposed rules through exposure to public comments, providing opportunity to be heard, which is basic to fundamental fairness, and allowing affected parties to develop record of objections for judicial review. [United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, Fed. Sec. L. Rep. \(CCH\) ¶92286, Fed. Sec. L. Rep. \(CCH\) ¶92286, 1985 U.S. Dist. LEXIS 15937 \(D.D.C. 1985\)](#).

Department of Labor complied with Administrative Procedures Act notice requirements when rule-making regarding Fair Labor Standards Act, [29 USCS §§ 201](#) et seq., tip credit provision, [29 USCS § 203\(m\)](#), and public was fully and specifically informed of subject matter under consideration, so rule-making was not arbitrary and capricious or abuse of discretion. [Nat'l Rest. Ass'n v. Solis, 870 F. Supp. 2d 42, 2012 U.S. Dist. LEXIS 73498 \(D.D.C. 2012\)](#).

79. Method of notification

Internet notice is not acceptable substitute for publication in Federal Register. [Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 344 U.S. App. D.C. 382, 51 Env't Rep. Cas. \(BNA\) 1961, 31 Envtl. L. Rep. 20447, 2001 U.S. App. LEXIS 1187 \(D.C. Cir. 2001\)](#).

Administrative Procedure Act requires general notice of proposed rulemaking unless persons subject thereto have actual notice. [United States v. An Article of Drug ... Neo-Terramycin Soluble Powder Concentrate, 540 F. Supp. 363 \(ND Tex 1982\)](#).

Agency's voluntary mailing of new policy to affected persons does not impose obligation to continuously update mailing list; purchaser of land subject to land acquisition policy of national seashore is not entitled to personal notice of change in policy. [Greenwald v. Olsen, 583 F. Supp. 1002, 1984 U.S. Dist. LEXIS 17879 \(D. Mass. 1984\)](#).

80. —Publication in Federal Register

Publication only in Federal Register meets requirement of Administrative Procedure Act ([5 USCS § 553](#)) of constructive notice. [Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 168 U.S. App. D.C. 387, 1975 U.S. App. LEXIS 14267 \(D.C. Cir. 1975\)](#).

Purpose of requirement that notice of proposed rulemaking be published in Federal Register pursuant to [5 USCS § 553\(b\)\(3\)](#) is to insure fairness and mature consideration of rules of general application, and to give affected members of public opportunity to comment; substantive rule is invalid if it is not promulgated in accordance with notice requirements of Administrative Procedure Act. [American Standard, Inc. v. United States, 602 F.2d 256, 220 Ct. Cl. 411, 44 A.F.T.R.2d \(RIA\) 5149 \(1979\)](#).

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Requirement that proposed rule be published in Federal Register is satisfied where text of amendment, clear on its face, is published as appendix to notice of proposed rulemaking. [Illinois Commerce Com. v. Interstate Commerce Com., 776 F.2d 355, 249 U.S. App. D.C. 389, 1985 U.S. App. LEXIS 31480 \(D.C. Cir. 1985\).](#)

District court abused its discretion in sanctioning government agency attorney under [Fed. R. Civ. P. 11](#); although attorney's argument that Administrative Procedures Act (APA) required Federal Register notices to allow for comment period of thirty days under [5 USCS § 553\(b\)](#) and (c) was erroneous, her argument constituted plausible interpretation of APA, and district court did not find that attorney's oral statements regarding comment period advocated argument previously contained in written submission, as required for sanctions under [Fed. R. Civ. P. 11\(b\)](#). [Columbia Venture LLC v. FEMA \(In re Bees\), 562 F.3d 284, 2009 U.S. App. LEXIS 6926 \(4th Cir. 2009\).](#)

81. Time of notice

Even though there was 5-year delay between publication of notice of proposed rulemaking and publication of regulation, and republication of notice of proposed rulemaking would have been helpful, notice met substantive technical requirements of [5 USCS § 553](#). [United States v. Daniels, 418 F. Supp. 1074, 1976 U.S. Dist. LEXIS 13431 \(D.S.D. 1976\).](#)

Office of Civilian Health and Medical Program of Uniformed Services (OCHAMPUS) failed to comply with rulemaking requirements of Administrative Procedure Act in changing standards and methods for reimbursement of Residential Treatment Centers, where no public notice of certain provisions was given until 5 months after critical dates used to determine reimbursement amounts, and basis and purpose statement in Federal Register notice was inadequate. [National Asso. of Psychiatric Treatment Centers for Children v. Weinberger, 658 F. Supp. 48, 1987 U.S. Dist. LEXIS 3525 \(D. Colo. 1987\).](#)

82. Waiver

Procedural irregularity which appellee asserted arose from failure of Secretary of Treasury to publish notice required was procedural irregularity which appellee had waived by participating in antidumping investigation without making timely objections to the Secretary. [United States v. Elof Hansson, Inc., 296 F.2d 779, 48 C.C.P.A. 91, C.A.D. 771, 1960 CCPA LEXIS 184 \(C.C.P.A. 1960\)](#), cert. denied, 368 U.S. 899, 82 S. Ct. 179, 7 L. Ed. 2d 95, 1961 U.S. LEXIS 234 (1961).

Finding and reasons for waiving 30 day notice must be published with proposed rule; notice and comment procedures should be waived only when delay would do real harm, and good cause exception is essentially emergency procedure. [Buschmann v. Schweiker, 676 F.2d 352, 1982 U.S. App. LEXIS 19597 \(9th Cir. 1982\).](#)

Issue of agency's failure to provide adequate notice of its intention to include sunset provision in proposed rule was waived where petitioner failed to raise issue in its petition for rehearing. [Cellnet Communs. v. FCC, 149 F.3d 429, 1998 FED App. 0201P, 1998 U.S. App. LEXIS 15024 \(6th Cir. 1998\).](#)

1994 supplement to Technical Assistance Manual to Americans with Disabilities Act was interpretive rule and, even if it reflected change in Department of Justice's thinking about comparable lines of sight, it was reasonable interpretation of ambiguous regulation that did not require notice and comment prior to publication. [Miller v. Cal. Speedway Corp., 536 F.3d 1020, 13 Accom. Disabilities Dec. \(CCH\) ¶13-150, 20 Am. Disabilities Cas. \(BNA\) 1508, 2008 U.S. App. LEXIS 16849 \(9th Cir. 2008\)](#), cert. denied, 555 U.S. 1208, 129 S. Ct. 1349, 173 L. Ed. 2d 648, 21 Am. Disabilities Cas. (BNA) 1056, 2009 U.S. LEXIS 1041 (2009).

Interim Rule of Attorney General regarding Sex Offender Registration and Notification Act did not violate Administrative Procedure Act because explanation for bypassing 30-day notice of comment period to make community aware of presence of sex offenders satisfied public interest prong of good cause exception under [5 USCS § 553](#). [United States v. Santana, 584 F. Supp. 2d 941, 2008 U.S. Dist. LEXIS 106463 \(W.D. Tex. 2008\).](#)

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Good cause exception to negotiated rulemaking under Higher Education Act was improperly invoked because neither rule nor emergency was identified; applicable standard of whether good cause exists to find that compliance with usual process is impracticable, unnecessary, or contrary to public interest is same legal standard that applies to waiver of Administrative Procedure Act's notice and comment requirement, which is narrowly construed and only reluctantly countenanced. [Bauer v. DeVos, 325 F. Supp. 3d 74, 2018 U.S. Dist. LEXIS 155229 \(D.D.C. 2018\)](#).

2. Contents and Sufficiency of Notice

83. Generally

Administrative Procedure Act ([5 USCS § 553\(b\)](#)) does not require that interested parties be provided with precise notice of each aspect of regulations eventually adopted, but notice is sufficient if it affords them reasonable opportunity to participate in rule-making process. [Forester v. Consumer Product Safety Com., 559 F.2d 774, 182 U.S. App. D.C. 153, 1977 U.S. App. LEXIS 13151 \(D.C. Cir. 1977\)](#).

In informal rule making, agency must publish notice in Federal Register of proposed proceedings including either terms or substance of proposed rule or description of subject and issues involved ([5 USCS § 553\(b\)\(3\)](#)); since public is generally entitled to submit their views and relevant data on any proposals, notice must be sufficient to fairly apprise interested parties of issues involved, but it need not specify every precise proposal which agency may ultimately adopt as rule. [Action for Children's Television v. FCC, 564 F.2d 458, 183 U.S. App. D.C. 437, 2 Media L. Rep. \(BNA\) 2120, 1977 U.S. App. LEXIS 12614 \(D.C. Cir. 1977\)](#).

Cases finding inadequacy of notice suggest concern that notice be clear and to point and where notice is inadequate, agency's consideration of comments received in response thereto, no matter how careful, cannot cure defect. [McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 267 U.S. App. D.C. 367, 27 Env't Rep. Cas. \(BNA\) 1288, 18 Env'tl. L. Rep. 20473, 1988 U.S. App. LEXIS 1626 \(D.C. Cir. 1988\)](#).

Ninth Circuit concludes that notice requirements of Administrative Procedure Act (APA), [5 USCS §§ 552\(a\)\(1\), 553\(b\)](#), require that some indication of regulatory intent that overcomes plain language must be referenced in published notices that accompany rule-making process; otherwise, interested parties would not have meaningful opportunity to comment on proposed regulations that APA contemplates, [5 USCS § 553\(c\)](#), because they would have had no way of knowing what was actually proposed. [Safe Air for Everyone v. United States EPA, 488 F.3d 1088, 2007 U.S. App. LEXIS 12361 \(9th Cir. 2007\)](#).

Agency is not put to higher standard of notice in case of informal proceeding than in formal one; in both proceedings content of notice afforded by agency is governed by [5 USCS § 553\(b\)](#). [Jones v. Bergland, 456 F. Supp. 635, 1978 U.S. Dist. LEXIS 16862 \(E.D. Pa. 1978\)](#).

Adequate notice must reveal agency's views in concrete and focused form so as to make criticism or formulation of alternatives possible. [United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, Fed. Sec. L. Rep. \(CCH\) ¶ 92286, Fed. Sec. L. Rep. \(CCH\) ¶92286, 1985 U.S. Dist. LEXIS 15937 \(D.D.C. 1985\)](#).

84. Time, place and nature of proceedings

Notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for rule to permit interested parties to comment meaningfully. [Florida Power & Light Co. v. United States, 846 F.2d 765, 269 U.S. App. D.C. 377, 1988 U.S. App. LEXIS 6488 \(D.C. Cir. 1988\)](#), cert. denied, 490 U.S. 1045, 109 S. Ct. 1952, 104 L. Ed. 2d 422, 1989 U.S. LEXIS 2164 (1989).

Failure to provide time and place of public rulemaking proceedings is not merely technical omission since participation by interested parties ensures said agency decisions are based upon relevant information and statute requires that time, place, and nature of rulemaking be published so as to inform public when and where comments should be submitted. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\)](#).

85. Reference to legal authority under which rule is proposed

Final rules of the Departments of Health and Human Services, Labor, and the Treasury concerning the religious and moral exemptions to the ACA satisfied the APA's notice requirements as the request for comments detailed the Departments' view that they had legal authority under the ACA to promulgate both exemptions, as well as authority under RFRA to promulgate the religious exemption. [Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania](#), 140 S. Ct. 2367, 207 L. Ed. 2d 819, 28 Fla. L. Weekly Fed. S. 519, 2020 U.S. LEXIS 3546 (2020).

Notice of proposed rulemaking must include reference to legal authority under which rule is proposed; reference to statutory authority appearing for first time in agency's appellate brief does not comply with notice requirement. [Global Van Lines, Inc. v. Interstate Commerce Com.](#), 714 F.2d 1290, 1983 U.S. App. LEXIS 16788 (5th Cir. 1983).

In case in which almond producers sought judicial review of district court's entry of summary judgment in favor of appellee, Secretary of Department of Agriculture, on their claim that, in seeking to prevent spread of salmonella, Secretary exceeded his authority in requiring California almonds sold domestically to be treated with heat or chemicals, producers argued that Secretary was obligated under Administrative Procedure Act to address his statutory authority sua sponte; however, Secretary expressly stated that he was issuing treatment rule under his authority in Agricultural Marketing Agreement Act of 1937, [7 USCS §§ 601–674](#), and California Almond Marketing Order, [7 CFR § 981.42\(b\)](#), to regulate almond quality. [Koretov v. Vilsack](#), 707 F.3d 394, 404 U.S. App. D.C. 96, 2013 U.S. App. LEXIS 3695 (D.C. Cir. 2013).

86. Substance of proposed rule or description of subjects and issues involved

Under [5 USCS § 553](#), interested parties are entitled to notice of description of subjects and issues involved and not position that staff would take at hearing. [Colorado Interstate Gas Co. v. Federal Power Com.](#), 209 F.2d 717, 3 Pub. Util. Rep. 3d (PUR) 321, 1953 U.S. App. LEXIS 3836 (10th Cir. 1953), rev'd, 348 U.S. 492, 75 S. Ct. 467, 99 L. Ed. 583, 4 Oil & Gas Rep. 897, 8 Pub. Util. Rep. 3d (PUR) 1, 1955 U.S. LEXIS 1401 (1955).

Notice of rulemaking is sufficient if it provides description of subjects and issues involved. [California Citizens Band Asso. v. United States](#), 375 F.2d 43, 1967 U.S. App. LEXIS 7185 (9th Cir.), cert. denied, 389 U.S. 844, 88 S. Ct. 96, 19 L. Ed. 2d 112, 1967 U.S. LEXIS 761 (1967).

Notice under [5 USCS § 553](#) must be sufficiently descriptive of subjects and issues involved so that interested parties may offer informed criticism and comments, but it need not contain every precise proposal which agency may ultimately adopt as rule. [Ethyl Corp. v. EPA](#), 541 F.2d 1, 176 U.S. App. D.C. 373, 8 Env't Rep. Cas. (BNA) 1785, 6 Env'tl. L. Rep. 20267, 1976 U.S. App. LEXIS 12309 (D.C. Cir.), cert. denied, 426 U.S. 941, 96 S. Ct. 2663, 49 L. Ed. 2d 394, 8 Env't Rep. Cas. (BNA) 2200, 1976 U.S. LEXIS 3993 (1976).

Agency commits serious procedural error when it fails to reveal portions of technical basis for proposed rule in time to allow for meaningful commentary. [Connecticut Light & Power Co. v. Nuclear Regulatory Com.](#), 673 F.2d 525, 218 U.S. App. D.C. 134, 1982 U.S. App. LEXIS 20990 (D.C. Cir.), cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76, 1982 U.S. LEXIS 205 (1982).

Agency notice must describe range of alternatives being considered with reasonable specificity; otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision making. [Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency](#), 705 F.2d 506, 227 U.S. App. D.C. 201, 18 Env't Rep. Cas. (BNA) 2033, 13 Env'tl. L. Rep. 20490, 1983 U.S. App. LEXIS 28644 (D.C. Cir. 1983).

Notice is sufficient if it fairly apprises interested parties of subjects and issues before agency, thereby affording interested persons reasonable and meaningful opportunity to participate in rulemaking process. [Mobil Oil Corp. v. Department of Energy](#), 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 (Temp. Emer. Ct. App. 1983), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

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Where respondent Environmental Protection Agency's (EPA) [42 USCS § 7525\(g\)](#) interim final rule permitting manufacturers to pay nonconformance penalties (NCP) in exchange selling noncompliant engines solely benefitted intervenor noncompliant manufacturer, and EPA argued that under [5 USCS § 553\(b\)](#), persons subject to rule were named and either personally served or otherwise had actual notice thereof in accordance with law, so as to dispense with notice and comment requirements, argument failed because petitioner heavy-duty diesel engine manufacturers had known only that EPA was gathering information for possible NCP and merely orally supplied some information they thought might be relevant to setting levels of penalty and upper limit, and EPA did not provide draft of rule, did not advise of levels, did not explain or discuss its methodology, and did not ask manufacturers to discuss whether NCPs were justified in first place; such scant and misleading notice was sufficient under § 553(b)(3). [Mack Trucks, Inc. v. EPA, 682 F.3d 87, 401 U.S. App. D.C. 194, 74 Env't Rep. Cas. \(BNA\) 1929, 42 Env'tl. L. Rep. 20133, 2012 U.S. App. LEXIS 11851 \(D.C. Cir. 2012\)](#), reh'g denied, [2012 U.S. App. LEXIS 17191 \(D.C. Cir. Aug. 15, 2012\)](#), reh'g, en banc, denied, [2012 U.S. App. LEXIS 17273 \(D.C. Cir. Aug. 15, 2012\)](#).

Agency's notice to public, under [5 USCS § 553](#), is sufficient if substance of proposed agency action is presented. [National Industrial Traffic League v. United States, 396 F. Supp. 456, 1975 U.S. Dist. LEXIS 11482 \(D.D.C. 1975\)](#).

Agency's notice to public of proposed rule-making is sufficient under [5 USCS § 553\(b\)](#) where substance of proposed rule is announced and where interested parties are given reasonable opportunity to participate. [Sima Products Corp. v. McLucas, 460 F. Supp. 128, 1978 U.S. Dist. LEXIS 14432 \(N.D. Ill. 1978\)](#), aff'd, [612 F.2d 309, 15 Av. Cas. \(CCH\) ¶17916, 1980 U.S. App. LEXIS 21681 \(7th Cir. 1980\)](#).

Notice of rulemaking is sufficient if it provides description of subjects and issues involved; notice which includes outline of essential elements of new program which fairly apprises public of what agency is about to do is sufficient. [Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 16 Env'tl. L. Rep. 20096, 1985 U.S. Dist. LEXIS 16288 \(E.D. Cal. 1985\)](#).

87. Test to determine sufficiency of notice

Proper test to determine sufficiency of notice is whether notice would fairly apprise interested persons of subjects and issues agency is considering; notice need not specifically identify every precise proposal which agency may ultimately adopt as rule; agency may adopt new rule which contains substantial differences from one originally proposed and still have acted lawfully. [American Transfer & Storage Co. v. Interstate Commerce Com., 719 F.2d 1283, 1983 U.S. App. LEXIS 15118 \(5th Cir. 1983\)](#).

Where Department of Labor (DOL) denied individual's requests for records, finding that information was contained in system of records that had been designated as exempt system under [5 USCS § 552a\(k\)\(2\)](#), DOL failed to comply with notice and comment provisions of Administrative Procedure Act in its attempt to exempt system of records from access because, inter alia, introductory sections of notice did not mention "exemptions" at all. [Louis v. United States DOL, 419 F.3d 970, 23 I.E.R. Cas. \(BNA\) 459, 2005 U.S. App. LEXIS 17147 \(9th Cir. 2005\)](#).

General test of adequacy of notice is whether notice of rule-making affords interested parties with notice of significant subjects and issues involved, allowing public to effectively participate in rulemaking process. [Abington Memorial Hospital v. Heckler, 576 F. Supp. 1081, 1983 U.S. Dist. LEXIS 11028 \(E.D. Pa. 1983\)](#), aff'd, [750 F.2d 242, 1984 U.S. App. LEXIS 15933 \(3d Cir. 1984\)](#).

88. Particular cases

When proposed rule is based on scientific data, agency should identify data and methodology used to obtain it; mere identification of study without release of data is inadequate as agency cannot promulgate rules based on data known only to agency. [Lloyd Noland Hospital & Clinic v. Heckler, 762 F.2d 1561, 1985 U.S. App. LEXIS 30631 \(11th Cir. 1985\)](#).

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Requirement that proposed rule be published in Federal Register is satisfied where text of amendment, clear on its face, is published as appendix to notice of proposed rulemaking. [Illinois Commerce Com. v. Interstate Commerce Com.](#), 776 F.2d 355, 249 U.S. App. D.C. 389, 1985 U.S. App. LEXIS 31480 (D.C. Cir. 1985).

Explanation by Nuclear Regulatory Commission in its final notice of rule imposing uniform annual fee on nuclear power reactor licensees was adequate, where Commission explained that it had reviewed research costs to insure that only generic cost associated with all power reactors, with operating licenses, regardless of type, were included in cost basis. [Florida Power & Light Co. v. United States](#), 846 F.2d 765, 269 U.S. App. D.C. 377, 1988 U.S. App. LEXIS 6488 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045, 109 S. Ct. 1952, 104 L. Ed. 2d 422, 1989 U.S. LEXIS 2164 (1989).

Fact that agency's notice in Federal Register of promulgation of regulations was only 14 sentences long does not constitute insufficient notice. [Rybachek v. United States EPA](#), 904 F.2d 1276, 31 Env't Rep. Cas. (BNA) 1585, 20 Env'tl. L. Rep. 20973, 1990 U.S. App. LEXIS 7833 (9th Cir. 1990).

FCC provided inadequate notice of decision requiring Bell Operating Companies (BOCs) to unbundle and offer separate access services to long-distance carriers, and allowing BOCs to phase out their bundled access offerings, where it initially provided inadequate notice to public and later, through back channel, informed single party of its intentions, thereby arrogating to itself power to determine who would have opportunity to comment on its proposal. [MCI Telecommunications Corp. v. FCC](#), 57 F.3d 1136, 313 U.S. App. D.C. 51, 1995 U.S. App. LEXIS 15800 (D.C. Cir. 1995).

Defendant Army Corps of Engineers' issuance of nationwide permits under Clean Water Act meant builders had to either stop projects to seek individual permits or modify projects and thus, they were rules under [5 USCS § 601\(2\)](#), part of Regulatory Flexibility Act, [5 USCS §§ 601](#) et seq., and under [5 USCS § 551\(4\)](#), part of Administrative Procedure Act, and were subject to review under [5 USCS §§ 604, 611\(a\)\(1\)](#); fact that Corps did not issue any notice of proposed rulemaking pursuant to rulemaking provision of [5 USCS § 553](#) was not dispositive. [Nat'l Ass'n of Home Builders v. United States Army Corps of Eng'rs](#), 417 F.3d 1272, 368 U.S. App. D.C. 23, 60 Env't Rep. Cas. (BNA) 2078, 35 Env'tl. L. Rep. 20157, 2005 U.S. App. LEXIS 15573 (D.C. Cir. 2005).

[National Guidelines for Sex Offender Registration and Notification \(SMART Guidelines\)](#), 73 Fed. Reg. 38,030 (July 2, 2008), complied with both letter and spirit of notice requirement of [5 USCS § 553\(b\)\(2\)](#); Attorney General did receive comments on retroactivity and considered substantive merits thereof. [United States v. Whitlow](#), 714 F.3d 41, 2013 U.S. App. LEXIS 7782 (1st Cir.), cert. denied, 571 U.S. 915, 134 S. Ct. 287, 187 L. Ed. 2d 207, 2013 U.S. LEXIS 6413 (2013).

Federal Communications Commission did not violate Administrative Procedure Act in its reclassification of broadband service as telecommunications service because although notice of proposed rulemaking did say that Commission was considering relying on § 706 of Telecommunications Act of 1996, it also expressly asked for comments on whether Commission should reclassify broadband, and interested parties could comment meaningfully on possibility that Commission would follow U.S. Supreme Court precedent and look to consumer perception and on Commission's use of telecommunications management exception. [United States Telecom Ass'n v. FCC](#), 825 F.3d 674, 423 U.S. App. D.C. 183, 2016 U.S. App. LEXIS 10716 (D.C. Cir. 2016), reh'g denied, 2017 U.S. App. LEXIS 7712 (D.C. Cir. May 1, 2017), reh'g denied, 855 F.3d 381, 428 U.S. App. D.C. 439, 2017 U.S. App. LEXIS 8064 (D.C. Cir. 2017), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6516 (2018), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6567 (2018), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6608 (2018), cert. denied, 139 S. Ct. 474, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6631 (2018), cert. denied, 139 S. Ct. 453, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6592 (2018), cert. denied, 139 S. Ct. 475, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6595 (2018), cert. denied, 139 S. Ct. 455, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6613 (2018).

Federal Communications Commission could regulate interconnection arrangements under Title II of Communications Act of 1934 as component of broadband service because notice of proposed rulemaking provided

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adequate notice that Commission would regulate interconnection arrangements under Title II, and Commission was not required to classify broadband as telecommunications service in both directions before it could regulate interconnection arrangements under Title II, [United States Telecom Ass'n v. FCC, 825 F.3d 674, 423 U.S. App. D.C. 183, 2016 U.S. App. LEXIS 10716 \(D.C. Cir. 2016\)](#), reh'g denied, [2017 U.S. App. LEXIS 7712 \(D.C. Cir. May 1, 2017\)](#), reh'g denied, [855 F.3d 381, 428 U.S. App. D.C. 439, 2017 U.S. App. LEXIS 8064 \(D.C. Cir. 2017\)](#), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6516 (2018), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6567 (2018), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6608 (2018), cert. denied, 139 S. Ct. 474, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6631 (2018), cert. denied, [139 S. Ct. 453, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6592 \(2018\)](#), cert. denied, 139 S. Ct. 475, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6595 (2018), cert. denied, 139 S. Ct. 455, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6613 (2018).

Federal Communications Commission's reclassification of mobile broadband as commercial rather than private mobile service was reasonable and supported by record demonstrating rapidly growing and virtually universal use of mobile broadband service; even if Commission gave inadequate notice of its redefinition of public switched network in notice of proposed rulemaking, lack of notice was harmless. [United States Telecom Ass'n v. FCC, 825 F.3d 674, 423 U.S. App. D.C. 183, 2016 U.S. App. LEXIS 10716 \(D.C. Cir. 2016\)](#), reh'g denied, [2017 U.S. App. LEXIS 7712 \(D.C. Cir. May 1, 2017\)](#), reh'g denied, [855 F.3d 381, 428 U.S. App. D.C. 439, 2017 U.S. App. LEXIS 8064 \(D.C. Cir. 2017\)](#), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6516 (2018), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6567 (2018), cert. denied, 139 S. Ct. 454, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6608 (2018), cert. denied, 139 S. Ct. 474, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6631 (2018), cert. denied, [139 S. Ct. 453, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6592 \(2018\)](#), cert. denied, 139 S. Ct. 475, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6595 (2018), cert. denied, 139 S. Ct. 455, 202 L. Ed. 2d 361, 2018 U.S. LEXIS 6613 (2018).

Notice which merely requests suggestions on appropriate percentage test, without clue as to whether agency proposed percentages to be raised, lowered, or maintained, is insufficient; general request for comments is not adequate notice of proposed rule change. [United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, Fed. Sec. L. Rep. \(CCH\) ¶92286, Fed. Sec. L. Rep. \(CCH\) ¶92286, 1985 U.S. Dist. LEXIS 15937 \(D.D.C. 1985\)](#).

Borrowers' claim that FmHA violated [5 USCS § 553\(b\)](#) is dismissed where FmHA did not publish in proposed rules sentences included in final version of rule, since FmHA is not required to publish in proposed rules precise text of final rules, and sentences at issue do not change character or purpose of subsection, but rather make it more detailed and specific. [Coleman v. Block, 663 F. Supp. 1315, 1987 U.S. Dist. LEXIS 5190 \(D.N.D. 1987\)](#), vacated, [Coleman v. Lyng, 864 F.2d 604, 1988 U.S. App. LEXIS 17585 \(8th Cir. 1988\)](#), cert. denied, [Coleman v. Yeutter, 493 U.S. 953, 110 S. Ct. 364, 107 L. Ed. 2d 351, 1989 U.S. LEXIS 5268 \(1989\)](#).

Promulgation of noncommercial group use regulation by Forest Service met notice requirements for rulemaking under [5 USCS § 553\(b\)](#), notwithstanding its failure to publish particular reports relating to group that was alleged target of regulation, as notice was published in Federal Register that included nature, legal authority, terms, and substance of proposed rule. [Black v. Arthur, 18 F. Supp. 2d 1127, 1998 U.S. Dist. LEXIS 14000 \(D. Or. 1998\)](#), aff'd, [201 F.3d 1120, 2000 Cal. Daily Op. Service 1051, 2000 D.A.R. 1555, 30 Env'tl. L. Rep. 20338, 2000 U.S. App. LEXIS 1705 \(9th Cir. 2000\)](#).

National Credit Union Administration had no obligation under [5 USCS § 553\(b\)\(3\)](#) to disclose information about specific cases under review when promulgating rule, and, thus, notice of proposed rulemaking was not deficient owing to fact that it did not contain information concerning specific cases. [CUNA v. NCUA, 57 F. Supp. 2d 294, 1995 U.S. Dist. LEXIS 22083 \(E.D. Va. 1995\)](#), aff'd, [188 F.3d 228, 1999 U.S. App. LEXIS 19718 \(4th Cir. 1999\)](#).

As general rule, agency must itself provide notice of regulatory proposal; having failed to do so, it cannot bootstrap notice from comment; comments of other interested parties do not satisfy agency's obligation to provide notice. [Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553, 61 Env't Rep. Cas. \(BNA\) 1822, 2005 U.S. Dist. LEXIS 24550 \(D. Vt. 2005\)](#).

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Establishment of control date under Amendment 11 to Atlantic Sea Scallop Fishery Management Plan, 50 CFR pt. 648, was valid, as notice requirements of [16 USCS § 1853\(b\)\(2\)\(C\)](#) and [5 USCS § 553\(b\)\(3\)](#) and public meeting requirements of [16 USCS § 1852\(h\)\(3\)](#) were satisfied. [Gen. Category Scallop Fishermen v. Sec'y of United States DOC, 720 F. Supp. 2d 564, 2010 U.S. Dist. LEXIS 36800 \(D.N.J. 2010\)](#), aff'd, [635 F.3d 106, 41 Env'tl. L. Rep. 20114, 2011 U.S. App. LEXIS 5138 \(3d Cir. 2011\)](#).

Two Comment Requests discussed methodologies that Department of Commerce will use to determine whether targeted dumping has occurred, while Limiting Rule restricts Commerce's ability to impose targeting remedy across all sales; therefore, First and Second Comment Requests failed to provide interested parties with adequate notice and comment before Department of Commerce withdrew Limiting Rule ([19 CFR § 351.414\(f\)\(2\) \(2007\)](#)). [Gold E. Paper \(Jiangsu\) Co. v. United States, 918 F. Supp. 2d 1317, 35 Int'l Trade Rep. \(BNA\) 1608, 2013 Ct. Intl. Trade LEXIS 74 \(Ct. Int'l Trade 2013\)](#).

None of Department of Commerce's reasons in support of immediate revocation (without prior notice and comment) rose to level required; that Commerce improvidently enacted rules without adequate experience of how they would work, that rules apply to ongoing investigations, and rules could deny relief to domestic industries, did not rise to level required for it to avoid Administrative Procedure Act's requirements. [Gold E. Paper \(Jiangsu\) Co. v. United States, 918 F. Supp. 2d 1317, 35 Int'l Trade Rep. \(BNA\) 1608, 2013 Ct. Intl. Trade LEXIS 74 \(Ct. Int'l Trade 2013\)](#).

3. Change in Substance of Rule From What Was Proposed in Notice

89. Generally

[5 USCS § 553](#) does not require agency to publish in advance every precise proposal which it may ultimately adopt as rule, and publication of notice was sufficient, even though additional language was added to rule as finally promulgated. [California Citizens Band Asso. v. United States, 375 F.2d 43, 1967 U.S. App. LEXIS 7185 \(9th Cir.\)](#), cert. denied, [389 U.S. 844, 88 S. Ct. 96, 19 L. Ed. 2d 112, 1967 U.S. LEXIS 761 \(1967\)](#).

Administrative Procedure Act does not require agency to publish in advance every precise proposal which it may ultimately adopt as rule, particularly when proposals are adopted in response to comments from participants in rulemaking proceeding. [Daniel International Corp. v. Occupational Safety & Health Review Com., 656 F.2d 925, 9 O.S.H. Cas. \(BNA\) 2102, 1981 U.S. App. LEXIS 18758 \(4th Cir. 1981\)](#).

Agency need not issue final rule which is essentially identical to proposed rule; agencies require flexibility in rulemaking so that they may be able to respond appropriately to comments received after initial rulemaking proposals, since contrary rule would lead to absurdity that in rulemaking under [5 USCS § 553](#) agency can learn from comments only at peril of starting new procedural round of commentary. [Association of American Railroads v. Adams, 485 F. Supp. 1077, 1978 U.S. Dist. LEXIS 15589 \(D.D.C. 1978\)](#).

The Administrative Procedures Act does not contain "reinstatement of old rules" exception to "opportunity to comment" right conferred to interested parties by [5 USCS § 553\(c\)](#). [N.C. Growers' Ass'n v. Solis, 2009 U.S. Dist. LEXIS 54733 \(M.D.N.C. June 29, 2009\)](#), corrected, injunction granted, [644 F. Supp. 2d 664, 92 Empl. Prac. Dec. \(CCH\) ¶43628, 2009 U.S. Dist. LEXIS 64861 \(M.D.N.C. 2009\)](#).

90. "Logical outgrowth"

Notice is sufficiently descriptive of subjects and issues involved where notice outlines method proposed by regulation and where critical elements of proposal did not change and final rule was logical outgrowth of proposed rule. [Air Transp. Ass'n v. CAB, 732 F.2d 219, 235 U.S. App. D.C. 333, 18 Av. Cas. \(CCH\) ¶ 17746, 1984 U.S. App. LEXIS 23338 \(D.C. Cir. 1984\)](#).

Final rule containing changes from proposed rule need not undergo second notice and comment period, even where agency makes substantial changes from proposed version, so long as final changes are in character with original scheme and logical outgrowth of proposed rule. [Natural Resources Defense Council, Inc. v. United States](#)

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[EPA, 824 F.2d 1258, 26 Env't Rep. Cas. \(BNA\) 1233, 18 Env'tl. L. Rep. 20088, 1987 U.S. App. LEXIS 9646 \(1st Cir. 1987\).](#)

A regulation is not invalid by reason of inadequate notice where changes in final regulation are in character with original scheme and are logical outgrowth of notice and content already given and description of subjects and issues involved in proposed rule are sufficient to put challenging parties on notice of contemplated action. [La Madrid v. Hegstrom, 830 F.2d 1524, 1987 U.S. App. LEXIS 14127 \(9th Cir. 1987\).](#)

Agency can promulgate final regulation as it differs from proposed regulation if final rule is "logical outgrowth" of proposed rule and this is so even though agency's ultimate choice barely qualifies as such "logical outgrowth". [Natural Resources Defense Council, Inc. v. Thomas, 838 F.2d 1224, 267 U.S. App. D.C. 274, 27 Env't Rep. Cas. \(BNA\) 1041, 18 Env'tl. L. Rep. 20519, 1988 U.S. App. LEXIS 709 \(D.C. Cir.\), cert. denied, 488 U.S. 888, 109 S. Ct. 219, 102 L. Ed. 2d 210, 28 Env't Rep. Cas. \(BNA\) 1840, 1988 U.S. LEXIS 4507 \(1988\), cert. denied, 488 U.S. 901, 109 S. Ct. 250, 102 L. Ed. 2d 238, 28 Env't Rep. Cas. \(BNA\) 1840, 1988 U.S. LEXIS 4347 \(1988\).](#)

Changes in rules from proposals do not require additional round of notice-and-comment under [5 USCS § 553\(b\)](#), where final rules represent "logical outgrowth" of proposals. [Action Alliance of Senior Citizens v. Bowen, 846 F.2d 1449, 269 U.S. App. D.C. 463, 1988 U.S. App. LEXIS 6446 \(D.C. Cir. 1988\), vacated, remanded, 494 U.S. 1001, 110 S. Ct. 1329, 108 L. Ed. 2d 469, 1990 U.S. LEXIS 1098 \(1990\).](#)

Test to determine if final rule is "logical outgrowth" of proposed rule is whether parties should have anticipated that controverted requirement might be imposed. [Hercules, Inc. v. United States EPA, 938 F.2d 276, 291 U.S. App. D.C. 11, 33 Env't Rep. Cas. \(BNA\) 1526, 21 Env'tl. L. Rep. 21356, 1991 U.S. App. LEXIS 14648 \(D.C. Cir. 1991\).](#)

Final rule that is logical outgrowth from notice of proposed rulemaking does not violate notice requirement of APA. [Engine Mfrs. Ass'n, ex rel. Certain of its Engine Mfrs. Ass'n, ex rel. Certain of its Members v. United States EPA, 88 F.3d 1075, 319 U.S. App. D.C. 12, 42 Env't Rep. Cas. \(BNA\) 1993, 26 Env'tl. L. Rep. 21477, 1996 U.S. App. LEXIS 17066 \(D.C. Cir. 1996\).](#)

U.S. Commodity Futures Trading Commission (CFTC) did not violate [5 USCS § 553\(c\)](#) when it responded to requests for clarification about marketing restriction by outlining seven factors that would be internal guide for agency in evaluating restriction; this was logical outgrowth of proposed rulemaking on which comments were received, and notice and comment on these precise marketing restriction factors was not required. [Inv. Co. Inst. v. United States CFTC, 891 F. Supp. 2d 162, 2012 U.S. Dist. LEXIS 175941 \(D.D.C. 2012\).](#)

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Order and report by Federal Communications Commission (FCC), issued subsequent to notice of proposed continuation of minority preference policy, effecting departure from policy in new rules governing broadcast license applications, violated notice and comment requirements of § 553 since agency took contrary position to that stated in notice; while final rule need not be exact replica of rule proposed in notice, final rule must be "logical outgrowth" of rule proposed. [National Black Media Coalition v. FCC, 791 F.2d 1016, Util. L. Rep. \(CCH\) ¶13147, 1986 U.S. App. LEXIS 25509 \(2d Cir. 1986\).](#)

Although final IRS rule regarding allocation of membership dues was substantially different from notice of proposed rulemaking, medical association was adequately notified, since final rule was "logical outgrowth" of and was "contained" in proposed version. [American Medical Ass'n v United States, 887 F.2d 760, 64 A.F.T.R.2d \(RIA\) 5715 \(CA7 Ill 1989\).](#)

In claim by Public Service Commission of District of Columbia alleging that FCC approved revised separations manual used by telephone company in allocating their costs between federal and state regulatory jurisdictions on ground that FCC did not give adequate notice of changes as required by [5 USCS § 553](#), court will find that final rule was not other than logical outgrowth of original proposal and therefore adequate notice was given. [Public Service](#)

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Com. v. FCC, 906 F.2d 713, 285 U.S. App. D.C. 19, Util. L. Rep. (CCH) ¶13669, 1990 U.S. App. LEXIS 10062 (D.C. Cir. 1990).

FCC rule that applicants for mobile satellite system licenses contribute funds to consortium to demonstrate financial eligibility met “logical outgrowth” test of notice requirement where notice of proposed rule-making apprised interested applicants that they would have to demonstrate financial ability to meet costs of constructing, launching, and operating satellite for one year. Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 289 U.S. App. D.C. 16, Util. L. Rep. (CCH) ¶13746, 1991 U.S. App. LEXIS 4290 (D.C. Cir. 1991), app. after remand, 983 F.2d 275, 299 U.S. App. D.C. 250, 1993 U.S. App. LEXIS 1126 (D.C. Cir. 1993).

Test to determine if final rule is “logical outgrowth” of proposed rule is whether parties should have anticipated that controverted requirement might be imposed; where EPA stated that it anticipated using definition of “transfers” contained in FPMR and FPMR failed to contain such definition, interested parties were put on notice that final rule might also fail to do so. Hercules, Inc. v. United States EPA, 938 F.2d 276, 291 U.S. App. D.C. 11, 33 Env't Rep. Cas. (BNA) 1526, 21 Env'tl. L. Rep. 21356, 1991 U.S. App. LEXIS 14648 (D.C. Cir. 1991).

Final rules defining hazardous waste in “derived-from” terms, promulgated without notice and comment, violate APA where rules had no counterpart in, and were not logical outgrowth of, proposed rule. Shell Oil Co. v. EPA, 950 F.2d 741, 292 U.S. App. D.C. 332, 34 Env't Rep. Cas. (BNA) 1049, 22 Env'tl. L. Rep. 20305, 1991 U.S. App. LEXIS 28478 (D.C. Cir. 1991).

FDA's announcement in its “Notice of Applicability of Final Rule” that human heart valve allografts were subject to regulations governing replacement heart valves was not logical outgrowth of established regulation where allografts had been distributed for years with no indication from FDA that they were subject to regulations, and judicial review of manufacturer's claim was not foreclosed by limitations period. Northwest Tissue Ctr. v. Shalala, 1 F.3d 522, 1993 U.S. App. LEXIS 19474 (7th Cir. 1993), reh'g, en banc, denied, 1993 U.S. App. LEXIS 24957 (7th Cir. Sept. 24, 1993).

Department of Health and Human Services regulation requiring third party payer, who learns that Health Care Financing Association has made Medicare primary payer for services for which third party has or should have made primary payment, to give notice to that effect to Medicare intermediary or carrier that paid claim, is logical outgrowth of proposal on which public has had opportunity to comment, and adoption does not violate APA. Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 306 U.S. App. D.C. 104, 44 Soc. Sec. Rep. Service 391, 1994 U.S. App. LEXIS 10733 (D.C. Cir. 1994), cert. denied, 513 U.S. 1147, 115 S. Ct. 1095, 130 L. Ed. 2d 1064, 1995 U.S. LEXIS 1017 (1995).

Congressional amendments completely revising scheme for reimbursing Medicare hospitals constituted sufficiently “good cause” under [5 USCS § 553](#) for bypassing notice and comment requirement, and prospective-only policy toward error correction constituted sufficiently logical outgrowth of initial statement indicating that errors would be recalculated; thus, final rules fell within allowance for modifications following public comment pursuant to [42 USCS § 1395ww](#). Methodist Hosp. v. Shalala, 38 F.3d 1225, 309 U.S. App. D.C. 37, 46 Soc. Sec. Rep. Service 63, 1994 U.S. App. LEXIS 33187 (D.C. Cir. 1994).

Where operators of small municipal waste combustor (MWC) units challenged order of Environmental Protection Agency (EPA) that set emission limits for MWC units, MWC operators were not deprived of proper notice when final rule collapsed proposed rule's three categories of small MWC units into two, because that was logical outgrowth of proposed rule. Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 360 U.S. App. D.C. 129, 57 Env't Rep. Cas. (BNA) 2121, 2004 U.S. App. LEXIS 3391 (D.C. Cir. 2004).

Proper notice was given of Veterans Administration's (VA) final rule requiring claims and appeals to use standard VA forms because final rule was “logical outgrowth” of proposed rule of which proper notice was given, as final rule did not change proposed rule's basic approach of standardizing claims process. Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs, 818 F.3d 1336, 2016 U.S. App. LEXIS 6331 (Fed. Cir. 2016).

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Records access rule of Occupational Health and Safety Administration (29 CFR § 1910.20) was not promulgated in violation of notice and comment requirements of [5 USCS § 553](#) by addition of definition of “toxic substance and harmful physical agent” in final rule, where (1) addition was logical outgrowth of comment proceedings during which subject was extensively discussed, (2) preamble of proposed rule gave adequate notice that coverage of rule was to be given broad scope, and (3) rule imposes no record making burden on employers. [Louisiana Chem. Ass'n v. Bingham, 550 F. Supp. 1136, 10 O.S.H. Cas. \(BNA\) 2113, 1982 U.S. Dist. LEXIS 15659 \(W.D. La. 1982\)](#), aff'd, 731 F.2d 280, 1984 U.S. App. LEXIS 22736 (5th Cir. 1984).

Restrictions under Telemarketing Sales Rule, as amended, [68 Fed. Reg. 4580 \(January 29, 2003\)](#), on use by telemarketers of pre-acquired account information were not promulgated in violation of notice and comment requirements of [5 USCS § 553\(b\)](#) and (c); fact that final rule covered entities that proposed rule did not cover did not mean that notice was inadequate, as policies underlying notice requirement had been served and final rule was logical outgrowth of proposed rule. [U.S. Sec. v. FTC, 282 F. Supp. 2d 1285, 2003-2 Trade Cas. \(CCH\) ¶74157, 2003 U.S. Dist. LEXIS 16650 \(W.D. Okla. 2003\)](#), rev'd, in part, [358 F.3d 1228, 32 Media L. Rep. \(BNA\) 1357, 2004-1 Trade Cas. \(CCH\) ¶74290, 2004 U.S. App. LEXIS 2564 \(10th Cir. 2004\)](#).

Where [11 C.F.R. § 100.24\(a\)\(2\)](#) implemented [2 USCS § 431\(20\)\(A\)\(i\)](#) by defining “voter registration activity” to include requirement that activity assist in registration of voters, regulation was invalid under [5 USCS § 553\(b\)\(3\)](#) since final rule was not logical outgrowth of proposed rule as set out in notice of proposed rulemaking; there was no notice of proposed limitation to voter registration activity nor any solicitation of comments concerning possible exceptions to limitation. [Shays v. FEC, 337 F. Supp. 2d 28, 2004 U.S. Dist. LEXIS 18694 \(D.D.C. 2004\)](#), dismissed, in part, [2004 U.S. App. LEXIS 24896 \(D.C. Cir. Dec. 2, 2004\)](#), aff'd, [414 F.3d 76, 367 U.S. App. D.C. 185, 2005 U.S. App. LEXIS 14314 \(D.C. Cir. 2005\)](#).

Where notice of proposed rule provided for confidentiality presumptions for certain data submitted to defendant Secretary of Department of Transportation by intervenor-defendant tire manufactures, but final rule promulgated under [49 USCS § 30166\(m\)\(1\)](#), (4), part of Transportation Recall Enhancement, Accountability, and Documentation Act, was direct opposite, deeming certain data as categorically confidential under Freedom of Information Act, plaintiff citizen group was not given adequate notice and opportunity to comment under [5 USCS § 553](#) and remand was ordered. [Public Citizen, Inc. v. Mineta, 427 F. Supp. 2d 7, 2006 U.S. Dist. LEXIS 18580 \(D.D.C. 2006\)](#).

U.S. Department of Agriculture (USDA) was required to afford interested parties opportunity to comment on rule changes because numerous changes between USDA's 2002 Rule and 2005 Rule did not constitute logical outgrowths of proposed rule, and its failure to provide opportunity for comment violated Administrative Procedure Act. [Citizens for Better Forestry v. United States Dep't of Agric., 481 F. Supp. 2d 1059, 2007 U.S. Dist. LEXIS 27419 \(N.D. Cal. 2007\)](#).

92. New or additional notice

There is nothing in [5 USCS § 553](#) that requires new notice whenever agency responsibly adopts suggestions of interested parties, where all significant new information developed during rulemaking was made available for comment well in advance of issuance of final regulations. [Ethyl Corp. v. EPA, 541 F.2d 1, 176 U.S. App. D.C. 373, 8 Env't Rep. Cas. \(BNA\) 1785, 6 Env'tl. L. Rep. 20267, 1976 U.S. App. LEXIS 12309 \(D.C. Cir.\)](#), cert. denied, 426 U.S. 941, 96 S. Ct. 2663, 49 L. Ed. 2d 394, 8 Env't Rep. Cas. (BNA) 2200, 1976 U.S. LEXIS 3993 (1976).

Submission of proposed rule for comment does not, of necessity, bind agency to undertake new round of notice and comment before it adopts rule which is different—even substantially different—from proposed rule because adequacy of notice must be tested by determining whether it would fairly apprise interested persons of subjects and issues before agency. [American Iron & Steel Institute v. Environmental Protection Agency, 568 F.2d 284, 10 Env't Rep. Cas. \(BNA\) 1689, 7 Env'tl. L. Rep. 20738, 1977 U.S. App. LEXIS 11571 \(3d Cir. 1977\)](#).

Agency adopting final rules that differ from proposed rules is required to renounce when changes are so major that original notice does not adequately frame subjects for discussion, but agency need not renounce changes that follow

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logically from or that reasonably develop rules it proposes originally. [Connecticut Light & Power Co. v. Nuclear Regulatory Com.](#), 673 F.2d 525, 218 U.S. App. D.C. 134, 1982 U.S. App. LEXIS 20990 (D.C. Cir.), cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76, 1982 U.S. LEXIS 205 (1982).

Statutory duty to submit proposed rule for comment does not include obligation to provide new opportunities for comment whenever final rule differs from proposed rule. [Air Transp. Ass'n v. CAB](#), 732 F.2d 219, 235 U.S. App. D.C. 333, 18 Av. Cas. (CCH) ¶ 17746, 1984 U.S. App. LEXIS 23338 (D.C. Cir. 1984).

Final rule containing changes from proposed rule need not undergo second notice and comment period, even where agency makes substantial changes from proposed version, so long as final changes are in character with original scheme and logical outgrowth of proposed rule. [Natural Resources Defense Council, Inc. v. United States EPA](#), 824 F.2d 1258, 26 Env't Rep. Cas. (BNA) 1233, 18 Env'tl. L. Rep. 20088, 1987 U.S. App. LEXIS 9646 (1st Cir. 1987).

New notice and comment period is not required simply because final regulations are different from proposed regulations; additional notice is superfluous where regulations have been adequately framed and discussed. [American Federation of Government Employees v. Office of Personnel Management](#), 618 F. Supp. 1254, 1985 U.S. Dist. LEXIS 15426 (D.D.C. 1985), aff'd, 782 F.2d 278, 251 U.S. App. D.C. 196 (D.C. Cir. 1986).

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Inmate Financial Responsibility Program was properly adopted; submission of proposed rule for comment does not bind agency to undertake new round of notice and comment before it adopts rule which is different from proposed rule, and proposed rule's failure to mention that there would be expected allotment of not less than 50 percent of inmate's monthly pay did not result in inadequate notice under [5 USCS § 553](#). [James v. Quinlan](#), 866 F.2d 627, 1989 U.S. App. LEXIS 691 (3d Cir.), cert. denied, 493 U.S. 870, 110 S. Ct. 197, 107 L. Ed. 2d 151, 1989 U.S. LEXIS 4353 (1989).

Oil and gas companies' argument that United States Environmental Protection Agency (EPA) had not provided adequate notice of economic-achievability test during rulemaking was unavailing where agency's economic achievability argument was very basis under which final Phase III rule for use of cooling water intake structures for new offshore facilities was promulgated; EPA had considered barrier to entry and economic impact, as distinguished from making specific, facility-by-facility cost-benefit analyses, as basis for final rule, and that position had not changed during appeal of that final rule. [ConocoPhillips Co. v. United States EPA](#), 612 F.3d 822, 71 Env't Rep. Cas. (BNA) 1225, 40 Env'tl. L. Rep. 20200, 2010 U.S. App. LEXIS 15229 (5th Cir. 2010).

IRS failed to publish accurate proposed version of regulations pertaining to taxation of proceeds from sale of magazines by tax-exempt organizations to nonmembers under [5 USCS § 553\(b\)\(3\)](#), and thus regulation is invalid, where proposed version described regulations as providing for flexible, case-by-case approach involving certain factors to consider and adopted regulations set out 3 specific methods of calculating tax, because regulation was issued without notice of drastic change in proposal. [American Medical Ass'n v United States](#), 668 F. Supp. 1085, 61 A.F.T.R.2d (RIA) 731 (ND Ill 1987).

Commerce Secretary/National Marine Fisheries Service's promulgation of regulations requiring shrimp trawlers to use turtle exclusion devices or in some instances to reduce tow times was procedurally proper under [5 USCS § 553\(b\)](#), where agency published proposed rules in Federal Register, conducted 16 public hearings that were properly noticed, and changed proposed rules to include reduced tow times provision upon frequent suggestion through public comment, because agency was not even required to hold public hearings on these regulations pursuant to Endangered Species Act ([16 USCS §§ 1531](#) et seq.), but did in fact notify many concerned parties through various means, hold hearings, and achieve final regulations that were no surprise to plaintiffs. [La. ex rel. Guste v. Verity](#), 681 F. Supp. 1178, 18 Env'tl. L. Rep. 20944, 1988 U.S. Dist. LEXIS 9877 (E.D. La.), aff'd, 850 F.2d 211, 1988 U.S. App. LEXIS 9958 (5th Cir. 1988).

4. Failure to Provide Notice and Effect Thereof

94. Generally

Regulation is invalid if agency fails to follow procedures required by Administrative Procedures Act ([5 USCS § 553](#)). [Buschmann v. Schweiker, 676 F.2d 352, 1982 U.S. App. LEXIS 19597 \(9th Cir. 1982\)](#).

While defects in original notice may be cured by adequate later notice, curative effect depends on agency's mind remaining open enough at later date and consideration of comments as matter of grace is not enough. [McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 267 U.S. App. D.C. 367, 27 Env't Rep. Cas. \(BNA\) 1288, 18 Env'tl. L. Rep. 20473, 1988 U.S. App. LEXIS 1626 \(D.C. Cir. 1988\)](#).

Farm workers' textual argument that, under Administrative Procedure Act (APA), [5 USCS §§ 553](#), and [701–706](#), act of reinstating rule did not qualify as formulating rule was not supported by any precedent, and actually was undermined by definition of term formulating cited by farm workers; it was immaterial whether rule at issue was newly drafted or was drawn from another source; when 2008 regulations took effect on January 17, 2009, they superseded 1987 regulations for all purposes relevant to appeal and as result, 1987 regulations ceased to have any legal effect, and their reinstatement would have put in place set of regulations that were new and different formulations from 2008 regulations; Department of Labor's reinstatement of 1987 regulations qualified as rule making under broad language of that term, and that Department was required to comply with APA's notice and comment procedures. [N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 20 Wage & Hour Cas. 2d \(BNA\) 34, 2012 U.S. App. LEXIS 26136 \(4th Cir. 2012\)](#).

Agency failure to provide advance notice and opportunity for public to comment renders regulation unenforceable. [McKenzie v. Heckler, 605 F. Supp. 1217, 1985 U.S. Dist. LEXIS 21212 \(D. Minn. 1985\)](#), rev'd, [787 F.2d 1216, 1986 U.S. App. LEXIS 23419 \(8th Cir. 1986\)](#), disapproved, [Wheeler v. Heckler, 787 F.2d 101, 1986 U.S. App. LEXIS 23431 \(3d Cir. 1986\)](#).

95. Prejudice

Even where challenger to rule presents no basis for invalidating rule on substantive grounds, it cannot be said with certainty whether comments would have had some effect if they had been considered when issue was open and challenger need not show that irregularities caused "specific prejudice". [McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 267 U.S. App. D.C. 367, 27 Env't Rep. Cas. \(BNA\) 1288, 18 Env'tl. L. Rep. 20473, 1988 U.S. App. LEXIS 1626 \(D.C. Cir. 1988\)](#).

Attorney General's interim rule of February 28, 2007, which required pre-enactment sex offenders to comply with federal Sex Offender Registration and Notification Act, [42 USCS § 16913](#), meant that act was effective as to defendant on that date; because he failed to register after that date, he violated [18 USCS § 2250\(a\)](#); even if enactment of rule violated [5 USCS § 553\(b\)](#), (c), and (d) of Administrative Procedures Act, any violations were harmless. [United States v. Torres, 767 F.3d 426, 2014 U.S. App. LEXIS 17335 \(5th Cir. 2014\)](#).

While wherever it appears that absence of notice has resulted in prejudice to complaining party, action of administrative agency will be set aside, no prejudice is shown where party complaining had actual knowledge of and participated in administrative proceedings. [Florida Citrus Com. v. United States, 144 F. Supp. 517, 1956 U.S. Dist. LEXIS 3982 \(D. Fla. 1956\)](#), aff'd, [352 U.S. 1021, 77 S. Ct. 589, 1 L. Ed. 2d 595, 1957 U.S. LEXIS 1227 \(1957\)](#).

96. Actual notice despite failure to provide notice

Even though no notice was given as required under § 4 of Administrative Procedure Act ([5 USCS § 553](#)) when order and first amendment were promulgated, numerous interested parties who filed petition for rehearing after amended order was promulgated had no cause for complaint when second amended order was promulgated, since that order was adopted only after full hearing was accorded parties. [Amerada Petroleum Corp. v. Federal Power](#)

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[Com.](#), [231 F.2d 461](#), [5 Oil & Gas Rep. 819](#), [13 Pub. Util. Rep. 3d \(PUR\) 595](#), [1956 U.S. App. LEXIS 3413 \(10th Cir. 1956\)](#).

Failure to publish proposed rules in Federal Register does not preclude effectiveness of otherwise valid agency action where interested parties have actual notice and full, fair opportunity to participate in rulemaking process; however, on another occasion where agency reconsidered rule, parties did not have notice, since when they made inquiries as to status of presently effective announcement, officials repeatedly assured them that announcement would remain in effect, thereby precluding participation upon reconsideration of announcement. [Arlington Oil Mills, Inc. v. Knebel](#), [543 F.2d 1092](#), [1976 U.S. App. LEXIS 6138 \(5th Cir.\)](#), reh'g denied, [545 F.2d 168 \(5th Cir. 1976\)](#).

Actual knowledge by most interested parties is sufficient to cure notice defects; notice of study used in rulemaking process is sufficient where copies are sent to industry organizations which must have disseminated studies based upon number and relative uniformity of responses. [Lloyd Noland Hospital & Clinic v. Heckler](#), [762 F.2d 1561](#), [1985 U.S. App. LEXIS 30631 \(11th Cir. 1985\)](#).

Failure of notice of rulemaking to specify empirical study upon which rulemaking relied is not fatal where commenters have actual notice of study. [Abington Memorial Hospital v. Heckler](#), [576 F. Supp. 1081](#), [1983 U.S. Dist. LEXIS 11028 \(E.D. Pa. 1983\)](#), aff'd, [750 F.2d 242](#), [1984 U.S. App. LEXIS 15933 \(3d Cir. 1984\)](#).

It is sufficient if information subsequently supplied to public after original notice discloses in detail thinking that animated formation of proposed rule and data upon which rule is based; information provided by officials upon request to those who called information number listed in published notice renders notice sufficient. [Bedford County Memorial Hospital v. Heckler](#), [583 F. Supp. 367](#), [1984 U.S. Dist. LEXIS 18181 \(W.D. Va. 1984\)](#), aff'd, remanded, [769 F.2d 1017](#), [1985 U.S. App. LEXIS 21917 \(4th Cir. 1985\)](#).

Secretary of Agriculture did not violate publication requirements of [5 USCS §§ 552\(a\)\(1\)](#), [553\(b\)](#) and [7 USCS § 1445\(f\)\(3\)](#) when he established rebate program for tobacco purchasers funded with assessments from tobacco growers, because (1) under [7 USCS § 1445\(f\)\(3\)](#) Secretary need only publish price support level, not rebate program, (2) growers had actual notice of rebate program through press release and thus Secretary complied with [5 USCS § 552\(a\)\(1\)](#) and (3) Secretary did not act to establish rule, and thus publication under [5 USCS § 553\(b\)](#) is not required. [Strickland v. Flue-Cured Tobacco Cooperative Stabilization Corp.](#), [643 F. Supp. 310](#), [1986 U.S. Dist. LEXIS 21184 \(D.S.C. 1986\)](#).

Where savings and loan associations challenged adequacy of Federal Home Loan Bank Board's notice of its inclusion of informal memorandum as one of subjects of proposed rulemaking, notice requirements of [5 USCS § 553\(b\)](#) are met despite lack of publication since memorandum, submitted in response to notice of proposed rulemaking (NPRM), and comments elicited by memorandum, provide clear evidence that NPRM must have fairly apprised interested parties of issues involved, and all insured institutions had received actual notice of full text of informal memorandum. [Haralson v. Federal Home Loan Bank Bd.](#), [678 F. Supp. 925](#), [1987 U.S. Dist. LEXIS 13008 \(D.D.C. 1987\)](#).

Instructions setting pre-export notice requirement are not rules or regulations because of failure to follow rulemaking procedures of [5 USCS § 553](#); agency failure to follow procedures under [5 USCS § 553](#) provides shield to members of public who, because of failure, lack timely notice of requirements; if it is shown that person had actual timely notice of unpublished requirement, requirement can be enforced against that person; actual notice may be based upon direct or circumstantial evidence. (1983, Cust Serv) CSD 84-28, 18 CBD No. 11, p 42.

Actual notice provided by FCC to party subject to accounting requirements adopted in FCC order concerning antitrust litigation was sufficient under [5 USCS § 553\(b\)](#) to support application of requirements to those parties notwithstanding contention that publication was required for order to have been procedurally proper. Re American Telephone and Telegraph Co., Ameritech, Bell Atlantic, Bell South, NYNEX, Pacific Telesis, Southwestern Bell & US West—Accounting Instructions for Judgment and Other Costs Associated With Litton Systems Antitrust Law Suit, FCC 88-21 (Adopted January 19, 1988).

97. Particular cases

Decision by Indian Health Service to discontinue Indian Children's Program—which provides diagnostic and treatment services in southwestern United States to Indian children with handicaps, and which Program has been paid for out of lump-sum appropriations to Service—is not rendered invalid by Service's failure to abide by notice-and-comment requirements for rule making under Administrative Procedure Act (APA), [5 USCS § 553](#), even assuming that statement discontinuing Program would qualify as "rule" within meaning of APA, because such statement would be exempt from notice-and-comment requirements under § 553(b)(A), which exempts "general statements of policy, or rules of agency organization," given that (1) discontinuance of Program might be seen as affecting Service's organization, and (2) term "general statemen[t] of policy" includes an announcement that agency will discontinue discretionary allocation of unrestricted funds from lump-sum appropriation. [Lincoln v. Vigil, 508 U.S. 182, 113 S. Ct. 2024, 124 L. Ed. 2d 101, 7 Fla. L. Weekly Fed. S 312, 93 Cal. Daily Op. Service 3774, 93 D.A.R. 6460, 1993 U.S. LEXIS 3566](#), remanded, 2 F.3d 1161, 1993 U.S. App. LEXIS 32920 (10th Cir. 1993).

Manual of Department of Health and Human Services, setting forth rules for reimbursement to hospitals of reasonable advance refunding costs under Medicare on amortized rather than lump sum basis, adopted without notice and comment procedure, was not substantive rule change subject to requirements of Administrative Procedure Act. [Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 115 S. Ct. 1232, 131 L. Ed. 2d 106, 95 Cal. Daily Op. Service 1666, 46 Soc. Sec. Rep. Service 640, 1995 U.S. LEXIS 1808](#), remanded, 52 F.3d 325, 1995 U.S. App. LEXIS 18016 (6th Cir. 1995).

Decision of Department of Health and Human Services to strike from final HHS-specific regulations mandatory self-evaluation requirement that had been in general regulations and proposed agency-specific regulations did not call for new round of notice-and-comment, where change arose not from comment on proposals but from supervening external force of memorandum from Office of Management and Budget disapproving mandatory self-evaluation requirement contained in general regulations. [Action Alliance of Senior Citizens v. Bowen, 846 F.2d 1449, 269 U.S. App. D.C. 463, 1988 U.S. App. LEXIS 6446 \(D.C. Cir. 1988\)](#), vacated, remanded, 494 U.S. 1001, 110 S. Ct. 1329, 108 L. Ed. 2d 469, 1990 U.S. LEXIS 1098 (1990).

Rule promulgated by United States Park Service prohibiting storage of excessive property at park site was substantive regulation, and since rule was adopted without required notice and comment, it was invalid, and defendant's conviction under it must be reversed. [United States v. Picciotto, 875 F.2d 345, 277 U.S. App. D.C. 312, 1989 U.S. App. LEXIS 7139 \(D.C. Cir. 1989\)](#).

United States Drug Enforcement Agency rule banning sale of consumable products containing hemp oil, cake, or seed was invalid and unenforceable where it changed prior regulation regarding naturally occurring tetrahydrocannabinols and agency had failed to follow notice and comment procedures in promulgating rule. [Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 2003 Cal. Daily Op. Service 5706, 2003 D.A.R. 7248, 2003 U.S. App. LEXIS 13231 \(9th Cir. 2003\)](#).

Because Sexual Offenders Registration and Notification Act (SORNA), explicitly required Attorney General (A.G.) to specify applicability of Act to persons convicted prior to effective date of SORNA, and because A. G. did not promulgate regulation making that determination in compliance with Administrative Procedure Act, defendant was not subject to SORNA's requirements during period indicated in indictment and his motion to dismiss indictment should have been granted. [United States v. Cain, 583 F.3d 408, 2009 FED App. 0361P, 2009 U.S. App. LEXIS 22436 \(6th Cir. 2009\)](#), reh'g denied, reh'g, en banc, denied, [2010 U.S. App. LEXIS 3438 \(6th Cir. Feb. 17, 2010\)](#).

Transportation Security Administration did not justify its failure to issue notice and solicit comments before deciding it would use advanced imaging technology scanners for primary airport screening and rule was not interpretive, procedural, or general policy statement, so it was not exempted from notice requirements by [5 USCS § 553\(b\)\(3\)\(A\)](#). [Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec., 653 F.3d 1, 397 U.S. App. D.C. 313, 2011 U.S. App. LEXIS 14503 \(D.C. Cir. 2011\)](#), reh'g, en banc, denied, [2011 U.S. App. LEXIS 26354 \(D.C. Cir. Sept. 12, 2011\)](#).

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Both settlement agreement and forest supervisor's statement were "rules" within meaning of Administrative Procedures Act (APA), because they were agency statements of general applicability and future effect designed to implement, interpret, or prescribe law or policy and not, as Forest Service argued rules of agency organization, procedure, or practice excepted from APA's notice and comment requirement. [*Minard Run Oil Co. v. United States Forest Serv.*, 670 F.3d 236, 73 Env't Rep. Cas. \(BNA\) 1932, 41 Env'tl. L. Rep. 20294, 177 Oil & Gas Rep. 1, 2011 U.S. App. LEXIS 19265 \(3d Cir. 2011\)](#).

IRS form establishing bank Currency Transaction Reporting requirements for structured transactions under [31 USCS § 5313](#) is not mere statutory interpretation but is rulemaking regulation where form implemented statute by creating new duties and thus constitutes legislative rule promulgated without proper notice or hearing. [*United States v. Shearson Lehman Bros., Inc.*, 650 F. Supp. 490, 1986 U.S. Dist. LEXIS 16943 \(E.D. Pa. 1986\)](#).

Pregnant woman is entitled to return of controversial "abortion pills" confiscated from her upon attempt to import them from Great Britain, where FDA agents seized pills from woman at airport pursuant to "Import Alert 66-47," which added these specific pills to list of drugs specifically excluded from pilot program allowing importation of unapproved drugs for personal use, because, under agency's own rules, notice and comment procedures were required for proper promulgation of "Alert" under [5 USCS § 553](#) but were not performed. [*Benten v. Kessler*, 799 F. Supp. 281, 1992 U.S. Dist. LEXIS 10516 \(E.D.N.Y. 1992\)](#).

Department of Interior's Notice of Inquiry (NOI), announcing that subsidence would not be considered to fall within surface mining prohibitions of [30 USCS § 1272\(e\)](#), is legislative rulemaking and must be invalidated and remanded for compliance with Administrative Procedure Act, [5 USCS § 553](#), where NOI defines "surface impacts incident to underground coal mine," because Congress did not define surface impacts and department's definition is exercise of delegated legislative power which requires notice and comment under [5 USCS § 553](#). [*National Wildlife Fed'n v. Babbitt*, 835 F. Supp. 654, 23 Env'tl. L. Rep. 21464, 1993 U.S. Dist. LEXIS 13430 \(D.D.C. 1993\)](#).

Amendment by Immigration and Naturalization Service (INS) in 1988 to [8 C.F.R. § 211.1](#), which admittedly granted additional authority to INS to impose fines against airlines when they transported undocumented aliens into United States, was void because INS did not provide notice and comment for change as required when change impacted upon substantive right or obligation of regulated parties. [*Air India v. Brien*, 261 F. Supp. 2d 134, 2003 U.S. Dist. LEXIS 6504 \(E.D.N.Y. 2003\)](#), reconsideration granted, [239 F.R.D. 306, 2006 U.S. Dist. LEXIS 93435 \(E.D.N.Y. 2006\)](#).

Delegation promulgated by Secretary of Department of Homeland Security (DHS) on March 1, 2003, which vested Bureau of Citizenship and Immigration Services with authority to exercise appellate jurisdiction over matters described in [8 CFR § 103.1\(f\)\(3\)\(E\)\(iii\)](#) (as in effect on February 28, 2003), falls within procedural exception of [5 USCS § 553](#) and does not require publication in order to be effective because delegation specifies internal organization of DHS. [*United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 2010 U.S. Dist. LEXIS 75552 \(N.D. Cal. 2010\)](#).

In challenge by plaintiffs, Florida sugarcane grower and renewable energy company, because defendant U.S. Army Corps of Engineers' new "Stockton Rules" reversed Corps' former position that prior converted cropland (CC) shifted to non-agricultural use was exempt from Clean Water Act, and that pumping did not impact CC designation, rules were set aside for failure to comply with notice and comment requirements of [5 USCS §§ 552, 553\(b\)](#), (c). [*New Hope Power Co. v. United States Army Corps of Eng'Rs*, 746 F. Supp. 2d 1272, 72 Env't Rep. Cas. \(BNA\) 2177, 2010 U.S. Dist. LEXIS 103231 \(S.D. Fla. 2010\)](#).

Court found that 1991 amendment of interest-payment regulation for Medicare without notice and comment fell outside of interpretative rule exception and violated Administrative Procedure Act (APA), [5 USCS § 701](#) et seq. amended regulation was published in Code of Federal Regulations, and not only effectively amended prior legislative rule, but also literally did so. [*UPMC Mercy v. Sebelius*, 793 F. Supp. 2d 62, 2011 U.S. Dist. LEXIS 62385 \(D.D.C. 2011\)](#), dismissed, [2011 U.S. App. LEXIS 26109 \(D.C. Cir. Dec. 7, 2011\)](#).

C. Opportunity to Participate

98. Purpose

Purpose of rulemaking hearings is to permit agency to educate itself and not to allow interested parties to choose issues or narrow scope of proceedings; agency can look beyond particular hearing record and draw upon own expertise. [*Pacific Coast European Conference v. United States*, 350 F.2d 197, 1965 U.S. App. LEXIS 6673 \(9th Cir.\)](#), cert. denied, 382 U.S. 958, 86 S. Ct. 433, 15 L. Ed. 2d 362, 1965 U.S. LEXIS 52 (1965).

Administrative Procedure Act notice and comment procedures exist to insure that unelected administrators, who are not directly accountable to populace, are forced to justify their quasi-legislative rulemaking before informed and skeptical public. [*New Jersey v. Department of Health & Human Services*, 670 F.2d 1262, 1981 U.S. App. LEXIS 14934 \(3d Cir. 1981\)](#).

Purpose of comment period is to allow interested members of public to communicate information, concerns, and criticisms to agency during rulemaking process; if notice of proposed rulemaking fails to provide accurate picture of reasoning that has led agency to proposed rule, interested parties will not be able to comment meaningfully upon agency's proposals. [*Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 218 U.S. App. D.C. 134, 1982 U.S. App. LEXIS 20990 \(D.C. Cir.\)](#), cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76, 1982 U.S. LEXIS 205 (1982).

Purpose of notice and comment procedure is to allow agency to benefit from experience and input of parties who file comments and to see to it that agency maintains flexible and open minded attitude towards its own rule; procedure encourages public participation in administrative process and educates agency, thereby helping to insure informed agency decisionmaking. [*Chocolate Mfrs. Assn. v. Block*, 755 F.2d 1098, 1985 U.S. App. LEXIS 29335 \(4th Cir. 1985\)](#).

Solicitation of comments is basis of informal rule-making under [5 USCS § 553](#), because it is means by which public participates in rule-making process; it is also efficient channel through which experts in field and those affected by proposed rules can provide information which may have been overlooked by agency, can point out abstruse effects of proposed rules, and can suggest alternatives. [*Dow Chemical, USA v. Consumer Product Safety Com.*, 459 F. Supp. 378, 9 Env'tl. L. Rep. 20016, 1978 U.S. Dist. LEXIS 14604 \(W.D. La. 1978\)](#).

[5 USCS § 553](#) was enacted to give public opportunity to participate in rule-making process, and it also enables agency promulgating rule to educate itself before establishing rules and procedures which have substantial impact on those regulated. [*Cerro Metal Products v. Marshall*, 467 F. Supp. 869, 7 O.S.H. Cas. \(BNA\) 1125, 1979 O.S.H. Dec. \(CCH\) ¶23373, 1979 U.S. Dist. LEXIS 13934 \(E.D. Pa. 1979\)](#), aff'd, [620 F.2d 964, 29 Fed. R. Serv. 2d \(Callaghan\) 828, 8 O.S.H. Cas. \(BNA\) 1196, 1980 O.S.H. Dec. \(CCH\) ¶24411, 1980 U.S. App. LEXIS 18292 \(3d Cir. 1980\)](#), disapproved, [*Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 1985 A.M.C. 46, 11 O.S.H. Cas. \(BNA\) 2049, 1984 O.S.H. Dec. \(CCH\) ¶26981, 1984 U.S. App. LEXIS 20653 \(2d Cir. 1984\)](#).

Principal purpose of notice and comment provisions is to provide that legislative functions of administrative agencies shall as far as possible be exercised only after public participation on notice; participation by interested parties ensures that agency decisions are based upon relevant information; informal discussion of government officials with some interested parties does not cure failure to provide general notice. [*Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\)](#).

Notice and comment serves purposes of improving quality of agency rulemaking by testing proposed rules through exposure to public comments, providing opportunity to be heard, which is basic to fundamental fairness, and allowing affected parties to develop record of objections for judicial review. [*United Church Bd. for World Ministries v. SEC*, 617 F. Supp. 837, Fed. Sec. L. Rep. \(CCH\) ¶92286, Fed. Sec. L. Rep. \(CCH\) ¶92286, 1985 U.S. Dist. LEXIS 15937 \(D.D.C. 1985\)](#).

99. Persons entitled to participate

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Rulemaking provisions of [5 USCS § 553](#) are designed to assure fairness and mature consideration of certain regulations by permitting interested parties to comment on them prior to their adoption. [Aiken v. Obledo, 442 F. Supp. 628, 1977 U.S. Dist. LEXIS 13406 \(E.D. Cal. 1977\)](#).

Participation by interested parties ensures that agency decisions are based upon relevant information. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\)](#).

[20 CFR § 410.490](#) is invalid under [5 USCS § 553\(b\)](#) and (c), as incorporated into Black Lung Benefits Act by [5 USCS § 554\(d\)](#), [33 USCS § 919\(d\)](#), and [30 USCS § 932\(a\)](#), as applied to claims arising under Part C of Act, since mine operator could not have known at time notice of proposed rulemaking in connection with promulgation of § 410.490 was issued that it would be subjected to liability thereunder for claim under Part C and operator was deprived opportunity to comment and argue as "interested person" that § 410.490, which does not allow rebuttal of presumption of total disability by establishing that disability did not arise out of coal mine employment, conflicts with requirement of [30 USCS § 923\(b\)](#) that all relevant evidence be considered, and with requirement of §§ 901(a) and 902(f)(1)(A) that benefits be awarded only for total disability due to pneumoconiosis arising out of coal mine employment. *Whiteman v Boyle Land & Fuel Coal Co. & Rockwood Ins. Co.* (1988) 11 BLR 1-99.

100. Submission of data, views or arguments

It is notice of proposed rulemaking to which statutory right of comment applies, not rulemaking record. [American Mining Congress v. Marshall, 671 F.2d 1251, 1982 O.S.H. Dec. \(CCH\) ¶25933, 1982 U.S. App. LEXIS 21616 \(10th Cir. 1982\)](#).

Persons affected by rulemaking have legal right that their comments reach agency decision makers in at least summary form and that those comments be considered before final action is taken; neither Administrative Procedures Act ([5 USCS §§ 551](#) et seq.) nor due process clause accord similar treatment to staff evaluations that move beyond mere summary of record comments to express independent judgments of subordinate agency personnel; mid-level managers of agency may therefore filter out evaluations of lower-level personnel if they so chose, so long as relevant record comments are not eliminated in process as well. [National Small Shipments Traffic Conference, Inc. v. Interstate Commerce Com., 725 F.2d 1442, 233 U.S. App. D.C. 336, 1984 U.S. App. LEXIS 26156 \(D.C. Cir. 1984\)](#).

Where parties are given notice and opportunity to participate in rulemaking by filing written data and statements of views and arguments, there is compliance with [5 USCS § 553](#), and it is not abuse of discretion to deny oral presentation. [Tidewater Express Lines, Inc. v. United States, 281 F. Supp. 995, 1968 U.S. Dist. LEXIS 10078 \(D. Md. 1968\)](#).

Opportunity to submit written comments or materials sufficiently meets hearing requirements of [5 USCS § 553](#). [Chip Steak Co. v. Hardin, 332 F. Supp. 1084, 1971 U.S. Dist. LEXIS 11145 \(N.D. Cal. 1971\)](#), aff'd, 467 F.2d 481, 1972 U.S. App. LEXIS 6943 (9th Cir. 1972).

101. —Hearings

There is no constitutional right to hearing in rulemaking. *Alaska S.S. Co. v. Federal Maritime Com.*, 356 F.2d 59, 1966 U.S. App. LEXIS 7301 (9th Cir. 1966).

[5 USCS § 553](#) does not require evidentiary hearing or oral argument, and opportunity for evidentiary hearing or oral argument need not be given because of importance of issues; instead, there is no basis for disturbing agency's discretion to control course of own rulemaking proceedings. [Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 128 U.S. App. D.C. 262, 1967 U.S. App. LEXIS 5767 \(D.C. Cir. 1967\)](#).

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In situation where general policy is focal question, legislative type hearing is appropriate, even assuming oral submission. [*International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 155 U.S. App. D.C. 411, 4 Env't Rep. Cas. \(BNA\) 2041, 3 Env'tl. L. Rep. 20133, 1973 U.S. App. LEXIS 11707 \(D.C. Cir. 1973\).](#)

5 USCS § 553 allows somewhat informal procedures such as nonadjudicatory type of hearing on written submissions, and clearly under § 553(a), agency possesses discretion whether to permit oral presentation and reply submissions and, if so, to determine their scope, character and time sequence. *American Public Gas Asso. v. Federal Power Com.*, 567 F.2d 1016, 186 U.S. App. D.C. 23, 59 Oil & Gas Rep. 351, 1977 U.S. App. LEXIS 12916 (D.C. Cir. 1977), cert. denied, 435 U.S. 907, 98 S. Ct. 1457, 55 L. Ed. 2d 499, 1978 U.S. LEXIS 157 (1978).

Parties are not entitled to public oral hearing. [*Chip Steak Co. v. Hardin*, 332 F. Supp. 1084, 1971 U.S. Dist. LEXIS 11145 \(N.D. Cal. 1971\)](#), aff'd, 467 F.2d 481, 1972 U.S. App. LEXIS 6943 (9th Cir. 1972).

Evidentiary hearing prior to rule-making is not required, since where rule of conduct applies to more than few people, it is impracticable that everyone should have direct voice in its adoption, and Constitution does not require all public acts to be done in town meeting or assembly of whole. [*Sima Products Corp. v. McLucas*, 460 F. Supp. 128, 1978 U.S. Dist. LEXIS 14432 \(N.D. Ill. 1978\)](#), aff'd, 612 F.2d 309, 15 Av. Cas. (CCH) ¶17916, 1980 U.S. App. LEXIS 21681 (7th Cir. 1980).

102. —Oral presentations

5 USCS § 553 does not require evidentiary hearing or oral argument, and opportunity for evidentiary hearing or oral argument need not be given because of importance of issues; instead, there is no basis for disturbing agency's discretion to control course of own rulemaking proceedings. [*Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 128 U.S. App. D.C. 262, 1967 U.S. App. LEXIS 5767 \(D.C. Cir. 1967\).](#)

Comprehensive oral submissions of legislative nature are required even for rule-making, when controversial regulations governing competitive practices are involved. [*International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 155 U.S. App. D.C. 411, 4 Env't Rep. Cas. \(BNA\) 2041, 3 Env'tl. L. Rep. 20133, 1973 U.S. App. LEXIS 11707 \(D.C. Cir. 1973\).](#)

5 USCS § 553 allows somewhat informal procedures such as nonadjudicatory type of hearing on written submissions, and clearly under § 553(a), agency possesses discretion whether to permit oral presentation and reply submissions and, if so, to determine their scope, character and time sequence. *American Public Gas Asso. v. Federal Power Com.*, 567 F.2d 1016, 186 U.S. App. D.C. 23, 59 Oil & Gas Rep. 351, 1977 U.S. App. LEXIS 12916 (D.C. Cir. 1977), cert. denied, 435 U.S. 907, 98 S. Ct. 1457, 55 L. Ed. 2d 499, 1978 U.S. LEXIS 157 (1978).

Neither Administrative Procedure Act nor Clean Water Act afford applicants for NPDES permit absolute right to oral presentation of evidence and use of cross-examination. [*Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156, 273 U.S. App. D.C. 180, 28 Env't Rep. Cas. \(BNA\) 1401, 19 Env'tl. L. Rep. 20016, 1988 U.S. App. LEXIS 13319 \(D.C. Cir. 1988\).](#)

Where parties are given notice and opportunity to participate in rulemaking by filing written data and statements of views and arguments, there is compliance with **5 USCS § 553**, and it is not abuse of discretion to deny oral presentation. [*Tidewater Express Lines, Inc. v. United States*, 281 F. Supp. 995, 1968 U.S. Dist. LEXIS 10078 \(D. Md. 1968\).](#)

103. —Evidence

Neither Administrative Procedure Act nor Clean Water Act afford applicants for NPDES permit absolute right to oral presentation of evidence and use of cross-examination; agencies conducting initial licensing proceedings may adopt procedures for submission of all or part of evidence in written form, when party will not be prejudiced thereby. [*Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156, 273 U.S. App. D.C. 180, 28 Env't Rep. Cas. \(BNA\) 1401, 19 Env'tl. L. Rep. 20016, 1988 U.S. App. LEXIS 13319 \(D.C. Cir. 1988\).](#)

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FDA was not required to allow pharmaceutical manufacturer to rebut opinion of expert whose opinion led to ruling adverse to manufacturer under [5 USCS § 553\(c\)](#) in action by manufacturer challenging FDA's determination that divalproex sodium is not chemical entity distinct from valproic or sodium valproate, and thus manufacturer is entitled to 2 years of exclusive marketing of drug containing divalproex sodium rather than 10 years under [21 USCS § 355\(j\)\(4\)\(D\)\(v\)](#), because manufacturer was allowed to submit evidence on issue, notwithstanding that expert's opinion was not disclosed to manufacturer. [Abbott Laboratories v. Young, 691 F. Supp. 462, 1988 U.S. Dist. LEXIS 7793 \(D.D.C. 1988\)](#), remanded, [920 F.2d 984, 287 U.S. App. D.C. 190, 17 U.S.P.Q.2d \(BNA\) 1027, 1990 U.S. App. LEXIS 21007 \(D.C. Cir. 1990\)](#).

There is no legal or equitable bar to extension of discovery rights to rulemaking proceedings; it falls well within broad discretion in formulating appropriate procedures which will be conducted through effective and expeditious resolution of issues. *California Water & Tel. Co.*, 27 Ad. L. Rep., 2d 402 (1970).

104. Time period for participation

Court generally frowns upon post-promulgation comment periods since public comment contributes importantly to self-governance and helps ensure that administrative agencies will consider all relevant factors before acting; in determining whether to uphold rule, court may take into account quality of agency's response to post-promulgation comments, and where response suggests that agency has been open-minded, presumption against late comment period can be overcome and rule upheld. [Levesque v. Block, 723 F.2d 175, 1983 U.S. App. LEXIS 14292 \(1st Cir. 1983\)](#).

Rulemaking proceedings would never end if agency's response to comments must always be made subject to additional comments, and studies performed by agency staff after close of comment period do not automatically give rise to successive comment period. [Community Nutrition Institute v. Block, 749 F.2d 50, 242 U.S. App. D.C. 28, 1984 U.S. App. LEXIS 16192 \(D.C. Cir. 1984\)](#).

Reliance by agency on evidence that comes into existence after close of comment period is reversible error. [American Iron & Steel Inst. v. OSHA, 939 F.2d 975, 291 U.S. App. D.C. 147, 15 O.S.H. Cas. \(BNA\) 1177, 1991 O.S.H. Dec. \(CCH\) ¶29406, 1991 U.S. App. LEXIS 15740 \(D.C. Cir. 1991\)](#).

EPA violated APA where it requested and accepted justifications for rejecting certain clean air emission control measures after comment period closed. [Ober v. United States EPA, 84 F.3d 304, 96 Cal. Daily Op. Service 3388, 96 D.A.R. 5531, 42 Env't Rep. Cas. \(BNA\) 1801, 26 Env'tl. L. Rep. 21157, 1996 U.S. App. LEXIS 11216 \(9th Cir. 1996\)](#).

When agency rulemaking under [5 USCS § 553](#) works properly, agency must make continuous disclosure of facts and assumptions on which it intends to rely in promulgating its rule; every party cannot have last word and some cutoff is necessary, but main objective of § 553 procedure should be, as far as practicable, to let anyone comment on all facts and all ideas that agency considers. [American Asso. of Meat Processors v. Bergland, 460 F. Supp. 279, 1978 U.S. Dist. LEXIS 18061 \(D.D.C. 1978\)](#).

Where final rule is prepared and circulated before expiration of period for public comment, it is obvious that agency did not adequately consider comments; allowing budgetary pressures to override mandate that public comments be considered is not in keeping with statute. [Lloyd Noland Hospital & Clinic v. Heckler, 619 F. Supp. 1, 1984 U.S. Dist. LEXIS 17855 \(N.D. Ala. 1984\)](#), modified, [762 F.2d 1561, 1985 U.S. App. LEXIS 30631 \(11th Cir. 1985\)](#).

Challengers of Farmers Home Administration (FmHA) election regulations were provided opportunity to comment on regulations before their adoption, and thus suit to obtain additional opportunity to comment is moot under [5 USCS § 553](#), notwithstanding argument that adoption of interim regulations prior to comment period would discourage public input, since many persons did provide comments. [Sullivan v. Farmers Home Admin., 691 F. Supp. 927, 1987 U.S. Dist. LEXIS 15040 \(E.D.N.C. 1987\)](#).

5 USCS § 553

Gasoline excise taxpayer's challenge to validity of tax laws must fail, where IRS did not violate notice and comment provisions of [5 USCS § 553](#) by not giving public 30 days to comment on regulation before it was promulgated in final form on July 22, 1992, because public had ample opportunity to comment on rule when it was first promulgated in proposed form as part of 1987 Proposed Regulations. [A. Tarricone, Inc. v United States, 4 F. Supp. 2d 323, 81 A.F.T.R.2d \(RIA\) 2283 \(SD NY 1998\)](#).

105. Ex parte matters

FAA's approval of state's application to collect passenger fee to be used to construct light rail system in order to provide ground access to airport was analogous to rule-making procedure of APA, and FAA's acceptance of state's ex parte material justifying application, in effect fundamental amendment of application, was never made public, and plaintiff therefore had fair opportunity to comment on it. [Air Transp. Ass'n of Am. v. FAA, 169 F.3d 1, 335 U.S. App. D.C. 85, 1999 U.S. App. LEXIS 3431 \(D.C. Cir. 1999\)](#).

Agency is not required to disclose and log all contacts when it is engaged in informal rulemaking; letters and phone calls from congressmen urging rescission of regulation do not taint agency decision. [Center for Science in Public Interest v. Department of Treasury, 573 F. Supp. 1168, 1983 U.S. Dist. LEXIS 19368 \(D.D.C. 1983\)](#).

In view of fact that rulemaking proceeding is not required by statute to be on record, but is more in nature of "paper" rulemaking, ex parte contacts are not impermissible. California Water & Tel. Co., 27 Ad. L. Rep., 2d 402 (1970).

106. Response of agency to submissions and comments

Agency failure to respond to comments is significant only insofar as it demonstrates that agency decision was not based on consideration of relevant factors. [Thompson v. Clark, 741 F.2d 401, 239 U.S. App. D.C. 179, 82 Oil & Gas Rep. 223, 1984 U.S. App. LEXIS 19785 \(D.C. Cir. 1984\)](#).

In suit by children's advocacy group challenging FCC's amendment of agency's broadcast application form, claim that agency failed to address group's comments is foreclosed where group did not raise issue in petition for reconsideration. [Action for Children's Television v. FCC, 906 F.2d 752, 285 U.S. App. D.C. 58, Util. L. Rep. \(CCH\) ¶13660, 1990 U.S. App. LEXIS 10150 \(D.C. Cir. 1990\)](#).

Notice and comment provision of [5 USCS § 553](#) will not be interpreted to require agency to respond to every comment or to analyze every issue or alternative raised by comments, no matter how insubstantial; agency need only respond to comments which, if true, would require change in agency's rule. [American Mining Congress v. United States EPA, 907 F.2d 1179, 285 U.S. App. D.C. 173, 31 Env't Rep. Cas. \(BNA\) 1935, 20 Env'tl. L. Rep. 21415, 1990 U.S. App. LEXIS 11366 \(D.C. Cir. 1990\)](#).

In setting routine cost limits under Medicare reimbursement to providers of health care to aged and disabled persons, Secretary of Health and Human Services responded adequately to public comment and acted reasonably in formulating wage index; given fact that part-time worker issue was of minor significance at time wage index was adopted, Secretary had no obligation to provide specific response to comments about it. [Mount Diablo Hosp. v. Shalala, 3 F.3d 1226, 93 Cal. Daily Op. Service 6366, 93 D.A.R. 10959, 42 Soc. Sec. Rep. Service 213, 1993 U.S. App. LEXIS 21590 \(9th Cir. 1993\)](#).

FAA's failure to consider or respond to petitioners' comments on proposed rule to reduce aircraft noise in Grand Canyon was not fatal to rule where rule was proposed by Secretary of Interior under Overflights Act which directs FAA to implement recommendation of Secretary without change except for aviation safety concerns. [Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 332 U.S. App. D.C. 133, 29 Env'tl. L. Rep. 20075, 1998 U.S. App. LEXIS 21588 \(D.C. Cir. 1998\)](#), cert. denied, 526 U.S. 1158, 119 S. Ct. 2046, 144 L. Ed. 2d 214, 1999 U.S. LEXIS 3837 (1999).

Environmental Protection Agency did not violate [5 USCS § 553\(c\)](#) in using particular model to establish maximum contaminant levels for uranium, radium, and beta/photons where agency's responses to public comments indicated

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that it had considered and rejected arguments and cited support for adopting another model. [City of Waukesha v. EPA, 320 F.3d 228, 355 U.S. App. D.C. 100, 55 Env't Rep. Cas. \(BNA\) 2025, 33 Env'tl. L. Rep. 20160, 2003 U.S. App. LEXIS 3456 \(D.C. Cir. 2003\)](#), reh'g denied, [2003 U.S. App. LEXIS 8464 \(D.C. Cir. May 2, 2003\)](#), reh'g, en banc, denied, [2003 U.S. App. LEXIS 8465 \(D.C. Cir. May 2, 2003\)](#), reh'g denied, [2003 U.S. App. LEXIS 8470 \(D.C. Cir. May 2, 2003\)](#), reh'g, en banc, denied, [2003 U.S. App. LEXIS 8509 \(D.C. Cir. May 2, 2003\)](#).

Pursuant to Natural Gas Act, [15 USCS § 717r\(b\)](#), and Administrative Procedure Act, [5 USCS § 553](#), Federal Energy Regulatory Commission's accounting order, which required natural gas pipeline companies to expense costs associated with Pipeline Safety Improvement Act of 2002, responded sufficiently to all of association's arguments from its petition for rehearing by determining that posited future benefits were too speculative to warrant capital accounting, rejecting analogy between testing costs, which secured no future service, and prepaid expenses, and finding that increase in required level of maintenance did not change fact that work remained maintenance activity. [Interstate Natural Gas Ass'n of Am. v. FERC, 494 F.3d 1092, 377 U.S. App. D.C. 446, 2007 U.S. App. LEXIS 17515 \(D.C. Cir. 2007\)](#).

[Treas. Reg. § 301.6233-1](#), which extended courts' jurisdiction in partnership-level proceedings to sham partnerships, was not procedurally invalid; IRS's failure to specifically discuss comments was not proper basis to set aside regulation, and any breach of 30-day notice requirement did not cause prejudice because same rules had been in place for more than 10 years as temporary regulation. [Petaluma FX Partners, LLC v Comm'r, 792 F.3d 72, 115 A.F.T.R.2d \(RIA\) 2284 \(App DC 2015\)](#).

Agency need not respond to all specific issues raised in comments on proposed rule, but response must be sufficient for court to determine whether agency considered relevant factors in reaching final decision. [Athens Community Hospital v. Heckler, 565 F. Supp. 695, 1983 U.S. Dist. LEXIS 16612 \(E.D. Tenn. 1983\)](#).

Agency is not required to respond to every negative comment to proposed rule, and agency response to particular concerns raised in comments by providing compromise between original position and position advocated in negative comments demonstrates agency's response to major issues raised by comments and explanation of reaction to them. [Sargent v. Block, 576 F. Supp. 882, 1983 U.S. Dist. LEXIS 11671 \(D.D.C. 1983\)](#), disapproved, [Thompson v. Clark, 741 F.2d 401, 239 U.S. App. D.C. 179, 82 Oil & Gas Rep. 223, 1984 U.S. App. LEXIS 19785 \(D.C. Cir. 1984\)](#).

Administrative decision maker is not required to consider every piece of paper submitted by public, but must consider all relevant material and can delegate detailed consideration of submissions to subordinates. [HLI Lordship Indus. v. Committee for Purchase from Blind & Other Severely Handicapped, 615 F. Supp. 970, 1985 U.S. Dist. LEXIS 17053 \(E.D. Va. 1985\)](#), rev'd, remanded, [791 F.2d 1136, 1986 U.S. App. LEXIS 25767 \(4th Cir. 1986\)](#).

In action involving critical habitat for Alameda whipsnake, court found that that Fish and Wildlife Service's responses to public comment on proposed rule were minimally legally adequate under standard set forth in American Mining Congress; Service responded to "significant" comments as term was defined therein. [Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 2003 U.S. Dist. LEXIS 15141 \(E.D. Cal. 2003\)](#).

[5 USCS § 553\(c\)](#) requires reasoned response to comments received generally in rulemaking proceeding and major problems raised therein; however, it does not require response to individual comments, so long as agency otherwise demonstrates that it has resolved main issues raised by comments in rational manner. Revision of Operating Rules for Class D Stations, 39 Ad. L. Rep., 2d 947 (1976).

107. Miscellaneous

Opportunity to comment after promulgation of regulation cannot substitute for notice and opportunity to comment beforehand. [Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 1979 U.S. App. LEXIS 10377 \(Temp. Emer.](#)

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[Ct. App. 1979](#)), cert. denied, 446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790, 1980 U.S. LEXIS 1578 (1980), app. after remand, [647 F.2d 142](#), 1981 U.S. App. LEXIS 14575 (Temp. Emer. Ct. App. 1981).

When agency rulemaking under [5 USCS § 553](#) works properly, agency must make continuous disclosure of facts and assumptions on which it intends to rely in promulgating its rule; every party cannot have last word and some cutoff is necessary, but main objective of § 553 procedure should be, as far as practicable, to let anyone comment on all facts and all ideas that agency considers. [American Asso. of Meat Processors v. Bergland](#), 460 F. Supp. 279, 1978 U.S. Dist. LEXIS 18061 (D.D.C. 1978).

Exhaustive discussion of comments received by agency is not prerequisite to administrative action where agency is exercising narrowly-defined authority in which limited number of factors are relevant. [Mandel v. Block](#), 573 F. Supp. 1522, 1983 U.S. Dist. LEXIS 12029 (S.D.N.Y. 1983).

State failed to establish that government agency had denied state meaningful opportunity to comment on circular pursuant to which state was denied federal reimbursement for interest costs incurred in acquisition of computer equipment, as allegedly would have violated [5 USCS § 553](#), where there was no evidence that state was dissuaded from commenting by language of request for comments when circular was incorporated into regulations, and state missed second opportunity to comment on circular when it was revised. [New York v. Shalala](#), 959 F. Supp. 614, 53 Soc. Sec. Rep. Service 274, 1997 U.S. Dist. LEXIS 1769 (S.D.N.Y. 1997).

U.S. Department of Agriculture's 2004 Interpretive Rule was more akin to clarifying rule than legislative rule and therefore, Administrative Procedure Act, [5 USCS §§ 551](#) et seq., [701](#) et seq., did not require public notice and comment prior to its issuance. [Citizens for Better Forestry v. United States Dep't of Agric.](#), 481 F. Supp. 2d 1059, 2007 U.S. Dist. LEXIS 27419 (N.D. Cal. 2007).

D. Notice and Opportunity to Participate in Particular Cases

108. Agriculture

Department of Agriculture assessments on almond growers are "rules" subject to notice and comment requirement of APA, because assessment rates directly affect financial interests of growers. [Cal-Almond, Inc. v. United States Dep't of Agric.](#), 14 F.3d 429, 93 Cal. Daily Op. Service 9487, 93 D.A.R. 16285, 1993 U.S. App. LEXIS 33328 (9th Cir. 1993), app. after remand, [67 F.3d 874](#), 95 Cal. Daily Op. Service 7965, 95 D.A.R. 13662, 1995 U.S. App. LEXIS 28028 (9th Cir. 1995).

Department of Agriculture's rule requiring 8-foot perimeter fence around certain animals, promulgated under Animal Welfare Act, [7 USCS §§ 2131](#) et seq., was substantive rule and therefore invalid without notice and comment procedure; 8-foot rule could not have been excogitated from statutorily sound structural-strength regulation and was arbitrary in sense that it could well be different without significant impairment of any regulatory purpose. [Hoctor v. United States Dep't of Agric.](#), 82 F.3d 165, 1996 U.S. App. LEXIS 9649 (7th Cir. 1996).

United States Department of Agriculture violated Administrative Procedure Act, [5 USCS §§ 551–559](#), [701–706](#), by promulgating payment-in-kind program for sugar crop without notice-and-comment rulemaking. [Sugar Cane Growers Coop. of Fla. v. Veneman](#), 289 F.3d 89, 351 U.S. App. D.C. 214, 2002 U.S. App. LEXIS 9042 (D.C. Cir. 2002), reh'g, en banc, denied, [2002 U.S. App. LEXIS 18404](#) (D.C. Cir. Aug. 30, 2002).

Provision in Handbook of Farm Services Agency prohibiting revision of acreage status when producer would benefit from revision imposes condition on revision of acreage reports beyond those required by regulations, thereby qualifying as legislative rule creating new law and requiring notice and comment procedure. Davidson v Glickman (1999, CA5 Miss) 169 F3d 996 subsequent app, remanded on other grounds [2002 U.S. App. LEXIS 28185](#) (CA5 Miss 2002).

Notice by Department of Agriculture that it would promulgate proposed regulation providing that no product shall contain any substance which would render it adulterated which is not approved by Administrator of Consumer or

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Marketing Service of USDA and set forth detailed chart of additives which would be acceptable, and containing chart which did not include sorbates, sufficiently indicated that sorbates would be prohibited in cooked sausage under new regulation, and specific addition of restriction on use of sorbates in final regulation was proper. [Chip Steak Co. v. Hardin, 332 F. Supp. 1084, 1971 U.S. Dist. LEXIS 11145 \(N.D. Cal. 1971\)](#), aff'd, 467 F.2d 481, 1972 U.S. App. LEXIS 6943 (9th Cir. 1972).

Directive of Secretary of Agriculture terminating emergency loan program for farmers in disaster area without notice, publication in Federal Register, or hearings violated applicable rule-making procedures provided in [5 USCS § 553](#). [Berends v. Butz, 357 F. Supp. 143, 1973 U.S. Dist. LEXIS 14428 \(D. Minn. 1973\)](#).

USDA's emergency interim rule to prohibit interstate shipment of citrus plants from Florida under Plant Protection Act did not comply with notice and comment requirements of [5 USCS §§ 553](#) and [706](#) and good cause was not shown by imposition of preliminary injunction; however, equitable discretion allowed rule to remain in place until proper Administrative Procedure Act requirements were met. [Record Buck Farms, Inc. v. Johanns, 510 F. Supp. 2d 868, 2007 U.S. Dist. LEXIS 30806 \(M.D. Fla. 2007\)](#).

Language of 1997 version of [7 C.F.R. § 400.169\(a\)](#) was ambiguous because conditional word "may" could have been applied to 45-day limit or to option of requesting final determination, and 2000 amendment was not irreconcilable with previous version because it did not proscribe party's option of requesting final administrative decision, but merely clarified that such request had to be done within 45-day period, thus, on challenge by plaintiff crop insurers, defendant Federal Crop Insurance Corporation had not been required to provide notice under [5 USCS § 553\(b\)](#),(c), when it promulgated 2000 version of [7 C.F.R. § 400.169](#) because newer version was interpretive rule. [Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp., 517 F. Supp. 2d 391, 2007 U.S. Dist. LEXIS 72151 \(D.D.C. 2007\)](#).

Where regulations appear to be totally exempted under Food Security Act from notice and requirement provisions of APA and there does not appear to be any substantial change in course from 1983 regulations in 1987 regulations that might require further notice and comment, Secretary was not required to publish "changes." [Associated Milk Producers, Inc. v. United States, 22 Cl. Ct. 682, 1991 U.S. Cl. Ct. LEXIS 80 \(Cl. Ct. Mar. 15, 1991\)](#).

109. —Farmers Home Administration

Farmers Home Administration gave adequate notice of regulations concerning fair housing marketing plans, where proposed regulations, along with description of proposed sales, were published one year before they were adopted, and were, in pertinent part, same. [Tucker v. Atwood, 880 F.2d 1250, 1989 U.S. App. LEXIS 12393 \(11th Cir. 1989\)](#).

Borrowers' claim that FmHA violated [5 USCS § 553\(b\)](#) is dismissed where FmHA did not publish in proposed rules sentences included in final version of rule, since FmHA is not required to publish in proposed rules precise text of final rules, and sentences at issue do not change character or purpose of subsection, but rather make it more detailed and specific. [Coleman v. Block, 663 F. Supp. 1315, 1987 U.S. Dist. LEXIS 5190 \(D.N.D. 1987\)](#), vacated, [Coleman v. Lyng, 864 F.2d 604, 1988 U.S. App. LEXIS 17585 \(8th Cir. 1988\)](#), cert. denied, [Coleman v. Yeutter, 493 U.S. 953, 110 S. Ct. 364, 107 L. Ed. 2d 351, 1989 U.S. LEXIS 5268 \(1989\)](#).

110. —Food stamps

Since Secretary of Agriculture's ruling that restaurant allowance was income for purpose of determining food stamp eligibility did not change any existing rights or obligations because there was no prior interpretation of food stamp regulations concerning similar restaurant allowance, it was interpretive rule not subject to notice and comment requirements of [5 USCS § 553](#). [New York v. Lyng, 829 F.2d 346, 1987 U.S. App. LEXIS 12667 \(2d Cir. 1987\)](#).

Rulemaking provisions of [5 USCS § 553](#) are designed to assure fairness and mature consideration of certain regulations by permitting interested parties to comment on them prior to their adoption, and members of unincorporated health care rights organization adversely affected in their receipt of food stamps by Secretary of

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Agriculture's past and continuing implementation of regulation which violated Freedom of Information Act, would fall within zone protected by § 553. [Aiken v. Obledo, 442 F. Supp. 628, 1977 U.S. Dist. LEXIS 13406 \(E.D. Cal. 1977\)](#).

111. —Marketing orders

Notice of proposed changes in milk pricing order is sufficient despite failure to propose specific change in location adjustment ultimately ordered by secretary where secretary initially provided notice apprising interested parties of issue involved. [Walmsley v. Block, 719 F.2d 1414, 1983 U.S. App. LEXIS 15677 \(8th Cir. 1983\)](#).

Where Department of Agriculture issued amendment to federal milk marketing orders prohibiting paper pooling with distant plants, [7 USCS § 1033.7\(c\)\(2\)](#), dairy farmers had standing to challenge amendment, but adequate notice was provided to farmers. [Alto Dairy v. Veneman, 336 F.3d 560, 2003 U.S. App. LEXIS 14181 \(7th Cir. 2003\)](#).

112. —Price supports

Rulemaking requirements of APA were applicable to Department of Agriculture's determinations of peanut price support differentials; thus, when Department issued press release concerning peanut differentials for 1967 crop year, it had made determination which was "final and conclusive" under applicable peanut price support legislation ([7 USCS § 1429](#)), and Secretary was required to provide adequate notice and opportunity for interested persons to participate when Secretary undertook to reconsider price differentials set in press release. [Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1976 U.S. App. LEXIS 6138 \(5th Cir.\)](#), reh'g denied, [545 F.2d 168 \(5th Cir. 1976\)](#).

Action of Secretary of Agriculture in inviting comments on proposed rule for collecting deduction of 50 cents per hundredweight from sales of all milk marketed commercially by producers, to be remitted to Commodity Credit Corporation to offset portion of cost of milk price support program, after determination to impose deduction had already been made without providing notice and opportunity for comment, does not constitute substantial compliance with notice and comment requirements of [5 USCS § 553](#), since comments were solicited not on Secretary's decision to implement deduction, but on his plan for collecting it, which does not cure failure to provide notice and opportunity to comment before decision was made. [South Carolina ex rel. Patrick v. Block, 558 F. Supp. 1004, 1983 U.S. Dist. LEXIS 19356 \(D.S.C. 1983\)](#).

Federal agency complied with [5 USCS § 553](#) when it abolished "24-hour rule" governing inspection of peanuts for purposes of price support program, under which peanut producer whose lot was rejected as diseased could have lot cleaned and returned for second inspection on next day, where agency published notice of proposed abolition of 24-hour rule, received comments, and considered comments received. [Boyd v. Glickman, 12 F. Supp. 2d 1261, 1998 U.S. Dist. LEXIS 10619 \(M.D. Ala. 1998\)](#).

113. Bureau of Prisons

Bureau of Prisons is "agency" within meaning of APA, thus implying that Bureau must publish for notice and comment program statements that have legal effect, and must avoid making errors of law in application of its regulations and program statements. [Bush v. Pitzer, 133 F.3d 455, 1997 U.S. App. LEXIS 36775 \(7th Cir. 1997\)](#), reh'g, en banc, denied, [1998 U.S. App. LEXIS 1124 \(7th Cir. Jan. 21, 1998\)](#).

Federal Bureau of Prisons (BOP) policy was invalid for failure to follow notice and comment provision of [5 USCS § 553](#), Administrative Procedure Act and, because court had no authority to determine place or location of imprisonment under [18 USCS § 3621](#), court enjoined BOP from exercising its discretion on inmate's place of incarceration based on invalid BOP policy and ordered BOP to reconsider designation of place of incarceration without consideration of invalid policy. [Hurt v. Fed. Bureau of Prisons, 323 F. Supp. 2d 1358, 2003 U.S. Dist. LEXIS 25589 \(M.D. Ga. 2003\)](#).

Bureau of Prison's termination of federal boot camp program without notice and comment violated requirements for agency rulemaking under Administrative Procedure Act, [5 USCS § 553](#). [Castellini v. Lappin, 365 F. Supp. 2d 197, 2005 U.S. Dist. LEXIS 6256 \(D. Mass. 2005\)](#).

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Inmate was not entitled to habeas relief on ground that Bureau of Prisons' February 2005 policy regulating availability of inmate placement in community corrections center, [28 C.F.R. §§ 570.20–570.21](#), failed to comply with Administrative Procedure Act (APA), [5 USCS §§ 551](#) et seq., because February 2005 policy was promulgated in compliance with notice and comment rulemaking procedures that were required by APA. [Moss v. Apker, 376 F. Supp. 2d 416, 2005 U.S. Dist. LEXIS 13487 \(S.D.N.Y. 2005\)](#).

Bureau of Prison's decision to terminate its boot camp program established pursuant to [18 USCS § 4046\(a\)](#) did not violate notice and comment requirement of Administrative Procedure Act, [5 USCS § 553](#) because discontinuance of discretionary allocation of unrestricted funds from lump sum appropriation was general statement of policy, which was expressly exempt from notice and comment requirement. [Palomino v. Fed. Bureau of Prisons, 408 F. Supp. 2d 282, 2005 U.S. Dist. LEXIS 39489 \(S.D. Tex. 2005\)](#).

Unpublished decision: Department of Justice, Bureau of Prisons Program Statement 5330.10, ch. 2, and 1997 version of Department of Justice, Bureau of Prisons Program Statement 5162.04, which clarifies [18 USCS § 3621\(e\)\(2\)\(B\)](#) and [28 C.F.R. § 550.58](#), are interpretive rules, not substantive rules; thus Federal Bureau of Prisons was not required to promulgate program statement under procedures required by [5 USCS § 553\(b\)](#), part of Administrative Procedures Act. [Norwood v. Stine, 2006 U.S. Dist. LEXIS 25999 \(E.D. Ky. May 2, 2006\)](#).

Unpublished decision: Regulation by Federal Bureau of Prisons that categorically excluded inmates who were convicted of firearm possession charges from obtaining early release after completion of substance abuse program was not arbitrary and capricious and rule was substantively reasonable. [Heathman v. Grondolsky, 2009 U.S. Dist. LEXIS 75755 \(D.N.J. Aug. 21, 2009\)](#).

Unpublished decision: Federal Bureau of Prisons Program Statement 5162.04, which implemented [18 USCS § 3621\(e\)\(2\)\(B\)](#) and properly promulgated regulations governing Residential Drug Abuse Treatment Program, were interpretive rules exempt from Administrative Procedure Act's "notice and comment" requirement. [Baldwin v. Fed. Bureau of Prisons, 2010 U.S. Dist. LEXIS 90450 \(D.N.J. Sept. 1, 2010\)](#).

Unpublished decision: There was no defect in notice and comment procedure employed in enactment of 2009 final regulation, codified at [28 CFR § 550.55](#), which prevented felon who had received sentencing enhancement under USSG § 2D1.1(b)(1) from obtaining early release under program created by [18 USCS § 3621\(e\)\(2\)\(B\)](#); proposed regulations were published in advance by Federal Bureau of Prisons, and public received appropriate opportunity for comment, as required by [5 USCS § 553](#). [Baldwin v. Fed. Bureau of Prisons, 2010 U.S. Dist. LEXIS 90450 \(D.N.J. Sept. 1, 2010\)](#).

114. —Community Confinement/Corrections Centers

Regional differences as to amount of time petitioner inmates were assigned to residential re-entry centers showed that individualized determinations were allowed; thus, Bureau of Prison's policies as to when to place inmates were not substantive rules subject to notice-and-comment requirements of [5 USCS § 553](#) so as to overturn policy issued as interim final rule by forgoing requirement under [5 USCS § 552\(d\)](#). [Sacora v. Thomas, 628 F.3d 1059, 2010 U.S. App. LEXIS 24869 \(9th Cir.\)](#), habeas corpus proceeding, [405 Fed. Appx. 202, 2010 U.S. App. LEXIS 26356 \(9th Cir. 2010\)](#), cert. denied, [565 U.S. 841, 132 S. Ct. 152, 181 L. Ed. 2d 68, 2011 U.S. LEXIS 6179 \(2011\)](#).

Prisoner was entitled to preliminary injunction enjoining government from transferring her from community corrections center (CCC) to federal prison camp based upon Federal Bureau of Prison's (Bureau) new policy prohibiting direct commitment of felons to CCCs under any circumstances because prisoner was likely to succeed on her claim that new Bureau policy was administrative rule that required notice and comment, as policy was exact opposite from Bureau's past policy and practice. [Ferguson v. Ashcroft, 248 F. Supp. 2d 547, 2003 U.S. Dist. LEXIS 5620 \(M.D. La. 2003\)](#).

Motions under [28 USCS § 2255](#) were allowed, where Bureau of Prisons' (BOP) manner of adopting policy change (i.e., to no longer consider judge's recommendation that offender serve term of imprisonment in community

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confinement, under any circumstances), was improper; BOP's abrupt action, without prior notice or opportunity for comment, violated [5 USCS § 553\(b\)](#), (d), part of Administrative Procedure Act (APA), [5 USCS § 551](#) et seq. [Iacaboni v. United States](#), 251 F. Supp. 2d 1015, 2003 U.S. Dist. LEXIS 4218 (D. Mass. 2003).

Even if Bureau of Prisons (BOP) documents, placing tighter limitations upon length of time prisoners could spend in Community Confinement Centers, had effect of regulations, they would be invalid because BOP provided no notice or opportunity for public comment as required by [5 USCS § 553](#) and other rulemaking provisions of Administrative Procedure Act. [Crowley v. Fed. Bureau of Prisons](#), 312 F. Supp. 2d 453, 2004 U.S. Dist. LEXIS 4088 (S.D.N.Y. 2004).

Bureau of Prisons' February 2005 Rule regarding Community Correction Center placement was enacted pursuant to notice-and-comment provisions of Administrative Procedure Act (APA), [5 USCS §§ 551, 553](#); thus, when applied to February 2005 Rule, inmate's claim that APA notice-and-comment procedures were not followed was without merit. [Pimentel v. Gonzales](#), 367 F. Supp. 2d 365, 2005 U.S. Dist. LEXIS 7748 (E.D.N.Y. 2005).

115. Consumer Product Safety Commission

Notice satisfied requirement of [5 USCS § 553](#) where (1) Consumer Product Safety Commission gave notice in Federal Register (subsequent to May 1, 1973, and prior to publication of November 1, 1975, regulations) that it intended to regulate substantially all bicycles, (2) July, 1974, regulations (suspended in December, 1974) provided explicit notice of eventual scope of November, 1975, regulations and prompted additional comments and public meetings, and (3) number of notices were published in interim period indicating scope of regulations. [Forester v. Consumer Product Safety Com.](#), 559 F.2d 774, 182 U.S. App. D.C. 153, 1977 U.S. App. LEXIS 13151 (D.C. Cir. 1977).

Promulgation by Consumer Product Safety Commission of standard under Consumer Product Safety Act, to insure that manufactured products are safe for consumer use, is subject to notice and comment provisions of Administrative Procedure Act ([5 USCS § 553](#)) with added provision that opportunity for oral presentation of data, views or arguments is to be given to interested persons ([15 USCS § 2058\(a\)\(2\)](#)). [Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Com.](#), 569 F.2d 831, 1978 U.S. App. LEXIS 12319 (5th Cir. 1978).

Failure of Consumer Product Safety Commission to give 30 days notice in Federal Register, that it had proposed a new bite test regulation for toy horns and adoption of such standard based upon test conditions different from those under which horns were actually used, deprived plaintiff toy manufacturer of "opportunity to participate in rule making" as provided by [5 USCS § 553](#) and adoption of new standard constituted abuse of discretion under [5 USCS § 706](#). [Clever Idea Co. v. Consumer Product Safety Com.](#), 385 F. Supp. 688, 1974 U.S. Dist. LEXIS 11764 (E.D.N.Y. 1974).

116. Energy and power

Reliance by federal power marketing agency upon guidelines established in course of prior decision on customer utility claimant's request for mitigation relief, from costs incurred in acquiring equipment to defray power transformation charges subsequently discontinued by agency, was not improper although guidelines were established without notice and comment procedures set forth in § 553, where agency possessed discretionary authority to formulate guidelines on case by case basis rather than through formal rulemaking, no undue hardship was imposed upon customer utility by agency's sudden change in direction of policy and agency did not use informal guidelines to amend recently adopted rule or to supplant pending rulemaking proceeding. [Coos-Curry Electric Cooperative, Inc. v. Jura](#), 821 F.2d 1341, 1987 U.S. App. LEXIS 8127 (9th Cir. 1987).

Rule enacted by Rural Electrification Administration to increase rural co-operative's rates in pre-emption of state regulation is invalid where Administration failed to provide notice and opportunity for comment, made no statement of basis for rule, made no administrative record, and did not publish rule in Federal Register, but merely sent co-

operative letter. [*Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, Util. L. Rep. \(CCH\) ¶13651, 1990 U.S. App. LEXIS 8577 \(7th Cir. 1990\).](#)

Department of Energy's attempt to delay new energy conservation standards for central air conditioners and heat pumps failed because it was promulgated without complying with notice-and-comment requirements of Administrative Procedure Act, specifically [5 USCS § 553\(c\)](#); because final rule failed to meet any of exceptions to those requirements, it was invalid rule. [*NRDC v. Abraham*, 355 F.3d 179, 57 Env't Rep. Cas. \(BNA\) 1833, 2004 U.S. App. LEXIS 414 \(2d Cir. 2004\).](#)

Notification published in Federal Register by Southwest Power Administration (SWPA) of preliminary hydroelectric power capacity reallocations upon which final allocations were to be made, policy and criteria used in formulations, and several public hearings conducted to receive public comment were sufficient under notice and comment requirements of [5 USCS §§ 551](#) et seq. in action by generating and transmitting cooperative challenging SWPA's failure to consider merits of its application for inclusion in reallocation and SWPA's approval and execution of allocation contracts on basis of alleged non-compliance with notice and rule-making procedures. [*Brazos Electric Power Cooperative, Inc. v. Southwestern Power Admin.*, 627 F. Supp. 350, 1985 U.S. Dist. LEXIS 12315 \(W.D. Tex. 1985\), aff'd, 819 F.2d 537, Util. L. Rep. \(CCH\) ¶13270, 1987 U.S. App. LEXIS 7729 \(5th Cir. 1987\).](#)

117. —Federal Energy Administration

Federal Energy Administration's price regulations controlling amount which may be charged by lessor as rent for real property used in retailing of gasoline were invalid where such agency failed to provide notice of proposed regulations and afford interested persons opportunity to comment and participate in agency rulemaking in accordance with [5 USCS § 553](#); record failed to illustrate good cause for avoiding compliance with this section where FEA, by waiting until expiration of Economic Stabilization Act ([15 USCS §§ 751](#) et seq.) to issue its own regulations controlling rents, effectively compelled interested parties to bear burden of compliance with regulation and time and expense of litigation in order to comment in any meaningful way on FEA's promulgation of such rent regulations. [*Shell Oil Co. v. Federal Energy Administration*, 527 F.2d 1243, 1975 U.S. App. LEXIS 11992 \(Temp. Emer. Ct. App. 1975\).](#)

Federal Energy Administrator's interim price regulation for unleaded gas instituted without public comments, even though there was ample time to do so, was arbitrary and capricious. [*Consumers Union of United States, Inc. v. Sawhill*, 393 F. Supp. 639, 1975 U.S. Dist. LEXIS 13130 \(D.D.C.\), aff'd, 523 F.2d 1404, 1975 U.S. App. LEXIS 12715 \(Temp. Emer. Ct. App. 1975\).](#)

118. —Federal Power Commission/Federal Energy Regulatory Commission

Notwithstanding requirement of § 7 of Natural Gas Act ([15 USCS § 717f](#)) that Federal Power Commission shall set certain matters for hearing, including applications for certificates of public convenience and necessity, and notwithstanding provisions of § 4 of Administrative Procedure Act (now [5 USCS § 553](#)) that agency shall afford interested persons opportunity to participate in rulemaking through submission of written data, views, or arguments, Federal Power Commission may, after affording interested parties opportunity to submit their views in writing, (1) adopt rule that natural gas producer's application for certificate of public convenience and necessity shall be rejected if pricing provisions of contracts submitted in support of it contain other than specified permissible terms, and (2) reject without hearing application for certificate of public convenience and necessity where application discloses price clauses which are not permissible under regulations, and no reasons are shown why in public interest rule should be waived. [*Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 84 S. Ct. 1105, 12 L. Ed. 2d 112, 20 Oil & Gas Rep. 447, 53 Pub. Util. Rep. 3d PUR\) 138, 1964 U.S. LEXIS 2166, reh'g denied, 377 U.S. 984, 84 S. Ct. 1881, 12 L. Ed. 2d 753 \(1964\).](#)

A regulation requiring payment of interest compounded monthly on refunds ordered by Federal Power Commission which was promulgated without notice was ineffective as such regulation was not within exceptions of [5 USCS §](#)

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[553\(b\)](#). *Texaco, Inc. v. Federal Power Com.*, 412 F.2d 740, 34 Oil & Gas Rep. 125, 80 Pub. Util. Rep. 3d (PUR) 107, 1969 U.S. App. LEXIS 11967 (3d Cir. 1969).

In setting rate ceilings, Federal Power Commission complied with requirements of [5 USCS § 553](#) by publishing notice of rule making and permitting filing of comments by interested parties; informal procedures were sufficient and no hearing need have been held, and Commission could thereafter modify rule without holding hearing or soliciting additional comment. *Mobil Oil Corp. v. Federal Power Com.*, 469 F.2d 130, 152 U.S. App. D.C. 119, 44 Oil & Gas Rep. 124, Util. L. Rep. (CCH) ¶11346, 1972 U.S. App. LEXIS 7276 (D.C. Cir. 1972), cert. denied, 412 U.S. 931, 93 S. Ct. 2749, 37 L. Ed. 2d 159, 1973 U.S. LEXIS 2233 (1973).

Publication in Federal Energy Regulatory Commission reporter of new time limit established by adjudication for filing application to succeed to certificate of public convenience and necessity did not, on due process grounds, adequately notify gas producers. *Mobil Exploration & Producing North America, Inc. v. Federal Energy Regulatory Com.*, 881 F.2d 193, Util. L. Rep. (CCH) ¶13553, 1989 U.S. App. LEXIS 12844 (5th Cir. 1989).

Marginally adequate notice by Federal Energy Regulatory Commission, stating that Commission was “proposing to amend its regulation to reflect provisions of” Decontrol Act that decontrol gas prior to January 1, 1993, and stating view that gas subject to post-enactment contracts is also decontrolled, although silent on question of temporarily released gas, combined with fact that several affected parties spotted issue, is sufficient to satisfy [5 USCS § 553](#). *Union Pac. Resources Co. v. FERC*, 936 F.2d 1310, 290 U.S. App. D.C. 253, 118 Oil & Gas Rep. 389, Util. L. Rep. (CCH) ¶13781, 1991 U.S. App. LEXIS 13008 (D.C. Cir. 1991).

Where controlling statute, which swept away obsolete regulations of Federal Energy Regulatory Commission that had occupied more than 500 pages of fine print in CFR, left Commission no authority to retain particular regulation, repeal of which may have had material collateral importance, notice and comment under [5 USCS § 553](#) could not have served purpose of hearing arguments for retention of regulation, nor does § 553 require agency to delay formal removal of legally defunct regulations while it canvasses all possible regulatory impacts; better procedure is to petition agency to open rulemaking to amend existing regulations. *Hadson Gas Sys. v. FERC*, 75 F.3d 680, 316 U.S. App. D.C. 98, 1996 U.S. App. LEXIS 1855 (D.C. Cir. 1996).

FPC (now Federal Energy Regulatory Commission) procedure which affords all interested parties opportunity to be heard before setting regulatory standards for certificates to be issued for new gas under [15 USCS § 717f](#), subject to any further hearings concerning individual certificate which Commission may require, adequately satisfies requirements of § 717f and APA; rulemaking procedures also apply to actions under [15 USCS §§ 717c](#) and [717d](#) where interested persons have opportunity to participate in rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. Area Rates for Appalachian & Illinois Basin Areas (1970) FPC Order, 27 Ad. L. Rep., 2d 654.

119. —Natural gas

Notwithstanding requirement of § 7 of Natural Gas Act ([15 USCS § 717f](#)) that Federal Power Commission shall set certain matters for hearing, including applications for certificates of public convenience and necessity, and notwithstanding provisions of § 4 of Administrative Procedure Act (now [5 USCS § 553](#)) that agency shall afford interested persons opportunity to participate in rulemaking through submission of written data, views, or arguments, Federal Power Commission may, after affording interested parties opportunity to submit their views in writing, (1) adopt rule that natural gas producer's application for certificate of public convenience and necessity shall be rejected if pricing provisions of contracts submitted in support of it contain other than specified permissible terms, and (2) reject without hearing application for certificate of public convenience and necessity where application discloses price clauses which are not permissible under regulations, and no reasons are shown why in public interest rule should be waived. *Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 84 S. Ct. 1105, 12 L. Ed. 2d 112, 20 Oil & Gas Rep. 447, 53 Pub. Util. Rep. 3d (PUR) 138, 1964 U.S. LEXIS 2166, reh'g denied, 377 U.S. 984, 84 S. Ct. 1881, 12 L. Ed. 2d 753 (1964).

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Action on proposed adoption of optional procedure for certifying new producer sales of natural gas is rule-making proceeding under [5 USCS § 553](#), not requiring formal evidentiary hearing. [Moss v. Federal Power Com., 502 F.2d 461, 164 U.S. App. D.C. 1, 48 Oil & Gas Rep. 545, Util. L. Rep. \(CCH\) ¶11564, 1974 U.S. App. LEXIS 7213 \(D.C. Cir. 1974\)](#), rev'd, in part, [424 U.S. 494, 96 S. Ct. 1003, 47 L. Ed. 2d 186, 54 Oil & Gas Rep. 247, 13 Pub. Util. Rep. 4th \(PUR\) 421, Util. L. Rep. \(CCH\) ¶11778, 1976 U.S. LEXIS 125 \(1976\)](#).

Notice and comment requirements of [5 USCS § 553\(b\)\(A\)](#) were not applicable to Department of Interior's (DOI) 2002 construction of marketable condition rule in 30 CFR § 206.151 as not allowing deductions from royalties under [30 USCS § 226\(b\)\(1\)\(A\)](#) for costs of compression and dehydration incurred after lessee's methane gas left central delivery points because set of 1995 guidance documents that interpreted rule differently were issued by policy board that did not have authority to bind DOI, and thus, interpretation in guidance documents was not binding regulation; this was true even if lessee had relief on guidance documents to calculate royalties for number of years. [Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 384 U.S. App. D.C. 107, 39 Env'tl. L. Rep. 20307, 170 Oil & Gas Rep. 121, 2008 U.S. App. LEXIS 25857 \(D.C. Cir. 2008\)](#), reh'g denied, reh'g, en banc, denied, [2009 U.S. App. LEXIS 29756 \(D.C. Cir. Feb. 13, 2009\)](#), cert. denied, [558 U.S. 819, 130 S. Ct. 86, 175 L. Ed. 2d 28, 2009 U.S. LEXIS 6929 \(2009\)](#).

120. —Oil and petroleum

Since expiration of Economic Stabilization Act extinguished Department's authority to regulate certain by-product of refining process such as petroleum coke but did not require agency to amend its cost allocation formula, expiration of Act cannot serve as basis for finding good cause to dispense with notice and comment requirements of [5 USCS § 553](#) and promulgation by Department of Energy of Amendment to mandatory petroleum price regulations which require that all products refined from crude oil, including those exempted from regulation by Act, bear their pro rata share of refiner's increased crude oil costs. [Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 1979 U.S. App. LEXIS 10377 \(Temp. Emer. Ct. App. 1979\)](#), cert. denied, [446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790, 1980 U.S. LEXIS 1578 \(1980\)](#), app. after remand, [647 F.2d 142, 1981 U.S. App. LEXIS 14575 \(Temp. Emer. Ct. App. 1981\)](#).

Notice of proposed comprehensive revision of regulations governing pricing and allocation of crude oil and petroleum products, advising only of intention to modify particular requirement with aim toward retaining it, without suggesting intent to evaluate de novo its merits, was insufficient under [5 USCS § 553\(b\)\(3\)](#), since it did not allow for meaningful comment by public on action actually contemplated by agency. [Mobil Oil Corp. v. Department of Energy, 547 F. Supp. 1246, 1982 U.S. Dist. LEXIS 9672 \(N.D.N.Y. 1982\)](#), aff'd in part and rev'd in part, vacated, in part, [728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#).

August 1973 Cost of Living Council oil price regulations are issued in accordance with applicable procedural requirements of Administrative Procedure Act ([5 USCS § 553](#)), even though notice of proposed rulemaking gave no hint that unit would be considered single "property" during rulemaking process, since notice is sufficient if it "fairly appraises interested persons of subjects and issues before agency" fact that final rule differs, even substantially, from published proposal, is not fatal; modification of proposed rules does not automatically generate new round of notice and comment. [United States v. Exxon Corp., 561 F. Supp. 816, 1983 U.S. Dist. LEXIS 18250 \(D.D.C. 1983\)](#), aff'd, [773 F.2d 1240, 1985 U.S. App. LEXIS 20355 \(Temp. Emer. Ct. App. 1985\)](#).

Department of Interior's new interpretation of regulation governing acceptance of Federal Energy Regulatory Commission's tariff rate for determining value of oil transported through outer continental shelf pipelines, as requiring offshore oil lessees to petition FERC for affirmative statement of jurisdiction after longstanding policy of accepting all tariffs filed with FERC as "approved," was new substantive rule rather than mere interpretation of rule, and, thus, was subject to notice and comment requirements of [5 USCS § 553](#). [Torch Operating Co. v. Babbitt, 172 F. Supp. 2d 113, 159 Oil & Gas Rep. 896, 2001 U.S. Dist. LEXIS 18417 \(D.D.C. 2001\)](#).

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EPA-proposed modifications to settlement agreement from law suit by environmental groups did not violate APA ([5 USCS § 553](#)). *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 205 U.S. App. D.C. 101, 14 *Env't Rep. Cas.* (BNA) 2161, 10 *Envtl. L. Rep.* 20803, 1980 U.S. App. LEXIS 14068 (D.C. Cir. 1980).

Environmental Protection Agency (EPA) did not act arbitrarily or capriciously by refusing to extend 45 day rule comment period for additional 30 days where plaintiff had full and fair opportunity to comment on all significant issues in rulemaking proceeding, presented no evidence of prejudice by EPA's refusal to extend comment period, and record did not indicate that comment period was inherently short or inadequate as there is no requirement concerning how many days EPA must allow for comment or that EPA must re-open comment period at request of one of proceeding's participants. *Phillips Petroleum Co. v. United States Environmental Protection Agency*, 803 F.2d 545, 25 *Env't Rep. Cas.* (BNA) 1033, 17 *Envtl. L. Rep.* 20387, 90 *Oil & Gas Rep.* 465, 1986 U.S. App. LEXIS 32141 (10th Cir. 1986).

Groundwater protection requirements promulgated in Environmental Protection Agency rule (EPA) were not supported by adequate explanation to withstand substantive challenge of rule as promulgated in final form, where statement of proposed rule did not explain exclusion of some classes of groundwater from protection or limiting criteria therefor. *Natural Resources Defense Council, Inc. v. United States EPA*, 824 F.2d 1258, 26 *Env't Rep. Cas.* (BNA) 1233, 18 *Envtl. L. Rep.* 20088, 1987 U.S. App. LEXIS 9646 (1st Cir. 1987).

Under Safe Drinking Water Act, EPA is not required to set maximum containment level for lead at water tap rather than establish treatment technique, but Agency's explanation for its decision not to regulate transient noncommunity water systems was inadequate where it failed to provide adequate notice that it might adopt broad definition of control, and where it failed to provide opportunity for public comment. *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 309 U.S. App. D.C. 235, 39 *Env't Rep. Cas.* (BNA) 1897, 25 *Envtl. L. Rep.* 20335, 1994 U.S. App. LEXIS 34174 (D.C. Cir. 1994).

Environmental Protection Agency's (EPA) final rule, which applied to monitoring regulations that appeared in Part 70 of EPA regulations, violated [5 USCS §§ 551\(5\)](#), [553\(c\)](#); EPA proposed to codify its interpretation of Part 70 rules through amendment of regulatory text, but "logical outgrowth" of its proposal did not include decision to repudiate proposed interpretation and adopt its inverse. *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 368 U.S. App. D.C. 116, 61 *Env't Rep. Cas.* (BNA) 1469, 2005 U.S. App. LEXIS 21683 (D.C. Cir. 2005).

Agency, without reopening comment period, could use supplementary data, unavailable during notice and comment period, that expanded on and confirmed information contained in proposed rulemaking and addressed alleged deficiencies in pre-existing data, so long as no prejudice was shown; because post-comment information was only important, not critical, to United States Fish and Wildlife Service's (FWS) decision not to list Buena Vista Shrew as endangered subspecies under Endangered Species Act, [16 USCS §§ 1531](#) et seq., and given deference owed to agencies in making such scientifically-based decisions, district court's judgment that no serious or substantial reason existed to negate listing and provide for new comment period was affirmed. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 62 *Env't Rep. Cas.* (BNA) 1865, 36 *Envtl. L. Rep.* 20117, 2006 U.S. App. LEXIS 15084 (9th Cir. 2006).

Provisions of final rule, which was promulgated by respondent Environmental Protection Agency (EPA) pursuant to § 316(b) of Clean Water Act (CWA), [33 USCS § 1326\(b\)](#), and was intended to protect aquatic organisms from being harmed or killed by regulating cooling water intake structures at large, existing power-producing facilities, were remanded because EPA failed to comply with [5 USCS § 553\(b\)\(3\)](#) and (c) in that it did not provide interested parties with notice and opportunity to challenge (1) site-specific cost-cost compliance variance, (2) provision allowing [33 USCS § 1326\(b\)](#) compliance to be established via compliance with technology installation and operation plan, (3) modification of definition of "new unit," and (4) independent-supplier provision. *Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83, 63 *Env't Rep. Cas.* (BNA) 1929, 37 *Envtl. L. Rep.* 20022, 2007 U.S. App. LEXIS 1642 (2d Cir. 2007), cert. granted, 552 U.S. 1309, 128 S. Ct. 1867, 170 L. Ed. 2d 743, 2008 U.S. LEXIS 3144 (2008), cert. granted, in part, 552 U.S. 1309, 128 S. Ct. 1868, 170 L. Ed. 2d 743, 2008 U.S. LEXIS 3145 (2008), cert. granted, in part, 552 U.S. 1309, 128 S. Ct. 1867, 170 L. Ed. 2d 743, 2008 U.S. LEXIS 3193 (2008), rev'd,

remanded, [556 U.S. 208, 129 S. Ct. 1498, 173 L. Ed. 2d 369, 21 Fla. L. Weekly Fed. S 747, 68 Env't Rep. Cas. \(BNA\) 1001, 39 Env'tl. L. Rep. 20067, 2009 U.S. LEXIS 2498 \(2009\)](#).

Where respondent Environmental Protection Agency initially solicited general comments on its proposed approaches for regulating Class 1 injection wells in South Florida, then, in its Notice of Data Availability, it specifically requested further comment on whether, given findings of Risk Assessment, type of hydrogeologic demonstrations set out in Option 2 of proposed rule were practicable and feasible, commentary provided ample support for proposition that technical challenges and factual uncertainties would generally prevent convincing in-depth hydrogeological demonstration of wastewater fate and transport as described in originally proposed Option 2, and accordingly, elimination of that demonstration requirement in promulgation of Final Rule constituted logical outgrowth of proposal and comments, contrary to arguments of petitioner environmental group. [Miami-Dade County v. United States EPA, 529 F.3d 1049, 21 Fla. L. Weekly Fed. C 787, 66 Env't Rep. Cas. \(BNA\) 2037, 38 Env'tl. L. Rep. 20136, 2008 U.S. App. LEXIS 12119 \(11th Cir. 2008\)](#).

Enhanced consultation and coordination between U.S. Environmental Protection Agency and U.S. Army Corps of Engineers regarding Clean Water Act discharge permits for mining projects was lawful; no permitting requirements were violated, constitutional executive power provided authority for inter-agency consultation and coordination, and memorandum of agencies' agreement was not subject to notice and comment rulemaking requirements because it was procedural rather than legislative. [Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 411 U.S. App. D.C. 52, 79 Env't Rep. Cas. \(BNA\) 1004, 44 Env'tl. L. Rep. 20153, 2014 U.S. App. LEXIS 13156 \(D.C. Cir. 2014\)](#).

Guidance issued by EPA to explain its understanding of requirement in Pathways II Rule that any method of measuring proportion of cellulosic biofuel must do so with reasonable accuracy was not legislative rule; rather, by deriving proposition from existing document whose meaning compelled or logically justified proposition, Guidance's discussion of peer-reviewed methods qualified as interpretative rule. To extent that Guidance was new and more detailed articulation of Pathways II Rule's requirements for peer-reviewed methods, such limited novelty did not make Guidance a legislative rule. [POET Biorefining, LLC v. EPA, 970 F.3d 392, 50 Env'tl. L. Rep. 20192, 2020 U.S. App. LEXIS 25877 \(D.C. Cir. 2020\)](#).

122. —Air quality

Upon review of approval by Administrator of Environmental Protection Agency of state plans for implementation of federal ambient air quality standards, if state hearings held prior to adoption of implementation plans were adequate and afforded interested parties right to public hearing, and Administrator in course of evaluation of state plans, reviewed state hearings, requirement of Administrative Procedure Act, [5 USCS § 553\(b\)\(B\)](#), were met and Administrator was not required to afford interested parties hearing prior to his approval of state plans. [Appalachian Power Co. v. EPA, 477 F.2d 495, 5 Env't Rep. Cas. \(BNA\) 1222, 3 Env'tl. L. Rep. 20310, 1973 U.S. App. LEXIS 10573 \(4th Cir. 1973\)](#), disapproved, [Union Electric Co. v. EPA, 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474, 8 Env't Rep. Cas. \(BNA\) 2143, 6 Env'tl. L. Rep. 20570, 1976 U.S. LEXIS 108 \(1976\)](#).

Requirement of Clean Air Act that public hearing precede decision granting or refusing request for one-year suspension of 1975 emission standards prescribed for light-duty vehicles amounted to insurance by Congress that issues would not be disposed of merely on written comments, minimum protection assured by APA for rule-making, but would also include oral submissions of legislative nature. [International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 155 U.S. App. D.C. 411, 4 Env't Rep. Cas. \(BNA\) 2041, 3 Env'tl. L. Rep. 20133, 1973 U.S. App. LEXIS 11707 \(D.C. Cir. 1973\)](#).

Action of Administrator of Environmental Protection Agency in approving submitted state plans for implementation of ambient air quality standards constituted informal rule-making under [5 USCS § 553](#), and approval of state plans was invalid without compliance with such statute's requirement that participation be permitted by interested parties, including acceptance of data and other comments. [Buckeye Power, Inc. v. EPA, 481 F.2d 162, 5 Env't Rep. Cas. \(BNA\) 1611, 3 Env'tl. L. Rep. 20634, 1973 U.S. App. LEXIS 9106 \(6th Cir. 1973\)](#), app. after remand, [523 F.2d 16, 8 Env't Rep. Cas. \(BNA\) 1092, 5 Env'tl. L. Rep. 20532, 1975 U.S. App. LEXIS 12880 \(6th Cir. 1975\)](#), app. after

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remand, [525 F.2d 80, 8 Env't Rep. Cas. \(BNA\) 1317, 5 Env'tl. L. Rep. 20701, 1975 U.S. App. LEXIS 12231 \(6th Cir. 1975\)](#), disapproved, [Union Electric Co. v. EPA, 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474, 8 Env't Rep. Cas. \(BNA\) 2143, 6 Env'tl. L. Rep. 20570, 1976 U.S. LEXIS 108 \(1976\)](#).

Petitioners were not insufficiently alerted to likely alternatives to have known what was at stake due to fact that Environmental Protection Agency's final regional air quality transportation control plan differed so radically from one proposed in administrator's published notice that they had no meaningful forewarning of its substance where, although changes were substantial, they were in character with original scheme and were additionally foreshadowed in proposals and comments advanced during rulemaking, and where parties had been warned that strategies might be modified in light of their suggestions. [South Terminal Corp. v. EPA, 504 F.2d 646, 6 Env't Rep. Cas. \(BNA\) 2025, 4 Env'tl. L. Rep. 20768, 1974 U.S. App. LEXIS 6696 \(1st Cir. 1974\)](#).

Approval of implementation plan under Clean Air Act by Environmental Protection Agency was invalid as result of EPA's failure to give notice that employer mass transit incentive provisions were being considered. [Maryland v. EPA, 530 F.2d 215, 8 Env't Rep. Cas. \(BNA\) 1105, 5 Env'tl. L. Rep. 20651, 1975 U.S. App. LEXIS 12697 \(4th Cir. 1975\)](#), vacated, [431 U.S. 99, 97 S. Ct. 1635, 52 L. Ed. 2d 166 \(1977\)](#).

Period for comments after promulgation of rule cannot be substituted for prior notice and comment required by Administrative Procedure Act, since otherwise agency could negate at will Congressional decision that notice and opportunity for comment must precede promulgation; Administrator of Environmental Protection Agency did not have good cause to adopt without prior notice and comment final rule pursuant to Clean Air Act ([42 USCS §§ 7401 et seq.](#)) by which he determined status of air quality for certain areas in country in relation to national ambient air quality standards for various air pollutants. [Sharon Steel Corp. v. Environmental Protection Agency, 597 F.2d 377, 13 Env't Rep. Cas. \(BNA\) 1005, 9 Env'tl. L. Rep. 20316, 1979 U.S. App. LEXIS 15155 \(3d Cir. 1979\)](#).

Environmental Protection Agency definition of "reasonably available control technology," articulated in agency memo to explain clean air statute, applied to disapprove proposed state emission control rules, did not create new law, rights, or duties, thus was interpretive rule without substantive legal effect not requiring § 553 notice and comment procedures. [Michigan v. Thomas, 805 F.2d 176, 25 Env't Rep. Cas. \(BNA\) 1197, 17 Env'tl. L. Rep. 20235, 1986 U.S. App. LEXIS 33501 \(6th Cir. 1986\)](#).

EPA is not required to provide detailed factual data when it acts under APA; it must provide public notice of terms or substance of proposed rule or description of subjects and issues involved, and thus EPA's inclusion of lengthy description of substance and purpose of state revision of its Clean Air Act implementation plan was sufficient to allow for informed public comment. [Missouri Limestone Producers Ass'n v. Browner, 165 F.3d 619, 47 Env't Rep. Cas. \(BNA\) 2025, 29 Env'tl. L. Rep. 20455, 1999 U.S. App. LEXIS 367 \(8th Cir. 1999\)](#), reh'g denied, [1999 U.S. App. LEXIS 4856 \(8th Cir. Mar. 19, 1999\)](#).

Purpose of notice and comment rulemaking was served where EPA, in first proposing that Indian Tribes should meet same air quality requirements as state, effectively raised question of whatever this would make sense; thus, any reasonable party should have understood that EPA might reach opposite conclusion after considering public comments. [Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 341 U.S. App. D.C. 222, 50 Env't Rep. Cas. \(BNA\) 1490, 30 Env'tl. L. Rep. 20565, 2000 U.S. App. LEXIS 8917 \(D.C. Cir. 2000\)](#), cert. denied, [532 U.S. 970, 121 S. Ct. 1600, 149 L. Ed. 2d 467, 52 Env't Rep. Cas. \(BNA\) 1480, 2001 U.S. LEXIS 2911 \(2001\)](#).

Guidance document by Environmental Protection Agency (EPA) as to Clean Air Act, [42 USCS §§ 7401 et seq.](#), that gave nonattainment areas of ozone air quality standard flexibility to choose between statutorily mandated program and equivalent program alternative was vacated because guidance document qualified as legislative rule that EPA was required to issue through notice and comment rulemaking; document could not be considered mere statement of policy because it bound EPA regional directors. [NRDC v. EPA, 643 F.3d 311, 395 U.S. App. D.C. 397, 72 Env't Rep. Cas. \(BNA\) 2185, 41 Env'tl. L. Rep. 20223, 2011 U.S. App. LEXIS 13390 \(D.C. Cir. 2011\)](#).

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Environmental Protection Agency (EPA) explained that it invoked “good cause” exception because court decision had invalidated Clean Air Interstate Rule (CAIR) state implementation plans (SIPS) and commentators could not have said anything during notice and comment period that would have changed that fact; EPA was correct that it would have been utterly “unnecessary” and wasteful to go through notice and comment given court decision. [EME Homer City Generation, L.P v. EPA, 795 F.3d 118, 417 U.S. App. D.C. 381, 80 Env't Rep. Cas. \(BNA\) 2005, 2015 U.S. App. LEXIS 13039 \(D.C. Cir. 2015\).](#)

Prevention of Significant Deterioration permitting authority was lawfully delegated to Assistant Administrator for Office of Air and Radiation without first providing notice and opportunity for public comment on rulemaking and then publishing final temporary delegation in Federal Register. [In the Matter of Avenal Power Ctr., LLC., 15 E.A.D. 384, 2011 EPA App. LEXIS 26 \(E.P.A. Aug. 18, 2011\).](#)

123. —Effluent limitations

EPA notice of proposed effluent guidelines for phosphate manufacturing, which stated that such guidelines were pursuant to several sections of Federal Water Pollution Control Act amendments, including §§ 301 and 304 ([33 USCS §§ 1311, 1314](#)), satisfied requirement of [5 USCS § 553](#) that notice include reference to legal authority under which rule is proposed. [Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620, 8 Env't Rep. Cas. \(BNA\) 1961, 6 Env'tl. L. Rep. 20467, 1976 U.S. App. LEXIS 11581 \(2d Cir. 1976\).](#)

Administrator of EPA properly construed APA ([5 USCS § 553](#)) as requiring both publication of proposed standards governing national effluent limitations applicable to potato processing industry and opportunity for industry or public comment prior to promulgation of final regulations; failure to include particular pollutant in notice of pollutants concerning which measures of control were proposed violated APA since no comment on final regulation promulgated concerning such pollutant had been solicited or received. [American Frozen Food Institute v. Train, 539 F.2d 107, 176 U.S. App. D.C. 105, 8 Env't Rep. Cas. \(BNA\) 1993, 6 Env'tl. L. Rep. 20485, 1976 U.S. App. LEXIS 11411 \(D.C. Cir. 1976\).](#)

Manufacturers of inorganic chemicals had adequate notice of EPA's proposed regulations governing effluent limitation guidelines for existing sources, and standards of performance for new sources, in inorganic chemicals manufacturing category of pollutants regulated by Federal Water Pollution Control Act ([33 USCS §§ 1251 et seq.](#)) where EPA published in Federal Register proposed regulations, statutory authority for such regulations, and summaries of comments received by EPA concerning such regulations. [E. I. Du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 8 Env't Rep. Cas. \(BNA\) 1718, 6 Env'tl. L. Rep. 20371, 1976 U.S. App. LEXIS 12452 \(4th Cir. 1976\),](#) aff'd in part and rev'd in part, [430 U.S. 112, 97 S. Ct. 965, 51 L. Ed. 2d 204, 9 Env't Rep. Cas. \(BNA\) 1753, 7 Env'tl. L. Rep. 20191, 1977 U.S. LEXIS 13 \(1977\).](#)

124. —Hazardous or toxic waste or pollutants

Fact that final regulations are different from interim final regulations does not invalidate them in terms of [5 USCS § 553\(b\)\(3\)](#) where (1) final regulations promulgated by Environmental Protection Agency set pesticide discharge limit on basis of data from nine plants with recommended pesticide removal technology, (2) seven of those nine plants were mentioned in interim development documents as forming basis for or supporting limit set by interim regulations, (3) those seven plants accounted for about 82% of data points used to determine final limits, (4) their products, treatment systems, and wasteload were all discussed in detail in interim development document, as was what was known of content of their waste water discharges, and (5) on strength of what was disclosed in interim development document, petitioners could have commented on applicability of those plants' treatment systems to other plants, and on importance of different processes, products, and volumes. [BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 13 Env't Rep. Cas. \(BNA\) 1193, 9 Env'tl. L. Rep. 20609, 1979 U.S. App. LEXIS 14862 \(1st Cir. 1979\),](#) cert. denied, [444 U.S. 1096, 100 S. Ct. 1063, 62 L. Ed. 2d 784, 14 Env't Rep. Cas. \(BNA\) 1048, 1980 U.S. LEXIS 171 \(1980\),](#) app. after remand, [614 F.2d 21, 17 Env't Rep. Cas. \(BNA\) 1054, 10 Env'tl. L. Rep. 20150, 1980 U.S. App. LEXIS 20900 \(1st Cir. 1980\).](#)

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Determination by Environmental Protection Agency administrator, to include area on national priorities list of known hazardous waste sites based on input by agency staff, did not violate § 553 notice and comment procedure because comments were not addressed since fact that administrator declined to subscribe to comments submitted did not imply failure to consider. [*Eagle-Picher Industries, Inc. v. United States EPA*, 822 F.2d 132, 262 U.S. App. D.C. 1, 26 Env't Rep. Cas. \(BNA\) 1129, 17 Env'tl. L. Rep. 21108, 1987 U.S. App. LEXIS 8269 \(D.C. Cir. 1987\).](#)

Environmental Protection Agency (EPA) failed to give sufficient notice of proposed requirements for disposal of radioactive waste, tied specifically into protection of groundwater, notwithstanding reasonably clear notice that individual protection requirements would be considered and express invitation for comment thereon, where concept of separate rule setting limits on groundwater to be protected was never presented to public, final groundwater protection requirements were never opened to public comment, and public was never able to comment on appropriateness of class designations or limiting criteria. [*Natural Resources Defense Council, Inc. v. United States EPA*, 824 F.2d 1258, 26 Env't Rep. Cas. \(BNA\) 1233, 18 Env'tl. L. Rep. 20088, 1987 U.S. App. LEXIS 9646 \(1st Cir. 1987\).](#)

EPA fairly apprised public of subjects and issues it was considering concerning toxic pollutants, where (1) although EPA proposed single limit of 7,400 ppm interested parties were informed that alternatives were being considered, (2) it was evident from public comment that proposed limit was too lenient, and (3) EPA considered more stringent limit of 30,000 ppm, but stated that additional provisions would have to be made for operators requiring additives. [*Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 863 F.2d 1420, 28 Env't Rep. Cas. \(BNA\) 1609, 19 Env'tl. L. Rep. 20225, 104 Oil & Gas Rep. 160, 1988 U.S. App. LEXIS 16366 \(9th Cir. 1988\).](#)

EPA provided adequate notice that pollutant phenol might be subject to pretreatment standards by indicating that phenol was one option under consideration and that outcome would depend on further study. [*Chemical Mfrs. Ass'n v. U.S. EPA*, 885 F.2d 253, 30 Env't Rep. Cas. \(BNA\) 1735, 20 Env'tl. L. Rep. 20076, 1989 U.S. App. LEXIS 16509 \(5th Cir. 1989\).](#)

EPA gave adequate notice that new testing procedure for determining toxicity characteristics of hazardous solid waste would be more sensitive to lead and other organic constituents than former procedure where EPA gave explicit notice of terms of procedure ultimately adapted, and where sewer industry submitted comments criticizing increased sensitivity, showing that they were given notice. [*Edison Elec. Inst. v. United States EPA*, 2 F.3d 438, 303 U.S. App. D.C. 169, 37 Env't Rep. Cas. \(BNA\) 1385, 23 Env'tl. L. Rep. 21173, 1993 U.S. App. LEXIS 20140 \(D.C. Cir. 1993\).](#)

EPA's repromulgation of regulations covering mining wastes had effect of rescinding previous regulation, and EPA was therefore required to comply with applicable rule-making provisions of APA; however, EPA is not required to start from scratch and may not need to initiate new notice and comment proceedings. [*Mobil Oil Corp. v. United States EPA*, 35 F.3d 579, 308 U.S. App. D.C. 262, 39 Env't Rep. Cas. \(BNA\) 1481, 24 Env'tl. L. Rep. 21472, 1994 U.S. App. LEXIS 26548 \(D.C. Cir. 1994\).](#)

EPA provided adequate notice and opportunity to comment where it published 3 notices of proposed rulemaking, first of which set forth both universal and alternative standards for soil contaminated with hazardous wastes, second notice postponed deadline for comment, and third notice expressly stated that universal, rather than alternative standard, would be applied. [*National Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 321 U.S. App. D.C. 319, 43 Env't Rep. Cas. \(BNA\) 1769, 27 Env'tl. L. Rep. 20444, 1996 U.S. App. LEXIS 29085 \(D.C. Cir. 1996\).](#)

Procedurally, it seems clear that normal listing of substance as toxic pollutant under [33 USCS § 1317\(a\)](#) is rule making, and various procedural requirements of rule making, including notice and comment period, will apply pursuant to [5 USCS § 553](#); it is more doubtful that final agency decision in response to primary jurisdiction referral about meaning of regulation constitutes rule making, and so it may be that various procedural requirements for listing, including notice and comment period, do not apply as of right. [*Narragansett Elec. Co. v. United States EPA*, 407 F.3d 1, 60 Env't Rep. Cas. \(BNA\) 1353, 35 Env'tl. L. Rep. 20093, 2005 U.S. App. LEXIS 7901 \(1st Cir. 2005\).](#)

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Because respondent Environmental Protection Agency's notice as to [40 C.F.R. § 270.10\(l\)](#) indicated how permitting authority was to judge compliance by reference to certain standards and provided sufficient factual detail and rationale to permit meaningful comment, and later specifically noted petitioner trade association's comments, [5 USCS §§ 553\(b\)\(3\)](#), (c), 706(2)(D) were satisfied. [Cement Kiln Recycling Coalition v. EPA, 493 F.3d 207, 377 U.S. App. D.C. 234, 64 Env't Rep. Cas. \(BNA\) 2025, 37 Env'tl. L. Rep. 20176, 2007 U.S. App. LEXIS 16711 \(D.C. Cir. 2007\)](#).

125. Federal Communications Commission

Notice of Inquiry in which FCC sought comments on view favoring assertion of jurisdiction over all CATV systems and on proposal to adopt for nonmicrowave systems rules it had adopted on same day for microwave systems, in which FCC discussed mushrooming entry of CATV into major population centers and FCC specifically requested comment on rule that would prohibit extending signal beyond specified contour into specified markets adequately specified substance of proposed rules. [Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 128 U.S. App. D.C. 262, 1967 U.S. App. LEXIS 5767 \(D.C. Cir. 1967\)](#).

Notice of rulemaking in 1984 Federal Communications Commission docket, proposing daytime radio station preference in comparative proceedings for new FM facility and broadcast licenses for 600 existing FM stations was adequate, notwithstanding failure to mention that preference was given for all new FM stations created in future by final rule, where notice of rulemaking 2 years prior alerted interested parties to file comments with respect to daytimer preference in all comparative proceedings and interested parties reasonably could be expected to follow subsequent proceedings. [National Black Media Coalition v. FCC, 822 F.2d 277, 1987 U.S. App. LEXIS 8162 \(2d Cir. 1987\)](#).

Procedures followed by FCC in establishing guidelines for health and safety standards of radio frequency radiation satisfied functional compliance test where FCC consulted with, and obtained comments of, any federal agency with jurisdiction or special expertise with respect to environmental impact involved, and considered cumulative effects of radiation. [Cellular Phone Taskforce v. FCC, 205 F.3d 82, 7 Accom. Disabilities Dec. \(CCH\) ¶7-240, 30 Env'tl. L. Rep. 20402, 2000 U.S. App. LEXIS 2770 \(2d Cir.\), reh'g denied, 217 F.3d 72, 8 Accom. Disabilities Dec. \(CCH\) ¶8-017, 2000 U.S. App. LEXIS 12246 \(2d Cir. 2000\)](#), cert. denied, 531 U.S. 1070, 121 S. Ct. 758, 148 L. Ed. 2d 661, 2001 U.S. LEXIS 124 (2001), cert. denied, 531 U.S. 1070, 121 S. Ct. 758, 148 L. Ed. 2d 661, 2001 U.S. LEXIS 125 (2001), cert. denied, 531 U.S. 1070, 121 S. Ct. 758, 148 L. Ed. 2d 661, 2001 U.S. LEXIS 126 (2001), cert. denied, 531 U.S. 1070, 121 S. Ct. 758, 148 L. Ed. 2d 661, 2001 U.S. LEXIS 127 (2001).

Action challenging FCC's second reconsideration order, which set forth method for compensating payphone service providers for coinless calls made from payphones, was remanded to FCC for further consideration because FCC did not have authority to promulgate second reconsideration order without first giving notice and opportunity for comment under [5 USCS § 553\(b\)](#), where order did not merely clarify rules promulgated earlier but was changing rules because telephone companies reporting and payment responsibilities had been changed. [Sprint Corp. v. FCC, 315 F.3d 369, 354 U.S. App. D.C. 288, 2003 U.S. App. LEXIS 910 \(D.C. Cir. 2003\)](#).

Where Federal Communications Commission (FCC) issued restructuring order that eliminated 25 percent bidding credit for businesses owned by women or members of racial minorities and established and retroactively applied substantially similar bidding credit to licensees that qualified as small businesses, FCC did not abuse its discretion in dismissing licensee's notice-and-comment challenge as untimely. [Sioux Valley Rural TV, Inc. v. FCC, 349 F.3d 667, 358 U.S. App. D.C. 344, 2003 U.S. App. LEXIS 23810 \(D.C. Cir. 2003\)](#), cert. denied, 541 U.S. 989, 124 S. Ct. 2032, 158 L. Ed. 2d 493, 2004 U.S. LEXIS 2777 (2004).

In review of telecommunications regulations, FCC fell short of its notice obligation under [5 USCS § 553\(b\)\(3\)](#) when it adopted new metric for measuring diversity and competition in market without public notice and comment on that metric before it was incorporated into final rule. [Prometheus Radio Project v. FCC, 373 F.3d 372, 2004 U.S. App. LEXIS 12720 \(3d Cir. 2004\)](#), cert. denied, 545 U.S. 1123, 125 S. Ct. 2902, 162 L. Ed. 2d 310, 2005 U.S. LEXIS 4807 (2005), cert. denied, 545 U.S. 1123, 125 S. Ct. 2902, 162 L. Ed. 2d 310, 2005 U.S. LEXIS 4810 (2005), cert.

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denied, 545 U.S. 1123, 125 S. Ct. 2903, 162 L. Ed. 2d 310, 2005 U.S. LEXIS 4809 (2005), cert. denied, 545 U.S. 1123, 125 S. Ct. 2903, 162 L. Ed. 2d 310, 2005 U.S. LEXIS 4808 (2005), cert. denied, 545 U.S. 1123, 125 S. Ct. 2904, 162 L. Ed. 2d 310, 2005 U.S. LEXIS 4811 (2005), cert. denied, 545 U.S. 1123, 125 S. Ct. 2903, 162 L. Ed. 2d 310, 2005 U.S. LEXIS 4812 (2005).

Where respondent FCC had stated that functional equivalency test to determine appropriate compensation between local exchange carriers was inconsistent with [47 CFR § 51.711](#), and sought comment on whether rule should be amended, order eliminating test was interpretative and thus, notice and comment requirements under 5 USCS § 533(b), (c), did not apply. [SBC Inc. v. FCC, 414 F.3d 486, 2005 U.S. App. LEXIS 14220 \(3d Cir. 2005\)](#).

Federal Communications Commission did not violate [5 USCS § 553](#) by failing in timely manner to make available for public comment raw data underlying study because limited liability company, although on notice of findings and conclusions of study, did not ask for data before FCC issued its final rule. [EchoStar Satellite L.L.C. v. FCC, 457 F.3d 31, 372 U.S. App. D.C. 385, Copy. L. Rep. \(CCH\) ¶29234, 2006 U.S. App. LEXIS 18562 \(D.C. Cir. 2006\)](#).

In promulgating [47 CFR § 9.5](#), order that gave Internet telephone service providers only 120 days to transmit 911 calls to local emergency authority, FCC sufficiently provided notice of purpose, extent, form, and time frame of regulation. [Nuvio Corp. v. FCC, 473 F.3d 302, 374 U.S. App. D.C. 162, 2006 U.S. App. LEXIS 30820 \(D.C. Cir. 2006\)](#).

Pursuant to deferential review under [5 USCS § 706](#) and [47 USCS § 402](#), Federal Communications Commission failed to satisfy notice and comment requirements of Administrative Procedure Act, [5 USCS § 553](#), when it redacted, based on deliberative process privilege of [5 USCS § 552\(b\)\(5\)](#), studies on which it relied in promulgating [47 CFR pt. 15](#) to regulate use of radio spectrum by access broadband over power line (BPL) operators under [47 USCS §§ 301](#) and [302a](#) and failed to provide reasoned explanation for its choice of extrapolation factor for measuring emissions of BPL. [Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 390 U.S. App. D.C. 34, 2008 U.S. App. LEXIS 11704 \(D.C. Cir. 2008\)](#).

[47 CFR § 64.604\(C\)\(7\)](#), which restricted use of customer data came about in context of transfers between outgoing and incoming providers, but regulation unambiguously prohibited use of customer data except to connect telecommunications relay services (TRS) calls; declaratory rulings made by Federal Communications Commission (FCC) did not create any new duties with respect to customer data, but merely informed providers of FCC's interpretation of existing regulation; therefore, restriction contained in declaratory rulings was interpretative rule, and FCC was not required to comply with notice and comment procedures under [5 USCS § 553\(b\)\(A\)](#). [Sorenson Communs. v. FCC, 567 F.3d 1215, 2009 U.S. App. LEXIS 12070 \(10th Cir. 2009\)](#).

In promulgating interim order imposing cap on high-cost subsidies to competitive eligible telecommunications carriers in small and rural markets in order to preserve federal universal service fund, Federal Communications Commission did not violate [5 USCS § 553\(b\)](#) because it complied with Administrative Procedures Act's rule-making requirements and considered 113 sets of comments from interested parties. [Rural Cellular Ass'n v. FCC, 588 F.3d 1095, 388 U.S. App. D.C. 421, 2009 U.S. App. LEXIS 26976 \(D.C. Cir. 2009\)](#).

Respondent Federal Communications Commission's Final Notice of Proposed Rulemaking (FNPR), with its two general questions related to Newspaper/Broadcast Cross-Ownership rule, and irregular comment period that followed, did not satisfy [5 USCS § 553](#) in that FNPR did not make clear which characteristics were being considered or why, and commenters noted their submission were limited because FNPR made no proposals and suggested no options. [Prometheus Radio Project v. FCC, 652 F.3d 431, 2011 U.S. App. LEXIS 13855 \(3d Cir. 2011\)](#), cert. denied, 567 U.S. 951, 133 S. Ct. 64, 183 L. Ed. 2d 710, 2012 U.S. LEXIS 4894 (2012), cert. denied, 567 U.S. 951, 133 S. Ct. 63, 183 L. Ed. 2d 710, 2012 U.S. LEXIS 4924 (2012), cert. denied, 567 U.S. 951, 133 S. Ct. 73, 183 L. Ed. 2d 710, 2012 U.S. LEXIS 4954 (2012).

Federal Communications Commission (FCC) standstill rule, [47 CFR § 76.1302\(k\)](#), does not fall within procedural rule exception to Administrative Procedure Act's notice-and-comment requirements because it confers authority on

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FCC temporarily to extend term of contractual agreement between multichannel video programming distributor and unaffiliated network while network's program carriage complaint is pending; thus, it significantly affects substantive rights. [Time Warner Cable Inc. v. FCC, 729 F.3d 137, 41 Media L. Rep. \(BNA\) 2349, 2013 U.S. App. LEXIS 18336 \(2d Cir. 2013\)](#).

Given substantive burden imposed by standstill rule, [47 CFR § 76.1302\(k\)](#), absence of established FCC practice of issuing standstill orders in program carriage context, and uncertainty about FCC's authority to do so, rule substantively affects public to degree sufficient to implicate policy interests animating notice-and-comment rule-making; rule thus is substantive and subject to Administrative Procedure Act's notice-and-comment requirements. [Time Warner Cable Inc. v. FCC, 729 F.3d 137, 41 Media L. Rep. \(BNA\) 2349, 2013 U.S. App. LEXIS 18336 \(2d Cir. 2013\)](#).

Federal Communications Commission (FCC) standstill rule, [47 CFR § 76.1302\(k\)](#), was promulgated in violation of Administrative Procedure Act's notice-and-comment requirements because FCC's notice of proposed rule making (NPRM) did not specifically indicate that FCC was considering adopting standstill rule, and public did not anticipate that FCC would adopt standstill rule based on NPRM. [Time Warner Cable Inc. v. FCC, 729 F.3d 137, 41 Media L. Rep. \(BNA\) 2349, 2013 U.S. App. LEXIS 18336 \(2d Cir. 2013\)](#).

Federal Communications Commission's adoption of two limitations on Tribal Lifeline program was arbitrary and capricious because as to Tribal Facilities Requirement, Commission departed from its prior forbearance policy without reasoned explanation and failed to consider key aspects of program, and as to Tribal Rural Limitation, Commission did not consider its impact on service access and affordability and it failed to refer to data considering impact of its Tribal Rural Limitation on incentivizing infrastructure deployment; various non-harmless procedural deficiencies existed as well as Commission failed to provide adequate opportunity for comment on proposed limitations. [2019 U.S. App. LEXIS 3278](#).

In rulemaking proceeding in which FCC restricted presunrise broadcasting by certain stations, proper and timely publication in Federal Register imparts sufficient notice under [5 USCS § 553](#); licensee is not entitled to personal notice and opportunity for public hearing. [United States v. Daniels, 418 F. Supp. 1074, 1976 U.S. Dist. LEXIS 13431 \(D.S.D. 1976\)](#).

FCC's amendment of its rules and regulations affecting amateur radio service which is editorial in nature does not require public notice, procedure or effective date provisions of [5 USCS § 553](#). Re Editorial Amendment of Rules & Regulations (11/22/82, FCC) PR 32462.

Federal Communications Commission may dispense with notice and comment procedures of [5 USCS § 553](#) where changes to its rules involve minor, noncontroversial amendments. Re Amendment of FCC's Rules, FCC 83-474 (Adopted Oct. 19, 1983).

Changes to OST Bulletin No. 53 which describes operational characteristics with which transmitters in cellular service must comply in order to insure nation-wide compatibility relative to Domestic Public Cellular Radio Telecommunications Service need not be accompanied by prior notice and comment since change, which governs direction in which mobile station scans control channels assigned to system of cellular service, is not controversial and affording prior notice would not result in significant degree of public comment, change has already been unanimously approved by Electronic Industries Association cellular committee, change is relatively minor and inexpensive, if performed while equipment is still in manufacturing stage and should invoke little, if any, opposition. Re Inquiry Into Use of Bands 825–845 MHz & 870–890 MHz for Cellular Communications Systems, FCC 79-318 (Adopted June 16, 1983).

Actual notice provided by FCC to party subject to accounting requirements adopted in FCC order concerning antitrust litigation was sufficient under [5 USCS § 553\(b\)](#) to support application of requirements to those parties notwithstanding contention that publication was required for order to have been procedurally proper. Re American Telephone and Telegraph Co., Ameritech, Bell Atlantic, Bell South, NYNEX, Pacific Telesis, Southwestern Bell &

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US West—Accounting Instructions for Judgment and Other Costs Associated With Litton Systems Antitrust Law Suit, FCC 88-21 (Adopted January 19, 1988).

126. —Allocation of channels

Even though, in channel allocation proceeding, Federal Communications Commission took into account factor not listed in list of “priorities” published in notice in advance of rulemaking, it was not required to start proceedings all over again, since FCC complied with requirement of [5 USCS § 553](#) that notice include description of subjects and issues involved and priorities listed were only guides, not inflexible, unchanging rules. [Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 93 U.S. App. D.C. 342, 1954 U.S. App. LEXIS 4581 \(D.C. Cir. 1954\).](#)

Even though change of television channel allocation from one city to another is rulemaking proceeding subject to [5 USCS § 553](#), private approaches by station owners interested in allocation to Commission and consideration of letters which did not go into public record invalidated action. [Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 106 U.S. App. D.C. 30, 1959 U.S. App. LEXIS 3909 \(D.C. Cir. 1959\).](#)

FCC did not follow notice requirements of [5 USCS § 553\(b\)](#) in rulemaking proceedings used to allot new intermediate FM channels, procedure by which FCC adopted interim counterproposals did not comply with requirements of APA, because notice initiating omnibus rulemaking gave no indication that FCC was planning to abandon long standing policy of permitting channel substitutions in order to accommodate upgrade plans, and notice made no mention of substitution policy and did not alert petitioners to fact that FCC was adopting procedures that would permanently foreclose their upgrade plans. [Reeder v. FCC, 865 F.2d 1298, 275 U.S. App. D.C. 199, Util. L. Rep. \(CCH\) ¶13480, 1989 U.S. App. LEXIS 536 \(D.C. Cir. 1989\).](#)

Court rejected individual’s contention that he lacked adequate notice that his proposal to amend FCC’s Table of Allotments for FM radio channels could have been precluded by joint parties’ submission because notice of proposed rule making, as well as FCC’s regulations, made clear that proceeding would encompass mutually exclusive counterproposals and that late-filed conflicting proposals would be cut off and even if logical-outgrowth test required that affected party be able to anticipate preclusive outcome in particular allotment proceeding, that test would have been satisfied because, in light of FCC’s minimum distance separation requirements, individual should at least have known that initial proposal to allot channel 233C3 at Quanah, Texas could have conflicted with counterproposal that included only single channel up to 147 miles away. [Crawford v. FCC, 417 F.3d 1289, 368 U.S. App. D.C. 40, 2005 U.S. App. LEXIS 16184 \(D.C. Cir. 2005\).](#)

127. —Tariffs

Notice published by Federal Communications Commission in Federal Register which noted that it is desirable to determine in single proceeding lawfulness of all tariff schedules applicable to private line services and channels and directed telephone company to conduct study to determine cost in furnishing private line services and channels, which also included issues to be investigated, adequately apprised interested parties of Commission’s intention to conduct general investigation into private line tariffs, of lawfulness of carriers’ rates and possibility of prescription of new rates; notice was not statement of issues in general statutory language but was as specific as Commission could have made it at time. [Wilson & Co. v. United States, 335 F.2d 788, 1964 U.S. App. LEXIS 4491 \(7th Cir. 1964\),](#) remanded, [382 U.S. 454, 86 S. Ct. 643, 15 L. Ed. 2d 523, 1966 U.S. LEXIS 2364 \(1966\).](#)

Public notice issued after FCC had informally conferred with telephone companies regarding their interstate earnings, stating that companies would submit tariffs proposing major reductions in interstate telephone rates did not constitute “rulemaking” or approval or prescription of future rates, and state public utilities commission, as representative of people, regulatory agency, and telephone rate payer, was not entitled to notice and opportunity to be heard under [5 USCS § 553. Public Utilities Com. v. United States, 356 F.2d 236, 1966 U.S. App. LEXIS 7224 \(9th Cir.\),](#) cert. denied, [385 U.S. 816, 87 S. Ct. 35, 17 L. Ed. 2d 54, 1966 U.S. LEXIS 2932 \(1966\).](#)

128. Federal Home Loan Bank Board

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Enforcement by Federal Home Loan Bank Board of common-law fiduciary duties by court action does not fall within publicity and notice requirements of Administrative Procedure Act ([5 USCS § 553](#)), since publicity and notice sections are designed to meet need for public information on detailed agency rules and regulations. [Reich v Webb, 336 F.2d 153, 8 Fed. R. Serv. 2d \(Callaghan\) 24A.2, Case 4 \(CA9 Cal 1964\)](#).

Federal Home Loan Bank Board (FHLBB) cannot rest decision to impose receivership or conservatorship on internal agency memorandum without formal notice and comment where rule adopting new method of classifying certain commercial loans which contained references to agency memorandum as standard for judging appraisals did not give adequate notice that memorandum would be integral part of rule. [Haralson v. Federal Home Loan Bank Bd., 655 F. Supp. 1561, 1987 U.S. Dist. LEXIS 13420 \(D.D.C.\)](#), vacated, [678 F. Supp. 925, 1987 U.S. Dist. LEXIS 13008 \(D.D.C. 1987\)](#).

Where savings and loan associations challenged adequacy of Federal Home Loan Bank Board's notice of its inclusion of informal memorandum as one of subjects of proposed rulemaking, notice requirements of [5 USCS § 553\(b\)](#) are met despite lack of publication since memorandum, submitted in response to notice of proposed rulemaking (NPRM), and comments elicited by memorandum, provide clear evidence that NPRM must have fairly apprised interested parties of issues involved, and all insured institutions had received actual notice of full text of informal memorandum. [Haralson v. Federal Home Loan Bank Bd., 678 F. Supp. 925, 1987 U.S. Dist. LEXIS 13008 \(D.D.C. 1987\)](#).

129. Federal Maritime Administration or Commission

In action to approve shipping contracts, Federal Maritime Commission could revert from adjudication to general rulemaking without first giving notice of its intention in manner set forth in [5 USCS § 553](#); however, participation is to be limited to such clauses of proposed contract which were not dealt with in adjudicatory dockets, since shipowners had participated in adjudicatory proceedings. [Pacific Coast European Conference v. United States, 350 F.2d 197, 1965 U.S. App. LEXIS 6673 \(9th Cir.\)](#), cert. denied, 382 U.S. 958, 86 S. Ct. 433, 15 L. Ed. 2d 362, 1965 U.S. LEXIS 52 (1965).

Proceeding by Federal Maritime Administration to prescribe rates for future application is rulemaking in nature, and under Administrative Procedure Act ([5 USCS § 553](#)), shipowner was properly accorded opportunity to submit views in writing and was not entitled to hearing. [Alaska S.S. Co. v. Federal Maritime Com., 356 F.2d 59, 1966 U.S. App. LEXIS 7301 \(9th Cir. 1966\)](#).

130. Food and Drug Administration

Food and Drug Administration (FDA) standards informing food producers of allowable levels of unavoidable contaminants in foods constituted legislative rule requiring § 553 notice-and-comment procedures where (1) mandatory, definitive language employed by FDA in creating and describing action levels suggested present and binding effect, confirmed by fact that FDA considered it necessary for producers to secure exceptions to action levels, (2) FDA's statements indicated that action levels were binding and (3) formal notice published in Federal Register indicated that any food which contained toxins in excess of specific amount would be considered to be adulterated, thus, FDA by virtue of its own course in conduct chose to limit its discretion and promulgated as rules action levels which rendered present, binding effect on food producers. [Community Nutrition Institute v. Young, 818 F.2d 943, 260 U.S. App. D.C. 294, 1987 U.S. App. LEXIS 6385 \(D.C. Cir. 1987\)](#).

Commissioner of Food and Drugs should have complied with notice and comment provisions of [5 USCS § 553](#) before promulgating regulations relating to kinds of clinical investigations deemed necessary to establish effectiveness of drug products. [Pharmaceutical Mfrs. Asso. v. Finch, 307 F. Supp. 858, 1970 U.S. Dist. LEXIS 13179 \(D. Del. 1970\)](#), disapproved, [Rivera v. Becerra, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\)](#).

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District court found that U.S. Food and Drug Administration (FDA) did not violate Administrative Procedure Act, [5 USCS §§ 500–584, 701–706](#), when it promulgated its decision banning sale of ephedrine-alkaloid dietary supplements (EDS) in U.S.; FDA fairly apprised interested parties of nature of rulemaking process and provided them with meaningful opportunity to participate, and correctly followed congressional directive to analyze risks and benefits of EDS before it issued its decision, and decision was not arbitrary and capricious because it did not prohibit ephedrine alkaloids in conventional foods or traditional Asian medicines. [Nutraceutical Corp. v. Von Eschenbach, 477 F. Supp. 2d 1161, 2007 U.S. Dist. LEXIS 18868 \(D. Utah 2007\)](#).

131. Health and human services

Final rules of the Departments of Health and Human Services, Labor, and the Treasury concerning the religious and moral exemptions to the ACA satisfied the APA's objective requirements where the Departments requested and encouraged public comments on all matters addressed in the rules and gave interested parties 60 days to submit comments, the final rules included a concise statement of their basis and purpose, explaining that the rules were necessary to protect sincerely held moral and religious objections and summarizing the legal analysis supporting the exemptions, and the final rules did not become effective until more than 30 days after being published. [Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 207 L. Ed. 2d 819, 28 Fla. L. Weekly Fed. S. 519, 2020 U.S. LEXIS 3546 \(2020\)](#).

Proposal to reduce reimbursement of malpractice costs by introducing formula linking reimbursement to paid claim losses rather than utilization rates, which refers to possibility of national ratio alternative without specifying exact figure, is sufficient notice of secretary's intent to profoundly alter method of compensating hospitals for malpractice insurance premiums. [Walter O. Boswell Memorial Hospital v. Heckler, 573 F. Supp. 884, 1983 U.S. Dist. LEXIS 13359 \(D.D.C. 1983\)](#), remanded, [749 F.2d 788, 242 U.S. App. D.C. 110, 1984 U.S. App. LEXIS 16325 \(D.C. Cir. 1984\)](#), disapproved, [St. James Hospital v. Heckler, 760 F.2d 1460, 1985 U.S. App. LEXIS 31014 \(7th Cir. 1985\)](#).

Public Health Service investigation of biomedical researcher alleged to have misrepresented certain curves in journal article cannot proceed, where Public Health Service Interim Policies and Procedures for Dealing with Possible Misconduct in Extramural Research adopted informally as interim procedures in 1986 are agency rules subject to [5 USCS § 553](#) rulemaking provisions including notice and comment requirements, because rules being followed in investigating researcher were not properly promulgated and are invalid. [Abbs v. Sullivan, 756 F. Supp. 1172, 1990 U.S. Dist. LEXIS 18202 \(W.D. Wis. 1990\)](#), vacated, [963 F.2d 918, 23 Fed. R. Serv. 3d \(Callaghan\) 8, 1992 U.S. App. LEXIS 11489 \(7th Cir. 1992\)](#).

Despite hospitals' contention, Secretary of Department of Health and Human Services used notice-and-comment procedures required by Administrative Procedure Act in deciding not to adjust prospective payment system (PPS) rate; Secretary solicited comment on question of whether PPS rate should have been adjusted to account for replacement of 1979 malpractice rule and published proposed rule that indicated that no adjustment would be made; after opportunity for comment, Secretary adopted final rule that specifically addressed comments urging adjustment of PPS rate as result of change in malpractice rules. [HCA Health Servs. of Tenn., Inc. v. Thompson, 207 F. Supp. 2d 719, 2002 U.S. Dist. LEXIS 21505 \(M.D. Tenn. 2002\)](#).

132. —Medicare and Medicaid

Fiscal intermediary's letter to providers of services under Medicare Act interpreting "reasonable cost" limitation of [42 USCS § 1395f\(b\)](#) did not constitute promulgation of "regulation" for purposes of required notice under Administrative Procedure Act. [New Jersey Chapter, Inc. of American Physical Therapy Asso. v. Prudential Life Ins. Co., 502 F.2d 500, 164 U.S. App. D.C. 40, 1974 U.S. App. LEXIS 6972 \(D.C. Cir. 1974\)](#), cert. denied, [420 U.S. 1004, 95 S. Ct. 1444, 43 L. Ed. 2d 762, 1975 U.S. LEXIS 1153 \(1975\)](#).

Rule promulgated by the Secretary of the Department of Health and Human Services (HHS) satisfied the Administrative Procedure Act's notice-and-comment requirements because the rule was a logical outgrowth of the proposed rule change, and the notice provided adequate notice to commenters of what the agency was

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considering; the notice described the content of the rule, and HHS corrected its misstatement of the then-applicable rule before the end of the second comment period. [Empire Health Found. v. Azar, 958 F.3d 873, 2020 U.S. App. LEXIS 14282 \(9th Cir. 2020\)](#), reh'g denied, [2020 U.S. App. LEXIS 33108 \(9th Cir. Oct. 20, 2020\)](#).

In rulemaking concerning Medicare reimbursement for malpractice insurance costs, agency notice which failed to contain element contained in final rule does not render rule defective where element was clearly implied by other statements in proposed rule. [Abington Memorial Hospital v. Heckler, 576 F. Supp. 1081, 1983 U.S. Dist. LEXIS 11028 \(E.D. Pa. 1983\)](#), aff'd, [750 F.2d 242, 1984 U.S. App. LEXIS 15933 \(3d Cir. 1984\)](#).

Requirements of [5 USCS § 553\(c\)](#) are not applicable to Medicare regulation which disallows reimbursement for bedside telephones provided to Medicare beneficiaries; pursuant to [5 USCS § 553\(a\)\(2\)](#), rulemaking relating to “benefits” is exempt from Administrative Procedure Act’s requirements. [Greater Cleveland Hospital Asso. Group Appeal v. Schweiker, 599 F. Supp. 1000, 1984 U.S. Dist. LEXIS 18225 \(N.D. Ohio 1984\)](#).

Secretary of Health and Human Service’s promulgation of rule implementing new survey process for determining whether nursing facilities receiving federal Medicaid funds are provided quality medical care is invalid, where (1) 60-day comment period was inadequate and Secretary’s failure to extend period pursuant to numerous requests was arbitrary and capricious, (2) notice of proposed rulemaking did not include guidelines and forms constituting system, (3) rule did not include details of methodology defining level of care and duty of state survey agency, and (4) statement of basis and purpose was flawed. [Estate of Smith v. Bowen, 656 F. Supp. 1093, 1987 U.S. Dist. LEXIS 2620 \(D. Colo. 1987\)](#).

HHS Secretary satisfied requirements of [5 USCS § 553\(c\)](#) in issuing regulation changing reimbursement method for anesthesia services under Part B of Medicare program, where Secretary gave 30 days’ notice of proposed interim rule, gave appropriate consideration to comments received, and responded to voluminous comments in notice of final rule, even though plaintiffs claim that Secretary’s mind was unalterably closed, that she set her mind on eliminating modifiers, and that she never intended to consider any contrary views, because it is not role of courts to police mindset of Secretary if she otherwise follows appropriate rulemaking procedures. [Necktopoulos v. Shalala, 941 F. Supp. 1382, 52 Soc. Sec. Rep. Service 112, 1996 U.S. Dist. LEXIS 14330 \(S.D.N.Y. 1996\)](#).

Secretary of Health and Human Services’ 1995 interpretation of Medicare cost-reporting rules do not impose “new duties” on home health care providers or other institutions, but simply restates that providers are required to adhere to limitations contained in other sections of Medicare regulations in preparing their cost reports; as result, Medicare Provider Reimbursement Manual § 3205 is interpretive rule that is exempt from Administrative Procedure Act’s notice and comment provisions under [5 USCS § 553\(b\)\(3\)\(A\)](#), rather than legislative rule. [Visiting Nurse Ass’n v. Thompson, 378 F. Supp. 2d 75, 2004 U.S. Dist. LEXIS 28468 \(E.D.N.Y. 2004\)](#).

Plaintiffs failed to state claim under [5 USCS § 553\(b\)\(3\)](#) or [42 USCS § 1395hh\(b\)\(1\)](#) where United States Secretary of Health and Human Services’ choice of general description of applicable financial standards under durable medical equipment bidding program was consistent with text of Medicare Prescription Drug, Improvement, and Modernization Act, *Pub. L. No. 108-173, 117 Stat. 2066* (2003), promoted purposes behind program, and had been affirmed by Congress. [Tex. Alliance for Home Care Servs. v. Sebelius, 811 F. Supp. 2d 76, 2011 U.S. Dist. LEXIS 101380 \(D.D.C. 2011\)](#), aff'd, [681 F.3d 402, 401 U.S. App. D.C. 71, 2012 U.S. App. LEXIS 11048 \(D.C. Cir. 2012\)](#).

Centers for Medicare and Medicaid Services did not violate notice and comment requirements of Administrative Procedure Act and Medicare Act when it published correcting amendment to [42 CFR § 412.534](#) without additional notice and comment because contents of correcting amendment were logical outgrowth of previous public comments; both proposed rule and preamble to final rule addressing commenters’ concerns demonstrated that public had opportunity during comment period to present to agency its contentions to proposed rule, and as transition period was merely implementing mechanism for 25 percent rule—already subject of extensive public comment after defendant issued notice of proposed rulemaking—an additional notice and comment period before correcting amendment was issued would not have provided commentators with their first occasion to offer new and

different criticisms which agency might find convincing. [Select Specialty Hosp. - Akron, LLC v. Sebelius, 820 F. Supp. 2d 13, 2011 U.S. Dist. LEXIS 123062 \(D.D.C. 2011\)](#).

In case in which Medicare provider argued that even if Secretary of U.S. Department of Health and Human Services' subdelegation to outside entity was permissible, it had to be effected through notice-and-comment rulemaking; since Secretary's subdelegation of her authority to make sustained or high level of payment error determination did not establish or change substantive legal standard governing scope of benefits, payment for services, or eligibility of individuals, entities or organizations to furnish or receive services, subdelegation was not required under [42 USCS § 1395hh\(a\)\(2\)](#) to be effected via notice-and-comment rulemaking. [Gentiva Healthcare Corp. v. Sebelius, 857 F. Supp. 2d 1, 2012 U.S. Dist. LEXIS 48655 \(D.D.C. 2012\)](#), aff'd, [723 F.3d 292, 406 U.S. App. D.C. 269, 2013 U.S. App. LEXIS 14886 \(D.C. Cir. 2013\)](#).

133. —Social Security benefits

Bellmon Review Program providing for Secretary of Health and Human Services own-motion review of administrative law judge (ALJ) decisions regarding social security benefits allowances, was substantive rule under Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) requiring notice and comment procedures since program, which limited Secretary's discretion not to review ALJ decisions, resulted in mandatory review of denials of benefits in close cases where benefits might previously have been granted, thus, claimants receiving favorable decisions from targeted ALJs faced mandatory screening of favorable decisions which under prior practice would have been final, thus, program effected change in existing policy. [W.C. v. Bowen, 807 F.2d 1502, 1987 U.S. App. LEXIS 954 \(9th Cir.\)](#), reh'g denied, amended, [819 F.2d 237 \(9th Cir. 1987\)](#).

HHS offset of retroactive SSDB benefits by concurrently awarded SSI benefits, awarded under [42 USCS § 1320a-6](#), is not invalid for failure to follow notice and comment requirements of [5 USCS § 553](#) and supports congressional purpose of preventing windfalls to retroactive beneficiaries. [Sheppard v. Sullivan, 906 F.2d 756, 285 U.S. App. D.C. 62, Unemployment Ins. Rep. \(CCH\) ¶ 15562, Unemployment Ins. Rep. \(CCH\) ¶15562A, 1990 U.S. App. LEXIS 10141 \(D.C. Cir. 1990\)](#).

Failure of Secretary of Health and Human Services to comply with Administrative Procedure Act's notice and comment requirements in abandoning pro rata method for "first day of month" rule in determining social security benefits eligibility invalidated new rule; agency's internal operations directive changed existing rights and obligations, thus was substantive rule not exempt from notice and comment requirements. [Brow v. Secretary of Health & Human Services, 627 F. Supp. 1467, 1986 U.S. Dist. LEXIS 29432 \(D. Vt. 1986\)](#).

134. —Supplemental Security Income benefits

Notice of proposed rulemaking by Department of Health, Education & Welfare which generally addressed subject of income and exclusion from income of persons eligible for Supplemental Security Income (SSI) benefits, but failed to deal with aspects covered by regulation later adopted, did not comply with [5 USCS § 553](#). [Kollett v. Harris, 619 F.2d 134, 1980 U.S. App. LEXIS 18491 \(1st Cir. 1980\)](#).

HHS offset of retroactive SSDB benefits by concurrently awarded SSI benefits, awarded under [42 USCS § 1320a-6](#), is not invalid for failure to follow notice and comment requirements of [5 USCS § 553](#) and supports congressional purpose of preventing windfalls to retroactive beneficiaries. [Sheppard v. Sullivan, 906 F.2d 756, 285 U.S. App. D.C. 62, Unemployment Ins. Rep. \(CCH\) ¶ 15562, Unemployment Ins. Rep. \(CCH\) ¶15562A, 1990 U.S. App. LEXIS 10141 \(D.C. Cir. 1990\)](#).

135. Housing and urban development

Proscription against delegation of reviewing function included in 42 USCS § 1451 is not violated by refusal of Federal Housing and Home Finance Agency administrator to grant oral hearing to various residential tenants to challenge feasibility of cooperating city's relocation plan. [Gart v. Cole, 263 F.2d 244, 1 Fed. R. Serv. 2d \(Callaghan\)](#)

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[13, 1959 U.S. App. LEXIS 4553 \(2d Cir.\)](#), cert. denied, 359 U.S. 978, 79 S. Ct. 898, 3 L. Ed. 2d 929, 1959 U.S. LEXIS 1117 (1959).

Even though Housing Act ([42 USCS §§ 1441](#) et seq.) does not explicitly require Secretary of Housing and Urban Development to consider views or claims of anyone other than local agency, he is still obligated by due process to make fair, nonarbitrary decisions, and if his decision is to be truly protective of public and private interests recognized by Housing Act, he must afford homeowners' association opportunity equal to that available to urban renewal agency to submit written and documentary evidence. [Powelton Civic Home Owners Asso. v. Department of Housing & Urban Development](#), 284 F. Supp. 809, 1968 U.S. Dist. LEXIS 10029 (E.D. Pa. 1968).

Local public housing authorities ("PHAs") are entitled to declaration that HUD violated under [5 USCS § 553](#), where HUD applied retroactively new method for calculating its operating subsidies, because new method constituted legislative or substantive rules since it involved major changes in evaluating subsidies, including imposing new and mandatory obligations on PHAs and contradicting existing regulation, and HUD failed to follow formal requirements of Administrative Procedures Act in implementing these rules until several years after their implementation. [Committee for Fairness v. Kemp](#), 791 F. Supp. 888, 1992 U.S. Dist. LEXIS 6254 (D.D.C. 1992).

United States Department of Housing and Urban Development's reliance on internal loan analysis was improper because, absent reference in proposed rule to internal loan analysis and at least summary of specific data and methodology on which analysis relied, plaintiffs and plaintiff-intervenors were deprived of meaningful opportunity to comment, [5 USCS § 553\(c\)](#), on what became centerpiece of rationale underlying final rule ([24 CFR § 203.19](#)). [Penobscot Indian Nation v. United States HUD](#), 539 F. Supp. 2d 40, 2008 U.S. Dist. LEXIS 16395 (D.D.C. 2008).

Final rule which barred use of seller-funded downpayment assistance for mortgages insured by Federal Housing Administration (FHA) was set aside and matter was remanded to agency for further action because HUD failed to provide reasoned analysis for its departure from prior policy and failed to adequately respond to comments. [Nehemiah Corp. of Am. v. Jackson](#), 546 F. Supp. 2d 830, 2008 U.S. Dist. LEXIS 16222 (E.D. Cal. 2008).

[24 CFR § 401.100\(b\)](#) was legislative and therefore invalid for defendant Secretary of United States Department of Housing and Urban Development's failure to follow [5 USCS § 553](#)'s notice-and-comment procedures in that it added content, since in its absence, there was no basis to require plaintiff apartment owner to meet eligibility requirements for renewal of his Section 8, [42 USCS § 1437f](#), Housing Assistance Payment contract. [Steinhorst Assocs. v. Preston](#), 572 F. Supp. 2d 112, 2008 U.S. Dist. LEXIS 64859 (D.D.C. 2008).

Notice issued by Department of Housing and Urban Development, which required return of unauthorized investment income from grant money awarded under Native American and Housing and Self Determination Act, [25 USCS §§ 4101](#) et seq., was not subject to notice and comment rulemaking; notice made no substantive change in recipients' legal duties regarding grant investments. [Muscogee \(Creek\) Nation Div. of Hous. v. United States HUD](#), 819 F. Supp. 2d 1225, 2011 U.S. Dist. LEXIS 46754 (E.D. Okla. 2011), aff'd, 698 F.3d 1276, 2012 U.S. App. LEXIS 22383 (10th Cir. 2012).

136. Immigration and aliens

Immigration and Naturalization Service's policy of placing upon common carriers burden of detaining stowaways who have applied for asylum constitutes legislative rule and is invalid for failure to comply with notice and comment procedures of APA. [Dia Navigation Co. v. Pomeroy](#), 34 F.3d 1255, 1994 A.M.C. 2921, 1994 U.S. App. LEXIS 25461 (3d Cir. 1994).

1990 Interim rule of Immigration and Naturalization Service, providing for grant of asylum based, inter alia, on family planning policy of home country, was never properly promulgated as legislative rule; rule did not fit exceptions listed in [5 USCS § 553](#) and therefore required notice and comment procedure. [Xin-Chang Zhang v. Slattery](#), 55 F.3d 732, 1995 U.S. App. LEXIS 12296 (2d Cir. 1995), cert. denied, 516 U.S. 1176, 116 S. Ct. 1271, 134 L. Ed. 2d 217, 1996 U.S. LEXIS 1827 (1996).

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Unpublished decision: Department of Homeland Security (DHS) did not violate Administrative Procedure Act, [5 USCS § 551](#) et seq., and, therefore, alien's due process rights when it reorganized detention boundaries without notice and comment since interpretive rules, general statements of policy or rules of agency organization, procedure or practice could be implemented without notice and comment, [5 USCS § 553\(b\)\(A\)](#), and DHS reorganization was interpretation of statute that gave DHS authority to conduct removal proceedings. [Ballesteros v. Ashcroft, 452 F.3d 1153, 2006 U.S. App. LEXIS 14541 \(10th Cir. 2006\)](#), corrected, [2006 U.S. App. LEXIS 32546 \(10th Cir. June 14, 2006\)](#), review or reh'g granted, in part, reh'g denied, remanded, [482 F.3d 1205, 2007 U.S. App. LEXIS 7406 \(10th Cir. 2007\)](#).

General notice of proposed regulation governing calculation of minimum wage U.S. employer must offer in order to recruit foreign workers under H-2B visa program was sufficient since it fairly apprised interested persons of subjects and issues, and legal basis and purpose of regulation, properly responded to relevant and significant public comments concerning relevant factors, and articulated satisfactory explanation for action including rational connection between facts found and choice made for calculating minimum wage. [La. Forestry Ass'n v. Sec'y United States DOL, 745 F.3d 653, 2014 U.S. App. LEXIS 2167 \(3d Cir. 2014\)](#).

In case in which 26 states challenged government's Deferred Action for Parents (DAPA) program and government sought stay of preliminary injunction pending appeal, government did not make strong showing that it was likely to succeed on merits on its claim that DAPA did not require notice and comment under Administrative Procedure Act. [Texas v. United States, 787 F.3d 733, 2015 U.S. App. LEXIS 8657 \(5th Cir. 2015\)](#).

Implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program was properly enjoined because States had proven likelihood of success on merits on their procedural claim that DAPA was substantive rule that had to be submitted for notice and comment and on its substantive claim that DAPA was contrary to Immigration and Nationality Act, and States had also satisfied other requirements for preliminary injunction. [Texas v. United States, 809 F.3d 134, 2015 U.S. App. LEXIS 19725 \(5th Cir. 2015\)](#), cert. granted, [577 U.S. 1101, 136 S. Ct. 906, 193 L. Ed. 2d 788, 2016 U.S. LEXIS 841 \(2016\)](#), aff'd, [136 S. Ct. 2271, 195 L. Ed. 2d 638, 2016 U.S. LEXIS 4057 \(2016\)](#).

Alleged denial to petitioners, detained refugees, of rights to participate in rule-making by Immigration and Naturalization Service (INS) under which they were detained and which resulted from alleged invalid promulgation of INS internal guidelines was cured and issue mooted where detainees were offered opportunity to comment on interim rules subsequently published effecting new policy. [Ishtyaq v. Nelson, 627 F. Supp. 13, 1983 U.S. Dist. LEXIS 13104 \(E.D.N.Y. 1983\)](#).

Aliens who were subject to final removal orders, and who had violated supervised release orders by committing crimes or otherwise failing to comply with release conditions, were denied writ of habeas corpus under [28 USCS § 2241](#) because Department of Homeland Security's (DHS) Intensive Supervision Appearance Program (ISAP) did not violate their due process rights, was not beyond DHS' [8 USCS §§ 1231\(a\)\(3\)\(D\), 1253\(b\)](#) authority, and did not violate Administrative Procedure Act (APA), [5 USCS § 553](#); among other things, placement in ISAP was not detention, liberty interest at issue in ISAP was not fundamental as applied to final-order aliens and ISAP, even if it was detention, was not indefinite; further, ISAP, not being new administrative rule, was not subject to APA requirements. [Son Nguyen v. B.I., Inc., 435 F. Supp. 2d 1109, 2006 U.S. Dist. LEXIS 35796 \(D. Or. 2006\)](#).

Unpublished decision: District court properly dismissed foreign law graduate's claim that Executive Office for Immigration Review (EOIR) failed to promulgate change to [8 CFR § 1292.1\(a\)\(2\)](#) correctly because EOIR complied with publication requirements of Administrative Procedures Act, and graduate received notice as matter of law because, while there was error in printing final rule in Code of Federal Regulations, final rule was correctly published in Federal Register, and publication in Federal Register provided notice to those affected by rule. [Romero v. United States DOJ, 556 Fed. Appx. 365, 2014 U.S. App. LEXIS 3430 \(5th Cir. 2014\)](#).

Rescission of Deferred Action for Childhood Arrivals (DACA) program was general statement of policy regarding how DHS would exercise its enforcement discretion; notice-and-comment procedures were not required. [NAACP v.](#)

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[Trump, 298 F. Supp. 3d 209, 2018 U.S. Dist. LEXIS 68589 \(D.D.C. 2018\)](#), aff'd, [140 S. Ct. 1891, 207 L. Ed. 2d 353, 28 Fla. L. Weekly Fed. S. 345, 2020 U.S. LEXIS 3254 \(2020\)](#).

Immigration organizations were entitled to a temporary restraining order and an order to show cause enjoining the President, Attorney General, and Department of Homeland Security (the defendants) from taking any action to implement the rule entitled Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims. 8 C.F.R. pts. 208, 1003, 1208, because the rule irreconcilably conflicted with the INA and the expressed intent of Congress, violated the APA's notice-and-comment provisions, frustrated the organizations' missions and forced them to divert resources outside of their core services, and the executive's interest in deterring asylum seekers—whether or not their claims were meritorious—on a basis that Congress did not authorize carried drastically less weight, if any. [East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 2018 U.S. Dist. LEXIS 198092 \(N.D. Cal. 2018\)](#), aff'd, [950 F.3d 1242, 2020 U.S. App. LEXIS 6620 \(9th Cir. 2020\)](#).

137. Interior Department

Bureau of Indian Affairs violated APA in adopting, subsequent to Court of Appeals' invalidation of existing criteria for higher education grant eligibility, new set of written criteria without following notice and comment rulemaking procedures specified by APA. [Malone v. Bureau of Indian Affairs, 38 F.3d 433, 94 Cal. Daily Op. Service 7782, 94 D.A.R. 14304, 1994 U.S. App. LEXIS 28215 \(9th Cir. 1994\)](#).

Failure of forest service to comply with technical provisions of manual regarding public comment on alternatives to building of forest service road across flood plain does not constitute basis for enjoining project where road has been virtually completed and record indicates that public participated in routing decision. [Sierra Club v. Block, 576 F. Supp. 959, 14 Env'tl. L. Rep. 20009, 1983 U.S. Dist. LEXIS 11265 \(D. Or. 1983\)](#).

Agency statement establishing procedures for oil and gas lease sales was invalid because agency did not follow notice-and-comment rulemaking requirements, nor did agency provide for public comment on environmental impact statement, and agency had no discretion to dispense with public participation opportunities; vacatur was appropriate as standard remedy for arbitrary and capricious agency action because setting aside lease sales would not be overly disruptive. [W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042, 50 Env'tl. L. Rep. 20047, 2020 U.S. Dist. LEXIS 34612 \(D. Idaho 2020\)](#).

138. —Fish and wildlife

President's proclamation issued pursuant to § 3 of Migratory Bird Treaty Act (16 USCS § 704) did not violate any of provisions of Administrative Procedure Act ([5 USCS § 553](#)) where notice of such proclamation was given and where such proclamation was made after a review by Secretary of Interior of findings of Federal Wildlife Service based on extensive study and investigation. [Lansden v. Hart, 168 F.2d 409, 1948 U.S. App. LEXIS 4183 \(7th Cir.\)](#), cert. denied, [335 U.S. 858, 69 S. Ct. 132, 93 L. Ed. 405, 1948 U.S. LEXIS 1600 \(1948\)](#).

United States Fish and Wildlife Service had articulated reasonable basis—Washington western gray squirrel population's lack of biologically and ecologically distinguishing features—for its conclusion that loss of population would not cause significant gap and its decision to deny petition to list squirrels as endangered "distinct population segment" under [16 USCS § 1533](#) was not arbitrary or capricious. [Northwest Ecosystem Alliance v. United States Fish & Wildlife Serv., 475 F.3d 1136, 63 Env't Rep. Cas. \(BNA\) 1993, 2007 U.S. App. LEXIS 2296 \(9th Cir. 2007\)](#).

Abbreviated period for public comment on proposed rules governing hunting of migratory birds did not contravene public participation provisions of [5 USCS § 553\(c\)\(d\)\(3\)](#) where regulations were product of year-long process, including air and ground surveys, data analysis, Canadian and state wildlife management agencies' recommendations, review by Water Fowl Advisory Committee, and where five of seven plaintiff organizations were sent copies of proposed water fowl regulations prior to publication. [Fund for Animals v. Frizzell, 402 F. Supp. 35, 8 Env't Rep. Cas. \(BNA\) 1393, 1975 U.S. Dist. LEXIS 15646 \(D.D.C.\)](#), aff'd, [530 F.2d 982, 174 U.S. App. D.C. 130, 8 Env't Rep. Cas. \(BNA\) 1591, 6 Env'tl. L. Rep. 20188, 1975 U.S. App. LEXIS 11314 \(D.C. Cir. 1975\)](#).

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Notice provided by Fish and Wildlife Service regarding proposed critical habitat for Alameda whipsnake was inadequate under Administrative Procedures Act, [5 USCS §§ 551](#) et seq., and Endangered Species Act, [16 USCS §§ 1531](#) et seq., although Service complied with notice requirements for proposal for critical habitat designation for snake to extent of timing and method of giving notice because notice provided by Service in regard to proposed rule deprived public of meaningful opportunity to comment and to offer informed criticism and comments. [Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv.](#), 268 F. Supp. 2d 1197, 2003 U.S. Dist. LEXIS 15141 (E.D. Cal. 2003).

Because final rule deviated substantially from proposed rule, defendants failed to provide public with adequate notice and opportunity for comment on Eastern Distinct Population Segments (DPS), in violation of [5 USCS § 553](#); because Fish and Wildlife Service (FWS) expanded boundaries of DPS in final rule, it was bypassing application of Endangered Species Act (ESA), [16 USCS §§ 1531–1544](#), in non-core population areas; therefore, FWS's application of Policy Regarding Recognition of Distinct Vertebrate Population (DPS Policy) was inconsistent with statute under which regulations were promulgated, and final rule was vacated and remanded for reconsideration by FWS. [Nat'l Wildlife Fed'n v. Norton](#), 386 F. Supp. 2d 553, 61 Env't Rep. Cas. (BNA) 1822, 2005 U.S. Dist. LEXIS 24550 (D. Vt. 2005).

In action in which environmental organizations filed suit against defendants, Bureau of Land Management and U.S. Fish and Wildlife Service, alleging violations of Endangered Species Act (ESA), NEPA, Federal Land Policy and Management Act of 1976, and APA, Service did not commit procedural violation under ESA or APA where: (1) Service did provide notice that it might exclude area from critical habitat depending on results of economic analysis; and (2) plaintiffs and other interested parties provided comment on draft economic analysis, which was basis for ultimate exclusions. [Ctr. for Biological Diversity v. BLM](#), 422 F. Supp. 2d 1115, 2006 U.S. Dist. LEXIS 14675 (N.D. Cal. 2006).

Where residents and non-profit corporations sought temporary restraining order (TRO) preventing Department of Interior and United States Fish and Wildlife Service (FWS) from conducting limited black bear hunt in national wildlife refuge, motion for TRO was denied because (1) residents' claim that their ability to view bears would be irreparably harmed was speculative where residents had never seen black bear at refuge; (2) members of non-profit organizations would not be exposed to circumstances of hunt where hunt was to take place in remote area that would be closed to visitors who were not participating in hunt; and (3) residents and organizations failed to show likelihood of success in proving that FWS violated National Environmental Policy Act or rulemaking and notice requirements of Administrative Procedure Act, [5 USCS § 553\(b\)\(3\)\(A\)](#), where FWS presented evidence showing (a) that FWS engaged in proper rulemaking procedures, (b) that FWS issued Finding of No Significant Impact pursuant to [42 USCS § 4332\(2\)\(C\)](#), (c) that hunt was compatible with FWS's mission, and (d) that hunt would have nominal impact on bear population. [Moore v. Kempthorne](#), 464 F. Supp. 2d 519, 2006 U.S. Dist. LEXIS 89274 (E.D. Va. 2006).

139. —Minerals

Notice given prior to Secretary of Interior's promulgation of regulations authorizing Department of Interior to use geographic areas to allocate royalty crude oil under Mineral Leasing Act ([30 USCS § 192](#)) was sufficient since it provided enough information to alert interested parties to potential effect of regulations. [Laketon Asphalt Refining, Inc. v. United States Dep't of Interior](#), 624 F.2d 784, 1980 U.S. App. LEXIS 15995 (7th Cir. 1980).

"Procedure paper", unpublished agency paper developed by Minerals Management Service of Department of Interior for valuing natural gas liquid products, focusing entirely on spot market price, rather than range of various types of prices presented in governing regulation, was "rule" and its promulgation constituted rulemaking in violation of APA's notice and comment requirements. [Phillips Petroleum Co. v. Johnson](#), 22 F.3d 616, 129 Oil & Gas Rep. 136, 1994 U.S. App. LEXIS 14315 (5th Cir. 1994), modified, on reh'g, 1994 U.S. App. LEXIS 40854 (5th Cir. Sept. 7, 1994), cert. denied, 514 U.S. 1092, 115 S. Ct. 1817, 131 L. Ed. 2d 740, 1995 U.S. LEXIS 3035 (1995).

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In case in which conservation group sued Secretary of Interior and other federal official, challenging promulgation of final rule for [Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams, 73 Fed. Reg. 75,814 \(Dec. 12, 2008\)](#) and Secretary and officials filed motions to remand, vacate rule, and dismiss case for lack of jurisdiction, granting motions would wrongfully permit them to bypass established statutory procedures for repealing agency rule. agency had to follow same procedure to repeal rule as it did to enact rule. [Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 70 Env't Rep. Cas. \(BNA\) 1527, 39 Env'tl. L. Rep. 20174, 2009 U.S. Dist. LEXIS 73019 \(D.D.C. 2009\)](#).

In an action under the Administrative Procedures Act (APA), in which plaintiff states challenged the Department of Interior's repeal of the Valuation Rule, which governed the payment of royalties on oil, gas and coal extracted from federal and Indian lands, both declaratory relief and vacatur were proper remedies because the Office of Natural Resources Revenue (ONRR) violated established legal precedent requiring an agency to provide a reasoned explanation for disregarding and contradicting facts and circumstances underlying the adoption of the rules that it now sought to repeal; and the ONRR failed to comport with the APA's notice and comment requirement, denying the public a meaningful opportunity to participate in the regulatory process. [California v. United States DOI, 381 F. Supp. 3d 1153, 49 Env'tl. L. Rep. 20063, 2019 U.S. Dist. LEXIS 66300 \(N.D. Cal. 2019\)](#).

140. Interstate Commerce Commission/Surface Transportation Board

ICC's Gateway Elimination Regulations were not invalid for having been promulgated without adequate notice, since industry was generally on notice that ICC was proposing revision of policy on gateway issues; [5 USCS § 553](#) does not require every aspect of proposed order to be explained in general notice and technical flaw in notice may be overcome if actual conduct of proceeding puts participants under notice of what is under contemplation. [Common Carrier Conference-Irregular Route v. United States, 534 F.2d 981, 175 U.S. App. D.C. 244, 1976 U.S. App. LEXIS 11650 \(D.C. Cir.\)](#), cert. denied, 429 U.S. 921, 97 S. Ct. 317, 50 L. Ed. 2d 288, 1976 U.S. LEXIS 3316 (1976).

Notice requirements of Administrative Procedure Act ([5 USCS §§ 553\(b\)](#) and [554\(b\)](#)) do not apply in relation to order of Interstate Commerce Commission which dismissed railroad's application for inclusion in railroad merger, and alternative petition for additional traffic protective conditions, because § 553(b) applies only to rulemaking and § 554(b) applies only to agency adjudication required by statute to be determined on record after opportunity for agency hearing. [Chicago, M., S. P. & P. R. Co. v. United States, 585 F.2d 254, 1978 U.S. App. LEXIS 8636 \(7th Cir. 1978\)](#).

Interstate Commerce Commission failed to satisfy requirement of [5 USCS § 553\(b\)](#) in prescribing new rules and adopting new procedures for licensing of tour brokers where (1) although Commission published general notice in Federal Register, it was not notice of proposed rulemaking but was one looking toward formulation of possible legislative amendments which might be proposed to Congress (2) alleged notice did not provide reference to legal authority under which rule was proposed, as required by § 553(b)(2), and (3) Commission did not comply with § 553(b)(3) in not including terms or substance of proposed rule. [National Tour Brokers Asso. v. United States, 591 F.2d 896, 192 U.S. App. D.C. 287, 1978 U.S. App. LEXIS 7185 \(D.C. Cir. 1978\)](#).

Initial notice of proposed rulemaking by Interstate Commerce Commission involving applications seeking substitution of single-line service for existing joint-line operations was in compliance with Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) even though initial notice gave no indication of any intent to change method by which protest of interested persons would be handled once agency had determined that carrier's protest would be allowed where notice fairly apprised interested persons of subjects and issues before Commission. [Bonney Motor Express, Inc. v. United States, 640 F.2d 646, 1981 U.S. App. LEXIS 18904 \(5th Cir. 1981\)](#).

Interstate Commerce Commission's notice of proposed rulemaking relative to standard of revenue adequacy for market dominant carriers was adequate under [5 USCS § 553\(b\)\(3\)](#) where it (1) alerted shipper interests to fact that ICC perceived difficulties with use of ratios and flow of funds analyses and (2) explicitly defined what "ICC" considered current cost of capital to be. [Bessemer & L. E. R. Co. v. Interstate Commerce Com., 691 F.2d 1104](#),

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[1982 U.S. App. LEXIS 24708 \(3d Cir. 1982\)](#), cert. denied, 462 U.S. 1110, 103 S. Ct. 2463, 77 L. Ed. 2d 1340, 1983 U.S. LEXIS 468 (1983).

In action taken by Interstate Commerce Commission in eliminating from annual reports required to be filed by railroads certain schedules that Commission decided did not contain information needed by it on regular and frequent basis for its own administrative purposes was lawful action and Commission need not weigh public desires for information against Commission needs. [Simmons v. Interstate Commerce Com., 757 F.2d 296, 244 U.S. App. D.C. 221, 1985 U.S. App. LEXIS 31384 \(D.C. Cir. 1985\)](#).

New rules adopted by ICC for procedures in railroad abandonment applications did not have “substantial impact” on any parties or any persons not involved in proceedings thereunder, and therefore promulgation of such rules did not have to comply with public hearing requirements of [5 USCS § 553](#). [Pennsylvania v. United States, 361 F. Supp. 208, 1973 U.S. Dist. LEXIS 13373 \(M.D. Pa.\)](#), aff'd, 414 U.S. 1017, 94 S. Ct. 440, 38 L. Ed. 2d 310, 1973 U.S. LEXIS 1358 (1973).

Under [5 USCS § 553](#), Interstate Commerce Commission has discretion to permit oral presentations and reply submissions, and, if so, to determine scope, character, and time sequence. [Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 6 Env't Rep. Cas. \(BNA\) 1129, 1973 U.S. Dist. LEXIS 10553 \(D. Del. 1973\)](#).

Court would not consider whether action by Interstate Commerce Commission in diverting from ongoing adjudicatory proceeding and electing to proceed by rulemaking, without giving notice of proposed rulemaking, triggered rulemaking requirements of [5 USCS § 553](#), where defect was known to participants, who did not raise this point. [Southern R. Co. v. United States, 412 F. Supp. 1122, 1976 U.S. Dist. LEXIS 15698 \(D.D.C. 1976\)](#), app. after remand, [502 F. Supp. 975, 1980 U.S. Dist. LEXIS 17136 \(D.D.C. 1980\)](#).

141. —Rates and charges

Neither negotiated rates policy of Interstate Commerce Commission nor application of policy to setting of maximum reasonable rates for coal shipments violates Administrative Procedure Act. [Burlington Northern, Inc. v. United States, 679 F.2d 915, 220 U.S. App. D.C. 97, 1982 U.S. App. LEXIS 21080 \(D.C. Cir. 1982\)](#).

Although revised notice of Interstate Commerce Commission is deficient in failing to include in title that rule making is involved, proceeding as whole, including text of previous notice, full text of revised notice, and comments subsequently received, fully informs public that purpose of proceeding is to formulate rules governing minimum rail rates. [Water Transport Asso. v. Interstate Commerce Com., 684 F.2d 81, 221 U.S. App. D.C. 307, 1982 U.S. App. LEXIS 17107 \(D.C. Cir. 1982\)](#).

Decision of Interstate Commerce Commission in rate structure investigation that “rate-break” rule which was previously mandatory in district be made voluntary was rulemaking and notice requirements of [5 USCS § 553](#) should have been met. [Chicago, B. & Q. R. Co. v. United States, 242 F. Supp. 414, 1965 U.S. Dist. LEXIS 7761 \(N.D. Ill. 1965\)](#), aff'd, [382 U.S. 422, 86 S. Ct. 616, 15 L. Ed. 2d 498, 1966 U.S. LEXIS 2423 \(1966\)](#).

The hearing procedures provided for in [5 USCS § 553](#) are applicable to promulgation of rules and regulations establishing additional “incentive” per diem charges for unequipped boxcars under [former] 49 USCS § 1(14). [Long Island R. Co. v. United States, 318 F. Supp. 490, 1970 U.S. Dist. LEXIS 10832 \(E.D.N.Y. 1970\)](#), disapproved, [United States v. Florida E. C. R. Co., 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223, 1973 U.S. LEXIS 137 \(1973\)](#).

Although proceeding in which Interstate Commerce Commission adopted order requiring railroads to pay incentive per diem charges on box cars on year-round basis did not demand that Commission hear oral testimony and permit cross examination, Commission was still obligated to afford fair notice of what Commission intended to do and reasonable opportunity for interested parties to know what issues were being raised so that they would have opportunity to participate in such rule-making process. [Ann Arbor R. Co. v. United States, 358 F. Supp. 933, 1973 U.S. Dist. LEXIS 13834 \(E.D. Pa. 1973\)](#).

142. Labor and employment

[29 CFR § 552.109\(a\)](#) was valid and binding regulation because Department of Labor (DOL) intended regulation as binding application of its rulemaking authority, and DOL satisfied notice requirements of [5 USCS § 553\(b\)\(3\)](#) when it published rule proposal for special Fair Labor Standards Act (FLSA) treatment of employees of “covered enterprises”; proposal meant only that DOL was considering matter, not that it would be adopted; thus, later withdrawal of proposed rule and determination that exempted all third-party-employed companionship workers from FLSA were reasonably foreseeable. [Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 127 S. Ct. 2339, 168 L. Ed. 2d 54, 20 Fla. L. Weekly Fed. S 329, 12 Wage & Hour Cas. 2d \(BNA\) 1089, 2007 U.S. LEXIS 7717 \(2007\).](#)

Procedures of Secretary of Labor in connection with entry of aliens for purpose of performing labor in United States are subject to notice and comment provisions of [5 USCS § 553](#). [Lewis--Mota v. Secretary of Labor, 469 F.2d 478, 1972 U.S. App. LEXIS 6685 \(2d Cir. 1972\).](#)

Civil Service Commission is not required to provide “written comment” due process procedures before reducing cost of living allowances. [Curlott v. Campbell, 598 F.2d 1175, 1979 U.S. App. LEXIS 13915 \(9th Cir. 1979\).](#)

Record clearly demonstrated that Department of Labor did not satisfy its notice and comment obligations; as result of Department’s content restriction, Department refused to receive comments on and to consider or explain relevant and significant issues; moreover, content restriction was so severe in scope, by preventing any discussion of substance or merits of either set of regulations, that opportunity for comment could not be said to have been meaningful opportunity. [N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 20 Wage & Hour Cas. 2d \(BNA\) 34, 2012 U.S. App. LEXIS 26136 \(4th Cir. 2012\).](#)

Conclusion that Department of Labor did not provide meaningful opportunity for comment was supported by exceedingly short duration of comment period; although Administrative Procedure Act, [5 USCS §§ 553](#), and [701–706](#), did not prescribe minimum number of days necessary to allow for adequate comment, based on important interests underlying requirements, instances actually warranting 10-day comment period would be rare. [N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 20 Wage & Hour Cas. 2d \(BNA\) 34, 2012 U.S. App. LEXIS 26136 \(4th Cir. 2012\).](#)

Department of Labor had to either publish adverse effect wage rate for foreign temporary agricultural workers prior to starting period of workers program period, or provide notice and comment that it was no longer doing so. [United Farmworkers of Am. v. Chao, 227 F. Supp. 2d 102, 2002 U.S. Dist. LEXIS 17031 \(D.D.C. 2002\).](#)

Because original financial reporting rule for unions, promulgated by defendant Secretary of Department of Labor (DOL), had been vacated, DOL was required to either comply with notice-and-comment procedures or good-cause exception of [5 USCS § 553\(b\)\(3\)\(B\)](#), and since it had done neither, its new rule was invalid and was again vacated on challenge by plaintiff union. [AFL-CIO v. Chao, 496 F. Supp. 2d 76, 183 L.R.R.M. \(BNA\) 3110, 154 Lab. Cas. \(CCH\) ¶10876, 2007 U.S. Dist. LEXIS 50955 \(D.D.C. 2007\).](#)

Because rule issued by defendant Secretary of Department of Labor to publish only claimants’ initials in Longshore and Harbor Workers’ Compensation Act and Black Lung Benefits Act decisions reflected value judgment that claimants’ privacy interests trumped right to public access to administrative determinations, it was substantive and not exempt under notice and comment procedures of [5 USCS § 553\(b\)\(3\)\(A\)](#), thus, plaintiff employers’ association had stated claim under Administrative Procedure Act. [Nat'l Ass'n of Waterfront Empls. v. Chao, 587 F. Supp. 2d 90, 2008 U.S. Dist. LEXIS 92722 \(D.D.C. 2008\).](#)

Unpublished decision: Decision by Benefits Review Board that affirmed award of benefits by ALJ to coal miner under [30 USCS § 932\(a\)](#) was affirmed because there was substantial evidence to support ALJ’s decision to give greater weight to medical opinion that accounted for contributions that both cigarette smoking and coal mine dust exposure made to miner’s condition; ALJ acted within scope of ALJ’s discretionary authority in consulting preamble to 2001 amendments to Department of Labor regulations for guidance when weighing conflicting medical evidence

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and, in so doing, violated neither notice and comment requirements of [5 USCS § 553](#) nor right to fair hearing pursuant to Due Process Clause of Fifth Amendment. [Little David Coal Co. v. Dir., Office of Workers' Comp. Programs, 532 Fed. Appx. 633, 2012 FED App. 0798N, 2012 U.S. App. LEXIS 15442 \(6th Cir. 2012\)](#).

[20 CFR § 410.490](#) is invalid under [5 USCS § 553\(b\)](#) and (c), as incorporated into Black Lung Benefits Act by [5 USCS § 554\(d\)](#), [33 USCS § 919\(d\)](#), and [30 USCS § 932\(a\)](#), as applied to claims arising under Part C of Act, since mine operator could not have known at time notice of proposed rulemaking in connection with promulgation of § 410.490 was issued that it would be subjected to liability thereunder for claim under Part C and operator was deprived opportunity to comment and argue as “interested person” that § 410.490, which does not allow rebuttal of presumption of total disability by establishing that disability did not arise out of coal mine employment, conflicts with requirement of [30 USCS § 923\(b\)](#) that all relevant evidence be considered, and with requirement of §§ 901(a) and 902(f)(1)(A) that benefits be awarded only for total disability due to pneumoconiosis arising out of coal mine employment. *Whiteman v Boyle Land & Fuel Coal Co. & Rockwood Ins. Co.* (1988) 11 BLR 1-99.

143. —Occupational safety and health

Notice of additional comment period concerning “issue of appropriate protections for workers transferred or removed from lead exposure” which did not propose any particular Medical Removal Protection benefit provision but solicited comments and evidence and scheduled informal hearing as to “whether, and to what extent, standards should require employers to protect employees who submit to medical surveillance and as result are removed from lead exposures in order to preserve employees’ health” and stated that there should be MRP benefits “that would maintain rate of pay, seniority and other rights of employee” when transferred or removed from his or her job as result of increased health risk from exposure to lead, and requested comments and information relating to 13 specific issues and in particular what should be appropriate scope of MRP provision more than adequately sufficed to apprise party that there was issue regarding breadth of MRP benefits. [United Steelworkers of America, etc. v. Schuylkill Metals Corp., 828 F.2d 314, 13 O.S.H. Cas. \(BNA\) 1393, 1987 O.S.H. Dec. \(CCH\) ¶28059, 1987 U.S. App. LEXIS 13065 \(5th Cir. 1987\)](#).

OSHA’s rule amending reporting requirements in cases of workplace death or multiple injury is regulation aimed at information gathering for range of potential hazards rather than “standard” aimed at correction of particular risk. [Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 312 U.S. App. D.C. 395, 17 O.S.H. Cas. \(BNA\) 1272, 1995 O.S.H. Dec. \(CCH\) ¶30831, 1995 U.S. App. LEXIS 15102 \(D.C. Cir. 1995\)](#).

OSHA directive, pursuant to which each employer in selected industries will be inspected unless it adopts comprehensive safety and health program standards that in some respects exceeded those required by law was substantive rule requiring notice and comment. [Chamber of Commerce of the United States v. United States DOL, 174 F.3d 206, 335 U.S. App. D.C. 370, 18 O.S.H. Cas. \(BNA\) 1673, 1999 O.S.H. Dec. \(CCH\) ¶31787, 1999 U.S. App. LEXIS 6367 \(D.C. Cir. 1999\)](#).

Mine Safety and Health Administration’s (MSHA) decision not to alter diesel particulate matter standard for mines, which had been promulgated under [30 USCS § 811](#) and was already set to take effect, was not arbitrary and capricious; MSHA had previously expressed its intent to convert measurement used for standard but explained that it lacked scientific data to support conversion; because final standard was to take effect by operation of law, decision against conversion was not subject to notice and comment procedures under § 811 or [5 USCS § 553](#). [Nat’l Mining Ass’n v. MSHA, 599 F.3d 662, 389 U.S. App. D.C. 400, 40 Env’tl. L. Rep. 20088, 2010 U.S. App. LEXIS 5790 \(D.C. Cir. 2010\)](#).

Secretary’s commentaries on supervisory personnel exclusion of [30 CFR § 48.2\(a\)\(1\)\(ii\)](#) in MSHA memoranda and manual which required training of supervisory personnel on basis of functional distinctions was invalid attempt to amend regulation, lacked force and effect of law, and must stand as written, where commentaries were not promulgated in accordance with [30 USCS § 811](#), which requires all rules concerning mandatory health or safety standards be promulgated in accordance with notice and comment requirements of [5 USCS § 553](#), requires Secretary to publish any proposed rule modifying mandatory health or safety standard in Federal Register, and

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requires secretary to permit public comment on proposed regulation, since commentaries were not genuine interpretations or general policy statements. [Secretary v Western Fuels-Utah, Inc., 11 FMSHRC 278 \(1989\)](#).

144. —Office of Personnel Management

Rule promulgated by Office of Personnel Management which changed method by which civil service retirement benefits of part-time flexible postal employees retiring after February 11, 1978 are calculated is interpretative rule and constitutes proper interpretation of Civil Service Retirement Act ([5 USCS § 8332\(b\)\(1\)](#)). [American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 227 U.S. App. D.C. 351, 1983 U.S. App. LEXIS 28213 \(D.C. Cir. 1983\)](#), cert. denied, 465 U.S. 1100, 104 S. Ct. 1594, 80 L. Ed. 2d 126, 1984 U.S. LEXIS 1464 (1984).

Federal Personnel Manual Letter implementing Executive Order requiring drug testing of federal employees is invalid because Office of Personnel Management failed to comply with notice and comment procedures in issuing letter, which is required since letter is mandatory rule rather than agency guideline as contended by government. [National Treasury Employees Union v. Reagan, 685 F. Supp. 1346, 3 I.E.R. Cas. \(BNA\) 359, 1988 U.S. Dist. LEXIS 3990 \(E.D. La. 1988\)](#).

145. Military personnel and veterans

Where petitioner, political organizer, failed to carry burden to establish that validity of administrative directive of Veterans Affairs (VA), [38 CFR § 1.218\(a\)\(14\)](#), was properly before Federal Circuit for review under [38 USCS § 502](#), his challenge to prohibition on partisan political activity at VA centers was denied. Procedures under [5 USCS § 553\(e\)](#) were not required. [Preminger v. Sec'y of Veterans Affairs, 632 F.3d 1345, 2011 U.S. App. LEXIS 1559 \(Fed. Cir. 2011\)](#).

Selective Service Regulations are not rendered invalid where promulgated after publication in Federal Register and 30 day comment period prescribed by statute (50 USCS Appx § 463(b)), although agency has stated policy of allowing 60 days for comment, in accordance with Executive Order No. 12044 ([5 USCS § 553](#) note), which prescribes 60 day notice and comment period for agency regulations, excepting those issued with respect to military functions, since Executive Order No. 12044 has no underlying statutory foundation, not having been issued pursuant to statute, and cannot be given force and effect of law and enforced by court; only President can enforce 60 day period. [United States v. Martin, 557 F. Supp. 681, 1982 U.S. Dist. LEXIS 17175 \(N.D. Iowa 1982\)](#), rev'd, [733 F.2d 1309, 1984 U.S. App. LEXIS 22816 \(8th Cir. 1984\)](#).

Office of Civilian Health and Medical Program of Uniformed Services (OCHAMPUS) failed to comply with rulemaking requirements of Administrative Procedure Act in changing standards and methods for reimbursement of Residential Treatment Centers, where no public notice of certain provisions was given until 5 months after critical dates used to determine reimbursement amounts, and basis and purpose statement in Federal Register notice was inadequate. [National Asso. of Psychiatric Treatment Centers for Children v. Weinberger, 658 F. Supp. 48, 1987 U.S. Dist. LEXIS 3525 \(D. Colo. 1987\)](#).

146. National Marine Fisheries Service

Remand to National Marine Fisheries Service was unnecessary where Service conducted two new rule-makings, both of which sought public comment, after determining that sliding scale method was best method to calculate number of Pacific whiting passing through Makah Indian Tribe's fishing grounds. [Midwater Trawlers Coop. v. DOC, 393 F.3d 994, 35 Env'tl. L. Rep. 20006, 2004 U.S. App. LEXIS 26896 \(9th Cir. 2004\)](#).

Commerce Secretary/National Marine Fisheries Service's promulgation of regulations requiring shrimp trawlers to use turtle exclusion devices or in some instances to reduce tow times was procedurally proper under [5 USCS § 553\(b\)](#), where agency published proposed rules in Federal Register, conducted 16 public hearings that were properly noticed, and changed proposed rules to include reduced tow times provision upon frequent suggestion through public comment, because agency was not even required to hold public hearings on these regulations

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pursuant to Endangered Species Act ([16 USCS §§ 1531](#) et seq.), but did in fact notify many concerned parties through various means, hold hearings, and achieve final regulations that were no surprise to plaintiffs. [La. ex rel. Guste v. Verity](#), 681 F. Supp. 1178, 18 Env'tl. L. Rep. 20944, 1988 U.S. Dist. LEXIS 9877 (E.D. La.), aff'd, 850 F.2d 211, 1988 U.S. App. LEXIS 9958 (5th Cir. 1988).

National Marine Fisheries Service did not violate Magnuson-Stevens Fishery Conservation and Management Act, [16 USCS §§ 1801](#) et seq., or Administrative Procedure Act, [5 USCS §§ 551](#) et seq., by failing to provide notice and opportunity for comment on its decision, published via emergency rule, to set shark fishing quotas and to continue suspension of non-quota management measures. [Ocean Conservancy v. Evans](#), 260 F. Supp. 2d 1162, 2003 U.S. Dist. LEXIS 7081 (M.D. Fla. 2003).

National Marine Fisheries Service's decision to grant petition to list beluga whales as endangered species under Endangered Species Act (ESA), [16 USCS §§ 1531](#) et seq., was rational and was supported by administrative record because: under Service's definition of unacceptably high risk of extinction for large whales, Cook Inlet beluga easily qualified as endangered; Service had previously concluded that reasonable, conservative definition for endangered status for large whales was probability of extinction greater than or equal to 1 percent in 100 years, and results of status review for Cook Inlet beluga whale indicated 26 percent risk of extinction in 100 years; agency's population viability analysis represented best available science under [16 USCS § 1533\(b\)\(1\)\(A\)](#) and was therefore entitled to deference; Service clearly thought about state's objections and provided reasoned replies, which was all [5 USCS § 553](#) required; and written justification received after final rulemaking was sufficient to satisfy agency's obligation under [16 USCS § 1533\(i\)](#). [Alaska v. Lubchenco](#), 825 F. Supp. 2d 209, 42 Env'tl. L. Rep. 20348, 2011 U.S. Dist. LEXIS 133840 (D.D.C. 2011).

147. Office of Thrift Supervision

Office of Thrift Supervision's adoption of rule allowing interstate branching of federal savings institutions is not arbitrary and capricious under [5 USCS § 553\(b\)\(3\)](#), where rule was challenged on grounds that agency failed to give notice of studies and data it relied upon in making its decision, because agency need not identify specific studies or data since proposed rule did not rely upon any specific studies. [Conference of State Bank Supervisors v. Office of Thrift Supervision](#), 792 F. Supp. 837, 1992 U.S. Dist. LEXIS 8978 (D.D.C. 1992).

Office of Thrift Supervision (OTS) is enjoined from enforcing interim final rule governing mutual-to-stock conversions of savings associations, where OTS issued rule without prior notice and opportunity for comment, in reliance on good cause exception of Administrative Procedure Act ([5 USCS § 553\(b\)\(3\)\(B\)](#)), because (1) OTS could not rely on fact that it received public comments in response to another rule since that rule discussed different matters from interim rule, (2) use of good cause exception cannot be justified out of fear that savings association would apply for conversion before new rule becomes effective, (3) practical reach of rule is quite expansive, and (4) rule is not limited in time. [Thrift Depositors of Am. v. Office of Thrift Supervision](#), 862 F. Supp. 586, 1994 U.S. Dist. LEXIS 14374 (D.D.C. 1994), remanded, [1996 U.S. App. LEXIS 14234](#) (D.C. Cir. Apr. 4, 1996).

148. Parole Board

Due process did not require Board of Parole to provide federal prison inmates with opportunity for oral presentation of their views concerning Board's proposed policy rules governing granting or denial of parole. [Pickus v. United States Board of Parole](#), 543 F.2d 240, 177 U.S. App. D.C. 93, 1976 U.S. App. LEXIS 8654 (D.C. Cir. 1976).

Parole guidelines calculated to have substantial effect on ultimate parole decisions are not exempt from rule making. [Guerra v. Meese](#), 614 F. Supp. 1430, 1985 U.S. Dist. LEXIS 17276 (D.D.C. 1985).

149. Transportation

In proceeding by National Highway Traffic Safety Administration to amend standards relating to flashers, where Administration (1) published notice that it would adopt SAE standards, (2) adopted standards, but deleted SAE's sampling techniques from standard, (3) published notice as to deletion of sampling requirement after objection, (4)

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agreed with industry objectant that SAE standards could not be met without using sampling techniques, and (5) downgraded standards, downgrading of standards without notice violated [5 USCS § 553](#) and deprived consumer representatives of opportunity to comment on downgrading issue, and defect could not be disregarded, even though consumers petitioned for amendment or repeal of standard. [Wagner Electric Corp. v. Volpe, 466 F.2d 1013, 1972 U.S. App. LEXIS 7718 \(3d Cir. 1972\)](#).

Department of Transportation orders regulating airfare advertising required APA notice-and-comment procedures since orders were legislative rules where they used mandatory language and involved Department's practice of granting "exemptions" and Department published certain rules in C.F.R. [State of Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 276 U.S. App. D.C. 112, 1989 U.S. App. LEXIS 2238 \(D.C. Cir. 1989\)](#).

Although Department of Transportation (DOT), in promulgating certain rules under Air Transportation Safety and System Stabilization Act, [49 USCS 40101](#) nt., should not have labeled first through third rules as "final," DOT provided meaningful opportunity to comment before rules became effective, as required by Administrative Procedure Act, [5 USCS § 553\(c\)](#), where (1) interested persons, including carriers challenging rules, had three opportunities to comment while Fourth Final Rules was still in formative stages, (2) challenging carriers each commented on rules, and (3) some points made by carriers regarding these rules were adopted by DOT. [Fed. Express Corp. v. Mineta, 373 F.3d 112, 362 U.S. App. D.C. 103, 2004 U.S. App. LEXIS 13687 \(D.C. Cir. 2004\)](#).

[49 C.F.R. § 395.8\(k\)\(1\)](#), promulgated under [49 USCS § 31144\(a\)\(1\)](#), (b)(1), and [49 USCS § 31502\(b\)\(2\)](#), expressly required carriers to maintain supporting materials for each employed driver, which was defined in [49 C.F.R. § 390.5](#) to include independent commercial motor vehicle contractor, and thus, petitioner carrier's "conditional" safety rating by respondent Federal Motor Carrier Safety Administration was upheld due to carrier's failure to obtain and maintain it owner/operators' toll receipts; agency was not required to undergo notice and comment procedures of [5 USCS § 553\(c\)](#), part of APA. [Commodity Carriers, Inc. v. Fed. Motor Carrier Safety Admin., 434 F.3d 604, 369 U.S. App. D.C. 185, 2006 U.S. App. LEXIS 1353 \(D.C. Cir. 2006\)](#).

Court vacated respondent Federal Motor Carrier Safety Administration's rule under [49 USCS §§ 113\(b\), 31502\(d\), 31136](#), increasing daily driving limits for long-haul truck drivers from 10 to 11 hours where plaintiff citizens' group showed that data indicated risks more than doubled during that time, but multiplier used by agency was only 30 percent higher; agency did not disclose methodology by which it would derive time-on-task multipliers until it published rule—too late for interested parties to comment. [Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 377 U.S. App. D.C. 356, 154 Lab. Cas. \(CCH\) ¶135325, 12 Wage & Hour Cas. 2d \(BNA\) 1284, 2007 U.S. App. LEXIS 17513 \(D.C. Cir. 2007\)](#), reh'g denied, [2007 U.S. App. LEXIS 23112 \(D.C. Cir. Sept. 28, 2007\)](#), reh'g, en banc, denied, [2007 U.S. App. LEXIS 23114 \(D.C. Cir. Sept. 28, 2007\)](#).

Federal Railroad Administration (FRA) fully complied with notice requirements of [5 USCS § 553\(b\)](#) and (c) in promulgating rule requiring rear ends of freight trains to be marked with lighting devices, where notice of proposed rulemaking made known substance of rulemaking procedure as development of minimum standards for highly visible rear-end marking devices for trains, FRA made known its renewed interest in prior petition of union which would require lighted markers on freight trains, and notice itself indicated that reflective devices would be permissible only if they met performance criteria finally established by FRA. [Association of American Railroads v. Adams, 485 F. Supp. 1077, 1978 U.S. Dist. LEXIS 15589 \(D.D.C. 1978\)](#).

Department of Transportation's modification of proposed rule did not make notice of such rulemaking defective where plaintiffs had adequate notice of general subject of rulemaking and ought to have anticipated that proposed rule might be modified in light of development during rulemaking process. [American Public Transit Asso. v. Goldschmidt, 485 F. Supp. 811, 10 Envtl. L. Rep. 20581, 1980 U.S. Dist. LEXIS 17142 \(D.D.C. 1980\)](#).

In view of need for speedy action, it was appropriate for Secretary of Transportation and Federal Highway Administrator to issue temporary regulations under Surface Transportation Assistance Act's "Buy America" provisions, without proceeding by way of time-consuming, ordinary rule-making process, and therefore such

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regulations were validly issued under [5 USCS § 553\(b\)\(B\)](#). [Valiant Steel & Equipment, Inc. v. Goldschmidt, 499 F. Supp. 410, 1980 U.S. Dist. LEXIS 17727 \(D.D.C. 1980\)](#).

Plaintiff public interest organizations' claim that federal, state, and regional transportation agencies violated Administrative Procedure Act (APA) when they did not provide notice and opportunities for public comment on use of 2005 analysis year to show conformity with Clean Air Act failed because conformity determination of federal agency was not rule for purposes of APA. [Sierra Club v. Atlanta Reg'l Comm'n, 255 F. Supp. 2d 1319, 2002 U.S. Dist. LEXIS 26096 \(N.D. Ga. 2002\)](#).

150. —Civil Aeronautics Board

Regulations of Civil Aeronautics Board (CAB) requiring charter carriers to provide return flights to pre-paying round-trip passengers was interpretation of existing rule and not substantive rule-making subject to [5 USCS § 553](#) procedures where evidence indicated rule served to remind carriers of repeatedly articulated pre-existing duty, CAB provided sufficient, reasoned analysis of regulations in light of language, purpose, and legislative history surrounding enactment of regulatory powers, policy of protecting passengers against stranding had been consistently articulated and followed for significant period of time, and administrative intent or practical impact of rule did not serve to create new law, rights, or duties. [Arrow Air, Inc. v. Dole, 784 F.2d 1118, 251 U.S. App. D.C. 314, 1986 U.S. App. LEXIS 22188 \(D.C. Cir. 1986\)](#).

Fact that current ratemaking policies of Civil Aeronautics Board were developed for most part in trial-type proceedings does not bind Board to those same procedures for modifying policies or establishing new ones; where ratemaking deals with development of future ratemaking policies involving entire airline industry use of informal rulemaking procedures are appropriate. Domestic Passenger-Fare Level Policies, 44 Ad. L. Rep., 2d 202 (CAB 1978).

Show-cause procedures may be used to cancel tariff rule and adjudicatory hearing is not necessary, since Administrative Procedure Act, [5 USCS § 553](#), only requires notice and comment procedures unless Civil Aeronautics Board's own statute requires on-the-record hearings; former 49 USCS § 1482(d) of Federal Aviation Act provides that rates or rules may be found unlawful after notice and hearing, but does not indicate adjudicatory or on-the-record trial-type hearing is required and, therefore, such hearing is not required where there are no material issues of fact whose resolution requires full trial-type procedures. Failure to Operate or Carry, 79-9-129, CAB Adv Dig, September, 1979, p 65.

Not all policy determinations made by Civil Aeronautics Board must be formal substantive rules; Board considers issue of fairness and undue hardship in determining whether to use notice and comment procedures of rulemaking proceeding; ascertainment of whether concession fee violates former 49 USCS §§ 1373, 1374 constitutes either informal adjudication or interpretive rulemaking, and does not require notice and comment. Army-Air Force Exchange, Travel Agent Services, 80-6-40, CAB Adv Dig, June, 1980, p. 27.

151. —Federal Aviation Administration

FAA's imposition of fee schedule pursuant to interim final rule promulgated under Federal Aviation Reauthorization Act without notice and comment did not violate APA where legislation's history demonstrated that Congress sought rapid action from Agency. [Asiana Airlines v. FAA, 134 F.3d 393, 328 U.S. App. D.C. 237, 1998 U.S. App. LEXIS 1286 \(D.C. Cir. 1998\)](#), app. after remand, [254 F.3d 271, 349 U.S. App. D.C. 194, 2001 U.S. App. LEXIS 15623 \(D.C. Cir. 2001\)](#).

FAA's failure to consider or respond to petitioners' comments on proposed rule to reduce aircraft noise in Grand Canyon was not fatal to rule where rule was proposed by Secretary of Interior under Overflights Act which directs FAA to implement recommendation of Secretary without change except for aviation safety concerns. [Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 332 U.S. App. D.C. 133, 29 Env'tl. L. Rep. 20075, 1998 U.S. App. LEXIS 21588 \(D.C. Cir. 1998\)](#), cert. denied, 526 U.S. 1158, 119 S. Ct. 2046, 144 L. Ed. 2d 214, 1999 U.S. LEXIS 3837 (1999).

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Unpublished decision: Final rule issued by Federal Aviation Administration (FAA), which was to be codified at 14 CFR pt. 71 and which modified certain airspace, was proper because record contained sufficient evidence to support FAA's conclusions that proliferation of Traffic Alert and Collision Avoidance System Resolution Advisories in portion of airspace modified by rule posed significant safety risk and diminished airport efficiency; fact that FAA arrived at one of two alternatives to address these issues did not render its decision unreasonable; decision to move unregulated flyway did not require notice and comment because flyway was mere recommendation to pilots and did not carry with it any binding effect. [Aircraft Owners & Pilots Ass'n v. FAA, 296 Fed. Appx. 92, 2008 U.S. App. LEXIS 21512 \(D.C. Cir. 2008\)](#).

152. —Ships and vessels

“Payback” rule promulgated by Secretary of Transportation, allowing federally subsidized vessels to compete in domestic market upon compliance with specific payback requirements respecting unamortized portion of subsidy plus interest, violated [5 USCS § 553](#) where Secretary's statement of basis and purpose to benefit United States Merchant Marine and entire shipping industry failed to give adequate account of how payback rule served those objectives and why alternative measures were rejected in light of them. [Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847, 258 U.S. App. D.C. 6, 1987 U.S. App. LEXIS 1177 \(D.C. Cir.\)](#), cert. denied, 484 U.S. 819, 108 S. Ct. 76, 98 L. Ed. 2d 39, 1987 U.S. LEXIS 3451 (1987).

Coast Guard's promulgation of regulations permitting testing of lifesaving equipment by independent laboratories from which particular lifesaving gear was exempted was not sufficient notice of later regulations including particular lifesaving equipment previously exempted and included in later regulation. [U.S. Lifesaving Equipment Mfrs' Asso. v. Dole, 567 F. Supp. 696, 1983 U.S. Dist. LEXIS 17192 \(D.D.C. 1983\)](#).

Although court did not dispute that Great Lakes Pilotage Office (GLPO) may have legitimate reason for wanting to exclude cash from pilot association's investment base in calculating compensation rate that pilots could receive for their services, if GLPO intended to modify regulation as to what constituted investment base, then proper course would have been for it to amend regulation after providing appropriate opportunity for notice and comment; requirement of notice and comment, however, is not accomplished by advising party in separate final rule that its investment base will be calculated in manner inconsistent with existing regulation. [Lake Pilots Ass'n v. United States Coast Guard, 257 F. Supp. 2d 148, 2003 U.S. Dist. LEXIS 6370 \(D.D.C. 2003\)](#).

153. Treasury and internal revenue

Administrative Procedure Act ([5 USCS § 553](#)) does not require hearing in exercise of rulemaking authority conferred by Congress; thus, no hearing was required when Secretary of Treasury promulgated final list under Customs Simplification Act of 1956 ([19 USCS § 1402](#), note) and Secretary properly promulgated list after publishing notice and offering opportunity for comment. [C. M. C. Chemicals, Inc. v. United States, 198 F. Supp. 902, 47 Cust. Ct. 466, 1961 Cust. Ct. LEXIS 18 \(Cust. Ct. 1961\)](#).

IRS failed to publish accurate proposed version of regulations pertaining to taxation of proceeds from sale of magazines by tax-exempt organizations to nonmembers under [5 USCS § 553\(b\)\(3\)](#), and thus regulation is invalid, where proposed version described regulations as providing for flexible, case-by-case approach involving certain factors to consider and adopted regulations set out 3 specific methods of calculating tax, because regulation was issued without notice of drastic change in proposal. [American Medical Ass'n v United States, 668 F. Supp. 1085, 61 A.F.T.R.2d \(RIA\) 731 \(ND Ill 1987\)](#).

Tax defendant's motion to suppress evidence obtained using administrative summonses issued by IRS special agent must be denied, where defendant argues that delegation orders were not published in Federal Register so that agent was not properly authorized to issue summonses, because relevant orders by Treasury Secretary delegating authority to issue summonses are matters of agency procedure and need not be published in Federal Register. [United States v McCall, 727 F. Supp. 1252, 65 A.F.T.R.2d \(RIA\) 855 \(ND Ind 1990\)](#).

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Failure of Internal Revenue Service to comply with notice and comment rulemaking in promulgation of revenue procedure requires finding that procedure is not regulation and does not have force of law, but merely sets forth methodology service utilizes in evaluating application. [Beneficial Foundation, Inc. v United States, 8 Cl. Ct. 639, 56 A.F.T.R.2d \(RIA\) 5715 \(1985\)](#).

Treasury regulations applicable to calculation of amount of export income attributable to domestic international sales corporation were not issued in violation of APA where IRS accepted public comments on proposed regulations, held hearing, and issued statement of basis and purposes of adopted regulation. [Dow Corning Corp. v United States, 22 Cl. Ct. 184, 66 A.F.T.R.2d \(RIA\) 5214 \(1990\)](#).

154. Miscellaneous

Notice of hearing stating that Administrator of Federal Security Agency was to fix standard of fill (weight) of oysters to be contained in can was sufficient, even though notice did not advise of any precise proposal to change standard of fill to any specific weight. [Willapoint Oysters, Inc. v Ewing, 174 F.2d 676, 48-2 U.S. Tax Cas. \(CCH\) ¶9414, 1949 U.S. App. LEXIS 4272 \(9th Cir.\)](#), cert. denied, 338 U.S. 860, 70 S. Ct. 101, 94 L. Ed. 527, 1949 U.S. LEXIS 1816 (1949), reh'g denied, 339 U.S. 945, 70 S. Ct. 793, 94 L. Ed. 1360, 1950 U.S. LEXIS 2105 (1950).

Department of Justice's interpretation of 28 C.F.R. pt. 36, app. A, § 4.33.3, as requiring that wheelchair users be provided with comparable, or similar, viewing angles as other patrons, not just unobstructed view of movie screen, did not require additional rulemaking; enforcement action against movie theater owner was warranted by § 4.33.3, and, even if action were not warranted, enforcement would be denied on that ground alone, thus rendering any notice-and-comment argument as surplusage. [United States v. Cinemark USA, Inc., 348 F.3d 569, 2003 FED App. 0395P, 11 Accom. Disabilities Dec. \(CCH\) ¶11-069, 14 Am. Disabilities Cas. \(BNA\) 1788, 2003 U.S. App. LEXIS 22757 \(6th Cir. 2003\)](#), cert. denied, 542 U.S. 937, 124 S. Ct. 2905, 159 L. Ed. 2d 812, 15 Am. Disabilities Cas. (BNA) 1216, 2004 U.S. LEXIS 4609 (2004).

Court of appeals found that SEC violated [5 USCS § 553](#) when it reconsidered and upheld rule which required mutual funds that relied on Exemptive Rules to have board of directors composed of no less than 75 percent of directors who were independent and to have independent chairperson because it relied on cost estimates for implementing rule without giving U.S. Chamber of Commerce opportunity to comment on cost estimates, and court vacated those provisions of rule but withheld issuance of its mandate for 90 days so SEC could reopen record for comment on costs of implementing conditions. [Chamber of Commerce of the United States v. SEC, 443 F.3d 890, 370 U.S. App. D.C. 249, Fed. Sec. L. Rep. \(CCH\) ¶ 93740, Fed. Sec. L. Rep. \(CCH\) ¶93740, 2006 U.S. App. LEXIS 8403 \(D.C. Cir. 2006\)](#).

New Federal Election Commission (FEC) regulations promulgated under Federal Election Campaign Act of 1971, [Pub. L. No. 92-255, 86 Stat. 3](#), exceeded authority of FEC under Federal Election Campaign Act. [Emily's List v. FEC, 581 F.3d 1, 388 U.S. App. D.C. 150, 2009 U.S. App. LEXIS 20768 \(D.C. Cir. 2009\)](#).

Defendant's indictment under Adam Walsh Sex Offender Registration and Notification Act of 2006 (SORNA) had to be dismissed because SORNA did not have retroactive effect at time of indictment; interim regulation issued by Attorney General prior to indictment was not properly promulgated under [5 USCS § 553](#), and comprehensive guidelines making SORNA retroactive were not effective until after defendant was indicted. [United States v. Utesch, 596 F.3d 302, 2010 FED App. 0059P, 2010 U.S. App. LEXIS 4263 \(6th Cir. 2010\)](#).

Sex Offender Registration and Notification Act (SORNA), [42 USCS §§ 16901](#) et seq., became retroactive to pre-enactment offenders on August 1, 2008 because process used by Attorney General for final SMART guidelines was precisely what Administrative Procedures Act (APA) required (guidelines were made available for comment, and following review and discussion of comments, Attorney General issued final rule on July 2, 2008); because APA required 30 days before rule could become effective, SMART guidelines made SORNA retroactive when they became final on August 1, 2008. [United States v. Stevenson, 676 F.3d 557, 2012 FED App. 0052P, 2012 U.S. App. LEXIS 3570 \(6th Cir.\)](#), cert. denied, 568 U.S. 930, 133 S. Ct. 168, 184 L. Ed. 2d 236, 2012 U.S. LEXIS 7731 (2012).

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As to argument that Sentencing, Monitoring, Apprehending, Registering, and Tracking Guidelines failed to satisfy notice-and-comment requirements of Administrative Procedure Act, the Second Circuit joins several of its sister circuits finding that they did. [United States v. Lott, 750 F.3d 214, 2014 U.S. App. LEXIS 7730 \(2d Cir.\)](#), cert. denied, 574 U.S. 900, 135 S. Ct. 253, 190 L. Ed. 2d 187, 2014 U.S. LEXIS 5669 (2014).

Air cargo and mail carrier was entitled to preliminary injunction against enforcement of new policy established by Postmaster General whereby all categories of mail would be routed abroad by most expeditious air service, without regard to type of aircraft used, which policy had effect of depriving plaintiff of most of its mail revenue, where there was no publication or opportunity for interested persons to submit written data or brief on proposed change. [Seaboard World Airlines, Inc. v. Gronouski, 230 F. Supp. 44, 1964 U.S. Dist. LEXIS 8013 \(D.D.C. 1964\)](#).

Federal agencies' promulgation of Permit Revocation Rule, codified at [50 C.F.R. §§ 17.22, 17.32](#), 222.2, was subject to notice and comment requirements of Administrative Procedure Act, [5 USCS § 553](#), as regulation announced new substantive rule. [Spirit of the Sage Council v. Norton, 294 F. Supp. 2d 67, 57 Env't Rep. Cas. \(BNA\) 2103, 34 Env'tl. L. Rep. 20008, 2003 U.S. Dist. LEXIS 22203 \(D.D.C. 2003\)](#), vacated, remanded, [411 F.3d 225, 366 U.S. App. D.C. 249, 60 Env't Rep. Cas. \(BNA\) 1481, 35 Env'tl. L. Rep. 20110, 2005 U.S. App. LEXIS 9885 \(D.C. Cir. 2005\)](#).

United States Customs and Border Protection's distribution notice concerning impact of repeal of Continued Dumping and Subsidy Offset Act, former [19 USCS § 1675c](#) (repealed 2005), was interpretation of statute, and as such, [5 USCS § 553\(b\)\(A\)](#) did not apply. [Southern Shrimp Alliance v. United States, 617 F. Supp. 2d 1334, 33 Ct. Int'l Trade 560, 31 Int'l Trade Rep. \(BNA\) 1472, 2009 Ct. Intl. Trade LEXIS 43 \(Ct. Int'l Trade 2009\)](#).

Agency rule making with respect to issuance of regulations regarding human stem cell research complied with notice and comment requirements because applicable executive order required guidelines for funding embryonic stem cell research, and thus, it did not require notice and comment on whether to fund such research. [Sherley v. Sebelius, 776 F. Supp. 2d 1, 2011 U.S. Dist. LEXIS 81608 \(D.D.C. 2011\)](#), aff'd, [689 F.3d 776, 402 U.S. App. D.C. 178, 2012 U.S. App. LEXIS 17924 \(D.C. Cir. 2012\)](#).

Unpublished decision: Administrative Procedures Act violations were harmless because Sex Offender Registration and Notification Act defendant was not prejudiced by Attorney General's failure to comply with 30-day waiting period requirement or Attorney General's failure to provide notice and public comment period (defendant neither proposes comments he would have made during comment period nor did he choose to involve himself in post-promulgation comment period). [United States v. Byrd, 419 Fed. Appx. 485, 2011 U.S. App. LEXIS 5962 \(5th Cir.\)](#), cert. denied, 565 U.S. 1058, 132 S. Ct. 756, 181 L. Ed. 2d 482, 2011 U.S. LEXIS 8556 (2011).

E. Concise General Statement of Basis and Purpose of Rules

1. In General

155. Generally

If judicial review is to be meaningful, concise general statement of basis and purpose mandated by [5 USCS § 553](#) must enable court to see what major issues of policy were ventilated by informal proceedings and why agency reacted as it did. [Automotive Parts & Accessories Asso. v. Boyd, 407 F.2d 330, 132 U.S. App. D.C. 200, 1968 U.S. App. LEXIS 4351 \(D.C. Cir. 1968\)](#).

APA ([5 USCS § 553](#)) requires agency to provide public with notice of proposed rules, opportunity to comment on them, and "a concise general statement of their basis and purpose" that justifies rules in light of comments received. [Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 168 U.S. App. D.C. 387, 1975 U.S. App. LEXIS 14267 \(D.C. Cir. 1975\)](#).

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Basis and purpose statement required by [5 USCS § 553\(c\)](#) is very significant portion of regulation when issue arises as to its application and scope. [United States v. Frontier Airlines, Inc., 563 F.2d 1008, 14 Av. Cas. \(CCH\) ¶18159, 1977 U.S. App. LEXIS 11186 \(10th Cir. 1977\)](#).

156. Purpose of statement

Procedural requirements of [5 USCS § 553\(b\)](#)–(c) are intended to assist judicial review as well as to provide fair treatment for persons affected by rule, and to this end there must be exchange of views, information, and criticism between interested persons and agency; accordingly, (1) agency proposing informal rulemaking has obligation to make its views known to public in concrete and focused form so as to make criticism or formulation of alternatives possible, and (2) concise and general statement that must accompany rules finally promulgated must be accommodated to realities of judicial scrutiny which do not contemplate that court itself will, by laborious examination of record, formulate in first instance significant issues faced by agency and articulate rationale of their solution, but record must enable court to see what major issues of policy were ventilated by informal proceedings and why agency reacted to them as it did. [Home Box Office, Inc. v. FCC, 567 F.2d 9, 185 U.S. App. D.C. 142, 2 Media L. Rep. \(BNA\) 1561, 2 Media L. Rep. \(BNA\) 1957, 1977 U.S. App. LEXIS 14143 \(D.C. Cir.\)](#), cert. denied, 434 U.S. 829, 98 S. Ct. 111, 54 L. Ed. 2d 89, 3 Media L. Rep. (BNA) 1128, 1977 U.S. LEXIS 4377 (1977), app. after remand, [587 F.2d 1248, 190 U.S. App. D.C. 351, 4 Media L. Rep. \(BNA\) 1488, 1978 U.S. App. LEXIS 8912 \(D.C. Cir. 1978\)](#), limited, [Air Transp. Ass'n of Am. v. FAA, 169 F.3d 1, 335 U.S. App. D.C. 85, 1999 U.S. App. LEXIS 3431 \(D.C. Cir. 1999\)](#).

Purpose of requirement of Administrative Procedure Act that when rule is adopted, statement of its basis and purpose must accompany its publication ([5 USCS § 553\(c\)](#)) is to enable courts, which have duty to exercise review, to be aware of legal and factual framework underlying agency's action. [American Standard, Inc. v. United States, 602 F.2d 256, 220 Ct. Cl. 411, 44 A.F.T.R.2d \(RIA\) 5149 \(1979\)](#).

Purpose of requirement in [5 USCS § 553](#) that when rule is adopted, statement of its basis and purpose is to accompany its publication, is to enable courts, which have duty to exercise review, to be aware of legal and factual framework underlying agency's action. [American Standard, Inc. v. United States, 602 F.2d 256, 220 Ct. Cl. 411, 44 A.F.T.R.2d \(RIA\) 5149 \(1979\)](#).

Purpose of basis and purpose statement is to facilitate meaningful judicial review by enabling court to become aware of legal and factual background of agency decision. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

Purpose of “basis and purpose” statement is to illuminate agency insight into issues raised and its reactions to those issues. [Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 242 U.S. App. D.C. 110, 1984 U.S. App. LEXIS 16325 \(D.C. Cir. 1984\)](#).

Basis and purpose statement is intended to provide information to allow court to exercise judicial review. [United States v. Garner, 767 F.2d 104, 1985 U.S. App. LEXIS 20996 \(5th Cir. 1985\)](#).

Purpose of requirement of [5 USCS § 553\(c\)](#) that agencies incorporate in rules adopted concise general statement of basis and purpose is to provide, for judicial review, enunciation of basis and rationale of agency's action. [Natural Resources Defense Council, Inc. v. SEC, 389 F. Supp. 689, 8 Empl. Prac. Dec. \(CCH\) ¶9835, 7 Env't Rep. Cas. \(BNA\) 1199, 5 Env'tl. L. Rep. 20074, 9 Fair Empl. Prac. Cas. \(BNA\) 16, Fed. Sec. L. Rep. \(CCH\) ¶94910, Fed. Sec. L. Rep. \(CCH\) ¶94910, 1974 U.S. Dist. LEXIS 11687 \(D.D.C. 1974\)](#), app. after remand, [432 F. Supp. 1190, 14 Empl. Prac. Dec. \(CCH\) ¶7647, 10 Env't Rep. Cas. \(BNA\) 1026, 7 Env'tl. L. Rep. 20434, 14 Fair Empl. Prac. Cas. \(BNA\) 1544, Fed. Sec. L. Rep. \(CCH\) ¶96057, 1977 U.S. Dist. LEXIS 15800 \(D.D.C. 1977\)](#).

Basis and purpose statement serves primary function of permitting courts to scrutinize why and how regulations were actually adopted; in informal rulemaking proceedings, statement must alert reader to background behind

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comments, but other sources may be used to cast light on factual basis of statement. [Walter O. Boswell Memorial Hospital v. Heckler, 573 F. Supp. 884, 1983 U.S. Dist. LEXIS 13359 \(D.D.C. 1983\)](#), remanded, [749 F.2d 788, 242 U.S. App. D.C. 110, 1984 U.S. App. LEXIS 16325 \(D.C. Cir. 1984\)](#), disapproved, [St. James Hospital v. Heckler, 760 F.2d 1460, 1985 U.S. App. LEXIS 31014 \(7th Cir. 1985\)](#).

157. Time for statement

Mere failure to publish statement of rule's basis and purpose at same moment as regulations are published in Federal Register does not constitute violation of [5 USCS § 553\(c\)](#); rather inquiry must be whether rules and statement are published close enough together in time so that there is no doubt that statement accompanies rather than rationalizes rules. [Baltimore & O. C. T. R. Co. v. United States, 583 F.2d 678, 1978 U.S. App. LEXIS 9202 \(3d Cir. 1978\)](#), cert. denied, 440 U.S. 968, 99 S. Ct. 1520, 59 L. Ed. 2d 784, 1979 U.S. LEXIS 1297 (1979).

Statement of basis and purpose need not be published at exact same moment as rule, and inquiry is whether rule and statement are published close enough together in time so that there is no doubt that statement accompanies rather than rationalizes rule. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

158. Exceptions to statement requirement

No separate statement of purpose and basis of regulation is required where basis and purpose of rule is inherent in rule. [American Standard, Inc. v United States, 602 F.2d 256, 220 Ct. Cl. 411, 44 A.F.T.R.2d \(RIA\) 5149 \(1979\)](#).

Incorporation of concise general statement of basis and purpose of rules pursuant to [5 USCS § 553\(c\)](#) is not required in Department of Agriculture's final food stamp regulations to explain change in language from earlier published notice which made states liable to "account fully" for coupons delivered to them, to language imposing strict liability on states for lost coupons and receipts, where change in language serves only to clarify regulations to manifest prior understanding of agency and public as to strict liability aspect of regulations, since § 553(c) does not require statement explaining every aspect of final rules which are inherently explanatory. [Missouri ex rel. Freeman v. Block, 690 F.2d 139, 1982 U.S. App. LEXIS 24891 \(8th Cir. 1982\)](#).

Repeal of regulation exempt from rulemaking requirements under grants and benefit exception is not subject to requirement of concise general statement of rule's basis and purpose. [Washington Hospital Center v. Heckler, 581 F. Supp. 195, 1984 U.S. Dist. LEXIS 20701 \(D.D.C. 1984\)](#).

159. Contents and sufficiency of statement

When promulgating rule, agency is not required to abide by same stringent requirements of factfindings and supporting reasons which apply to adjudication, since Administrative Procedure Act ([5 USCS § 553](#)) requires only that agency incorporate in rules adopted concise general statement of basis and purpose. [Mobil Oil Corp. v. Federal Power Com., 469 F.2d 130, 152 U.S. App. D.C. 119, 44 Oil & Gas Rep. 124, Util. L. Rep. \(CCH\) ¶11346, 1972 U.S. App. LEXIS 7276 \(D.C. Cir. 1972\)](#), cert. denied, 412 U.S. 931, 93 S. Ct. 2749, 37 L. Ed. 2d 159, 1973 U.S. LEXIS 2233 (1973).

As regards requirement of [5 USCS § 553\(c\)](#) of "a concise general statement" of basis of rule adopted after informal rule making, although agency is not expected to discuss every item of fact or opinion included in submissions made to it, agency's general statement must enable courts upon judicial review to see what major issues of policy were ventilated by such informal proceedings and why agency reacted to them as it did. [Associated Industries of New York State, Inc. v. United States Dep't of Labor, 487 F.2d 342, 1 O.S.H. Cas. \(BNA\) 1340, 1973 U.S. App. LEXIS 7645 \(2d Cir. 1973\)](#).

Basis and purpose statement required by [5 USCS § 553](#) must be sufficiently detailed and informative to allow searching judicial scrutiny of how and why regulations were actually adopted and must advert to administrative

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determinations of factual sort to extent required for reviewing court to satisfy itself that none of regulatory provisions were framed in arbitrary or capricious manner, but regulations need not be supported by findings of fact. [Amoco Oil Co. v. EPA, 501 F.2d 722, 163 U.S. App. D.C. 162, 6 Env't Rep. Cas. \(BNA\) 1481, 4 Env'tl. L. Rep. 20397, 1974 U.S. App. LEXIS 8899 \(D.C. Cir. 1974\).](#)

Requirement in [5 USCS § 553\(c\)](#) that agency promulgating rules pursuant to “notice and comment” procedure incorporate concise general statement of basis and purpose certainly does not require agency to supply specific and detailed findings and conclusions of kind customarily associated with formal proceedings, but this position does not lessen or excuse agency’s obligation to publish statement of reasons sufficiently detailed to permit judicial review. [National Nutritional Foods Asso. v. Weinberger, 512 F.2d 688, 1975 U.S. App. LEXIS 16268 \(2d Cir.\)](#), cert. denied, 423 U.S. 827, 96 S. Ct. 44, 46 L. Ed. 2d 44, 1975 U.S. LEXIS 2351 (1975), app. after remand, [557 F.2d 325, 1977 U.S. App. LEXIS 13042 \(2d Cir. 1977\).](#)

When promulgating rule, agency is not required to abide by same stringent requirements of fact findings and supporting reasons which apply to adjudication. [P. A. M. News Corp. v. Butz, 514 F.2d 272, 168 U.S. App. D.C. 376, 1975 U.S. App. LEXIS 14336 \(D.C. Cir. 1975\).](#)

Statement of basis and purpose, in order to meet requirements of [5 USCS § 553\(c\)](#), must be sufficient to enable reviewing court to see what major issues of policy were ventilated by proceeding and why agency reacted to them as it did; statements of less than ideal clarity may be sufficient, and regulations with no statement of purpose may be upheld where agency’s purpose is considered obvious and unmistakable. [Citizens to Save Spencer County v. United States EPA, 600 F.2d 844, 195 U.S. App. D.C. 30, 12 Env't Rep. Cas. \(BNA\) 1961, 9 Env'tl. L. Rep. 20194, 1979 U.S. App. LEXIS 15913 \(D.C. Cir. 1979\).](#)

Requirement of concise general statement of rule’s basis and purpose requires legal grounds upon which agency relied. [Global Van Lines, Inc. v. Interstate Commerce Com., 714 F.2d 1290, 1983 U.S. App. LEXIS 16788 \(5th Cir. 1983\).](#)

Exhaustive explanation of administrator’s reasoning for adopting rule is not required; there is no obligation to make references in agency explanation to all specific issues raised and comments; explanation is sufficient if it enables reviewing court to see what major issues in policy were ventilated by informal proceedings and why agency reacted to them the way it did. [South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 1983 U.S. App. LEXIS 24104 \(4th Cir. 1983\)](#), cert. denied, 465 U.S. 1080, 104 S. Ct. 1444, 79 L. Ed. 2d 764, 1984 U.S. LEXIS 1344 (1984).

Even when basis and purpose statement is cursory or nonexistent, rule may be upheld when agency’s path may reasonably be discerned. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

Notice of proposed or interim orders need not contain elaborate reproductions of underlying studies, and it is sufficient that in announcement of rule agency describes information on which it relies and later makes information available to interested parties upon request. [Petry v. Block, 737 F.2d 1193, 238 U.S. App. D.C. 46, 1984 U.S. App. LEXIS 20990 \(D.C. Cir. 1984\).](#)

Although agency need not respond to every fact or contention in comments submitted, basis and purpose statement must identify major issues of policy ventilated by informal proceedings and why agency reacted to them as it did. [St. James Hospital v. Heckler, 760 F.2d 1460, 1985 U.S. App. LEXIS 31014 \(7th Cir.\)](#), cert. denied, 474 U.S. 902, 106 S. Ct. 229, 88 L. Ed. 2d 228, 1985 U.S. LEXIS 3956 (1985).

Basis and purpose statements must enable reviewing court to see objections and to determine why agency reacted to them as it did; agency should rebut vital relevant comments; statement which fails to give facts underlying conclusion and which does not consider reasonably obvious alternatives is inadequate. [Lloyd Noland Hospital & Clinic v. Heckler, 762 F.2d 1561, 1985 U.S. App. LEXIS 30631 \(11th Cir. 1985\).](#)

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In case in which final rule by Mine Safety and Health Administration (MSHA) required either that one additional portable oxygen device be provided for each miner in each emergency escapeway or that one additional portable oxygen device be provided in hardened room cache located between two adjacent emergency escapeways and accessible from both, mining trade association argued unsuccessfully that hardened room option—as opposed to option allowing common cache with less stringent safeguards—was arbitrary and capricious because MSHA did not sufficiently explain its decision; in preamble to final rule, MSHA referred to comments about other alternatives, and explained that its primary concern with approving common cache of devices was that cache needed to be secured against damage from explosions in either escapeway; underlying MSHA's analysis was apparent belief that redundancy provided by having separate sets of devices resulted in increased likelihood that at least one set would survive explosion. [Nat'l Mining Ass'n v. MSHA, 512 F.3d 696, 379 U.S. App. D.C. 262, 2008 U.S. App. LEXIS 482 \(D.C. Cir. 2008\)](#).

Inmate successfully completed residential drug abuse program and sought discretionary sentence reduction Bureau of Prisons (BOP) could grant under [18 USCS § 3621\(e\)\(2\)\(B\)](#), but BOP denied said relief; because public safety rational for BOP regulation which declared inmate convicted of felony firearm possession offense ineligible for early release, [28 CFR § 550.58\(a\)\(1\)\(vi\)\(B\)](#), was all that was required by [5 USCS §§ 553\(c\), 706\(2\)\(A\)](#), inmate's habeas petition based on invalidity of regulation was properly denied. [Gatewood v. Outlaw, 560 F.3d 843, 2009 U.S. App. LEXIS 6474 \(8th Cir.\)](#), cert. denied, 558 U.S. 993, 130 S. Ct. 490, 175 L. Ed. 2d 350, 2009 U.S. LEXIS 7835 (2009).

Although regulations promulgated under notice and comment procedures need not be accompanied by detailed findings of fact required in formal rulemaking and are reviewable only under deferential “arbitrary and capricious” standard of review, agency has obligation to publish statement of reasons that will be sufficiently detailed to permit judicial review. [National Asso. of Pharmaceutical Mfrs. v. Department of Health & Human Services, 586 F. Supp. 740, 1984 U.S. Dist. LEXIS 16608 \(S.D.N.Y. 1984\)](#).

Basis and purpose statement need not be exhaustive discussion of comments to agency, and detail required depends upon subject of regulation and nature of comments received; radical departures from existing policy require significant and detailed responses to serious comments opposing proposed regulations; preamble which neither acknowledges nor responds to criticisms of statistical validity of study which is only objective data upon which regulation is based is insufficient. [Bethesda Hospital v. Heckler, 609 F. Supp. 1360, 1985 U.S. Dist. LEXIS 20277 \(S.D. Ohio 1985\)](#), aff'd in part and rev'd in part, remanded, [810 F.2d 558, 1987 U.S. App. LEXIS 1549 \(6th Cir. 1987\)](#), disapproved, [University of Cincinnati v. Secretary of Health & Human Servs., 809 F.2d 307, 1987 U.S. App. LEXIS 1031 \(6th Cir. 1987\)](#).

Agency is not required to respond to every comment or to analyze every issue or alternative raised by comments; statement is sufficient when, taken in conjunction with notice of proposed rulemaking and considered in light of revisions of final rule made in response to public comments, statement demonstrates that agency considered significant issues relevant in promulgation of rule. [Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 16 Env'tl. L. Rep. 20096, 1985 U.S. Dist. LEXIS 16288 \(E.D. Cal. 1985\)](#).

Initial determination withdrawing exclusion from safeguard duties was unlawful agency decision because failure to follow notice and comment procedures resulted in deficient rulemaking; government's pending appeal deprived court of jurisdiction over motion to dissolve preliminary injunction, but modifying injunction to encompass second withdrawal permissibly maintained status quo, and doing so was appropriate because second withdrawal failed to address significant comments and lacked explanation. [Invenergy Renewables LLC v. United States, 2020 Ct. Intl. Trade LEXIS 152 \(Ct. Intl Trade Oct. 15, 2020\)](#).

160. Failure to provide statement

Regulations will not be declared void merely because of purely technical flaw in failing to include within rules themselves concise general statement of basis and purpose as required under [5 USCS § 553](#) where both basis and purpose are obvious from specific governing legislation and entire trade was fairly apprised of basis and purpose by

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procedure followed. [Hoving Corp. v. Federal Trade Com., 290 F.2d 803, 1961 Trade Cas. \(CCH\) ¶ 70032, 1961 U.S. App. LEXIS 4392 \(2d Cir. 1961\).](#)

Regulations with no statement of purpose may be upheld where agency's purpose is considered obvious and unmistakable. [Citizens to Save Spencer County v. United States EPA, 600 F.2d 844, 195 U.S. App. D.C. 30, 12 Env't Rep. Cas. \(BNA\) 1961, 9 Env'tl. L. Rep. 20194, 1979 U.S. App. LEXIS 15913 \(D.C. Cir. 1979\).](#)

Failure to incorporate in rule adopted concise general statement of basis and purpose renders agency action invalid; post hoc issuance of basis and purpose statement is unacceptable substitute for contemporaneous statement. [Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 230 U.S. App. D.C. 1, 17 Av. Cas. \(CCH\) ¶18585, 1983 U.S. App. LEXIS 26261 \(D.C. Cir. 1983\).](#)

Failure to include statement of statutory authority renders rulemaking unauthorized. [Global Van Lines, Inc. v. Interstate Commerce Com., 714 F.2d 1290, 1983 U.S. App. LEXIS 16788 \(5th Cir. 1983\).](#)

Even when basis and purpose statement is cursory or nonexistent, rule may be upheld when agency's path may reasonably be discerned. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

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Although agency must be given flexibility to reexamine and reinterpret its previous holdings, [5 USCS § 553\(c\)](#) requires that there must be thorough and comprehensive statement of reasons for decision, and order of Federal Communications Commission (adopting new guidelines, for preparation by broadcast applicants, of written equal opportunity programs to be filed with broadcast license renewal applications) would be set aside, as arbitrary and capricious, where Commission failed to articulate reasoned explanations for its action, since its alleged justifications were unsupported or inadequate. [Office of Communications of United Church of Christ v. FCC, 560 F.2d 529, 14 Empl. Prac. Dec. \(CCH\) ¶17782, 15 Fair Empl. Prac. Cas. \(BNA\) 387, 2 Media L. Rep. \(BNA\) 2343, 2 Media L. Rep. 2343, 1977 U.S. App. LEXIS 12126 \(2d Cir. 1977\).](#)

Agency action cannot be sustained in ex post facto rationalizations supplied during judicial review, and court would vacate regulations promulgated by Joint Board for Enrollment of Actuaries that supplemented § 3042 of Employment Retirement Income Security Act of 1974 (ERISA) ([29 USCS § 1242](#)) where Board had not published, as required by [5 USCS § 553\(e\)](#) concise general statement of basis and purpose of rules, but had merely appended unpublished statement of reasons in its motion to dismiss complaint of experienced actuaries adversely affected by regulations who had brought class action to restrain their implementation. [Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 185 U.S. App. D.C. 40, 1 Employee Benefits Cas. \(BNA\) 1335, 1977 U.S. App. LEXIS 12349 \(D.C. Cir. 1977\).](#)

Absent coherent discussion in record of factual basis and legislative purpose underlying Environmental Protection Agency's derivation of one effluent limitation (out of three in all) for one subdivision of industry (out of 66 in all) concerning amount of biodegradable material limitation for acetate grade dissolving sulfite mills, court would be unable to rely on usual assumption that agency, when relying on supportable facts and permissible policy concerns and when obligated to explain itself, will rationally exercise duties delegated to it by Congress ([5 USCS § 553](#)). [Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 191 U.S. App. D.C. 309, 11 Env't Rep. Cas. \(BNA\) 2149, 9 Env'tl. L. Rep. 20284, 1978 U.S. App. LEXIS 9247 \(D.C. Cir. 1978\).](#)

Interim rule of Maritime Administration will be vacated where agency failed to incorporate in rule concise general statement of its basis and purpose, satisfying requirements of [5 USCS § 553\(c\)](#), since requirement is mandatory and is met neither by inclusion of single descriptive but nonexplanatory sentence nor by unpublished memorandum recommending adoption of interim rule. [Independent U. S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 223 U.S. App. D.C. 185, 1982 U.S. App. LEXIS 25891 \(D.C. Cir. 1982\).](#)

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162. Agriculture

Department of Agriculture did not comply with requirements of [5 USCS § 553](#) where absolutely no statement of basis for its action was made. [P. A. M. News Corp. v. Hardin, 440 F.2d 255, 142 U.S. App. D.C. 227, 1971 U.S. App. LEXIS 11965 \(D.C. Cir. 1971\)](#), app. after remand, [514 F.2d 272, 168 U.S. App. D.C. 376, 1975 U.S. App. LEXIS 14336 \(D.C. Cir. 1975\)](#).

Incorporation of concise general statement of basis and purpose of rules pursuant to [5 USCS § 553\(c\)](#) is not required in Department of Agriculture's final food stamp regulations to explain change in language from earlier published notice which made states liable to "account fully" for coupons delivered to them, to language imposing strict liability on states for lost coupons and receipts, where change in language serves only to clarify regulations to manifest prior understanding of agency and public as to strict liability aspect of regulations, since § 553(c) does not require statement explaining every aspect of final rules which are inherently explanatory. [Missouri ex rel. Freeman v. Block, 690 F.2d 139, 1982 U.S. App. LEXIS 24891 \(8th Cir. 1982\)](#).

Borrower's claim that FmHA failed to follow proper procedure in adopting regulation that borrowers must seek to have debts owed to private creditors adjusted before they can be eligible for deferral from FmHA, and therefore violated [5 USCS § 553\(c\)](#), is upheld where FmHA did not include with regulation concise, general statement of their basis and purpose as required by [5 USCS § 553\(c\)](#), since statement was not sufficiently detailed and informative to allow searching judicial scrutiny of how and why regulation was adopted. [Coleman v. Block, 663 F. Supp. 1315, 1987 U.S. Dist. LEXIS 5190 \(D.N.D. 1987\)](#), vacated, [Coleman v. Lyng, 864 F.2d 604, 1988 U.S. App. LEXIS 17585 \(8th Cir. 1988\)](#), cert. denied, [Coleman v. Yeutter, 493 U.S. 953, 110 S. Ct. 364, 107 L. Ed. 2d 351, 1989 U.S. LEXIS 5268 \(1989\)](#).

U.S. Department of Agriculture (USDA) provided concise, informative statement of new rule's background and purpose and sufficiently articulated reasons why it enacted new rule as required by [5 USCS § 553\(c\)](#) where USDA determined that those who sell battered and coated potato products should receive Perishable Agricultural Commodities Act (PACA), [7 USCS §§ 499a–499s](#), protection because USDA believed that battering and coating were similar to processes already allowed under USDA regulations. [Fleming Cos. v. USDA, 322 F. Supp. 2d 744, 2004 U.S. Dist. LEXIS 15949 \(E.D. Tex. 2004\)](#), aff'd, [164 Fed. Appx. 528, 2006 U.S. App. LEXIS 2509 \(5th Cir. 2006\)](#).

163. Energy and power

Since under Natural Gas Act ([15 USCS § 717r](#)) rules, regulations, and orders are subject to court review and finding of FPC as to fact, if supported by substantial evidence, shall be conclusive, notice and comment record under [5 USCS § 553](#), while not formal adjudicative record required under §§ 556 and 557, must contain sufficient factual data, however informally presented, to provide substantial evidentiary support for action taken, and mere statement of rationale by agency, without evidentiary support, is not sufficient. [Union Oil Co. v. Federal Power Com., 542 F.2d 1036, 58 Oil & Gas Rep. 139, 1976 U.S. App. LEXIS 6464 \(9th Cir. 1976\)](#).

Agency need not make findings of fact in conventional sense in proceeding under [5 USCS § 553](#), and absent clear and specific congressional requirement court would decline to import into informal rule making those formalities developed for adjudicatory process and basically unsuited for policy rule making, where court failed to discern "clear and specific" legislative intention that Federal Power Commission employ additional procedures. [Superior Oil Co. v. Federal Energy Regulatory Com., 563 F.2d 191, 1977 U.S. App. LEXIS 5994 \(5th Cir. 1977\)](#).

[30 CFR § 50.41](#)'s broad language allowed Federal Mine Safety and Health Administration (MSHA) to require petitioning mine operators to produce employee medical and personnel records to verify compliance with other reporting obligations; § 50.41 was valid exercise of MSHA's authority under [30 USCS § 813\(a\)](#), (h), because Federal Mine Safety & Health Act of 1977 permitted regulation to authorize such record demands, and further, it

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was far too late to challenge validity of § 50.41 with argument that there had been no adequate explanation of its rationale as required by [5 USCS § 553\(c\)](#) because such challenge had not been timely brought under [30 USCS § 811\(d\)](#). [Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n](#), 715 F.3d 631, 2013 U.S. App. LEXIS 8473 (7th Cir. 2013).

Department of Energy's failure, in statement of basis and purpose accompanying final promulgation of amendment to regulations implementing Economic Stabilization Act of 1970 (12 USCS § 1904 note), to comment on requirement that refiners not be allowed to assign certain crude oil costs to covered products, is not fatal to promulgation of amendment, since issue was not raised by comments received by agency concerning proposal to status of major issue requiring agency comment in basis and purpose statement. [Naph-Sol Refining Co. v. Murphy Oil Corp.](#), 550 F. Supp. 297, 1982 U.S. Dist. LEXIS 9754, 1982 U.S. Dist. LEXIS 9755 (W.D. Mich. 1982), aff'd in part and rev'd in part, [728 F.2d 1477](#), 1983 U.S. App. LEXIS 14335 (Temp. Emer. Ct. App. 1983).

164. Environmental Protection Agency

Requirement under [5 USCS § 553](#) for concise general statement of basis and purpose of regulations is not to be interpreted overliterally and not stretched into mandate for reference to all specific issues raised in comments; however, in some particular instances, such as where EPA sets particular secondary air quality standard, compliance with minimum requirements of § 553 may not be sufficient and EPA must supply implementing statement that will enlighten court as to basis for particular numerical standard. [Kennecott Copper Corp. v. EPA](#), [462 F.2d 846](#), 149 U.S. App. D.C. 231, 3 Env't Rep. Cas. (BNA) 1682, 2 Env'tl. L. Rep. 20116, 1972 U.S. App. LEXIS 11223 (D.C. Cir. 1972).

Preamble to EPA regulations that succinctly reviewed history of proceedings, referred to records of EPA's methodology and factfindings, cited regulations' legal basis, and outlined both significant comments received and EPA's response met requirements of [5 USCS § 553](#) of concise general statement of regulations' basis and purpose. [Hooker Chemicals & Plastics Corp. v. Train](#), [537 F.2d 620](#), 8 Env't Rep. Cas. (BNA) 1961, 6 Env'tl. L. Rep. 20467, 1976 U.S. App. LEXIS 11581 (2d Cir. 1976).

165. Health and human services

Department of Health, Education and Welfare regulation relating to limits on resources allowable to recipients of Aid to Families With Dependent Children was flawed in that administrative record did not meet requirements of [5 USCS § 553\(c\)](#) that basis and purpose of regulation be stated, where no explanation was given for HEW's selection of particular dollar limitations and particular dollar exemption for necessary automobile. [National Welfare Rights Organization v. Mathews](#), [533 F.2d 637](#), 174 U.S. App. D.C. 410, 1976 U.S. App. LEXIS 12767 (D.C. Cir. 1976).

Basis and purpose statement which fails to address major criticisms of accuracy and relevance of study which is primary source of data relied on by secretary in formulating rule and which fails to address alternatives suggested by comments from public is insufficient. [Bedford County Memorial Hospital v. Health & Human Services](#), [769 F.2d 1017](#), 1985 U.S. App. LEXIS 21917 (4th Cir. 1985).

Although explanation by Department of Health and Human Services of decision to strike from final HHS-specific regulations mandatory self-evaluation requirement that had been in general regulations and proposed agency-specific regulations was indeed very concise and general, it did not fall short of requirement of [5 USCS § 553\(c\)](#) of concise general statement of rule's basis and purpose. [Action Alliance of Senior Citizens v. Bowen](#), [846 F.2d 1449](#), [269 U.S. App. D.C. 463](#), 1988 U.S. App. LEXIS 6446 (D.C. Cir. 1988), vacated, remanded, 494 U.S. 1001, 110 S. Ct. 1329, 108 L. Ed. 2d 469, 1990 U.S. LEXIS 1098 (1990).

Agency statement in response to comments which replied on two columns of federal register prose to more than 600 comments occupying five volumes of administrative record is inadequate where agency completely failed to respond to comments challenging statistical validity of empirical study upon which rule was based. [Abington](#)

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[Memorial Hospital v. Heckler, 576 F. Supp. 1081, 1983 U.S. Dist. LEXIS 11028 \(E.D. Pa. 1983\)](#), aff'd, [750 F.2d 242, 1984 U.S. App. LEXIS 15933 \(3d Cir. 1984\)](#).

Basis and purpose statement which does not mention objections made to statistical validity and import of study and which does not discuss alternatives proposed in comments is insufficient; where final rule is published 15 days after close of comment period in which over 600 comments were submitted, facts do not support finding of agency consideration of comments. [Alexandria Hospital v. Heckler, 586 F. Supp. 581, 1984 U.S. Dist. LEXIS 16948 \(E.D. Va. 1984\)](#), aff'd, remanded, [769 F.2d 1017, 1985 U.S. App. LEXIS 21917 \(4th Cir. 1985\)](#).

Regulations based on technical or scientific data require more detailed explanation of agency conclusions than less technical regulations; exclusion of public comments received and reports of individual inspections from administrative record does not preclude meaningful public comment where regulations are nontechnical in nature and where actual documents are available to commenters through Freedom of Information Act requests. [National Asso. of Pharmaceutical Mfrs. v. Department of Health & Human Services, 586 F. Supp. 740, 1984 U.S. Dist. LEXIS 16608 \(S.D.N.Y. 1984\)](#).

166. —Medicare and Medicaid

Statement by Secretary of Health, Education and Welfare in preamble to regulations relating to maximum reimbursement under Medicare and Medicaid programs for drugs when there are multiple sources of supply was sufficient where Secretary noted in preamble that reports were submitted questioning Food and Drug Administration's methods of classifying drugs as equivalent, and Secretary had considered such reports, but that FDA programs, despite some inadequacies, were functioning well enough to assure drug quality and that bioequivalence is neither major problem nor insurmountable obstacle to program. [AMA v. Mathews, 429 F. Supp. 1179, 1977 U.S. Dist. LEXIS 17036 \(N.D. Ill. 1977\)](#).

Rule promulgated by Secretary of Department of Health and Human Services (HHS) changing method of reimbursement to hospitals for malpractice insurance expenses incurred as result of treating Medicare patients was invalid under [5 USCS § 553](#) upon court review of full rule-making record where statement of purpose was to enable court to see what major issues of policy were ventilated by informal proceedings and why agency reacted to them as it did and where requisite basis and purpose statement failed to address critical issues raised by commentators. [Walter O. Boswell Memorial Hospital v. Heckler, 628 F. Supp. 1121, 1985 U.S. Dist. LEXIS 13735 \(D.D.C. 1985\)](#).

167. Transportation

Order promulgating rules under Freight Forwarder Law of 1961 (46 USCS §§ 801, 841a, 841b) meets requirements of [5 USCS § 553](#) in stating that rules implement Law and have for their purpose establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers, and ocean going common carriers in conduct of business affairs. *New York Foreign Freight Forwarders & Brokers Asso. v. Federal Maritime Com.*, 337 F.2d 289, 1964 U.S. App. LEXIS 4155 (2d Cir. 1964), cert. denied, 380 U.S. 910, 85 S. Ct. 893, 13 L. Ed. 2d 797, 1965 U.S. LEXIS 1781 (1965).

Reply by National Highway Traffic Safety Administration to equipment sellers' objections to proposed rule requiring manufacturers to provide head restraints was rational consideration of relevant matter presented as embodied in concise general statement of basis of purpose of standard under review, as required by [5 USCS § 553](#). [Automotive Parts & Accessories Asso. v. Boyd, 407 F.2d 330, 132 U.S. App. D.C. 200, 1968 U.S. App. LEXIS 4351 \(D.C. Cir. 1968\)](#).

Basis and purpose statement required by [5 USCS § 553\(c\)](#) is very significant portion of regulation when issue arises as to its application and scope, and Federal Aviation Agency would not meet its burden to demonstrate that it was acting within its authority in seeking subpoena where data requested had been collected for purpose of accident investigation, and not for administrative investigations relating to compliance with general flight regulations,

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purpose for which Agency required it. [United States v. Frontier Airlines, Inc., 563 F.2d 1008, 14 Av. Cas. \(CCH\) ¶18159, 1977 U.S. App. LEXIS 11186 \(10th Cir. 1977\)](#).

Basis and purpose statement furnished by Civil Aeronautics Board in connection with regulation (1) partly rescinding regulation requiring special segregation of cigar and pipe smokers, banning smoking when aircraft ventilation systems are not fully functioning, and protecting nonsmokers against burdens of breathing drifting smoke, and (2) rejecting proposed rules to ban smoking on small aircraft and on flights of less than one hour, and to provide special protections for persons especially sensitive to smoke, is deficient under [5 USCS § 553](#) where it fails to address major comments received and explain clearly why Board rescinded part of existing regulation and rejected other proposals, since arbitrary and capricious action in disregarding Board's responsibilities in rule making renders notice and comment provisions meaningless. [Action on Smoking & Health v. Civil Aeronautics Bd., 699 F.2d 1209, 226 U.S. App. D.C. 57, 17 Av. Cas. \(CCH\) ¶ 17748, 1983 U.S. App. LEXIS 30987 \(D.C. Cir. 1983\)](#).

Reference in text of amendment to goal of permitting efficient operations of railroad is comprehensible justification and meets requirement that agency incorporate general statement of basis and purpose of rule. [Illinois Commerce Com. v. Interstate Commerce Com., 776 F.2d 355, 249 U.S. App. D.C. 389, 1985 U.S. App. LEXIS 31480 \(D.C. Cir. 1985\)](#).

Plaintiff's challenge to regulation restricting Department of Transportation regulation controlling operation of drawbridges on Chicago River is granted summarily, where agency (1) discusses major comments in only descriptive manner, not explanatory, (2) fails to provide any explanation as to why old rule was unsatisfactory, and (3) fails to reveal what major issues of policy were ventilated by informal proceedings and why agency reacted to them as it did, because agency failed to provide general statement of rule's basis and purpose as required by [5 USCS § 553\(c\)](#). [Crowley's Yacht Yard v. Pena, 863 F. Supp. 18, 1994 U.S. Dist. LEXIS 14014 \(D.D.C. 1994\)](#).

168. Treasury and internal revenue

Consolidated return regulations did not violate purpose and basis requirements of Administrative Procedure Act since (1) regulations clarify and establish uniform system for reporting tax liability on consolidated basis, and (2) consolidated return regulations are reviewed in terms of large, comprehensive code and sizeable body of decisional law. [American Standard, Inc. v United States, 602 F.2d 256, 220 Ct. Cl. 411, 44 A.F.T.R.2d \(RIA\) 5149 \(1979\)](#).

Rescission of regulation by incoming administration on claim that cost to consumers and industry outweigh benefits is not adequate showing for rescission where agency failed to address previous rulemaking based on impressive factual record which documented costs to industry and savings in health costs to consumers of proposed labeling regulations. [Center for Science in Public Interest v. Department of Treasury, 573 F. Supp. 1168, 1983 U.S. Dist. LEXIS 19368 \(D.D.C. 1983\)](#).

169. Miscellaneous

Attorney General had good cause to invoke exception to providing 30-day notice as there was need for legal certainty about retroactive application of Sex Offender Registration and Notification Act (SORNA), [42 USCS §§ 16901](#) et seq., and [18 USCS § 2250](#), to sex offenders convicted before SORNA and concern for public safety that these offenders be registered in accordance with SORNA as quickly as possible; delaying implementation of regulation to accommodate notice and comment could reasonably be found to put public safety at greater risk; in addition, Attorney General did provide for and receive post-promulgation public comments, which were addressed in proposed National Guidelines issued in May 2007 and ultimately in final National Guidelines issued in July 2008. [United States v Gould \(2009, CA4 Md\) 568 F3d 459cert den 559 U.S. 974, 130 S. Ct. 1686, 176 L. Ed. 2d 186 \(2010\)](#).

Agency need not issue statement demonstrating that it has considered all relevant evidence presented to it, and in channel allocation proceeding, FCC complied with requirement that it incorporate a concise general statement of rule's basis and purpose when it compared populations of cities competing for channel and discussed relative

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importance of cities as evidenced by various factors in their economies. [Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 93 U.S. App. D.C. 342, 1954 U.S. App. LEXIS 4581 \(D.C. Cir. 1954\)](#).

Allocation by Committee for Purchase From Blind and Severely Handicapped of future procurement contracts for production of military medals to new contractor violated rulemaking procedures of § 553 where Committee's response to objections was flat statement, that listed medals were suitable for procurement, which failed (1) to articulate what major issues of policy were ventilated by informal proceedings, and (2) to provide concise general statement of basis and purpose of its decision, providing no evidence that Committee ever examined relevant data and requiring court to formulate in first instance significant issues faced by agency and to articulate rationale for their resolution thus placing Committee's decision beyond meaningful review. [HLI Lordship Industries, Inc. v. Committee for Purchase from Blind etc., 791 F.2d 1136, 1986 U.S. App. LEXIS 25767 \(4th Cir. 1986\)](#).

DEA's rulemaking procedure increasing controlled substance registration fees was inadequate where DEA did not explain how it had arrived at total program budget and failed to enumerate components of program and how particular costs were attributed to program. [American Medical Ass'n v. Reno, 57 F.3d 1129, 313 U.S. App. D.C. 44, 1995 U.S. App. LEXIS 15802 \(D.C. Cir. 1995\)](#).

Office of Civilian Health and Medical Program of Uniformed Services (OCHAMPUS) failed to comply with rulemaking requirements of Administrative Procedure Act in changing standards and methods for reimbursement of Residential Treatment Centers, where no public notice of certain provisions was given until 5 months after critical dates used to determine reimbursement amounts, and basis and purpose statement in Federal Register notice was inadequate. [National Asso. of Psychiatric Treatment Centers for Children v. Weinberger, 658 F. Supp. 48, 1987 U.S. Dist. LEXIS 3525 \(D. Colo. 1987\)](#).

In course of issuing nationwide permit authorizing discharge of dredged and fill material associated with surface coal mining, Army Corps of Engineers satisfied its obligation under [5 USCS § 553\(c\)](#) to reasonably respond to public comments because Corps acknowledged environmental impacts identified by environmental groups and explained basis for its conclusion that compensatory mitigation would successfully minimize those impacts. [Ohio Valley Env'tl. Coalition v. Hurst, 604 F. Supp. 2d 860, 39 Env'tl. L. Rep. 20072, 2009 U.S. Dist. LEXIS 26339 \(S.D. W. Va. 2009\)](#).

F. Applicability of [5 USCS §§ 556](#) and [557](#) When Statute Requires Rules to be Made on Record After Opportunity for Hearing

1. In General

170. Generally

Under provision of Administrative Procedure Act ([5 USCS § 553](#)), which makes provisions of §§ 556 and 557 of Act applicable to agency rule-making proceedings only when agency rules are required by statute to be made "on record" after opportunity for an agency hearing latter provisions need be applied in rule-making proceedings only where agency statute, in addition to providing hearing, prescribes explicitly that it be "on record"; however, precise words "on the record" in applicable statute are not necessary to make §§ 556 and 557 applicable to rule-making proceedings. [United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92 S. Ct. 1941, 32 L. Ed. 2d 453, 1972 U.S. LEXIS 122 \(1972\)](#).

Where agency's statute provides for a "hearing," rule-making hearings under [5 USCS § 553](#) are sufficient; provision of [5 USCS § 556\(d\)](#) which gives opportunity for cross-examination as matter of right is automatically applicable only if rules are required by statute to be made "on record"; without precise words "on record" § 556 does not automatically apply. [International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 155 U.S. App. D.C. 411, 4 Env't Rep. Cas. \(BNA\) 2041, 3 Env'tl. L. Rep. 20133, 1973 U.S. App. LEXIS 11707 \(D.C. Cir. 1973\)](#).

In relation to exercises of legislative rulemaking power rather than adjudicatory hearings, presence or absence of phrase "on record" is extremely relevant in determining under § 553 of Administrative Procedure Act ([5 USCS §](#)

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[553](#)) whether particular rule-making proceedings must be conducted in accordance with §§ 556 and 557. [Marathon Oil Co. v. EPA, 564 F.2d 1253, 12 Env't Rep. Cas. \(BNA\) 1098, 1977 U.S. App. LEXIS 5971 \(9th Cir. 1977\)](#).

[5 USCS §§ 556](#) and [557](#) govern only when rules are required by statute to be made on record after opportunity for agency hearing; when §§ 556 and 557 govern, parties have right to submit evidence and engage in some form of cross-examination. [American Public Gas Asso. v. Federal Power Com., 567 F.2d 1016, 186 U.S. App. D.C. 23, 59 Oil & Gas Rep. 351, 1977 U.S. App. LEXIS 12916 \(D.C. Cir. 1977\)](#), cert. denied, 435 U.S. 907, 98 S. Ct. 1457, 55 L. Ed. 2d 499, 1978 U.S. LEXIS 157 (1978).

An “on record” hearing under [5 USCS § 553](#) need not be oral trial-type hearing, and record may consist, for example, of submitted written evidence where no prejudice results from such a proceeding as required by § 556(d). [Long Island R. Co. v. United States, 318 F. Supp. 490, 1970 U.S. Dist. LEXIS 10832 \(E.D.N.Y. 1970\)](#), disapproved, [United States v. Florida E. C. R. Co., 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223, 1973 U.S. LEXIS 137 \(1973\)](#).

Just as Congress may authorize participation by interested parties beyond minimum established for rulemaking by notice and comment procedures of [5 USCS § 553](#), so to, it may adopt some but not all of more formal requirements of trial type hearing for adjudication or formal “on the record” rulemaking as specified by [5 USCS §§ 556](#) and [557](#). [Commodity Exchange, Inc. v. Commodity Futures Trading Com., 543 F. Supp. 1340, 1982 U.S. Dist. LEXIS 9591 \(S.D.N.Y. 1982\)](#), aff'd, [703 F.2d 682, 1983 U.S. App. LEXIS 29106 \(2d Cir. 1983\)](#).

2. Particular Cases

171. Agriculture

In matter arising under Sugar Act of 1948, [7 USCS § 1131\(c\)\(1\)](#), which requires that sugar workers be paid at rates not less than those determined by Secretary of Agriculture to be fair and reasonable after investigation and due notice and opportunity for public hearing, such wage determination by Secretary was not one required by statute to be made only on formal record after public hearing, to which [5 USCS §§ 556](#) and [557](#) would apply, but was rather nonadjudicatory rule-making determination in nature of legislative action, governed by provisions of [5 USCS § 553](#); in exercising such legislative function, Secretary should consider evidence formally presented at hearings but may also rely upon his own expertise and other relevant material available to him. [Angel v. Butz, 487 F.2d 260, 72 Lab. Cas. \(CCH\) ¶32977, 1973 U.S. App. LEXIS 7057 \(10th Cir. 1973\)](#), cert. denied, 417 U.S. 967, 94 S. Ct. 3170, 41 L. Ed. 2d 1138, 1974 U.S. LEXIS 2060 (1974).

Provisions of [5 USCS § 556](#) apply only to rule making required to be “on record” within meaning of that section, and marketing order applied prospectively to all milk producers and handlers in region, based on broad policy considerations, would clearly be instance of notice and comment rule making, and not “on record” since Agricultural Marketing Act did not use those words or their equivalent. [Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305, 183 U.S. App. D.C. 357, 1977 U.S. App. LEXIS 11913 \(D.C. Cir. 1977\)](#).

Poultry Products Inspection Act ([21 USCS § 451](#)) does not require agency hearing as contemplated by [5 USCS §§ 553, 556, 557](#) when Secretary of Agriculture is exercising his rulemaking power to exempt certain foods from classification as poultry product, and when no such formal hearing is required, agency need only follow notice and informal hearing requirements of § 553. [Borden Co. v. Freeman, 256 F. Supp. 592, 1966 U.S. Dist. LEXIS 10588 \(D.N.J.\)](#), aff'd, [369 F.2d 404, 1966 U.S. App. LEXIS 3857 \(3d Cir. 1966\)](#).

172. Energy and power

Since there is no requirement in Atomic Energy Act ([42 USCS § 2239](#)) that rulemaking proceedings be on record, hearing need not be held in accordance with §§ 7, 8 of Administrative Procedure Act ([5 USCS §§ 556, 557](#)); intervenor is not entitled to formal evidentiary hearing, but only opportunity afforded him to submit written comments upon proposed regulations. [Siegel v. Atomic Energy Com., 400 F.2d 778, 130 U.S. App. D.C. 307, 77 Pub. Util. Rep. 3d \(PUR\) 286, 1968 U.S. App. LEXIS 5867 \(D.C. Cir. 1968\)](#).

173. —Federal Power Commission/Federal Energy Regulatory Commission

Proposed new informal rule-making procedures, abolishing former trial-type adjudicatory procedure used in rate-fixing for natural gas by Federal Power Commission, are sufficient under Administrative Procedure Act, [5 USCS § 553](#), since Natural Gas Act does not require “hearing on record” in regard to rate-fixing procedures and since quasi-legislative rather than quasi-judicial activities are involved. [Phillips Petroleum Co. v. Federal Power Com., 475 F.2d 842, 45 Oil & Gas Rep. 505, 1973 U.S. App. LEXIS 11559 \(10th Cir. 1973\)](#), cert. denied, 414 U.S. 1146, 94 S. Ct. 901, 39 L. Ed. 2d 102, 1974 U.S. LEXIS 1576 (1974).

In establishing charges for pipeline transportation of liquid hydrocarbons, Federal Power Commission need not employ formal rule-making procedures of [5 USCS §§ 556](#) and [557](#), but was not entitled to proceed only in informal manner of publishing notice of proposed rule in Federal Register and giving interested parties opportunity to comment thereon under [5 USCS § 553](#); minimum informal rule-making procedures under § 553 and formal hearing procedures outlined in §§ 556 and 557 merely provide outer boundaries of administrative procedures, but do not preclude all possible formulations that might lie in between such extremes; procedures followed should be sufficiently adversary in nature to provide reasonable guarantee of reliability. [Mobil Oil Corp. v. Federal Power Com., 483 F.2d 1238, 157 U.S. App. D.C. 235, 47 Oil & Gas Rep. 67, 1973 U.S. App. LEXIS 8855 \(D.C. Cir. 1973\)](#).

FPC order determining initial natural gas rates for independent producer areas under its rule making authority complies with requirements of Administrative Procedure Act and Natural Gas Act; [15 USCS §§ 717o](#) and [717f](#) do not require FPC to follow formal procedures of [5 USCS §§ 556](#) and [557](#), and procedures utilized fully complied with requirements of [5 USCS § 553](#). [American Public Gas Asso. v. Federal Power Com., 498 F.2d 718, 162 U.S. App. D.C. 176, 48 Oil & Gas Rep. 389, 6 Pub. Util. Rep. 3d \(PUR\) 255, 1974 U.S. App. LEXIS 8498 \(D.C. Cir. 1974\)](#).

Since under Natural Gas Act ([15 USCS § 717r](#)) rules, regulations, and orders are subject to court review and finding of FPC as to fact, if supported by substantial evidence, shall be conclusive, notice and comment record under [5 USCS § 553](#), while not formal adjudicative record required under §§ 556 and 557, must contain sufficient factual data, however informally presented, to provide substantial evidentiary support for action taken, and mere statement of rationale by agency, without evidentiary support, is not sufficient. [Union Oil Co. v. Federal Power Com., 542 F.2d 1036, 58 Oil & Gas Rep. 139, 1976 U.S. App. LEXIS 6464 \(9th Cir. 1976\)](#).

Compliance by Federal Power Commission with informal rule making provisions of [5 USCS § 553](#) is sufficient; even though § 19(b) of Natural Gas Act ([15 USCS § 717r](#)) adopts substantial evidence test for factual components of FPC order, this does not require FPC to implement additional fact finding procedures that can produce record able to withstand stricter scrutiny than courts give to informal rule making. [Superior Oil Co. v. Federal Energy Regulatory Com., 563 F.2d 191, 1977 U.S. App. LEXIS 5994 \(5th Cir. 1977\)](#).

[5 USCS § 556\(d\)](#) does not require oral hearings, and Federal Energy Regulatory Commission did not violate provisions of Act in making orders to establish flowing gas rate where (1) Commission issued data collection forms and notice of proposed rule making, (2) after parties commented on forms, Commission served modified forms and producers submitted required data, (3) Commission’s staff issued rate recommendation, (4) after extension of time parties filed initial comments, and later had opportunity for reply comments, and (5) Commission then issued Opinion and entertained petitions for rehearing. [Tenneco Oil Co. v. Federal Energy Regulatory Com., 571 F.2d 834, 61 Oil & Gas Rep. 268, 25 Pub. Util. Rep. 4th \(PUR\) 107, Util. L. Rep. \(CCH\) ¶12080, 1978 U.S. App. LEXIS 11609 \(5th Cir.\), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94, 1978 U.S. LEXIS 169 \(1978\)](#).

174. Environmental Protection Agency

Electric companies were not entitled to adversary hearing by Environmental Protection Agency prior to federal adoption of state implementation plan under Clean Air Act Amendments of 1970; unless statute providing for agency action requires “hearing on record,” either in those exact words or in similar phrase, hearing need not be held. [Duquesne Light Co. v. EPA, 481 F.2d 1, 5 Env’t Rep. Cas. \(BNA\) 1473, 3 Env’tl. L. Rep. 20483, 1973 U.S. App. LEXIS 9585 \(3d Cir. 1973\)](#), app. after remand, [508 F.2d 743, 7 Env’t Rep. Cas. \(BNA\) 1465, 5 Env’tl. L. Rep.](#)

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[20188](#), 1975 U.S. App. LEXIS 16345 (3d Cir. 1975), app. after remand, [522 F.2d 1186](#), 8 Env't Rep. Cas. (BNA) 1065, 5 Env'tl. L. Rep. 20539, 1975 U.S. App. LEXIS 13030 (3d Cir. 1975), disapproved, [Union Electric Co. v. EPA](#), 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474, 8 Env't Rep. Cas. (BNA) 2143, 6 Env'tl. L. Rep. 20570, 1976 U.S. LEXIS 108 (1976).

No requirement is set forth in Clean Air Act that rulemaking hearings be on record after opportunity for agency hearing; thus, copper mining company is not entitled to adjudicatory type hearing when Environmental Protection Agency formulates proposed rule controlling emissions of sulfur dioxide from one of its facilities. [Anaconda Co. v. Ruckelshaus](#), 482 F.2d 1301, 5 Env't Rep. Cas. (BNA) 1673, 3 Env'tl. L. Rep. 20719, 1973 U.S. App. LEXIS 8438 (10th Cir. 1973).

Congress did not insert into Clean Air Act ([42 USCS §§ 1857](#) et seq.) language requiring Administrator of United States Environmental Protection Agency to make determinations on record after opportunity for agency hearing, which United States Supreme Court has held to trigger requirement of adjudicative hearing, and legislative-type hearing conducted by Environmental Protection Agency concerning Ohio sulphur dioxide control plan would be consistent with provisions of Clean Air Act and Administrative Procedure Act ([5 USCS § 553](#)). [Cleveland Electric Illuminating Co. v. EPA](#), 572 F.2d 1150, 11 Env't Rep. Cas. (BNA) 1288, 8 Env'tl. L. Rep. 20312, 1978 U.S. App. LEXIS 12652 (6th Cir.), cert. denied, 439 U.S. 910, 99 S. Ct. 278, 58 L. Ed. 2d 256, 12 Env't Rep. Cas. (BNA) 1156, 1978 U.S. LEXIS 181 (1978).

175. Federal Communications Commission

Administrative Procedure Act requires trial-type hearings only when rules or adjudications are required by statute to be made or determined on record after opportunity for agency hearing ([5 USCS §§ 553\(c\)](#), [554\(a\)](#)), and Act does not require trial-type procedures where Communications Act ([47 USCS § 205\(a\)](#)) does not require that rules be made on record, but merely that they be made after full opportunity for hearing ([47 USCS § 205\(a\)](#)). [American Tel. & Tel. Co. v. Federal Communications Com.](#), 572 F.2d 17, 1978 U.S. App. LEXIS 12878 (2d Cir.), cert. denied, 439 U.S. 875, 99 S. Ct. 213, 58 L. Ed. 2d 190, 1978 U.S. LEXIS 4318 (1978).

Language of [47 USCS § 205\(a\)](#) does not require trial type hearing in all instances; such hearing is particularly not required when proceedings are held to determine general policy applicable to all carriers on prospective basis. Regulatory Policies Concerning Resale & Shared Use of Common Carrier Services & Facilities, 40 Ad. L. Rep., 2d 846 (1977).

176. National Highway Traffic Safety Administration

Even though National Traffic and Motor Vehicle Safety Act ([15 USCS §§ 1381](#) et seq.) contains some language normally associated with formal evidentiary hearings, § 1392, which provides that Administrative Procedure Act shall apply to all orders establishing, amending, or revoking federal motor vehicle safety standards, permits informal rulemaking under [5 USCS § 553](#), and formal rulemaking under [5 USCS §§ 556](#), [557](#) is not required. [Automotive Parts & Accessories Asso. v. Boyd](#), 407 F.2d 330, 132 U.S. App. D.C. 200, 1968 U.S. App. LEXIS 4351 (D.C. Cir. 1968).

National Highway Traffic Safety Administration may amend safety standard through informal rulemaking proceeding pursuant to [5 USCS § 553](#) rather than through formal adjudication under §§ 556 and 557. [Chrysler Corp. v. Department of Transp.](#), 515 F.2d 1053, 1975 U.S. App. LEXIS 14790 (6th Cir. 1975).

177. Interstate Commerce Commission/Surface Transportation Board

Requirements of § 7(c) of Administrative Procedure Act ([5 USCS § 556](#)) that proponent of rule shall have burden of proof and of § 8(b) ([5 USCS § 557](#)) that decisions shall include statements of findings and conclusions, apply only when hearings are, by statute under which they are conducted, required to be made on record and with opportunity for oral hearing, and therefore have no application to Interstate Commerce Commission proceeding under § 204(a)(6) of Motor Carrier Act of 1935 for purpose of making rules governing leasing or interchange of equipment

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by motor carriers. [American Trucking Asso. v. United States, 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337, 1953 U.S. LEXIS 2561 \(1953\).](#)

Provisions of Administrative Procedure Act as to hearing, proof, and record in administrative proceedings ([5 USCS §§ 556, 557](#)) are not applicable to Interstate Commerce Commission rule-making rather than adjudicatory proceedings, resulting in promulgation of rules governing railroad freight car service, since (1) provision of such Act governing agency rule-making generally ([5 USCS § 553](#)), provides that §§ 556 and 557 shall be applicable to rule-making proceeding only when rules are required by statute “to be on record” after opportunity for an agency hearing, and (2) Esch Car Service Act (formerly 49 USCS § 1(14)(a)), under which Commission’s rules were promulgated, does not require that such rules “be made on record”; such Commission proceeding is governed by provisions of § 553, and is procedurally acceptable thereunder where Commission meets statutory requirements as to notice of proposed rule-making and opportunity for participation therein by interested parties, and where Commission’s “findings” and “conclusions,” embodied in its report, comply with statutory requirement that agency shall incorporate in rules adopted concise general statement of their basis and purpose. [United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92 S. Ct. 1941, 32 L. Ed. 2d 453, 1972 U.S. LEXIS 122 \(1972\).](#)

Interstate Commerce Commission rule-making proceeding to set general incentive per diem rates for use by railroads of freight cars owned by other railroads, as authorized by Interstate Commerce Act, is governed by [5 USCS § 553](#), which authorizes agency in rule-making proceedings to restrict interested parties to submission of written evidence and arguments without oral presentation except when rules are required by statute “to be made on record after opportunity for agency hearing”; Commission’s proceedings restricting interested railroads to only written submissions of evidence are not governed by stricter hearing provisions of [5 USCS §§ 556 and 557](#) which provide for trial-type hearing and give parties right to present oral evidence and to conduct cross-examination. [United States v. Florida E. C. R. Co., 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223, 1973 U.S. LEXIS 137 \(1973\).](#)

Interstate Commerce Commission rules required by § 1(14)(a) of Interstate Commerce Act (formerly 49 USCS § 1(14)(a)) to be made after full hearing are subject, not to Administrative Procedure Act provisions governing adjudications ([5 USCS §§ 554 and 557](#)), but rather, to provision governing informal rulemaking proceedings ([5 USCS § 553](#)). [Asphalt Roofing Mfrs. Asso. v. Interstate Commerce Com., 567 F.2d 994, 186 U.S. App. D.C. 1, 10 Env’t Rep. Cas. \(BNA\) 1916, 8 Env’t. L. Rep. 20037, 1977 U.S. App. LEXIS 11165 \(D.C. Cir. 1977\).](#)

Hearing required in rate making proceedings by Interstate Commerce Act is not equivalent of hearing for rules “made on record” under Administrative Procedure Act ([5 USCS § 553\(c\)](#)), and in such circumstances Interstate Commerce Commission’s decision is product of informal rule-making rather than adjudication. [Food Marketing Institute v. Interstate Commerce Com., 587 F.2d 1285, 190 U.S. App. D.C. 388, 1978 U.S. App. LEXIS 8392 \(D.C. Cir. 1978\).](#)

Although investigation proceeding conducted under § 216(g) of Interstate Commerce Act (formerly 49 USCS § 316(g)) is informal rulemaking and consequently is not governed by hearing provisions of Administrative Procedure Act ([5 USCS §§ 556, 557](#)) statutory requirement of hearing imposes certain minimum constraints on procedure followed by agency; one of these constraints is disallowance of recourse to ex parte communications since such contacts (1) violate basic fairness of hearing which ostensibly assures public right to participate in agency decision making, and (2) foreclose effective judicial review of agency’s final decision. [National Small Shipments Traffic Conference, Inc. v. Interstate Commerce Com., 590 F.2d 345, 191 U.S. App. D.C. 214, 1978 U.S. App. LEXIS 8193 \(D.C. Cir. 1978\).](#)

178. Labor and employment

Under Walsh-Healey Act (41 USCS § 43a), all wage determinations must be made on record after opportunity for hearing; thus, fact that such proceeding involves rulemaking rather than adjudication appears irrelevant, since in such situation, Congress has provided same procedural safeguards. [Wirtz v. Baldor Electric Co., 337 F.2d 518, 119 U.S. App. D.C. 122, 48 Lab. Cas. \(CCH\) ¶31518, 16 Wage & Hour Cas. \(BNA\) 295, 1963 U.S. App. LEXIS 3305 \(D.C. Cir. 1963\).](#)

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Section 6 of Occupational Safety and Health Act ([29 USCS § 655](#)) does not require rulemaking proceedings within meaning of provision of [5 USCS § 553](#) requiring application of formal requirements of §§ 556, 557; however it does suggest Congressional expectation that rulemaking would be on basis of record to which substantial evidence test, where pertinent, may be applied in event informal hearing is held. *Associated Industries of New York State, Inc. v. United States Dep't of Labor*, 487 F.2d 342, 1 O.S.H. Cas. (BNA) 1340, 1973 U.S. App. LEXIS 7645 (2d Cir. 1973).

179. Miscellaneous

Promulgation by Civil Aeronautics Board of special regulation governing maximum hours or periods of service of airmen is not subject to formal route prescribed by [5 USCS §§ 556, 557](#), since Civil Aeronautics Act does not require that rules be made on record after opportunity for agency hearing, and compliance with rulemaking requirements of § 553 is proper. *Air Line Pilots Asso. International v. Civil Aeronautics Board*, 215 F.2d 122, 26 Lab. Cas. (CCH) ¶68562, 1954 U.S. App. LEXIS 4284 (2d Cir. 1954).

While Shipping Act (46 USCS § 813a) does require notice and hearing, it does not require that rules be made on record after opportunity for agency hearing; thus, under [5 USCS § 553](#), provisions of §§ 7 and 8 of Administrative Procedure Act ([5 USCS §§ 556, 557](#)) do not apply; however, when rulemaking proceeding was abandoned and converted into series of individual adjudicatory proceedings, shipowners could reasonably assume they were engaged in hearing under §§ 556, 557. *Pacific Coast European Conference v. United States*, 350 F.2d 197, 1965 U.S. App. LEXIS 6673 (9th Cir.), cert. denied, 382 U.S. 958, 86 S. Ct. 433, 15 L. Ed. 2d 362, 1965 U.S. LEXIS 52 (1965).

Secretary of Commerce, in issuing flammability standards for mattresses under Flammable Fabrics Act ([15 USCS §§ 1191](#) et seq.), correctly interpreted such Act and Administrative Procedure Act provisions applicable thereto as contemplating rule-making under §§ 551 and 553 rather than under §§ 556 and 557, since statute contains no directive requiring hearings. *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1973 U.S. App. LEXIS 11764 (1st Cir. 1973).

Even though Bank Holding Company Act ([12 USCS § 1843](#)) does not include clause requiring that Federal Reserve Board determinations be “on record,” this does not mean that informal rulemaking requirements of [5 USCS § 553](#) apply and provision for hearing may be satisfied by evidentiary submission in written form only, since determination of public benefits and adverse effects of permitting bank holding company to form mortgage lending subsidiary is essentially adjudicative in nature. *Independent Bankers Asso. v. Board of Governors of Federal Reserve System*, 516 F.2d 1206, 170 U.S. App. D.C. 278, 1975 U.S. App. LEXIS 13397 (D.C. Cir. 1975).

Statutory direction (such as that contained in § 9 of Consumer Product Safety Act ([15 USCS § 2058](#))) to permit comments to be made orally as well as in writing presumes framework of informal rule-making and does not constitute mandate of hearing on record or its equivalent within meaning of [5 USCS § 553\(c\)](#) that would make formal rule-making provisions of [5 USCS §§ 556](#) and [557](#) applicable. *Laminators Safety Glass Asso. v. Consumer Product Safety Com.*, 578 F.2d 406, 188 U.S. App. D.C. 164, 1978 U.S. App. LEXIS 11653 (D.C. Cir. 1978).

Requirement of Economic Stabilization Act of “formal hearings” on proposed regulations is not identical with requirement that rules “be made on record after opportunity for agency hearing,” [5 USCS § 553](#), which, if applicable, would invoke procedures of [5 USCS §§ 556](#) and [557](#). *Minden Beef Co. v. Cost of Living Council*, 362 F. Supp. 298, 1973 U.S. Dist. LEXIS 12317 (D. Neb. 1973).

Summary judgment is granted to Committee for Purchase from Blind in action by private contractor challenging decision under 41 USCS § 47 to purchase directly from handicapped shelter, where contractor alleged inability to cross examine figures submitted by shelter to obtain procurement decision was denial of right to participate in decisionmaking process, because informal rulemaking under [5 USCS § 553](#) is more legislative in nature and does not embody judicial features of formal rulemaking under §§ 556 and 557 and is designed to permit interested parties to comment on pending matters rather than assert rights. *HLI Lordship Industries, Inc. v. Committee for*

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[Purchase from Blind & Other Severely Handicapped, 663 F. Supp. 246, 1987 U.S. Dist. LEXIS 9754 \(E.D. Va. 1987\).](#)

G. Exceptions to Notice and Participation Requirements

1. In General

180. Generally

Rulemaking provision of APA, [5 USCS § 553](#), requires agencies to publish in advance only substantive rules, expressly excluding from publishing requirement interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. [Stuart-James Co. v. SEC, 857 F.2d 796, 273 U.S. App. D.C. 5, Fed. Sec. L. Rep. \(CCH\) ¶94015, Fed. Sec. L. Rep. \(CCH\) ¶94015, 1988 U.S. App. LEXIS 12856 \(D.C. Cir. 1988\)](#), cert. denied, 490 U.S. 1098, 109 S. Ct. 2448, 104 L. Ed. 2d 1002, 1989 U.S. LEXIS 2760 (1989).

Rules or policies that merely clarify or explain existing laws or regulations, are exempt from requirements of [5 USCS § 553](#), but rules that effect change in existing laws or policies are subject to notice and comment requirements. [Mt. Diablo Hospital Dist. v. Bowen, 860 F.2d 951, 1988 U.S. App. LEXIS 14751 \(9th Cir. 1988\).](#)

Exemption from requirements of § 4 of Administrative Procedure Act ([5 USCS § 553](#)) should be allowed only where strong congressional intent to that effect exists or when matter fits within [5 USCS § 553\(a\)](#) or [§ 553\(b\)\(A\)](#) and (B). [Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 12 Env't Rep. Cas. \(BNA\) 1088, 8 Env'tl. L. Rep. 20748, 1978 U.S. Dist. LEXIS 15274 \(D.D.C. 1978\).](#)

181. Construction

Exceptions to notice and comment provisions are narrowly construed and reluctantly recountenanced; courts closely examine agency's proffered rationale, but may uphold finding of good cause justified by obvious and compelling facts that can be judicially noticed. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

It is axiomatic that exceptions to rulemaking requirements of Administrative Procedure Act are to be narrowly construed. [Wells v. Schweiker, 536 F. Supp. 1314, 34 Fed. R. Serv. 2d \(Callaghan\) 951, 1982 U.S. Dist. LEXIS 17785 \(E.D. La. 1982\).](#)

Exceptions to general notice and comment requirements are to be construed narrowly. [Credit Union Nat'l Asso. v. National Credit Union Admin. Bd., 573 F. Supp. 586, 1983 U.S. Dist. LEXIS 12356 \(D.D.C. 1983\).](#)

182. "Substantial impact"

Only rules without substantial impact on operation of statute, such as statements of clarification or explanation of existing statute are exempt from Administrative Procedure Act notice and comment procedures. [Cabais v. Egger, 527 F. Supp. 498, 1981 U.S. Dist. LEXIS 17199 \(D.D.C. 1981\)](#), rev'd, [684 F.2d 1031, 221 U.S. App. D.C. 509 \(D.C. Cir. 1982\)](#), aff'd in part and rev'd in part, [690 F.2d 234, 223 U.S. App. D.C. 121, 1982 U.S. App. LEXIS 25399 \(D.C. Cir. 1982\).](#)

Although substantial impact test is not sole factor to determine applicability of notice and comment procedures, substantial impact test remains one of several criteria for evaluating claims of exemption. [Credit Union Nat'l Asso. v. National Credit Union Admin. Bd., 573 F. Supp. 586, 1983 U.S. Dist. LEXIS 12356 \(D.D.C. 1983\).](#)

Use of substantial impact test as sole test to determine applicability of notice and comment procedures is repudiated; proper analysis is to determine whether rule creates law or, to contrary, merely explains what agency thinks statute or regulation means; substantial impact test remains one of several criteria for evaluating claims of

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exemption. [*Credit Union Nat'l Asso. v. National Credit Union Admin. Bd.*, 573 F. Supp. 586, 1983 U.S. Dist. LEXIS 12356 \(D.D.C. 1983\)](#).

Substantial impact test is used to distinguish between substantive rules and those which are merely interpretive, procedural, or general statements of policy; substantial impact test is not applicable to rules exempt from notice and comment procedure under grants and benefits exception. [*Washington Hospital Center v. Heckler*, 581 F. Supp. 195, 1984 U.S. Dist. LEXIS 20701 \(D.D.C. 1984\)](#).

183. Characterization of rule as exempt by agency

Under [5 USCS § 553\(b\)](#), whether notice of proposed agency action is necessary does not depend upon label that particular agency puts upon its given exercise of administrative power but rather upon what agency in fact does. [*Lewis--Mota v. Secretary of Labor*, 469 F.2d 478, 1972 U.S. App. LEXIS 6685 \(2d Cir. 1972\)](#).

Label placed on rule is not decisive, rather what is decisive is what agency does in fact. [*Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

Label given by agency to particular statement of policy is not dispositive, and court must independently inquire into substance and effect of policy pronouncement. [*Mt. Diablo Hospital Dist. v. Bowen*, 860 F.2d 951, 1988 U.S. App. LEXIS 14751 \(9th Cir. 1988\)](#).

Label placed on rules by agency does not determine whether notice and comment provisions of [5 USCS § 553](#) are applicable; instead, determination must be made in light of basic policy of § 553, which requires that when proposed regulation of general applicability has substantial impact on regulated industry or important class of members or products of industry, notice and opportunity for comment should first be provided. [*Pharmaceutical Mfrs. Asso. v. Finch*, 307 F. Supp. 858, 1970 U.S. Dist. LEXIS 13179 \(D. Del. 1970\)](#), disapproved, [*Rivera v. Becerra*, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\)](#).

Label given to rule by administrative agency is not determinative. [*Continental Oil Co. v. Burns*, 317 F. Supp. 194, 1970 U.S. Dist. LEXIS 10235 \(D. Del. 1970\)](#).

Agency characterization of directives as “staff instructions” is not controlling where directives create binding legal obligations. [*Herron v. Heckler*, 576 F. Supp. 218, 1983 U.S. Dist. LEXIS 12135 \(N.D. Cal. 1983\)](#).

In deciding whether agency pronouncement is in fact subject to notice and comment provisions, court scrutinizes language of reported statement and circumstances of its promulgation. [*Conservation Law Foundation, Inc. v. Harper*, 587 F. Supp. 357, 1984 U.S. Dist. LEXIS 16331 \(D. Mass. 1984\)](#).

184. —Interpretive rule characterization

Mere invocation by agency of statutory exceptions for interpretative rules is not dispositive as to whether general rule making requirements of Administrative Procedure Act are applicable. [*Detroit Edison Co. v. United States EPA*, 496 F.2d 244, 6 Env't Rep. Cas. \(BNA\) 1568, 4 Env'tl. L. Rep. 20388, 1974 U.S. App. LEXIS 9101 \(6th Cir. 1974\)](#).

Agency's intent when issuing rule should govern as to whether such rule is legislative or interpretive, and such intent is often to be determined from whether agency followed rulemaking procedures laid down, or chose instead to issue rule as explanation of agency's position regarding matter within its purview; since Secretary of Health, Education and Welfare appeared to have considered provision in Manual-enunciating Department's guidelines and polices for implementing Medicare regulations-to be interpretive, court would treat it as such ([5 USCS § 553](#)). [*Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250, 1978 U.S. App. LEXIS 6672 \(3d Cir. 1978\)](#).

Court is not inclined to give great weight to agency's post hoc reconstruction of efforts and intentions in characterizing rule as exempt; agency's reliance at time of promulgation upon good cause exception suggests that

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rule was intended to be legislative rather than interpretative at time of promulgation. [Levesque v. Block, 723 F.2d 175, 1983 U.S. App. LEXIS 14292 \(1st Cir. 1983\)](#).

Agency's characterization of rule as interpretative, while relevant, is not dispositive. [General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 239 U.S. App. D.C. 408, 21 Env't Rep. Cas. \(BNA\) 1529, 14 Env'tl. L. Rep. 20704, 1984 U.S. App. LEXIS 18840 \(D.C. Cir. 1984\)](#), cert. denied, 471 U.S. 1074, 105 S. Ct. 2153, 85 L. Ed. 2d 509, 22 *Env't Rep. Cas. (BNA) 1784, 1985 U.S. LEXIS 1722 (1985)*.

Agency may not characterize regulation as interpretive and thereby avoid notice and comment provisions merely because it relies upon previous regulation which was exempt from notice and comment under exemption for cases in which notice is impracticable, unnecessary, contrary to public interest. [United States v. Garner, 767 F.2d 104, 1985 U.S. App. LEXIS 20996 \(5th Cir. 1985\)](#).

Secretary of Centers for Medicare and Medicaid Services did not change pre-existing policy under [42 CFR § 413.134\(f\)\(2\)](#) when he decided that depreciation for assets could only be taken after acquisition that was bona fide purchase because there was no evidence of prior policy to contrary and Secretary merely provided interpretative clarifications that did not require notice and comment. [St. Luke's Hosp. v. Sebelius, 662 F. Supp. 2d 99, 2009 U.S. Dist. LEXIS 90138 \(D.D.C. 2009\)](#), aff'd, [611 F.3d 900, 391 U.S. App. D.C. 400, 2010 U.S. App. LEXIS 13701 \(D.C. Cir. 2010\)](#).

In challenge by plaintiffs, Florida sugarcane grower and renewable energy company, because defendant U.S. Army Corps of Engineers' new "Stockton Rules" reversed Corps' former position that prior converted cropland (CC) shifted to non-agricultural use was exempt from Clean Water Act, and that pumping did not impact CC designation, Rules were not merely interpretative, general statements of policy, or rules of agency organization or procedure which would be exempt under [5 USCS § 553\(b\)\(3\)\(A\)](#) from notice and comment requirements; Rules were general agency rules as defined by [5 USCS § 551](#). [New Hope Power Co. v. United States Army Corps of Eng'Rs, 746 F. Supp. 2d 1272, 72 Env't Rep. Cas. \(BNA\) 2177, 2010 U.S. Dist. LEXIS 103231 \(S.D. Fla. 2010\)](#).

185. —Deference by courts

While agency's interpretation of ruling as interpretative is not controlling, agency's interpretation of statutory mandate is entitled to judicial deference, and ruling would be considered as interpretative where agency was only construing statutory exception. [Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082, 1978 U.S. App. LEXIS 8096 \(Temp. Emer. Ct. App. 1978\)](#).

Under notice requirements of [5 USCS § 553\(b\)](#), agency's view of its own action is entitled to some deference by courts but agency's own label of its action is not binding on court for purposes of determining applicability of notice exceptions of § 553(b). [Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583, 1975 U.S. Dist. LEXIS 13982 \(D.N.J. 1975\)](#).

186. Temporary rules

Provision of Interstate Commerce Act authorizing Interstate Commerce Commission to make specific grants of emergency temporary authority without regard to notice and comment requirements did not exempt notice of elimination of notification to competing carriers of application for emergency temporary authority from notice and comment requirements of [5 USCS § 553](#); it did not follow that because emergency temporary authority could be granted without notice and comment that procedures for granting such authority could be altered or amended without notice and comment. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

Treasury decision establishing temporary rules relating to unincorporated business enterprises electing to be taxed as domestic corporations is validly promulgated, despite failure of Commissioner of Internal Revenue to provide prior notice and opportunity for comment, where notice and public hearing is impracticable, in that election must be exercised within 60 days after close of taxable year of enterprise, and decision is issued in February. [Warrick v. United States, 177 F. Supp. 481, 4 A.F.T.R.2d \(RIA\) 5691 \(ED Mich 1959\)](#).

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In view of need for speedy action, it was appropriate for Secretary of Transportation and Federal Highway Administrator to issue temporary regulations under Surface Transportation Assistance Act's "Buy America" provisions, without proceeding by way of time-consuming, ordinary rule-making process, and therefore such regulations were validly issued under [5 USCS § 553\(b\)\(B\)](#). [Valiant Steel & Equipment, Inc. v. Goldschmidt](#), 499 F. Supp. 410, 1980 U.S. Dist. LEXIS 17727 (D.D.C. 1980).

Administration Procedure Act (APA) ([5 USCS §§ 551](#) et seq.) applies to temporary rules issued by United States Coast Guard, where Coast Guard issued rule limiting drawbridge openings crossing Chicago River for recreational vehicles during 4-month period, because temporary rule is only exempted from APA requirements if rule meets one of exemptions set forth under § 553(b)(3) and Coast Guard failed to invoke exemptions and is therefore required to support rule with substantial evidence. [Crowley's Yacht Yard v. Pena](#), 886 F. Supp. 98, 1995 U.S. Dist. LEXIS 6972 (D.D.C. 1995).

187. Interim rules

1990 Interim rule of Immigration and Naturalization Service, providing for grant of asylum based, inter alia, on family planning policy of home country, was never properly promulgated as legislative rule; rule did not fit exceptions listed in [5 USCS § 553](#) and therefore required notice and comment procedure. [Xin-Chang Zhang v. Slattery](#), 55 F.3d 732, 1995 U.S. App. LEXIS 12296 (2d Cir. 1995), cert. denied, 516 U.S. 1176, 116 S. Ct. 1271, 134 L. Ed. 2d 217, 1996 U.S. LEXIS 1827 (1996).

FAA's imposition of fee schedule pursuant to interim final rule promulgated under Federal Aviation Reauthorization Act without notice and comment did not violate APA where legislation's history demonstrated that Congress sought rapid action from Agency. [Asiana Airlines v. FAA](#), 134 F.3d 393, 328 U.S. App. D.C. 237, 1998 U.S. App. LEXIS 1286 (D.C. Cir. 1998), app. after remand, [254 F.3d 271](#), 349 U.S. App. D.C. 194, 2001 U.S. App. LEXIS 15623 (D.C. Cir. 2001).

Public Health Service investigation of biomedical researcher alleged to have misrepresented certain curves in journal article cannot proceed, where Public Health Service Interim Policies and Procedures for Dealing with Possible Misconduct in Extramural Research adopted informally as interim procedures in 1986 are agency rules subject to [5 USCS § 553](#) rulemaking provisions including notice and comment requirements, because rules being followed in investigating researcher were not properly promulgated and are invalid. [Abbs v. Sullivan](#), 756 F. Supp. 1172, 1990 U.S. Dist. LEXIS 18202 (W.D. Wis. 1990), vacated, [963 F.2d 918](#), 23 Fed. R. Serv. 3d (Callaghan) 8, 1992 U.S. App. LEXIS 11489 (7th Cir. 1992).

Small Business Administration (SBA) "interim final rule," setting size standard for qualification for small business benefits for emerging industry of environmental assessment and reclamation of federal facilities, must be vacated, where SBA issued temporary size standard on emergency basis without public participation, because strict standard for use of interim emergency exemption from standard notice and comment procedures in SBA's own rules is taken verbatim from [5 USCS § 553\(b\)\(3\)\(B\)](#) and is not met here since SBA has not manifested why minimal delay for proper promulgation would work to detriment of small business. [Analysas Corp. v. Bowles](#), 827 F. Supp. 20, 1993 U.S. Dist. LEXIS 8356 (D.D.C. 1993).

188. —General statements of policy

Interim rule of Immigration and Naturalization Service amending existing regulation governing asylum and withholding of deportation under specified circumstances was general statement of policy and therefore exempt from notice and comment requirement; thus, Attorney General could revoke interim rule without completing notice and comment requirement. [Chen Zhou Chai v. Carroll](#), 48 F.3d 1331, 1995 U.S. App. LEXIS 4338 (4th Cir. 1995).

Interim regulation under [7 USCS § 1854](#) providing that textiles entered for in-bond transportation would be not be approved without documentation describing merchandise in sufficient detail to allow estimate of duties due and correctness of values or quantities on entry is exempt from prior notice and comment provisions under general

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statement of policy exception. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\).](#)

189. —Good cause

Congress is not obligated to state explicitly that statutes it enacts fit within exceptions to regulations or policies formulated solely by administrative agency; thus, congressional silence in no way reveals intent on its part that good cause exception not apply; Congress, by setting effective date so close to date of enactment, expresses belief that implementation of amendments to AFDC program is urgent, and it cannot be said that Department of Health and Human Services, by paying heed to that congressional concern in determining that it has good cause to promulgate interim final rules without full notice and comment, errs as matter of law. [Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 1982 U.S. App. LEXIS 22575 \(3d Cir. 1982\).](#)

Notice of proposed rulemaking is subject to exception for “good cause”; statutory mandate that agency have regulations in effect within short period of time justifies exception; interim rule is not subject to notice and comment where at time redrafting was considered only 75 days remained to complete process; although agency understaffing of rulemaking process does not without more normally constitute grounds for good cause exception, statutorily mandated regulatory changes which are extensive and burdensome support “good cause” exception. [Petry v. Block, 737 F.2d 1193, 238 U.S. App. D.C. 46, 1984 U.S. App. LEXIS 20990 \(D.C. Cir. 1984\).](#)

There is good cause for dispensing with requirements for notice and comment for interim regulation where Congress showed strong intent to expedite implementation of statutory amendment and where interim regulation expressly provided explanation of good cause. [Sepulveda v. Block, 782 F.2d 363, 1986 U.S. App. LEXIS 21991 \(2d Cir. 1986\).](#)

Interim rule issued by Federal Energy Regulatory Commission permitting electric power companies to utilize construction work-in-progress costs in establishing rate base, was proper under [5 USCS § 553](#) notwithstanding omission of notice and comment procedures, since public had notice of interim nature of previous rule in effect, ongoing public procedures indicated formulation of permanent policy, and fundamental approach was supported by broad and substantial record and where because of considerable reliance companies placed upon prior rule, to delay readoption until completion of all notice and comment procedures would be contrary to public interest in having clear and identifiable rule. [Mid-Tex Electric Coop., Inc. v. FERC, 822 F.2d 1123, 262 U.S. App. D.C. 61, Util. L. Rep. \(CCH\) ¶13280, 1987 U.S. App. LEXIS 8274 \(D.C. Cir. 1987\).](#)

Although FERC’s interim rule requiring advance notice and disclosure by pipeline company of construction or replacement of facilities has minimal reach, change is not within good cause exception and Commission improperly promulgated rule without notice and comment. [Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 297 U.S. App. D.C. 141, 124 Oil & Gas Rep. 194, 133 Pub. Util. Rep. 4th \(PUR\) 608, Util. L. Rep. \(CCH\) ¶13876, 1992 U.S. App. LEXIS 15700 \(D.C. Cir. 1992\).](#)

Agency asserting “serious harm” justification must state with specificity some facts and circumstances which demonstrate that new regulation must be swiftly put in place; this specificity requirement is little more than demand that agency comply with [5 USCS § 553\(b\)\(B\)](#)’s language which requires within rule brief statement of reasons supporting why agency wishes to waive notice and comment. [United States v. Reynolds, 710 F.3d 498, 2013 U.S. App. LEXIS 5089 \(3d Cir. 2013\).](#)

Farmers’ claim that no good cause existed under [5 USCS § 553](#) for avoiding normal notice and comment rulemaking procedures in order to make interim final rules implementing [7 USCS § 1982](#) is moot, because even if farmers prevail on their claim, appropriate relief would be opportunity for public comment and adoption of new final regulations after consideration thereof, and Farmers Home Administration (FmHA) already provided such relief subsequent to exigency of 1986 FmHA county committee elections. [Hedge v. Lyng, 689 F. Supp. 898, 1988 U.S. Dist. LEXIS 5993 \(D. Minn. 1988\).](#)

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USDA is preliminarily enjoined from enforcing or implementing new interim rule on mandatory labeling for meat and poultry products, although USDA states that new rule, aimed at preventing problems like recent outbreaks of foodborne illness due to mishandling and undercooking, is in public interest and falls within good cause exception of [5 USCS § 553\(b\)\(B\)](#), because food industry organizations have shown that USDA has been considering problem for sometime, that no emergency exists, and that normal rulemaking procedures—allowing affected parties and general public to participate in process—can and should be followed. [Texas Food Indus. Ass'n v. United States Dep't of Agric.](#), 842 F. Supp. 254, 1993 U.S. Dist. LEXIS 19037 (W.D. Tex. 1993).

[28 CFR § 72.3](#), which purportedly applied Sex Offender Registration and Notification Act, [42 USCS §§ 16901](#) et seq., retroactively, did not violate 30-day notice and comment requirement of Administrative Procedure Act because U.S. Attorney General showed good cause in promulgating interim rule without initial 30-day notice since, given safety risks of allowing sex offenders to continue unregistered, even for short period of time, notice before implementation of rule was impracticable, and further delay was against public interest. [United States v. Torres](#), 573 F. Supp. 2d 925, 2008 U.S. Dist. LEXIS 71136 (W.D. Tex. 2008).

On challenge by plaintiff coalition of healthcare organizations seeking to enjoin defendant federal officials from implementing interim final rules promulgated to enforce Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), *Pub. L. No. 110-343*, 122 Stat. 3861, 3881, statutory deadlines imposed by Congress created need for prompt guidance in implementing Mental Health Parity and Addiction Equity Act of 2008, and combined with other factors, such as serious risk that MHPAEA would go into effect without regulatory guidance for affected industry, and that officials continued to solicit comments, it supported finding “good cause” so that interim final rules did not violate [5 USCS § 553](#)'s notice and comment provisions. [Coalition for Parity v. Sebelius](#), 709 F. Supp. 2d 10, 49 Employee Benefits Cas. (BNA) 1519, 2010 U.S. Dist. LEXIS 60941 (D.D.C. 2010).

190. —Procedural rules

Interim policy of Federal Communications Commission that it would designate for hearing certain applications for television licenses is procedural rule which does not contravene Administrative Procedure Act, since policy does not prohibit any person from acquiring any particular station but simply requires that certain applications be subject to hearing. [Meredith Broadcasting Co. v. Federal Communications Com.](#), 365 F.2d 912, 124 U.S. App. D.C. 379, 1966 U.S. App. LEXIS 5667 (D.C. Cir. 1966).

Compliance with [5 USCS § 553](#) is not necessary for adoption of interim procedures designed to facilitate promulgation of new substantive rules. [Buckeye Cablevision, Inc. v. United States](#), 438 F.2d 948, 1971 U.S. App. LEXIS 11717 (6th Cir. 1971).

191. Emergency rules

Fact that Federal Energy Regulatory Commission considers regulations defective does not imply that emergency exists, and since no emergency exists Commission is not entitled to ignore [5 USCS § 553\(b\)](#). [Consumer Energy Council v. Federal Energy Regulatory Com.](#), 673 F.2d 425, 218 U.S. App. D.C. 34, Util. L. Rep. (CCH) ¶12532, 1982 U.S. App. LEXIS 22237 (D.C. Cir. 1982), aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 1983-1 Trade Cas. (CCH) ¶65474, 1983 U.S. LEXIS 828 (1983), aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 (1983), aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402 (1983), cert. denied, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 (1983), cert. denied, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1413 (1983).

FAA letter informing parachuting business that parachute jumping would no longer be authorized in area was immediate substantive rule and was not exempt from rulemaking requirements; letter was not general statement of policy nor response to immediate emergency. [San Diego Air Sports Center, Inc. v. Federal Aviation Admin.](#), 887 F.2d 966, 1989 U.S. App. LEXIS 15713 (9th Cir. 1989).

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National Marine Fisheries Service did not violate Magnuson-Stevens Fishery Conservation and Management Act, [16 USCS §§ 1801](#) et seq., or Administrative Procedure Act, [5 USCS §§ 551](#) et seq., by failing to provide notice and opportunity for comment on its decision, published via emergency rule, to set shark fishing quotas and to continue suspension of non-quota management measures. [Ocean Conservancy v. Evans, 260 F. Supp. 2d 1162, 2003 U.S. Dist. LEXIS 7081 \(M.D. Fla. 2003\)](#).

192. —Good cause

Under [5 USCS § 553\(b\)\(3\)\(B\)](#), term “unnecessary” refers to rules which are minor in character or deal with emergency. [Texaco, Inc. v. Federal Power Com., 412 F.2d 740, 34 Oil & Gas Rep. 125, 80 Pub. Util. Rep. 3d \(PUR\) 107, 1969 U.S. App. LEXIS 11967 \(3d Cir. 1969\)](#).

“Good cause” is found when circumstances pre-existing rulemaking call for immediate agency response and waiver is required to accomplish necessary speed; in special circumstances, good cause can exist when announcement of proposed rule itself can be expected to precipitate activity by affected parties that would harm public welfare; agency is justified in using emergency rulemaking procedures to promulgate rule where advance notice would result in severe market dislocations and erosion of scheme central to regulations. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

Notice and comment procedure in [5 USCS § 553](#) should be waived only when delay would do real harm, as where every day Department of Labor delayed clarifying its regulation under FLSA was another day that state and local governments might be exposed to unforeseen liability; this was emergency situation in which “good cause” exception should apply. [SEIU, Local 102 v. County of San Diego, 60 F.3d 1346, 95 Cal. Daily Op. Service 5591, 95 D.A.R. 9557, 130 Lab. Cas. \(CCH\) ¶33255, 2 Wage & Hour Cas. 2d \(BNA\) 1412, 1994 U.S. App. LEXIS 40787 \(9th Cir. 1994\)](#), cert. denied, 516 U.S. 1072, 116 S. Ct. 774, 133 L. Ed. 2d 726, 3 Wage & Hour Cas. 2d (BNA) 64, 1996 U.S. LEXIS 490 (1996).

Language of 2009 Notice and Suspension failed to show that Department of Labor invoked good cause exception, either explicitly or implicitly; instead, record plainly reflects that Department concluded that notice and comment procedures of Administrative Procedure Act, [5 USCS §§ 553](#), and [701–706](#), were applicable, but that it had complied with such requirements. [N.C. Growers' Ass'n v. UFW, 702 F.3d 755, 20 Wage & Hour Cas. 2d \(BNA\) 34, 2012 U.S. App. LEXIS 26136 \(4th Cir. 2012\)](#).

Small Business Administration (SBA) “interim final rule,” setting size standard for qualification for small business benefits for emerging industry of environmental assessment and reclamation of federal facilities, must be vacated, where SBA issued temporary size standard on emergency basis without public participation, because strict standard for use of interim emergency exemption from standard notice and comment procedures in SBA’s own rules is taken verbatim from [5 USCS § 553\(b\)\(3\)\(B\)](#) and is not met here since SBA has not manifested why minimal delay for proper promulgation would work to detriment of small business. [Analysas Corp. v. Bowles, 827 F. Supp. 2d, 1993 U.S. Dist. LEXIS 8356 \(D.D.C. 1993\)](#).

Resident’s certificate of naturalization could be cancelled because (1) resident illegally procured resident’s naturalization when resident was on probation at time of resident’s naturalization, in violation of [8 CFR § 316.10\(c\)\(1\)](#), and (2) this regulation was validly enacted as interim rule pursuant to “good cause” exception to notice and comment and delayed effectiveness requirements of Administrative Procedure Act, [5 USCS §§ 500](#) et seq., in [5 USCS § 553\(b\)](#)—(d), since adherence to these requirements would have prevented statutory program from having effect. [United States v. Rebelo, 646 F. Supp. 2d 682, 2009 U.S. Dist. LEXIS 74289 \(D.N.J. 2009\)](#), aff’d, [394 Fed. Appx. 850, 2010 U.S. App. LEXIS 19497 \(3d Cir. 2010\)](#).

193. Miscellaneous exceptions and application thereof

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Agency investigatory activities specified by modifications that were preliminary to promulgating regulations are not subject to notice and comment requirements under [5 USCS § 553](#). *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 205 U.S. App. D.C. 101, 14 Env't Rep. Cas. (BNA) 2161, 10 Env'tl. L. Rep. 20803, 1980 U.S. App. LEXIS 14068 (D.C. Cir. 1980).

Public hearing was not required prior to publication in Federal Register of designation of facility as covered by trespass regulation of Department of Energy and posting of notices at facility, since such actions do not constitute rulemaking but are executory in nature and are exempt from public notice and participation requirements by virtue of [5 USCS § 553\(b\)](#). *United States v. Thompson*, 687 F.2d 1279, 1982 U.S. App. LEXIS 18289 (10th Cir. 1982).

Regulation which merely reiterates statutory language does not require notice and comment procedures. *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294, 266 U.S. App. D.C. 56, 1987 U.S. App. LEXIS 15077 (D.C. Cir. 1987), cert. denied, 486 U.S. 1057, 108 S. Ct. 2825, 100 L. Ed. 2d 926, 1988 U.S. LEXIS 2684 (1988).

Argument that tax form 1040 and instructions constitute "rule" for purpose of APA and therefore must be published before penalty for willful failure to file tax return may be enforced has no merit. *United States v. Bentson*, 947 F.2d 1353, 91 Cal. Daily Op. Service 8312, 91 D.A.R. 12675, 68 A.F.T.R.2d (RIA) 5773 (CA9 Ariz 1991) ; *United States v. Hicks*, 947 F.2d 1356, 91 Cal. Daily Op. Service 8317, 91 D.A.R. 12672, 68 A.F.T.R.2d (RIA) 5762 (CA9 Ariz 1991).

Federal Register notice requirement does not apply to federal criminal statutes because Congress is not agency within meaning of [5 USCS § 551](#). *United States v. Schiefen*, 139 F.3d 638, 1998 U.S. App. LEXIS 5278 (8th Cir. 1998).

Reliance by Small Business Administration on eligibility criteria previously published in Administration Manual, in determining ineligibility of small business for special program for economically disadvantaged, rather than formulating such criteria through formal rulemaking proceedings under [5 USCS § 553\(b\)](#) is permissible. *Human Resources Management, Inc. v. Weaver*, 442 F. Supp. 241 (DC Dist Col 1977).

Public notice, procedure and effective date provisions of [5 USCS § 553](#) do not apply to Federal Communication Commission's editorial amendments to its rules wherein Commission reinstates rule. Re Editorial Amendment of Rules, FCC 905 (Adopted Nov. 4, 1983).

194. —Food and Drug Administration

Notice and comment requirements of [5 USCS § 553\(b\)](#) and (c) did not apply to action of Commissioner of Food and Drugs in terminating provisional approval of color additive FD & C Red No. 2 pursuant to Transitional Provisions of 1960 Color Additives Amendments to Federal Food, Drug, and Cosmetic Act, since under Food, Drug, and Cosmetic Act, commissioner has discretion to terminate listing at any time. *Certified Color Mfrs. Asso. v. Mathews*, 543 F.2d 284, 177 U.S. App. D.C. 137, 6 Env'tl. L. Rep. 20629, 1976 U.S. App. LEXIS 8173 (D.C. Cir. 1976).

Final regulations of Commissioner of Food and Drug Administration, establishing standards of identity and labeling requirements for food for special dietary uses (vitamins and minerals) would not meet statutory requirements where Commissioner improperly relied on exception to justify his decision not to engage in public rule-making. *National Nutritional Foods Asso. v. Kennedy*, 572 F.2d 377, 1978 U.S. App. LEXIS 12572 (2d Cir. 1978).

195. —Housing and urban development

Memoranda by Assistant Secretary of Department of Housing and Urban Development (HUD) which specifically sanctioned excluding certain categories of eligible persons from admission to federally funded housing project were not void for failure to comply with publishing requirements of § 553 in action by nonelderly mentally impaired and developmentally disabled adults alleging eligibility for residency in project, since § 553 required that HUD publish only rules which affected change in existing law or policy and memoranda in question did not effect such change. *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1987 U.S. App. LEXIS 4587 (10th Cir. 1987).

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Phrase in Housing Assistant Payments contract entered into under Section 8 of Housing Act, [42 USCS § 1437f](#), stating that parties are bound by “applicable regulations,” does not oblige HUD, when calculating annual rent adjustments, to comply with HUD regulations that track requirements of APA ([5 USCS §§ 551](#) and [553](#)); rather, reference to “applicable regulations” appears to refer to requirements listed on page one of contract. [National Leased Hous. Ass'n v. United States, 32 Fed. Cl. 762, 1995 U.S. Claims LEXIS 34 \(Fed. Cl. Feb. 17, 1995\)](#), aff'd, [105 F.3d 1423, 1997 U.S. App. LEXIS 1612 \(Fed. Cir. 1997\)](#).

196. —Labor and employment

Refusal of Civil Service Commission to include former employees with less than 20 years' service and retiring before age 62, and who had elected to receive deferred retirement annuity beginning at age 62, in class of persons entitled to receive cost-of-living increases is exempt from rulemaking procedures under [5 USCS § 553\(b\)](#). [Kenny v. Hampton, 475 F.2d 1323, 155 U.S. App. D.C. 54, 1973 U.S. App. LEXIS 11119 \(D.C. Cir. 1973\)](#).

Instruction of Occupational Safety and Health Administration prescribing method for establishing priorities among industries for inspection based upon injury rate and number of lost work days in particular industry is not subject to notice and comment procedure since it is not promulgated as legislative rule by Secretary of Labor, it is not standard which sets forth course of conduct or behavior to which employers will be held under penalty of law, nor does it have sufficient impact to justify notice and comment procedure. [In re Chicago Aluminum Castings Co., 535 F. Supp. 392, 1981 U.S. Dist. LEXIS 17297 \(N.D. Ill. 1981\)](#).

Inclusion of additional blood test for presence of human immunodeficiency virus, cause of Acquired Immune Deficiency Syndrome, within established Foreign Service medical and health program, may not be characterized as program involving legislative rule requiring rulemaking procedures of [5 USCS § 553](#). [Local 1812, American Federation of Government Employees v. United States Dep't of State, 662 F. Supp. 50, 1 Am. Disabilities Cas. \(BNA\) 1060, 43 Empl. Prac. Dec. \(CCH\) ¶136985, 43 Fair Empl. Prac. Cas. \(BNA\) 955, 2 I.E.R. Cas. \(BNA\) 47, 1987 U.S. Dist. LEXIS 4762 \(D.D.C. 1987\)](#).

Chemical corporation failed to state cause of action under notice and comment requirements of [5 USCS § 553\(b\)](#) when it challenged decision of Federal Mediation and Conciliation Service (FMCS) to appoint three arbitrators to hear chemical corporation's data compensation dispute with crop corporation because decision of FMCS merely applied its existing regulations, was not codified, was not published in Federal Register, was not de facto legislative rule, and had no binding effect on future exercise of discretion. [SRM Chem. Ltd., Co. v. Fed. Mediation & Conciliation Serv., 355 F. Supp. 2d 373, 59 Env't Rep. Cas. \(BNA\) 2085, 2005 U.S. Dist. LEXIS 882 \(D.D.C. 2005\)](#).

197. —Transportation

Interstate Commerce Commission procedure for rebate of rates conceded to be illegal did not fall within exemption provision of [5 USCS § 553](#) regarding notice. [National Motor Freight Traffic Asso. v. United States, 268 F. Supp. 90, 1967 U.S. Dist. LEXIS 9268 \(D.D.C. 1967\)](#), aff'd, 393 U.S. 18, 89 S. Ct. 49, 21 L. Ed. 2d 19, 1968 U.S. LEXIS 590 (1968).

Plaintiff public interest organizations' claim that federal, state, and regional transportation agencies violated Administrative Procedure Act (APA) when they did not provide notice and opportunities for public comment on use of 2005 analysis year to show conformity with Clean Air Act failed because conformity determination of federal agency was not rule for purposes of APA. [Sierra Club v. Atlanta Reg'l Comm'n, 255 F. Supp. 2d 1319, 2002 U.S. Dist. LEXIS 26096 \(N.D. Ga. 2002\)](#).

2. Interpretive Rules**a. In General****198. Generally**

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Interpretative rules consist of administrative construction of statutory provision on question of law reviewable in courts. [Pickus v. United States Bd. of Parole, 507 F.2d 1107, 165 U.S. App. D.C. 284, 1974 U.S. App. LEXIS 6536 \(D.C. Cir. 1974\)](#), disapproved, [Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192, 1977 U.S. LEXIS 49 \(1977\)](#).

Under [5 USCS § 553\(b\)](#), rulings of federal agencies are interpretive, where agencies are without authority to promulgate legally binding substantive rules. [Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 180 U.S. App. D.C. 281, 1977 U.S. App. LEXIS 10522 \(D.C. Cir. 1977\)](#).

Interpretive rule, for purposes of exception under [5 USCS § 553\(b\)](#), is rule which merely clarifies or explains existing law or regulations. [Gosman v. United States, 573 F.2d 31, 215 Ct. Cl. 617, 1978 U.S. Ct. Cl. LEXIS 56 \(Ct. Cl. 1978\)](#).

Interpretive rule is defined as clarification or explanation of existing laws or regulations rather than substantive modification in or adaption of new regulations. [Taunton Municipal Lighting Plant v. Department of Energy, 669 F.2d 710, 1982 U.S. App. LEXIS 22879 \(Temp. Emer. Ct. App. 1982\)](#).

Rule which is interpretation of regulation which was properly promulgated was not required to be promulgated in accordance with notice and comment procedures of Administrative Procedure Act ([5 USCS § 553](#)). [Northern Ill. Gas Co. v United States, 833 F.2d 1582, 61 A.F.T.R.2d \(RIA\) 1393 \(CA 1987\)](#).

Under [5 USCS § 553](#) of APA, only “substantive” agency rules must meet Act’s notice, comment and publication requirements before final implementation, while interpretative rules are not subject to strict limitation requirements. [Guadamuz v. Bowen, 859 F.2d 762, Unemployment Ins. Rep. \(CCH\) ¶ 14220, Unemployment Ins. Rep. \(CCH\) ¶14220A, 1988 U.S. App. LEXIS 14177 \(9th Cir. 1988\)](#).

Where agency is interpreting language already found in its regulations, and is not adding or amending regulatory language, it is not subject to notice and comment procedures, and court will apply “arbitrary and capricious” standard of review. [Beazer East, Inc. v. United States EPA, Region III, 963 F.2d 603, 34 Env't Rep. Cas. \(BNA\) 1937, 22 Env'tl. L. Rep. 21161, 1992 U.S. App. LEXIS 10414 \(3d Cir. 1992\)](#).

Where agency’s interpretive rule is clearly designed to have measurable impact and rule is found only in amicus brief and unpublished letter, method of dissemination does not meet minimal requirements of fair notice. [Federal Labor Relations Authority v. U.S. Dep't of Navy, 966 F.2d 747, 140 L.R.R.M. \(BNA\) 2361, 1992 U.S. App. LEXIS 11687 \(3d Cir. 1992\)](#).

Interpretation by FDIC’s Resolution Trust Corporation of regulation describing insurance coverage for qualifying joint accounts separately from individually-held accounts was not substantive rule making and therefore not invalid for failure to follow notice and comment procedures, where interpretation merely clarified and explained regulation. [Sekula v. FDIC, 39 F.3d 448, 1994 U.S. App. LEXIS 31382 \(3d Cir. 1994\)](#).

Although exception to interpretive rule exception for notice and comment required by statute may have been applicable to case brought under [42 USCS § 254c](#), in wake of repeal of notice and comment provision by Congress, claim that notice and comment was required was moot. [Pine Tree Medical Assocs. v. Secretary of HHS, 127 F.3d 118, 1997 U.S. App. LEXIS 24435 \(1st Cir. 1997\)](#).

Under interpretative rule exception, rule that embodies pure legal determination of what applicable law already is does not require notice and comment under [5 USCS § 553\(b\)](#), part of Administrative Procedure Act. [Dismas Charities, Inc. v. United States DOJ, 401 F.3d 666, 2005 FED App. 0128P, 2005 U.S. App. LEXIS 4103 \(6th Cir. 2005\)](#).

While substantive rules are those that effect change in existing law or policy or that affect individual rights and obligations, interpretive rules clarify or explain existing law or regulation and are exempt from requirement, in Administrative Procedure Act, [5 USCS § 553](#), of notice and comment per § 553(b)(A); interpretive rule merely

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represents agency's reading of statutes and rules rather than attempt to make new law or modify existing law. [Haas v. Peake](#), 525 F.3d 1168, 2008 U.S. App. LEXIS 9843 (Fed. Cir.), reh'g denied, reh'g, en banc, denied, 544 F.3d 1306, 2008 U.S. App. LEXIS 21100 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149, 129 S. Ct. 1002, 173 L. Ed. 2d 315, 2009 U.S. LEXIS 788 (2009), overruled, [Procopio v. Wilkie](#), 913 F.3d 1371, 2019 U.S. App. LEXIS 2906 (Fed. Cir. 2019).

5 USCS § 553(b)(3)(A) exempts "interpretative rules" from notice-and-comment procedures of Administrative Procedure Act. [Kornman & Assocs. v. United States](#), 527 F.3d 443, 101 A.F.T.R.2d (RIA) 2008-2132, 101 A.F.T.R.2d (RIA) 2132, 2008-1 U.S. Tax Cas. (CCH) ¶50333, 2008 U.S. App. LEXIS 10295 (5th Cir. 2008).

Broad or imprecise language in statute to which agency ruling is directed might be factor in determining that ruling is interpretive and therefore exempt from **5 USCS § 553** notice requirements. [Arkoosh v. Dean Witter & Co.](#), 415 F. Supp. 535, 1976 U.S. Dist. LEXIS 15497 (D. Neb. 1976), disapproved, [Leist v. Simplot](#), 638 F.2d 283, 1980 U.S. App. LEXIS 15922 (2d Cir. 1980).

Interpretive rules consist of administrative construction of statutory provisions on question of law reviewable in courts, as distinguished from self-imposed controls over manner and circumstances in which agency will exercise plenary power. [Cerro Metal Products v. Marshall](#), 467 F. Supp. 869, 7 O.S.H. Cas. (BNA) 1125, 1979 O.S.H. Dec. (CCH) ¶23373, 1979 U.S. Dist. LEXIS 13934 (E.D. Pa. 1979), aff'd, 620 F.2d 964, 29 Fed. R. Serv. 2d (Callaghan) 828, 8 O.S.H. Cas. (BNA) 1196, 1980 O.S.H. Dec. (CCH) ¶24411, 1980 U.S. App. LEXIS 18292 (3d Cir. 1980), disapproved, [Donovan v. Red Star Marine Services, Inc.](#), 739 F.2d 774, 1985 A.M.C. 46, 11 O.S.H. Cas. (BNA) 2049, 1984 O.S.H. Dec. (CCH) ¶26981, 1984 U.S. App. LEXIS 20653 (2d Cir. 1984).

In deciding whether rule is interpretive, for purposes of exception under **5 USCS § 553(b)**, crucial question is whether agency intends to exercise delegated power to make rules having force and effect of law, and intent usually can best be found in what agency says at time of issuing rules. [Firestone Synthetic Rubber & Latex Co. v. Marshall](#), 507 F. Supp. 1330, 28 Cont. Cas. Fed. (CCH) ¶181144, 25 Empl. Prac. Dec. (CCH) ¶31590, 24 Fair Empl. Prac. Cas. (BNA) 1699, 1981 U.S. Dist. LEXIS 18016 (E.D. Tex. 1981).

Interpretive rule is one that simply explains and sets forth, with greater specificity, that which statute already requires. [McKenzie v. Heckler](#), 602 F. Supp. 1150, 1985 U.S. Dist. LEXIS 22770 (D. Minn. 1985), disapproved, [Detson v. Schweiker](#), 788 F.2d 372, 1986 U.S. App. LEXIS 24095 (6th Cir. 1986).

Interpretative rule is rule or statement issued by agency which advises public of agency's construction of statute or regulations that it administers; interpretative rules may be binding in sense that regulated parties know that actions not in conformity with agency interpretation may be viewed by agencies as violation of statute, and such binding effect does not convert interpretative rule into legislative rule having force and effect of law. [American Medical Asso. v. Heckler](#), 606 F. Supp. 1422, 1985 U.S. Dist. LEXIS 20603 (S.D. Ind. 1985).

199. "Substantial impact"

Interpretive rule is not subject to **5 USCS § 553(b)** notice requirements simply because rule has substantial impact on regulated parties, and proper test for determining whether notice is appropriate under circumstances is whether interpretive rule would be fatal to rights of regulated parties. [Energy Reserves Group, Inc. v. Department of Energy](#), 589 F.2d 1082, 1978 U.S. App. LEXIS 8096 (Temp. Emer. Ct. App. 1978).

Where rule is properly characterized as interpretive, notice and comment procedures are not required despite substantial impact of rule; substantial impact of agency action does not of itself require notice and comment if it is otherwise expressly exempt as interpretative rule. [Rivera v. Becerra](#), 714 F.2d 887, 5 Employee Benefits Cas. (BNA) 1917, 1983 U.S. App. LEXIS 24456 (9th Cir. 1983), cert. denied, 465 U.S. 1099, 104 S. Ct. 1591, 80 L. Ed. 2d 124, 5 Employee Benefits Cas. (BNA) 1981, 1984 U.S. LEXIS 1452 (1984).

Proposed interpretive regulation of general applicability which has substantial impact on regulated industry must comply with notice requirements of **5 USCS § 553(b)** requiring prior examination and comment by affected parties.

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[Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 1978 U.S. Dist. LEXIS 19131 \(D. Del.\), aff'd, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\).](#)

Under “substantial impact” test, notion that applicability of § 4 of Administrative Procedure ([5 USCS § 553](#)) is governed by formal distinction that may exist between substantive rules and rules of procedure, policy or interpretation, has been rejected; crucial factor in this determination is actual effect and impact of regulation in question on public, and if regulation alters rights or obligations of persons affected then agency must utilize notice and comment procedure. [Sannon v. United States, 460 F. Supp. 458, 1978 U.S. Dist. LEXIS 15012 \(S.D. Fla. 1978\)](#), remanded, [631 F.2d 1247, 30 Fed. R. Serv. 2d \(Callaghan\) 964, 1980 U.S. App. LEXIS 11720 \(5th Cir. 1980\)](#).

Notice and comment procedure is not required for interpretive rules, even when such rules have substantial impact. [Linoz v. Heckler, 598 F. Supp. 486, 1984 U.S. Dist. LEXIS 24710 \(D. Haw. 1984\)](#), rev'd, [800 F.2d 871, 1986 U.S. App. LEXIS 31125 \(9th Cir. 1986\)](#).

200. Distinguished from substantive and legislative rules

Regulations, substantive rules, or legislative rules are those which create law, usually implementing existing law, whereas interpretative rules are statements as to what administrative officer thinks statute or regulation means. [Gibson Wine Co. v. Snyder, 194 F.2d 329, 90 U.S. App. D.C. 135, 1952 U.S. App. LEXIS 2769 \(D.C. Cir. 1952\)](#).

Although term “interpretative rule” is not expressly defined by Administrative Procedure Act ([5 USCS § 553\(b\)](#)) its essential meaning is readily distinguished from that of substantive or legislative rule which has force of law, while interpretative rule is merely clarification or explanation of existing statute or rule. [Guardian Federal Sav. & Loan Asso. v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 191 U.S. App. D.C. 135, 1978 U.S. App. LEXIS 7834 \(D.C. Cir. 1978\)](#).

While term “interpretative rule” is not defined in Administrative Procedure Act, general rule is that substantive or legislative rule has force of law, interpretative rule is merely clarification of existing statute or regulation. [Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

Interpretative rule simply states what administrative agency thinks statute means and only reminds affected parties of existing duties; if agency intends to create new law, rights, or duties, rule is properly considered to be legislative rule; where justification for rule is comprised of reasoned statutory interpretation and where rule does not create any new rights or duties but simply restates consistent practice of agency, rule is interpretative. [General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 239 U.S. App. D.C. 408, 21 Env't Rep. Cas. \(BNA\) 1529, 14 Env'tl. L. Rep. 20704, 1984 U.S. App. LEXIS 18840 \(D.C. Cir. 1984\)](#), cert. denied, 471 U.S. 1074, 105 S. Ct. 2153, 85 L. Ed. 2d 509, 22 Env't Rep. Cas. (BNA) 1784, 1985 U.S. LEXIS 1722 (1985).

Substantive rules are those that create law, usually implementing existing law or imposing general, extra statutory obligations pursuant to authority properly delegated by Congress; interpretive rules merely clarify or explain existing law or regulations. [Southern California Edison Co. v. Federal Energy Regulatory Com., 770 F.2d 779, Util. L. Rep. \(CCH\) ¶13059, 1985 U.S. App. LEXIS 22709 \(9th Cir. 1985\)](#).

Administrative interpretation or interpretative rule is clarification or explanation of existing laws or regulations rather than substantive modification or adoption of new regulation. [Continental Oil Co. v. Burns, 317 F. Supp. 194, 1970 U.S. Dist. LEXIS 10235 \(D. Del. 1970\)](#).

Two basic inquiries must be made when distinguishing between substantive and interpretive rules: (1) court should look to impact on parties subject to rule, and (2) court should consider whether there is genuine ground for difference of opinion on wisdom of policy embodied in rule so as to make hearing process meaningful and important requirement. [St. Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323, 1975 U.S. Dist. LEXIS 12029 \(N.D. Cal. 1975\)](#).

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Four criteria have been established to determine whether agency action involves interpretation or substantive regulation: (1) complexity and pervasiveness of rules issued, (2) drastic changes effected in existing law by rules, (3) degree of retroactivity and its impact, and (4) confusion and controversy engendered by practical difficulties of compliance with new rules. [Springs Mills, Inc. v. Consumer Product Safety Com., 434 F. Supp. 416, 1977 U.S. Dist. LEXIS 15299 \(D.S.C. 1977\).](#)

Rule making requirements of [5 USCS § 553](#) apply only to substantive rules, which are rules relating to and changing standards of conduct, which have force of law; interpretive rules, which are general statements of policy and rules of agency organization, procedure or practice are exempt. [American Meat Institute v. Bergland, 459 F. Supp. 1308, 1978 U.S. Dist. LEXIS 14620 \(D.D.C. 1978\).](#)

Distinction between interpretive rules and substantive rules is marked by bright line in that substantive or legislative rules create law while interpretive rules are administrative statements of what regulation is believed to mean, in form of guidelines, without adding to underlying regulation. [Hall v. Heckler, 602 F. Supp. 1169, 1985 U.S. Dist. LEXIS 22671 \(N.D. Cal. 1985\)](#), rev'd, 782 F.2d 1052 (9th Cir. 1986).

In determining whether rule is interpretive or legislative, court first decides whether Congress delegated legislative powers to agency, and second whether agency intended to use that power in promulgating particular rule; court will honor agency's characterization of rule as legislative or interpretive only if it reasonably describes what agency has done. [American Federation of Government Employees v. United States, 622 F. Supp. 1109, 1984 U.S. Dist. LEXIS 21013 \(N.D. Ga. 1984\)](#), aff'd, 780 F.2d 720, 1986 U.S. App. LEXIS 19962 (Fed. Cir. 1986).

"Interpretive rule," which is not subject to notice and comment requirements of [5 USCS § 553](#), explains what statute means or reminds parties of existing duties, while "substantive rule," which must satisfy those requirements, creates altogether new rights and duties. [United States v. Hallmark Constr. Co., 14 F. Supp. 2d 1069, 29 Env'tl. L. Rep. 20168, 1998 U.S. Dist. LEXIS 14505 \(N.D. Ill. 1998\).](#)

201. Change in previous interpretation

Mere change in interpretive rule is not automatically substantive, but must be analyzed under appropriate test for distinguishing between substantive and interpretative rules; change which is neither complex nor pervasive, does not effect drastic changes in existing law, is not retroactive, and does not present practical difficulties with compliance, is interpretive and not substantive. [Spartanburg General Hospital v. Heckler, 607 F. Supp. 635, 1985 U.S. Dist. LEXIS 20383 \(D.S.C. 1985\).](#)

Agency is permitted to change its interpretation of statute especially where prior interpretation is based upon error and may amend order to bring agency conduct into conformance with statutory mandate and such decision is interpretive decision which does not trigger notice and comment requirements. [Sierra Club v. Watt, 608 F. Supp. 305, 22 Env't Rep. Cas. \(BNA\) 1831, 15 Env'tl. L. Rep. 20716, 1 Fed. R. Serv. 3d \(Callaghan\) 1443, 1985 U.S. Dist. LEXIS 20590 \(E.D. Cal. 1985\).](#)

202. —Particular cases

Although nonprofit corporation, which operated halfway houses, had prudential standing to raise procedural challenge under [5 USCS § 553](#), part of Administrative Procedure Act, to Bureau of Prisons' new interpretation of [18 USCS § 3621\(b\)](#), notice and opportunity for comment procedures that were sought by corporation clearly were not required because rule-making requirements of [5 USCS § 553](#) did not apply to interpretative rules. [Dismas Charities, Inc. v. United States DOJ, 401 F.3d 666, 2005 FED App. 0128P, 2005 U.S. App. LEXIS 4103 \(6th Cir. 2005\).](#)

Even though internal memorandum purported to interpret existing regulations, its effect was to retroactively change effect of such regulation, where, in previous cases, regulation was interpreted in other manner and parties relied on such interpretation, and agency's reliance on new interpretation is arbitrary and capricious where agency does not give notice of proposed rule and allows interested parties opportunity to be heard. [Montana Power Co. v.](#)

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[Environmental Protection Agency, 429 F. Supp. 683, 9 Env't Rep. Cas. \(BNA\) 2096, 7 Env'tl. L. Rep. 20496, 1977 U.S. Dist. LEXIS 17658 \(D. Mont. 1977\).](#)

Section in Parole Commission's Notes and Procedures Manual relied on by commission in making determination of how long to delay prisoner's parole date due to additional conviction for submitting false federal tax returns is clearly interpretative rather than substantive rule and thus was properly promulgated without notice and comment under [5 USCS § 553\(b\)\(A\)](#), because no prior contrary interpretation of substantive provision governing "new criminal conduct in community" had ever been rendered and thus rule did not change any existing rights or obligations. [Sturm v. James, 684 F. Supp. 1218, 1988 U.S. Dist. LEXIS 3555 \(S.D.N.Y. 1988\).](#)

Reinterpretation by Bureau of Prisons (BOP) of [18 USCS §§ 3621](#) and [3624](#), which resulted in determination that BOP could not designate inmate to community confinement center for more than 10 percent of underlying prison sentence, was not subject to notice and comment requirements of [5 USCS § 553](#); policy change was interpretive, not substantive, because it merely clarified [18 USCS § 3624\(c\)](#). [Cohn v. Fed. Bureau of Prisons, 302 F. Supp. 2d 267, 2004 U.S. Dist. LEXIS 1711 \(S.D.N.Y. 2004\).](#)

Where Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued open letter indicating that it would no longer approve firearm barrels for otherwise non-importable firearms to be imported into United States, ATF was not required to provide notice and opportunity to comment concerning its rule-making since letter corrected prior misapprehension of statute rather than stated new law promulgated pursuant to ATF's rulemaking authority. [Firearms Import/Export Roundtable Trade Group v. Jones, 854 F. Supp. 2d 1, 2012 U.S. Dist. LEXIS 51929 \(D.D.C. 2012\)](#), aff'd, [498 Fed. Appx. 50, 2013 U.S. App. LEXIS 6056 \(D.C. Cir. 2013\).](#)

b. Particular Cases

203. Agriculture

Ruling that wine made from boysenberries may not be labeled blackberry wine is interpretative ruling not subject to rulemaking procedure of Administrative Procedure Act ([5 USCS § 553](#)). [Gibson Wine Co. v. Snyder, 194 F.2d 329, 90 U.S. App. D.C. 135, 1952 U.S. App. LEXIS 2769 \(D.C. Cir. 1952\).](#)

Regulation providing Privacy Act ([5 USCS § 552a](#)) notice in school lunch program is interpretive where regulations setting forth social security number collection requirement merely tracked requirements set forth in legislation; rule is interpretive where regulations simply explain what statutes already require. [Alcaraz v. Block, 746 F.2d 593, 1984 U.S. App. LEXIS 17086 \(9th Cir. 1984\).](#)

Amendments to handbook are exempt from notice and comment requirement as interpretive rules where amendments do no more than elaborate requirements that are implicit in regulations. [Westcott v. United States Dep't of Agriculture, 765 F.2d 121, 1985 U.S. App. LEXIS 19940 \(8th Cir. 1985\).](#)

Department of Agriculture was enjoined from enforcing departmental regulation governing use of mechanically deboned meat (MDM) as constituent element of certain food products where Secretary's failure to comply with rule-making provisions of [5 USCS § 553](#) could not be excused since department's contention that regulations at issue were mere "interpretive rules" was without merit, and where there was no "good cause" for ignoring rule-making requirements. [Community Nutrition Institute v. Butz, 420 F. Supp. 751, 1976 U.S. Dist. LEXIS 13280 \(D.D.C. 1976\).](#)

Agriculture Department's definition of "imitation" food, is interpretative rule since it is merely interpretation of statutory term not defined by relevant statute; definitional regulation is not subject to rulemaking requirements. [Grocery Mfrs. of America, Inc. v. Gerace, 581 F. Supp. 658, 1984 U.S. Dist. LEXIS 18790 \(S.D.N.Y. 1984\)](#), aff'd in part and rev'd in part, [755 F.2d 993, 1985 U.S. App. LEXIS 29399 \(2d Cir. 1985\).](#)

Catfish mortality rate of 20 percent, as determined by Farm Service Agency, was interpretive rule, and, thus, catfish farmers were not required to be given notice and opportunity to be heard on reduction of payment by 20 percent they received through Crop Loss Disaster Assistance program to account for mortality rate, based on application of

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rate, in farmers' action under [5 USCS § 553\(b\)\(3\)\(A\)](#). *Belgard v. USDA*, 185 F. Supp. 2d 647, 2001 U.S. Dist. LEXIS 22611 (W.D. La. 2001).

204. —Food stamps

Interpretation given by United States Department of Agriculture to regulations concerning treatment of nonrecurring lump-sum payments received under aid to families with dependent children program for purposes of computing income of recipient who is also entitled to benefits under food stamp program is not invalid for want of promulgation under Administrative Procedure Act since agency's interpretation of its own regulations need not be promulgated in accordance with standard notice and comment procedure. *Allen v. Bergland*, 661 F.2d 1001, 1981 U.S. App. LEXIS 17043 (4th Cir. 1981).

Rule changing definition of household for purposes of food stamp benefits is legislative rather than interpretative since rule is promulgated pursuant to rulemaking authority granted to agency by Congress; agency's characterization of rule is exempt under good cause exception is not determinative; similarity between definition in rule in statutory definition does not render rule interpretative. *Levesque v. Block*, 723 F.2d 175, 1983 U.S. App. LEXIS 14292 (1st Cir. 1983).

205. Bureau of Alcohol, Tobacco and Firearms

Ruling of Bureau of Alcohol, Tobacco and Firearms which further refines statutory language and sets forth definition of machine gun is interpretative rule not subject to notice and comment procedures or formalities of agency hearing. *York v. Secretary of Treasury*, 774 F.2d 417, 1985 U.S. App. LEXIS 21959 (10th Cir. 1985).

Purchase-order requirement rule of Bureau of Tobacco and Firearms, necessary for importation of firearms for government use, is interpretative rule and therefore exempt from notice and comment procedure and is reasonable and consistent with statutory design to narrowly restrict importation of machine guns. *Interport Inc. v. Magaw*, 135 F.3d 826, 328 U.S. App. D.C. 414, 1998 U.S. App. LEXIS 2850 (D.C. Cir. 1998).

ATF's Open Letter to all Federal Firearms Licensees dated Sept. 21, 2011 was interpretive and exempt from notice-and-comment procedures; Open Letter did not impermissibly expand "unlawful user" definition under [27 CFR § 478.11](#) to include holders of medical marijuana registry cards, as users of medical marijuana were not using it "as prescribed by licensed physician" within meaning of § 478.11. *Wilson v. Lynch*, 835 F.3d 1083, 2016 U.S. App. LEXIS 16108 (9th Cir. 2016), cert. denied, 137 S. Ct. 1396, 197 L. Ed. 2d 555, 2017 U.S. LEXIS 2173 (2017).

Ruling of Bureau of Alcohol, Tobacco, and Firearms (ATF) requiring that purchase order from governmental purchaser accompany application for importation of weapons was not subject to notice and comment provisions of [5 USCS § 553](#), where ruling did not modify or add to requirement set forth in regulation, but merely informed interested parties regarding what would satisfy ATF, because ruling is interpretive rule, not legislative rule. *Interport v. Magaw*, 923 F. Supp. 242, 1996 U.S. Dist. LEXIS 5745 (D.D.C. 1996), aff'd, in part, 135 F.3d 826, 328 U.S. App. D.C. 414, 1998 U.S. App. LEXIS 2850 (D.C. Cir. 1998).

206. Bureau of Prisons

Federal Bureau of Prisons program requiring inmates to pay half of earned wages toward certain financial responsibilities is improper under [5 USCS § 553\(b\)](#) and (c), where Bureau contends program is "interpretation" of required payments but has applied program in "formula like" manner, because program is substantive rule subject to procedural requirements. *Prows v. United States Dept't of Justice*, 704 F. Supp. 272, 1988 U.S. Dist. LEXIS 15497 (D.D.C. 1988), aff'd, 291 U.S. App. D.C. 9, 1991 U.S. App. LEXIS 15492 (D.C. Cir. 1991).

Petitioners had right to require that Bureau of Prisons not act on potentially erroneous interpretation of law; where agency had clear duty not to improperly foreclose any legally available places of imprisonment to petitioners who were on work release; petitioners raised serious questions whether type of rule-making at issue was not exempted

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from Administrative Procedures Act's requirements. [Byrd v. Moore, 252 F. Supp. 2d 293, 2003 U.S. Dist. LEXIS 3259 \(W.D.N.C. 2003\)](#).

Bureau of Prisons did not exceed its authority under [18 USCS §§ 3621\(b\), 3624\(c\)](#) when it limited inmate placements in community corrections centers at end of sentence to lesser of 10 percent of sentence or six months; moreover, because that policy was interpretative rule within meaning of [5 USCS § 553\(b\)\(3\)\(A\)](#), notice and comment were not required. [Skelskey v. Deboo, 332 F. Supp. 2d 485, 2004 U.S. Dist. LEXIS 16789 \(D. Conn. 2004\)](#).

Where inmates sued Federal Bureau of Prisons (BOP), challenging its new policy that all sentences of imprisonment had to be served in traditional prison, inmates failed to establish violation of notice and comment provisions of Administrative Procedure Act, [5 USCS § 553](#), because BOP's new policy was interpretive rule and thus, notice and comment under § 553 was not required. [Kiley v. Fed. Bureau of Prisons, 333 F. Supp. 2d 406, 2004 U.S. Dist. LEXIS 17756 \(D. Md. 2004\)](#).

Since U.S. Bureau of Prisons' (BOP) cancellation of Intensive Confinement Center Program was general statement of BOP policy, it was not subject to notice requirement found in [5 USCS § 553\(b\)\(A\)](#). [Mares v. Fed. Bureau of Prisons, 401 F. Supp. 2d 775, 2005 U.S. Dist. LEXIS 34959 \(S.D. Tex. 2005\)](#).

BOP rule whereby inmates with two-level sentence enhancement for possession of firearm were categorically excluded from eligibility for early release upon completion of residential drug treatment program was permissible internal agency guideline and did not run afoul of notice and comment provisions of Administrative Procedures Act. [Robinson v. Gonzales, 493 F. Supp. 2d 758, 2007 U.S. Dist. LEXIS 48186 \(D. Md. 2007\)](#).

Regulation issued by U.S. Bureau of Prisons, [28 CFR § 550.58\(a\)\(1\)\(vi\)\(B\) \(2000\)](#), which excluded inmates from early release due to firearms offenses, was not subject to notice and comment provisions of Administrative Procedure Act, [5 USCS § 553\(b\)\(A\)](#), because it was interpretative rule; enabling statute, [18 USCS § 3621](#), did not define "nonviolent offenses" or specify which inmates convicted of nonviolent offenses were entitled to early release, and thus, regulation was necessary to fill this gap by defining this ambiguous term. [Minotti v. Whitehead, 584 F. Supp. 2d 750, 2008 U.S. Dist. LEXIS 91758 \(D. Md. 2008\)](#).

Unpublished decision: Where federal prisoners filed habeas corpus petitions to challenge validity of Bureau of Prisons regulation under which they were denied eligibility for reduction in their sentences, [28 C.F.R. § 550.58\(a\)\(1\)](#), district court properly denied prisoners' petitions because, although interim version of regulation might have been invalid under Administrative Procedure Act for noncompliance with notice and comment procedures, regulation was properly finalized before its application to prisoners. [Miller v. Gallegos, 125 Fed. Appx. 934, 2005 U.S. App. LEXIS 1743 \(10th Cir. 2005\)](#).

Unpublished decision: In [28 USCS § 2241](#) petition in which pro se federal inmate asserted that U.S. Bureau of Prison's decision to terminate Intensive Confinement Center (ICC) Program, for which she had been recommended at sentencing, without providing notice and chance to comment violated regulations under Administrative Procedure Act (APA), that argument failed; ICC Program was funded by lump-sum Congressional appropriations, and decision to terminate program was discretionary; it was merely change in rule of agency organization, which was exempt from notice requirements. [Ojeda v. Fed. Bureau of Prisons, 225 Fed. Appx. 285, 2007 U.S. App. LEXIS 9146 \(5th Cir. 2007\)](#).

207. Consumer Product Safety Commission

CPSC's statement of interpretation, which had clear intent of eliminating former exclusion from small parts rule of paper, fabric, yarn, fuzz, elastic or string components, and directly impacted enormous range of children's products, was legislative rule under [5 USCS § 553](#) and must be set aside for failure to comply with notice and comment procedures. [Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Com., 874 F.2d 205, 1989 U.S. App. LEXIS 14534 \(4th Cir. 1989\)](#).

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Consumer Product Safety Commission's regulations banning use of TRIS flame retardant in children's sleep wear would be null and void where (1) such regulations were not interpretive rules and statement of policy constituting exception under [5 USCS § 553\(d\)\(2\)](#), but were new rules, and (2) Commission had failed to follow procedural safeguards enacted by Congress, had failed to provide rule-making hearing with respect to any of its TRIS bans, and had deprived plaintiff manufacturer of due process of law. [Springs Mills, Inc. v. Consumer Product Safety Com., 434 F. Supp. 416, 1977 U.S. Dist. LEXIS 15299 \(D.S.C. 1977\)](#).

208. Customs and duties

Customs Form 4790, requiring persons transporting more than \$10,000 to disclose amount, was not required to be promulgated by notice and comment procedures specified in [5 USCS § 553](#). [United States v. Yuzary, 55 F.3d 47, 1995 U.S. App. LEXIS 9996 \(2d Cir. 1995\)](#).

Customs form for reporting of currency is "legislative" rule rather than interpretive rule or general statement of policy where form is intended to implement pertinent statute and regulation; rule is not interpretive where it is designed to implement law; rule is not interpretive where it imposes substantive duties. [United States v. Two Hundred Thousand Dollars \(\\$200,000\) in United States Currency, 590 F. Supp. 866, 1984 U.S. Dist. LEXIS 15054 \(S.D. Fla. 1984\)](#).

Challenge to Customs' "Zero Tolerance" policy by owners of seized vessels must fail, where statutory authority for seizure of vessels appears in [19 USCS § 1595a\(A\)](#) and policy merely provided for strict uniform enforcement of existing drug and forfeiture laws, because new policy governing prosecution of criminal statutes is classic example of interpretive rule not required to be submitted for public notice and comments under [5 USCS § 553](#). [Vu v. Meese, 755 F. Supp. 1375, 1991 U.S. Dist. LEXIS 148 \(E.D. La. 1991\)](#).

New policy applying to resellers' entries of foreign products which were covered by request for antidumping review of unaffiliated producers of products was interpretive rule within meaning of [5 USCS § 553\(b\)](#), and thus did not require formal rulemaking, since rule did not effect substantive change in regulatory provisions; new policy filled gap in existing regulatory scheme by accounting for entries of resellers which were not covered by final results of producers' antidumping review, and policy was not new position inconsistent with existing regulation. [Parkdale Int'l, Ltd. v. United States, 508 F. Supp. 2d 1338, 31 Ct. Int'l Trade 1229, 29 Int'l Trade Rep. \(BNA\) 2255, 2007 Ct. Intl. Trade LEXIS 123 \(Ct. Int'l Trade 2007\)](#).

Customs ruling stating its understanding of meaning of specific tariff description is interpretive rule which is specifically excepted from notice and participation requirements by [5 USCS § 553\(b\)A](#). [Way Distribs. v. United States, 85 Cust. Ct. 54, C.D. 4870, 1980 Cust. Ct. LEXIS 1182 \(Cust. Ct. Aug. 13, 1980\)](#), aff'd, [Border Brokerage Co. v. United States, 646 F.2d 539, 68 C.C.P.A. 32, C.A.D. 1262, 2 Int'l Trade Rep. \(BNA\) 1466, 1981 CCPA LEXIS 225 \(C.C.P.A. 1981\)](#), aff'd, [Way Distributors, Inc. v. United States, 653 F.2d 467, 68 C.C.P.A. 57, C.A.D. 1265, 1981 CCPA LEXIS 205 \(C.C.P.A. 1981\)](#).

209. Education

Unwritten guideline used by Secretary of Education to ensure that federal impact aid payments were related to actual education expenditures by local educational agencies, without regard to federal impact, was interpretive rule involving grant or benefit specifically exempted from Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) and thus not subject to § 553 notice and comment procedures. [Chula Vista City School Dist. v. Bennett, 824 F.2d 1573, 1987 U.S. App. LEXIS 444 \(Fed. Cir. 1987\)](#), cert. denied, 484 U.S. 1042, 108 S. Ct. 774, 98 L. Ed. 2d 861, 1988 U.S. LEXIS 494 (1988).

Letter purporting to interpret Individuals With Disabilities Education Act was not legislative ruling subject to notice and comment procedure of APA. [Metropolitan School Dist. v. Davila, 969 F.2d 485, 1992 U.S. App. LEXIS 17421 \(7th Cir. 1992\)](#), reh'g, en banc, denied, [1992 U.S. App. LEXIS 20530 \(7th Cir. Sept. 1, 1992\)](#), cert. denied, 507 U.S. 949, 113 S. Ct. 1360, 122 L. Ed. 2d 740, 1993 U.S. LEXIS 1675 (1993).

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Department of Education was not required to abide by notice and comment provisions of APA when using interpretive rule regarding Individuals with Disabilities Education Act, [20 USCS §§ 1400](#) et seq., and did not attempt to create new rights or duties. [Virginia Dep't of Educ. v. Riley, 86 F.3d 1337, 2 Accom. Disabilities Dec. \(CCH\) ¶2-282, 17 Am. Disabilities Dec. 81, 1996 U.S. App. LEXIS 14834 \(4th Cir. 1996\)](#), different results reached on reh'g, [106 F.3d 559, 3 Accom. Disabilities Dec. \(CCH\) ¶3-209, 20 Am. Disabilities Dec. 810, 1997 U.S. App. LEXIS 2796 \(4th Cir. 1997\)](#).

It was unlikely that interpretive guidelines of Department of Education establishing Three-Part Test for assessing compliance with Title IX of Education Amendments of 1972, [20 USCS §§ 1681](#) et seq., were subject to notice and comment requirements of [5 USCS § 553\(b\)](#) of Administrative Procedure Act (APA) because APA did not apply to interpretive rules and interpretive guidelines did not become amendments merely by supplying more detail than regulations they interpreted. [Equity in Ath., Inc. v. Dep't of Educ., 504 F. Supp. 2d 88, 2007 U.S. Dist. LEXIS 61211 \(W.D. Va. 2007\)](#), aff'd, [291 Fed. Appx. 517, 2008 U.S. App. LEXIS 18003 \(4th Cir. 2008\)](#).

210. Energy and power

Federal Energy Office complied with [5 USCS § 553](#) when it amended its initial rule, promulgated under authority of Emergency Petroleum Allocation Act and directing proprietors of service stations to deal with purchasers according to “normal business practices”, to prohibit retail gasoline service stations from limiting sales of all or part of their monthly gasoline allocation to their regular customers to exclusion of other motorists; such amendment could properly be seen to be “interpretative” of what was meant by “normal business practices,” so that Federal Energy Office would have no need to explain its decision to dispense with 30-day notice requirement before its amended rule was put into effect. [Reeves v. Simon, 507 F.2d 455, 1974 U.S. App. LEXIS 5878 \(Temp. Emer. Ct. App. 1974\)](#), cert. denied, [420 U.S. 991, 95 S. Ct. 1426, 43 L. Ed. 2d 672, 1975 U.S. LEXIS 1060 \(1975\)](#).

Pronouncements of Federal Energy Administration concerning certain accounting techniques used by petroleum refiners are not interpretive under [5 USCS § 553\(b\)](#), where pronouncements require that refiners allocate monthly sales revenues first to recoupment of all increased product costs, and second to recoupment of increased nonproduct costs. [Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

Since Department of Energy ruling is interpretation of existing statutory stripper well exemption and of legislative regulation issued pursuant thereto, it is interpretative rule which is not binding on courts, has no future effect, and is exempt from notice and comment procedures of [5 USCS § 553](#). [Energy Consumers & Producers Asso. v. Department of Energy, 632 F.2d 129, 1980 U.S. App. LEXIS 18952 \(Temp. Emer. Ct. App.\)](#), cert. denied, [449 U.S. 832, 101 S. Ct. 102, 66 L. Ed. 2d 38, 1980 U.S. LEXIS 2772 \(1980\)](#).

Because Department of Energy’s “layering rule” is interpretation of underlying rules against anti-circumvention of pricing regulations, is not substantial departure from meaning of underlying statute, and has no substantial impact of its own, Department need not fulfill notice and comment procedure of APA. [MAPCO Int'l v. FERC, 993 F.2d 235, 1993 U.S. App. LEXIS 10613 \(Temp. Emer. Ct. App. 1993\)](#).

Change in interest rate used by Department of Energy in remedial order proceedings does not require formal rulemaking procedures mandated by [5 USCS § 553\(b\)](#), since change in interest rate is statement of agency policy and thus exempt from rulemaking procedures. Hudson Oil Co. (DOE, July 1, 1985) No. HRO-0141.

211. —Federal Power Commission/Federal Energy Regulatory Commission

Order by Federal Power Commission indicating that it would continue to follow policy adopted in administrative case regarding treatment of taxes in ratemaking case is statement of policy based essentially on interpretation of Tax Reform Act and is properly issued without notice or opportunity for hearing. [Memphis Light, Gas & Water Div. v. Federal Power Com., 462 F.2d 853, 149 U.S. App. D.C. 238, 29 A.F.T.R.2d \(RIA\) 1283, 29 A.F.T.R.2d \(RIA\) 696 \(App DC 1972\)](#).

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Under [5 USCS § 553\(b\)](#), statement by Federal Power Commission is interpretive, wherein Commission announces its dissatisfaction with technique of “vintaging” natural gas prices based on date of initial production contracts, since statement is not basic modification of rate-setting regulations, alters no existing rates, and is within meaning of language of existing regulations. [Shell Oil Co. v. Federal Power Com.](#), 491 F.2d 82, 46 Oil & Gas Rep. 515, 4 Pub. Util. Rep. 4th (PUR) 339, Util. L. Rep. (CCH) ¶11517, 1974 U.S. App. LEXIS 9675 (5th Cir. 1974).

212. Environmental Protection Agency

Environmental Protection Agency rule that manufacturer must remedy all properly maintained and used vehicles subject to recall regardless of age or mileage at time of repair is interpretive rule in view of justification of rule which is comprised of reasoned statutory interpretation and fact that rule does not create new rights or duties but simply restates consistent practice of agency. [General Motors Corp. v. Ruckelshaus](#), 742 F.2d 1561, 239 U.S. App. D.C. 408, 21 Env't Rep. Cas. (BNA) 1529, 14 Env'tl. L. Rep. 20704, 1984 U.S. App. LEXIS 18840 (D.C. Cir. 1984), cert. denied, 471 U.S. 1074, 105 S. Ct. 2153, 85 L. Ed. 2d 509, 22 Env't Rep. Cas. (BNA) 1784, 1985 U.S. LEXIS 1722 (1985).

Final rule promulgated and made effective immediately by Environmental Protection Agency, without prior notice or opportunity for comment by interested parties, was interpretive rule outside scope of notice and comment requirements of [5 USCS § 553](#), where agency stated that principle purpose of final rule was to codify new statutory requirements and explained and interpreted its regulations, not by reference to whether agency was reasonably exercising delegated power to promulgate rule, but by reference to its view of what Congress intended such new requirements to be, indicating that final rule was attempt to construe specific statutory provisions. [United Technologies Corp. v. U.S. EPA](#), 821 F.2d 714, 261 U.S. App. D.C. 226, 26 Env't Rep. Cas. (BNA) 1110, 17 Env'tl. L. Rep. 21015, 1987 U.S. App. LEXIS 7949 (D.C. Cir. 1987).

EPA improperly interpreted “solid waste” in Resource Conservation and Recovery Act to include secondary material held on ground for recycling where it excluded same material held for same reason in tanks, containers, buildings, or on pads. [Association of Battery Recyclers, Inc. v EPA](#), 208 F.3d 1047, 341 U.S. App. D.C. 78, 50 Env't Rep. Cas. (BNA) 1385, 30 Env'tl. L. Rep. 20512, 2000 U.S. App. LEXIS 7203 (D.C. Cir. 2000).

213. —Air quality

Administrator of Environmental Protection Agency was not required to follow rulemaking procedures under [5 USCS § 553\(b\)\(A\)](#) in ruling that Clean Air Act as amended forbade nationwide sale of California-equipped cars which conformed to its most recent emission standards unless those cars also met federal emission standards since rulemaking is not required under § 553(b)(A) when agency merely interprets and carries out congressional revisions as opposed to actually exercising delegated legislative powers. [Ford Motor Co. v. Environmental Protection Agency](#), 606 F.2d 1293, 196 U.S. App. D.C. 386, 13 Env't Rep. Cas. (BNA) 1529, 1979 U.S. App. LEXIS 12431 (D.C. Cir. 1979).

Environmental Protection Agency definition of “reasonably available control technology,” articulated in agency memo to explain clean air statute, applied to disapprove proposed state emission control rules, did not create new law, rights, or duties, thus was interpretive rule without substantive legal effect not requiring [5 USCS § 553](#) notice and comment procedures. [Michigan v. Thomas](#), 805 F.2d 176, 25 Env't Rep. Cas. (BNA) 1197, 17 Env'tl. L. Rep. 20235, 1986 U.S. App. LEXIS 33501 (6th Cir. 1986).

Petition for review was denied because Environmental Protection Agency's (EPA) Designations of Areas for Air Quality Planning Purposes; [Technical Correction](#), 67 Fed. Reg. 12474 (Mar. 19, 2002) (2002 Nevada Rule) specifying that Nevada was divided into more than 250 baseline areas for purposes of prevention of significant deterioration program under Clean Air Act was neither arbitrary nor capricious nor out of accordance with law and because 2002 Nevada Rule was interpretive law and not substantive law EPA did not err when it did not offer notice and comment procedures. [Reno-Sparks Indian Colony v. United States EPA](#), 336 F.3d 899, 2003 Cal. Daily Op.

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[Service 6259, 2003 D.A.R. 7866, 2003 D.A.R. 7871, 56 Env't Rep. Cas. \(BNA\) 1833, 33 Env'tl. L. Rep. 20240, 2003 U.S. App. LEXIS 14206 \(9th Cir. 2003\).](#)

214. —Pesticides and insecticides

Announcement by Environmental Protection Agency under Federal Insecticide, Fungicide and Rodenticide Act which results in ban of phosphorus paste used for killing rats and roaches does not have legal effect of regulation and is interpretation not requiring adherence to notice requirements of 5 USCS § 533(b). [Stearns Electric Paste Co. v. Environmental Protection Agency, 461 F.2d 293, 4 Env't Rep. Cas. \(BNA\) 1164, 2 Env'tl. L. Rep. 20368, 1972 U.S. App. LEXIS 9622 \(7th Cir. 1972\).](#)

1978 Environmental Protection Agency memorandum outlining Agency's interpretation of § 6(a)(2) of Federal Insecticide, Fungicide, and Rodenticide Act ([7 USCS § 136d\(a\)\(2\)](#)) requiring registrants to submit new factual information to agency is classic example of interpretative rule which is exempted from notice and comment procedures by [5 USCS § 553](#). [Chemical Specialties Mfrs. Ass'n v. United States EPA, 484 F. Supp. 513, 14 Env't Rep. Cas. \(BNA\) 2103, 10 Env'tl. L. Rep. 20430, 1980 U.S. Dist. LEXIS 17307 \(D.D.C. 1980\).](#)

Court would take judicial notice of Federal Register entries describing Environmental Protection Agency's policy setting standard of acute dietary exposure for performing risk assessments necessary to set pesticide tolerances under [21 USCS § 346a](#) in action alleging that EPA adopted standard without following rulemaking requirements of [5 USCS § 553\(b\)](#). [American Farm Bureau v. United States EPA, 121 F. Supp. 2d 84, 51 Env't Rep. Cas. \(BNA\) 2027, 2000 U.S. Dist. LEXIS 16940 \(D.D.C. 2000\).](#)

215. —Water quality

EPA was justified in refusing to hold evidentiary hearing regarding its determination that facility owned by Puerto Rico sewer authority must fully comply with Clean Water Act's secondary treatment requirements for publicly owned treatment works where EPA previously established facility's requirements when facility was emitting pollutants, and facility failed to proffer any legally cognizable basis for modifying requirements. [Puerto Rico Aqueduct & Sewer Auth. v. United States EPA, 35 F.3d 600, 39 Env't Rep. Cas. \(BNA\) 1269, 25 Env'tl. L. Rep. 20555, 1994 U.S. App. LEXIS 23913 \(1st Cir. 1994\)](#), cert. denied, 513 U.S. 1148, 115 S. Ct. 1096, 130 L. Ed. 2d 1065, 40 Env't Rep. Cas. (BNA) 1224, 1995 U.S. LEXIS 1024 (1995).

Preamble to regulations implementing Clean Water Act, suggesting that "waters of United States" include waters used as habitat by endangered species or birds protected by Migratory Bird Treaties, is merely interpretive rule and thus not subject to notice and comment requirements of APA. [Leslie Salt Co. v. United States, 55 F.3d 1388, 95 Cal. Daily Op. Service 3764, 95 D.A.R. 6478, 40 Env't Rep. Cas. \(BNA\) 1865, 25 Env'tl. L. Rep. 21046, 1995 U.S. App. LEXIS 11930 \(9th Cir.\)](#), cert. denied, 516 U.S. 955, 116 S. Ct. 407, 133 L. Ed. 2d 325, 9 Fla. L. Weekly Fed. S 309, 95 Cal. Daily Op. Service 8440, 95 D.A.R. 14513, 42 Env't Rep. Cas. (BNA) 1350, 26 Env'tl. L. Rep. 20001, 1995 U.S. LEXIS 7153 (1995).

216. Federal Aviation Administration

Federal Aviation Administration's test of alternative flight pattern for period of 90 days which does not make substantive impact on rights and duties of persons subject to regulation is exempt from notice and comment requirement. [Alexandria v. Helms, 728 F.2d 643, 18 Av. Cas. \(CCH\) ¶17755, 20 Env't Rep. Cas. \(BNA\) 1553, 1984 U.S. App. LEXIS 25040 \(4th Cir. 1984\).](#)

FAA's failure to publish, in Code of Federal Regulations after public notice and comment, rule authorizing revocation of airman's certificate for misfeasance during flight incident, is not in violation of [5 USCS § 553](#). [Hite v. National Transp. Safety Bd., 991 F.2d 17, 1993 U.S. App. LEXIS 13773 \(1st Cir. 1993\).](#)

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FAA's Notice of Enforcement defining "duty-to-report time" as not constituting "rest time" did not require notice and comment where its position had been consistent for 50 years. [*Aviators for Safe & Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 6 Wage & Hour Cas. 2d \(BNA\) 353, 2000 U.S. App. LEXIS 17969 \(1st Cir. 2000\)](#).

Letter issued by Federal Aviation Administration that required airlines to calculate mandatory rest times for crew members under [14 CFR § 121.471](#) based upon actual time of flight as opposed to scheduled time of flight was interpretative ruling that did not substantively change regulations and did not require notice and comment rulemaking before it was implemented. [*Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 351 U.S. App. D.C. 399, RICO Bus. Disp. Guide ¶10270, 7 Wage & Hour Cas. 2d \(BNA\) 1484, 2002 U.S. App. LEXIS 10270 \(D.C. Cir. 2002\)](#).

217. Federal Communications Commission

Written announcement by Federal Communications Commission that in case of tie in Commission's comparative proceedings for awarding telecommunications license should end in tie, lottery may be used to award license between or among equally qualified applicants, did not have substantial impact on anyone, thus, was interpretative rule not requiring notice and comment procedures under § 553. [*National Latino Media Coalition v. FCC*, 816 F.2d 785, 259 U.S. App. D.C. 481, 1987 U.S. App. LEXIS 5402 \(D.C. Cir. 1987\)](#).

While [47 USCS § 251\(d\)\(1\)](#), part of Telecommunications Act of 1996 (TCA), directed respondent Federal Communications Commission to establish regulations to implement statutory requirements of [47 USCS §§ 153\(26\)](#), [251\(b\)\(2\)](#), part of TCA, concerning "number portability" as defined by [47 USCS § 153\(30\)](#), order that required, upon customer's request, that petitioner wireline carriers transfer their customers' numbers to wireless carriers, if wireless carrier's "coverage area" overlapped geographic location of wireline number's rate center and if wireless carrier maintained original rate center, was legislative rule and not merely interpretive rule because prior order expressly declared that wireline carriers were not obligated to provide location portability, and thus order was subject to notice and comment provisions of [5 USCS § 553](#), part of Administrative Procedure Act, but challenged order was not disturbed because Commission had published notice in Federal Register, and received and considered comments, and proposal was virtually identical to order adopted; any error, if there was one, was harmless under [5 USCS § 706](#). [*United States Telecom Ass'n v. FCC*, 400 F.3d 29, 365 U.S. App. D.C. 149, 2005 U.S. App. LEXIS 4058 \(D.C. Cir. 2005\)](#), app. after remand, [563 F.3d 536, 385 U.S. App. D.C. 327, 2009 U.S. App. LEXIS 9741 \(D.C. Cir. 2009\)](#).

Where porting obligations of wireless carriers under new order by respondent Federal Communications Commission flowed from prior order, new order was interpretive rule under [5 USCS § 553\(b\)\(3\)\(A\)](#), even if it had substantial impact, and no impact statement was required under [5 USCS § 604](#), part of Regulatory Flexibility Act, as had been asserted by petitioner rural telephone carriers. [*Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 365 U.S. App. D.C. 247, 2005 U.S. App. LEXIS 4057 \(D.C. Cir. 2005\)](#).

Federal Communications Commission's waiver of station operating standards that reduced protections afforded full-power frequency modulation (FM) stations against signal interference from low-power FM stations was general policy statement that was exempted from Administrative Procedure Act's notice-and-comment requirement, [5 USCS § 553\(b\)\(A\)](#). [*Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 386 U.S. App. D.C. 259, 2009 U.S. App. LEXIS 12150 \(D.C. Cir. 2009\)](#).

If accounting requirements adopted by FCC in antitrust suit amounted to agency rule, rule was interpretive and thus not subject to requirements for publication of notice specified under [5 USCS § 553\(b\)](#). Re American Telephone and Telegraph Co., Ameritech, Bell Atlantic, Bell South, NYNEX, Pacific Telesis, Southwestern Bell & US West—Accounting Instructions for Judgment and Other Costs Associated With Litton Systems Antitrust Law Suit, FCC 88-21 (Adopted January 19, 1988).

218. Federal Reserve System

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Under [5 USCS § 553\(b\)](#), statement by Board of Governors of Federal Reserve System, concerning Board's views of scope of prior regulation enacted in conformance with notice requirements of § 553(b), is interpretive, where Board's views are stated in provisional terms and there is no suggestion that views have either finality or force of specifications made in earlier regulation. [National Asso. of Ins. Agents, Inc. v. Board of Governors of Federal Reserve System, 489 F.2d 1268, 160 U.S. App. D.C. 144, 1974 U.S. App. LEXIS 10676 \(D.C. Cir. 1974\).](#)

Amendment of Federal Reserve Board regulation defining permissible nonbanking activities is interpretive and not subject to notice and hearing requirements of [5 USCS § 553](#) where amended regulation expresses agency's narrowed view of language of original regulation and makes explicit what was implicit under original regulation. [American Bancorporation, Inc. v. Board of Governors of Federal Reserve System, 509 F.2d 29, 1974 U.S. App. LEXIS 5450 \(8th Cir. 1974\).](#)

Federal reserve board statement, in connection with ruling on application for acquisition of industrial loan company, that institution which both offers NOW accounts and commercial loans is "bank" constitutes improper attempt to impose legislative policy by adjudicative order; court rejects contention that statement is interpretive rule and therefore exempt from rulemaking provisions of [5 USCS § 553](#) since statement involves significant policy change. [First Bancorporation v. Board of Governors of Federal Reserve System, 728 F.2d 434, 1984 U.S. App. LEXIS 25323 \(10th Cir. 1984\).](#)

Directives issued and contracts entered into by Department of Health and Human Services in implementing system of "peer review" of Medicare outlays called for by Congress in 1982 amendments to Medicare Act constitute mere procedural rules or general statements of policy that do not substantially alter rates or interests of regulated hospitals and Department was not required to undertake notice and comment procedure prescribed by [5 USCS § 553](#). [American Hospital Asso. v. Bowen, 834 F.2d 1037, 266 U.S. App. D.C. 190, 1987 U.S. App. LEXIS 15999 \(D.C. Cir. 1987\).](#)

Federal Reserve Board interpretation of Regulation Z (12 CFR § 226.401) is interpretative rule not subject to notice and opportunity for comment provisions of [5 USCS § 553](#), since interpretation is not complex and all-pervasive set of regulatory matter, but merely represents attempt to clarify or define term "actual unanticipated late payment charge." [Continental Oil Co. v. Burns, 317 F. Supp. 194, 1970 U.S. Dist. LEXIS 10235 \(D. Del. 1970\).](#)

Federal Reserve Board regulation defining withdrawal from system for purposes of statute and which thus provides interpretive aid as to meaning of statutory term is interpretive regulation that is not subject to notice and comment requirements. [First Bank & Trust Co. v. Board of Governors of Federal Reserve System, 605 F. Supp. 555, 1984 U.S. Dist. LEXIS 20960 \(E.D. Ky. 1984\).](#)

219. Food and Drug Administration

Regulations promulgated by Food and Drug Administration, which classify as prescription drugs certain preparations of vitamins, are not interpretive rules under [5 USCS § 553\(b\)](#), where regulations are intended to have force of law. [National Nutritional Foods Asso. v. Weinberger, 512 F.2d 688, 1975 U.S. App. LEXIS 16268 \(2d Cir.\), cert. denied, 423 U.S. 827, 96 S. Ct. 44, 46 L. Ed. 2d 44, 1975 U.S. LEXIS 2351 \(1975\), app. after remand, 557 F.2d 325, 1977 U.S. App. LEXIS 13042 \(2d Cir. 1977\).](#)

Compliance policy guides of FDA do not effect change in existing law or policy but explain how FDA will enforce existing law and are interpretive rules or policy statements and therefore exempt from notice and comment procedures. [Takhar v. Kessler, 76 F.3d 995, 96 Cal. Daily Op. Service 967, 96 D.A.R. 1588, 1996 U.S. App. LEXIS 1933 \(9th Cir. 1996\).](#)

Announcement by FDA that radiopharmaceuticals "should be regulated", variously titled or referred to as "Notice", "guidance", and "policy statement" was not interpretive rule and therefore subject to notice and comment procedure, where it did not purport to construe any language in relevant statute or regulation but rather used wording

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consistent with extending its regulatory reach. [Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 326 U.S. App. D.C. 422, 1997 U.S. App. LEXIS 29780 \(D.C. Cir. 1997\)](#).

Regulations issued by Commissioner of Food and Drugs which promulgate new standards of evidence necessary to demonstrate effectiveness of drug products are not procedural or interpretive under [5 USCS § 553\(b\)](#). [Pharmaceutical Mfrs. Asso. v. Finch, 307 F. Supp. 858, 1970 U.S. Dist. LEXIS 13179 \(D. Del. 1970\)](#), disapproved, [Rivera v. Becerra, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\)](#).

Where plaintiff manufacturer's action against defendant federal officials challenged Food and Drug Administration (FDA) Final Rule finding that dietary supplements containing ephedrine alkaloids were adulterated under [21 USCS § 342\(f\)\(1\)\(A\)](#), because Dietary Supplement Health and Education Act of 1994 directed FDA to restrict distribution of dietary supplements which posed any risk that was unreasonable in light of its potential benefits, FDA's use of risk-benefit analysis was proper, and that analysis was interpretive rule which did not require notice and comment under [5 USCS § 553](#). [Hi-Tech Pharms., Inc. v. Crawford, 505 F. Supp. 2d 1341, 2007 U.S. Dist. LEXIS 59849 \(N.D. Ga. 2007\)](#), aff'd, [544 F.3d 1187, 21 Fla. L. Weekly Fed. C 1148, 2008 U.S. App. LEXIS 21050 \(11th Cir. 2008\)](#).

220. Health and human services

Where statute expressly leaves selection of either first or second preceding month as base month to secretary's discretion, secretary's decision adopting second preceding month constitutes exercise of limited option characterized as interpretive rule. [Zaharakis v. Heckler, 744 F.2d 711, 1984 U.S. App. LEXIS 17975 \(9th Cir. 1984\)](#).

Gap-filling method used by Secretary of HHS to calculate new reimbursement rates for suppliers of durable medical goods pursuant to [42 USCS § 1395m](#) is interpretative rather than substantive and does not require notice and comment procedure where Secretary characterized action as best method of implementing statute in light of lack of relevant data, and where plaintiffs failed to substantiate claim of substantive impact. [La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 37 Soc. Sec. Rep. Service 430, 1992 U.S. App. LEXIS 11435 \(1st Cir. 1992\)](#).

Interpretive rules that alter manner in which parties present themselves to agency are permissible under interpretive rule exception to notice and comment requirement so long as rule represents agency's explanation of provision and is not intended to substantially change existing rights and duties; thus, where duties of health care providers have not markedly changed, Department of Health and Human Services is not required to observe notice and comment procedures. [Sentara-Hampton Gen. Hosp. v. Sullivan, 980 F.2d 749, 298 U.S. App. D.C. 372, 39 Soc. Sec. Rep. Service 520, 1992 U.S. App. LEXIS 32340 \(D.C. Cir. 1992\)](#).

Acquiescence Ruling in which Secretary of Health and Human Services provided, pursuant to court ruling, that in order for recipient's benefit to be reduced because of subsidized support, recipient must receive "actual economic benefit" from subsidy was interpretive, not substantive and did not create rights or impose obligations; it merely interpreted court's mandate and was therefore not subject to notice and comment requirements. [Gordon v. Shalala, 55 F.3d 101, 48 Soc. Sec. Rep. Service 24, 1995 U.S. App. LEXIS 12295 \(2d Cir. 1995\)](#), cert. denied, 517 U.S. 1103, 116 S. Ct. 1317, 134 L. Ed. 2d 470, 1996 U.S. LEXIS 1962 (1996).

Health and Human Service's rule terminating federal matching funds for state juvenile justice programs was interpretive rule exempt from notice and comment requirement where prior approvals of state programs were themselves interpretive rules. [Chief Probation Officers v. Shalala, 118 F.3d 1327, 97 Cal. Daily Op. Service 5380, 97 D.A.R. 8755, 1997 U.S. App. LEXIS 16785 \(9th Cir. 1997\)](#).

Government did not violate notice and comment requirements by interpreting regulatory accommodation under Patient Protection and Affordable Care Act, which permitted religious nonprofit organizations to opt out of contraceptive coverage requirement, to apply on employer-by-employer basis, rather than plan-by-plan basis; delay in implementation of rule would have interfered with prompt availability of contraceptive coverage and delayed

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implementation of opt-out. [Priests for Life v United States HHS \(2014, App DC\) 772 F3d 229](#) reh'g, en banc, denied, [2015 U.S. App. LEXIS 8326 \(App DC 2015\)](#).

Indian health service policy authorizing denial of “contract health care” to off-reservation Indians otherwise within scope of IHS program is subject to general notice and comment requirements of [5 USCS § 553](#) since policy effected substantial change in existing statutes and regulations and had direct and significant impact upon substantive rights of segment of general public, and under these circumstances policy statement was not exempt from § 553 requirements as “interpretive rule” or “general statement of policy”. [Lewis v. Weinberger, 415 F. Supp. 652, 1976 U.S. Dist. LEXIS 14886 \(D.N.M. 1976\)](#).

Administrative directive characterized as “staff instructions” which set forth guidelines for determining exempt property for purposes of eligibility for supplemental security income benefits is rule since agency directive is promulgated by agency, is applicable prospectively to class of beneficiaries generally, and is designed to implement, interpret, or prescribe law; claims manual provisions are “rules” since they declare policies generally binding on affected public and provide specific standards to regulate future action; claims manual provisions are not interpretive rules where secretary relies upon such provisions as substantive regulations in deciding entitlements, citing claims manual provisions as binding authority for decision; claims manual provisions meet “substantial impact” test where they are used to affect eligibility for benefits, and failure to comply with notice and comment provisions renders challenged claim manual provisions void and unenforceable. [Herron v. Heckler, 576 F. Supp. 218, 1983 U.S. Dist. LEXIS 12135 \(N.D. Cal. 1983\)](#).

To determine whether rule disclaiming coverage or particular diagnostic laboratory test is substantive or interpretative, court first determines if there is law which rule purports to interpret; rule providing that clotting time tests used to monitor patients undergoing kidney dialysis are not to be billed separately from basic dialysis charge is interpretative rather than substantive and is therefore not subject to notice and comment rulemaking. [Bio-Medical Applications of Providence, Inc. v. Heckler, 593 F. Supp. 1233, 1984 U.S. Dist. LEXIS 23299 \(D.D.C. 1984\)](#), aff'd, [776 F.2d 365, 249 U.S. App. D.C. 399 \(D.C. Cir. 1985\)](#).

Announcement by Department of Health and Human Services limiting reimbursement to states of costs of caseworker social services to foster care children under [42 USCS § 603\(a\)\(3\)](#) is “interpretive rule” and as such is not subject to notice and comment procedures under [5 USCS § 553](#). [New York State Dep't of Social Services v. Bowen, 648 F. Supp. 850, 1986 U.S. Dist. LEXIS 17347 \(D.D.C. 1986\)](#), aff'd, [835 F.2d 360, 266 U.S. App. D.C. 296, 1987 U.S. App. LEXIS 16605 \(D.C. Cir. 1987\)](#).

Challenge to 1995 revised guidelines updating criteria to be considered in making medically underserved population (MUP) designations must fail, where guidelines do not modify but merely clarify 1976 regulations, because they are interpretive rules exempt from notice and comment requirements under [5 USCS § 553\(b\)\(3\)](#). [Pine Tree Medical Assocs. v. Secretary of Health & Human Servs., 944 F. Supp. 38, 1996 U.S. Dist. LEXIS 16086 \(D. Me. 1996\)](#), aff'd, [127 F.3d 118, 1997 U.S. App. LEXIS 24435 \(1st Cir. 1997\)](#).

Department of Health and Human Services (HHS) change requests did not encode any substantive value judgment, but simply dictated verification processes that HHS would use to ensure that claims for referred items or services were validly referred by qualified physician; change requests made no distinction between claims on basis of subject matter, they were valid under notice and comment obligations interpretive rules exception. [Ass'n of Am. Physicians & Surgs. v. Sebelius, 110 A.F.T.R.2d \(RIA\) 6499 \(DC Dist Col 2012\)](#).

221. —Manuals

Provision of Medicare Provider Reimbursement Manual would be interpretive rule, where such rule effected no change in policy or in law, but explained what more general terms of statute and regulation could already be deemed to require. [Gosman v. United States, 573 F.2d 31, 215 Ct. Cl. 617, 1978 U.S. Ct. Cl. LEXIS 56 \(Ct. Cl. 1978\)](#).

5 USCS § 553

Provider Reimbursement Manual providing guidelines and policies to implement Medicare regulations and which merely interprets administrative regulations is not rendered inapplicable by virtue of not being promulgated in accordance with Administrative Procedures Act ([5 USCS § 553](#)), since rulemaking procedures of Act are inapplicable to interpretive rules. [Rio Hondo Memorial Hospital v. United States, 689 F.2d 1025, 231 Ct. Cl. 657, 1982 U.S. Ct. Cl. LEXIS 477 \(Ct. Cl. 1982\)](#).

“Regional office manual” provision is binding on agency as substantive regulation despite agency’s characterization as “interpretive guideline” where provision is directed at states and major category of recipients under state plans. [Cubanski v. Heckler, 781 F.2d 1421, 1986 U.S. App. LEXIS 22092 \(9th Cir. 1986\)](#), cert. granted, 479 U.S. 1083, 107 S. Ct. 1282, 94 L. Ed. 2d 141, 1987 U.S. LEXIS 646 (1987), vacated, remanded, [485 U.S. 386, 108 S. Ct. 1200, 99 L. Ed. 2d 402, 1988 U.S. LEXIS 1450 \(1988\)](#).

On appeal by Medicare provider from summary judgment disallowing federal reimbursement of interest on loans made by hospital's funded depreciation account to its general operating account, Medicare Provider Reimbursement Manual requirement that deposits to funded depreciation accounts remain in accounts for 6 months before reimbursable interest-bearing loans may be made to other hospital accounts was merely interpretative guide to Medicare regulations and as such was exempt from notice and comment requirements of § 553. [St. Mary's Hospital v. Blue Cross & Blue Shield Association/Blue Cross & Blue Shield, 788 F.2d 888, 1986 U.S. App. LEXIS 24300 \(2d Cir. 1986\)](#).

Argument that regulations implementing Medicare Act are invalid because they were not established pursuant to APA fails because [5 USCS § 553](#) excludes from its procedures interpretive rules, and agency manual excluding stock maintenance costs merely classified expenses necessary to patient care. [National Medical Enterprises, Inc. v. Sullivan, 916 F.2d 542, 1990 U.S. App. LEXIS 17728 \(9th Cir. 1990\)](#), cert. denied, 500 U.S. 917, 111 S. Ct. 2014, 114 L. Ed. 2d 100, 1991 U.S. LEXIS 2750 (1991).

Provisions in Medicare provider reimbursement manual and amendments thereto are interpretative rules, not subject to rulemaking process of [5 USCS § 553](#), thus, issuance by Secretary of Health and Human Services of revised manual provision in response to changes in medical industry did not constitute substantive change requiring notice and hearing under § 553. [Creighton Omaha Regional Health Care Corp. v. Bowen, 822 F.2d 785, 1987 U.S. App. LEXIS 785, 1987 U.S. App. LEXIS 8372 \(8th Cir. 1987\)](#).

Change in section of HHS's provider Medicare reimbursement manual calling for amortization of advance refunding costs was not mere interpretation of regulation, but worked substantive change in regulations and was therefore invalid attempt to make substantive rule without satisfying formal rulemaking requirement. [Mother Frances Hosp. v. Shalala, 15 F.3d 423, 43 Soc. Sec. Rep. Service 508, 1994 U.S. App. LEXIS 3842 \(5th Cir. 1994\)](#), vacated, remanded, 514 U.S. 1011, 115 S. Ct. 1350, 131 L. Ed. 2d 209, 95 D.A.R. 3457, 1995 U.S. LEXIS 1999 (1995).

Provisions in Medicare Provider Reimbursement Manual setting forth criteria for reopening Medicare cost report is interpretive rule and therefore not subject to notice and comment requirements. [Your Home Visiting Nurse Servs. v. Secretary of HHS, 132 F.3d 1135, 1997 FED App. 0366P, 1997 U.S. App. LEXIS 35873 \(6th Cir. 1997\)](#), cert. granted, in part, 524 U.S. 925, 118 S. Ct. 2318, 141 L. Ed. 2d 693, 98 Cal. Daily Op. Service 4569, 98 D.A.R. 6259, 1998 U.S. LEXIS 4009 (1998), aff'd, [525 U.S. 449, 119 S. Ct. 930, 142 L. Ed. 2d 919, 12 Fla. L. Weekly Fed. S 112, 99 Cal. Daily Op. Service 1347, 1999 Colo. J. C.A.R. 875, 99 D.A.R. 1673, 59 Soc. Sec. Rep. Service 763, 1999 U.S. LEXIS 1512 \(1999\)](#).

U.S. Dep't Health & Human Serv., Health Care Fin. Admin., Program Integrity Manual ch. 13, §§ 5.1 and 5.4, which were unpublished guidelines issued by Secretary of Health and Human Services for Medicare contractors to follow in creating local coverage determinations for review of certain payment claims, were interpretive and not legislative rules and, thus, they did not have to be promulgated in accordance with notice and comment provisions of Administrative Procedure Act, [5 USCS § 553\(b\)](#) and (c). [Erringer v. Thompson, 371 F.3d 625, 2004 U.S. App. LEXIS 11432 \(9th Cir. 2004\)](#).

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Provisions of Provider Reimbursement Manual § 2134.9 and 2150.2b—issued by Secretary of Health, Education and Welfare pursuant to Medicare Act ([42 USCS §§ 1395](#) et seq.), which disallow reimbursement of stock maintenance costs of Medicare providers—are interpretive rules because they were issued to advise public of agency's construction of statute which it administers, and are therefore excluded from requirements of [5 USCS § 553\(b\)\(A\)](#). [American Medical International, Inc. v. Secretary of Health, Education & Welfare](#), 466 F. Supp. 605, 1979 U.S. Dist. LEXIS 14655 (D.D.C. 1979), aff'd, 677 F.2d 118, 219 U.S. App. D.C. 267, 1981 U.S. App. LEXIS 18516 (D.C. Cir. 1981).

Medicare Intermediary Manual is interpretative rule of agency not subject to rulemaking procedures. [Borgess Medical Center v. Schweiker](#), 563 F. Supp. 370, 1982 U.S. Dist. LEXIS 10003 (W.D. Mich. 1982).

Provision of provider reimbursement manual, which is designed to inform public about agency's construction of Medicare statute, is properly characterized as interpretive rule and agency is not required to promulgate provision in conformity with rulemaking requirements; interpretive rule which is consistent with statute and with other interpretive rules is not arbitrary and capricious. [Bond Hospitals, Inc. v. Heckler](#), 587 F. Supp. 1268, 1984 U.S. Dist. LEXIS 16629 (D.D.C. 1984), aff'd, 762 F.2d 137, 246 U.S. App. D.C. 43 (D.C. Cir. 1985).

Medicare reimbursement manuals which define term “in-patient days” are interpretive where provisions are neither complex nor pervasive, where provisions do not work drastic change in existing law, are not retroactive, and where compliance engenders no practical difficulties. [Culpeper Memorial Hospital v. Heckler](#), 592 F. Supp. 1173, 1984 U.S. Dist. LEXIS 24080 (E.D. Va. 1984), rev'd, 770 F.2d 1257, 1985 U.S. App. LEXIS 22620 (4th Cir. 1985).

Agency manual which contains interpretations or clarifications of existing regulations is not subject to notice and comment requirement despite fact that provisions of manual may have substantial impact on those regulated. [Linoz v. Heckler](#), 598 F. Supp. 486, 1984 U.S. Dist. LEXIS 24710 (D. Haw. 1984), rev'd, 800 F.2d 871, 1986 U.S. App. LEXIS 31125 (9th Cir. 1986).

HHS's Provider Reimbursement Manual § 2203 is not subject to APA rulemaking procedures, where § 2203 does not add new obligations or rights for hospitals (but merely guides allocation of costs to ancillary or routine cost centers for purpose of Medicare reimbursements), since manual is more accurately characterized as interpretive rather than substantive rule. [National Medical Enters. v. Shalala](#), 826 F. Supp. 558, 41 Soc. Sec. Rep. Service 626, 1993 U.S. Dist. LEXIS 9786 (D.D.C. 1993), aff'd, 43 F.3d 691, 310 U.S. App. D.C. 40, 46 Soc. Sec. Rep. Service 309, 1995 U.S. App. LEXIS 281 (D.C. Cir. 1995).

In a suit for breached of construction contract against a government agency, the plaintiff's claim that the agency manual was a binding agency directive was without merit because there was no evidence the government agency intended for the manual to be binding on parties that contract with the government; moreover, there was evidence the government agency intended for the manual to be advisory in nature. [Tidewater Contrs., Inc. v. United States](#), 131 Fed. Cl. 372, 2017 U.S. Claims LEXIS 252 (Fed. Cl. Mar. 30, 2017).

222. —Medicare and Medicaid

Letter written by employee of Bureau of Health Insurance to official of Blue Cross was not subject to general notice and comment requirements of [5 USCS § 553](#), where letter did not announce substantive change in Medicare policy but was at most interpretation of Medicare regulations. [Homan & Crimen, Inc. v. Harris](#), 626 F.2d 1201, 1980 U.S. App. LEXIS 13523 (5th Cir.), reh'g denied, 633 F.2d 582 (5th Cir. 1980).

Directives issued and contracts entered into by Department of Health and Human Services in implementing system of “peer review” of Medicare outlays called for by Congress in 1982 amendments to Medicare Act constitute mere procedural rules or general statements of policy that do not substantially alter rates or interests of regulated hospitals and Department was not required to undertake notice and comment procedure prescribed by [5 USCS § 553](#). [American Hospital Asso. v. Bowen](#), 834 F.2d 1037, 266 U.S. App. D.C. 190, 1987 U.S. App. LEXIS 15999 (D.C. Cir. 1987).

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Policy adopted by HHS Secretary, under which Tax Equity and Fiscal Responsibility Act (TEFRA) bonuses are paid at final settlement stage of Medicare reimbursement process is not merely “interpretive” ruling, since any policy excluding TEFRA bonuses from established scheme of paying total amount of reimbursement provider is due at tentative settlement stage represents change in law and policy that must be promulgated according to notice and comment rulemaking requirements of [5 USCS § 553](#). *Mt. Diablo Hospital Dist. v. Bowen*, 860 F.2d 951, 1988 U.S. App. LEXIS 14751 (9th Cir. 1988).

“Maintenance amount ceiling rule,” contained in amendment concerning amount of money to be allocated from Medicaid funds for maintenance and support of non-institutionalized spouses of institutionalized Medicaid recipients, was not “interpretative rule” exempt from notice and comment requirements under [5 USCS § 553](#); accordingly, rule is invalid due to failure of HHS to comply with rulemaking requirements of Administrative Procedure Act. *Ohio Dep’t of Human Servs. v. United States Dep’t of Health & Human Servs., Health Care Fin. Admin.*, 862 F.2d 1228, 1988 U.S. App. LEXIS 16010 (6th Cir. 1988).

Determination by Secretary of HHS that chelation therapy is not covered for Medicare reimbursement was not legislative rule, since it created no new law but rather interpreted reasonable and necessary requirement for medical reimbursement. *Friedrich v. Secretary of HHS*, 894 F.2d 829, 1990 U.S. App. LEXIS 851 (6th Cir. 1990), reh’g denied, 1990 U.S. App. LEXIS 5134 (6th Cir. Mar. 7, 1990), cert. denied, 498 U.S. 817, 111 S. Ct. 59, 112 L. Ed. 2d 34, 1990 U.S. LEXIS 3963 (1990).

Secretary of Health and Human Services can require long-term care facilities to have patients in residence before certifying them for Medicaid participation; requirement is not “substantive rule” that must be promulgated in accordance with APA. *Indiana by Department of Public Welfare v. Sullivan*, 934 F.2d 853, 1991 U.S. App. LEXIS 11225 (7th Cir. 1991).

Policy of Health and Human Services not to allow Medicare providers to submit their own independent studies to demonstrate they meet requirements for Rural Referral Center certification was interpretive rule or regulation establishing RRC criteria and Secretary was not required to follow notice and comment procedure in its adoption. *Board of Trustees of Knox County Hosp. v. Shalala*, 135 F.3d 493, 55 Soc. Sec. Rep. Service 325, 48 Fed. R. Evid. Serv. (CBC) 1034, 1998 U.S. App. LEXIS 1391 (7th Cir. 1998).

Health Care Financing Administration’s ruling classifying medical equipment such as braces on wheeled bases fitted to persons with severe musculoskeletal problem as “durable medical equipment” rather than “braces”, thereby limiting Medicare reimbursement for such devices, was interpretive rule not requiring notice and comment. *Warder v. Shalala*, 149 F.3d 73, 57 Soc. Sec. Rep. Service 847, 1998 U.S. App. LEXIS 17060 (1st Cir. 1998), cert. denied, 526 U.S. 1064, 119 S. Ct. 1455, 143 L. Ed. 2d 541, 1999 U.S. LEXIS 2585 (1999).

Where agency has issued rule under Administrative Procedure Act’s notice-and-comment provisions, [5 USCS § 553](#), courts ordinarily refuse to consider objections not submitted in accordance with agency procedures during rulemaking process; as general rule that courts should not topple over administrative decisions unless administrative body not only has erred but has erred against objection made at time appropriate under its practice; delivery of plaintiff hospitals’ letter of objection to Centers for Medicare and Medicaid (CMS) 2007 final reimbursement rule was accepted by CMS employee, so they were entitled to presume that submission was acceptable even though they failed to call number listed in notice of proposed rulemaking, so it was not abuse of discretion to supplement 2007 rulemaking record with letter. *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 394 U.S. App. D.C. 59, 2011 U.S. App. LEXIS 854 (D.C. Cir. 2011).

Under Administrative Procedure Act, new substantive rules must be promulgated and published before they can become effective, except interpretative rules which are statements as to what administrative officer thinks statute or regulation means; thus, ruling by Secretary of Health and Human Services that hospital’s debt service reserve fund do not qualify as fund depreciation because they were established with borrowed funds and so are not reimbursable under Medicare does not constitute a substantive change in Medicare policy adopted without adherence to

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requirements of [5 USCS § 553](#). [Sacred Heart Hospital v. Heckler, 601 F. Supp. 299, 1984 U.S. Dist. LEXIS 22943 \(E.D. Pa. 1984\)](#), aff'd, [770 F.2d 1075, 1985 U.S. App. LEXIS 22581 \(3d Cir. 1985\)](#).

Department of Health and Human Services regulation prohibiting home health providers from representing Medicare beneficiaries in appealing denied claims is invalid for failure to provide notice and opportunity for public comment, because rule is not interpretative, but effects substantial change in law where (1) neither [42 USCS §§ 1395](#) et seq. nor regulation governing non-attorney representation mention prohibiting health agencies from representing beneficiaries, (2) rule contains no reference to any interpretation of any statute or regulation, and (3) rule does not describe pre-existing policy but is promulgated as new policy. [In Home Health Care, Inc. v. Bowen, 639 F. Supp. 1124, 1986 U.S. Dist. LEXIS 22751 \(D.D.C. 1986\)](#).

Department of Health and Human Services policy concerning use exclusion of assets when determining eligibility for Medicaid program is proper under [5 USCS §§ 553\(b\)\(A\)](#) and [706\(2\)\(A\)-\(D\)](#), because (1) memorandum that allegedly sets policy only clarifies existing policy and thus was not policy promulgated in contravention of [553\(b\)\(A\)](#) and (2) policy that highest bona fide offer to purchase asset determine asset's market value even if considered unreasonably low by owner does not violate [§§ 706\(2\)\(A\)-\(D\)](#). [Willey v. Ives, 696 F. Supp. 1388, 1988 U.S. Dist. LEXIS 11447 \(D. Me. 1988\)](#).

Statistical sampling in readjudication of Medicare claims by HHS to determine overpayments and reimbursement liability is lawful and will be upheld, even though HHS ruling explaining use of sampling method is potentially unfair in abstract and was not produced through rulemaking, because ruling on method of calculation is merely interpretive rule not subject to formal rulemaking requirements under [5 USCS § 553\(b\)\(3\)\(A\)](#). [Chaves County Home Health Services, Inc. v. Sullivan, 732 F. Supp. 188, 1990 U.S. Dist. LEXIS 2583 \(D.D.C. 1990\)](#), aff'd, [931 F.2d 914, 289 U.S. App. D.C. 276, 1991 U.S. App. LEXIS 7356 \(D.C. Cir. 1991\)](#).

Therapy centers' challenge to Medicare overpayment calculations must fail, where centers allege manual and HCFA ruling explaining statistical sample method for calculations too voluminous for case-by-case review was not implemented in accordance with rule-making procedures of [5 USCS § 553](#), because manual and ruling are merely interpretations of existing statute, do not create new law or depart from prior practice, and are exempted from rule-making requirements under [§ 553\(b\)\(A\)](#). [Mile High Therapy Centers, Inc. v. Bowen, 735 F. Supp. 984, 1988 U.S. Dist. LEXIS 17350 \(D. Colo. 1988\)](#).

Conclusion by Health Care Financing Administration that 2 numerical codes under which ambulatory surgical center previously had received reimbursement under Medicare for certain pain management procedures no longer covered those procedures constituted interpretive rule rather than legislative rule and was therefore not subject to notice and comment requirements of [5 USCS § 553](#). [Headache & Pain Ctr. v. Secretary of HHS, 24 F. Supp. 2d 1200, 59 Soc. Sec. Rep. Service 217, 1998 U.S. Dist. LEXIS 17245 \(D. Kan. 1998\)](#).

Medicare Provider Reimbursement Manual § 3205 does not constitute substantial change to any previous interpretation of regulation because § 3205 was Secretary's initial interpretation of cost-reporting regulations; as such, Secretary of Health and Human Services was not required to promulgate § 3205 in accordance with notice and comment provisions of Administrative Procedure Act, [5 USCS § 553\(b\)](#). [Visiting Nurse Ass'n v. Thompson, 378 F. Supp. 2d 75, 2004 U.S. Dist. LEXIS 28468 \(E.D.N.Y. 2004\)](#).

Although medical facilities argued that policy announced in 2000 Program Memorandum should have been published in Federal Register and undergone public notice and comment before public issuance, under Administrative Procedure Act, notice and comment was not required for interpretive rules or general statements of policy, [5 USCS § 553\(b\)\(3\)\(A\)](#), and Program Memorandum A-00-76 was interpretation of existing regulation and thus did not require notice and comment; furthermore, medical facilities failed to demonstrate any prejudice that resulted from Secretary of Health and Human Service's failure to timely file Memorandum in Federal Register, and failure to disclose for public comment was subject to rule of prejudicial error, which prevented courts from setting aside agency rule absent showing of prejudice, [5 USCS § 706](#). [Forsyth Mem'l Hosp., Inc. v. Sebelius, 667 F. Supp.](#)

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[2d 143, 2009 U.S. Dist. LEXIS 105302 \(D.D.C. 2009\)](#), aff'd, [639 F.3d 534, 395 U.S. App. D.C. 41, 2011 U.S. App. LEXIS 8498 \(D.C. Cir. 2011\)](#).

Must-bill policy of Secretary of U.S. Department of Health and Human Services, which required provider to bill its state's Medicaid program for costs associated with dual-eligibles before claiming payment for such costs as Medicare bad debt, was classic example of interpretive rule or general statement of policy, not subject to Administrative Procedure Act's notice and comment rulemaking requirement. [Cove Assocs. J.V. v. Sebelius, 848 F. Supp. 2d 13, 2012 U.S. Dist. LEXIS 40322 \(D.D.C. 2012\)](#).

223. —Social Security

Secretary of Health and Human Service's policy of postponing calculation and payment of retroactive social security disability insurance benefits until calculation and payment of supplemental security income benefits was proper construction of windfall offset statute (§ 1127 of Social Security Act, [42 USCS § 1320a-6](#)) and comported with intent of Congress; interpretative rules may include administrative construction of statutory provision on question of law reviewable in courts. [McKenzie v. Bowen, 787 F.2d 1216, 1986 U.S. App. LEXIS 23419 \(8th Cir. 1986\)](#).

Social Security rule which precluded combining non-severe impairments and provided examples of per se non-severe medical conditions was interpretation of severity regulations. [Bailey v. Sullivan, 885 F.2d 52, Unemployment Ins. Rep. \(CCH\) ¶ 14882, Unemployment Ins. Rep. \(CCH\) ¶14882A, 14 Fed. R. Serv. 3d \(Callaghan\) 535, 1989 U.S. App. LEXIS 13230 \(3d Cir. 1989\)](#).

Social Security ruling requiring that Veteran's Administration benefits paid to veteran for support of veteran's dependent be counted as dependent's unearned income in calculating dependent's Supplemental Security Income benefits is interpretive rule and not subject to notice and comment requirement. [White v. Shalala, 7 F.3d 296, 42 Soc. Sec. Rep. Service 441, 1993 U.S. App. LEXIS 26807 \(2d Cir. 1993\)](#).

Rules issued by Secretary of Department of Human Health and Services pertaining to calculation of benefits for disabled workers found eligible for both Old Age, Survivors, and Disability Insurance and Supplemental Security Income are not subject to notice-and-comment rulemaking under [5 USCS § 553\(b\)\(A\)](#) where rules do not alter any right or effect change in benefits enacted by Congress, because rules are interpretative only. [White v. Bowen, 636 F. Supp. 1235, 1986 U.S. Dist. LEXIS 25125 \(S.D.N.Y. 1986\)](#).

Social Security Administration was not required to apply notice and comment procedures to supplemental instruction under [5 USCS § 553\(b\)](#), where instruction interprets second step of 5-step procedure for determining disability claims, because instruction is interpretive rule. [Wilson v. Sullivan, 709 F. Supp. 1351, Unemployment Ins. Rep. \(CCH\) ¶ 14944, Unemployment Ins. Rep. \(CCH\) ¶14944A, 1989 U.S. Dist. LEXIS 3126 \(D.N.J. 1989\)](#).

224. Immigration and aliens

Memorandum on which U.S. Citizenship and Immigration Services (CIS) relied did not create any new law, rights, or obligations; instead, document was internal memorandum that simply provided CIS's construction of [8 CFR § 248.1](#) in particular factual circumstance; accordingly, thus, notice and comment procedures were not required by [5 USCS § 553](#). [L.A. Closeout, Inc. v. Dep't of Homeland Sec., 513 F.3d 940, 2008 U.S. App. LEXIS 1044 \(9th Cir. 2008\)](#).

Immigration regulation revoking exemption of alien students from requirement of labor certification before applying for change to permanent resident status, promulgated without notice and effective immediately, was "substantive" rather than "interpretive" under [5 USCS § 553](#), and was contrary to law for failure of Immigration and Naturalization Service to observe requirements of Administrative Procedure Act. [Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288, 1973 U.S. Dist. LEXIS 12818 \(D.D.C. 1973\)](#).

Agency determination did not violate notice and comment procedures and was not arbitrary or capricious because agency did not reverse longstanding administrative interpretation and practice when it concluded that crewmembers

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with D-1 visas could not work on cruise that did not dock at foreign port. [Bimini Superfast Operations LLC v. Winkowski, 994 F. Supp. 2d 106, 2014 U.S. Dist. LEXIS 2981 \(D.D.C. 2014\)](#).

225. Interstate Commerce Commission/Surface Transportation Board

In action challenging adoption of rules by Interstate Commerce Commission, it was for court to determine whether rule was interpretative rule, general statement of policy or procedural rule exempt from notice and comment requirements of [5 USCS § 553\(b\)\(A\)](#); thus, label that Commission placed upon its given exercise of administrative power was not conclusive, rather it was what Commission did in fact. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

Interstate Commerce Commission's notice of elimination of notification to competing carriers of application for emergency temporary authority was not interpretative rule under [5 USCS § 553\(b\)\(A\)](#) for such notice did not purport to interpret statute or regulation, was not mere clarification, defined no ambiguous term, gave no officer's opinion about meaning of statute or regulation; rather, it affected change in method used by Commission in granting substantive rights and thus was new rule and could not be interpretative. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

Interpretative statement issued by Interstate Commerce Commission resolving previous inconsistency between regulations of ICC and Department of Defense is interpretative rule specifically exempted from notice and requirement procedures; ICC did no more than determine from legislative language and history that Congress did not authorize it to impose its rule on another agency with parallel and conflicting regulation. [Allied Van Lines, Inc. v. Interstate Commerce Com., 708 F.2d 297, 1983 U.S. App. LEXIS 27365 \(7th Cir. 1983\)](#).

Even though Interstate Commerce Commission intended that "press release" be interpretative of existing tariffs, and even though existing tariffs did not fix responsibility for removing grain doors from box cars between consignees and railroads, press release which placed burden on consignees was order of ICC and was improperly promulgated without notice and opportunity for participation, where long standing practice of railroads was to remove grain doors at own expense. [A.E. Staley Mfg. Co. v. United States, 310 F. Supp. 485, 1970 U.S. Dist. LEXIS 13022 \(D. Minn. 1970\)](#).

Order of Interstate Commerce Commission concerning freight rate increases for railroad operating between points in United States and Canada was exempt from notice and hearing requirements mandated by [5 USCS § 553\(b\)\(A\)](#) where order was designed to remove apparent ambiguity with previous Commission Order and to correct railroads' erroneous interpretation as to rate increases authorized for all rail traffic moving to and from geographic locations in question. [Canadian N. R. Co. v. United States, 425 F. Supp. 290, 1976 U.S. Dist. LEXIS 12064 \(D.D.C. 1976\)](#), aff'd, 430 U.S. 961, 97 S. Ct. 1638, 52 L. Ed. 2d 352, 1977 U.S. LEXIS 1441 (1977).

226. Justice Department

Department of Justice regulations delegating to Attorney General authority to compromise claims are interpretive rules and do not give right of action to plaintiffs challenging settlement agreed to by Department of Justice. [United States ex rel. Papazian v American Prod. Indus., 58 F.3d 404, 95 Cal. Daily Op. Service 4308, 95 D.A.R. 7391 \(CA9 Cal 1995\)](#).

Notice and comment was not required where Department of Justice interpretation of its manual was not sufficiently distinct or additive to regulation requiring that wheelchair areas in public accommodations provide lines of sight comparable to those of general public where interpretation required lines of sight over standing spectators. [Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 326 U.S. App. D.C. 25, 4 Accom. Disabilities Dec. \(CCH\) ¶14-074, 6 Am. Disabilities Cas. \(BNA\) 1614, 23 Am. Disabilities Dec. 142, 1997 U.S. App. LEXIS 16148 \(D.C. Cir. 1997\)](#), cert. denied, 523 U.S. 1003, 118 S. Ct. 1184, 140 L. Ed. 2d 315, 7 Am. Disabilities Cas. (BNA) 1696, 1998 U.S. LEXIS 1639 (1998), overruled in part, [Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 135 S. Ct.](#)

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[1199, 191 L. Ed. 2d 186, 25 Fla. L. Weekly Fed. S 127, 45 Envtl. L. Rep. 20050, 165 Lab. Cas. \(CCH\) ¶36321, 24 Wage & Hour Cas. 2d \(BNA\) 529, 2015 U.S. LEXIS 1740 \(2015\).](#)

Where defendant on supervised release argued that U.S. Attorney General promulgated regulation governing DNA collection in violation of notice and comment provisions of Administrative Procedure Act (APA), [5 USCS § 553](#), rulemaking process under APA was not required because Attorney General's regulation, which mirrored statute, was interpretive rule. [United States v. Kriesel, 508 F.3d 941, 2007 U.S. App. LEXIS 27492 \(9th Cir. 2007\).](#)

227. Labor and employment

Regulations issued by Department of Labor's Office of Federal Contract Compliance Programs (41 CFR Part 60-40) authorizing disclosure of records obtained by Office do not have force and effect of law where Office treated them as interpretative rules, not giving notice of proposed rule making required for promulgation of substantive rules by Administrative Procedure Act ([5 USCS § 553](#)). [Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208, 26 Cont. Cas. Fed. \(CCH\) ¶83181, 19 Empl. Prac. Dec. \(CCH\) ¶9121, 19 Fair Empl. Prac. Cas. \(BNA\) 475, 4 Media L. Rep. \(BNA\) 2441, 1979 U.S. LEXIS 34 \(1979\).](#)

Notice of amendment to regulations including industrial homeworkers under Fair Labor Standards Act ([29 USCS §§ 206, 215](#)) is not necessary under Administrative Procedure Act ([5 USCS § 553](#)) because of rule's nature as "interpretative" and Administrator's finding of "good cause" for immediate action, based upon fact that other employers were complying with this interpretation and defendant knew of view long held by Administrator. [Mitchell v. Edward S. Wagner Co., 217 F.2d 303, 27 Lab. Cas. \(CCH\) ¶68826, 12 Wage & Hour Cas. \(BNA\) 331, 1954 U.S. App. LEXIS 4027 \(2d Cir. 1954\), cert. denied, 348 U.S. 964, 75 S. Ct. 524, 99 L. Ed. 752, 1955 U.S. LEXIS 1091 \(1955\).](#)

Labor Department field memorandum directing the denial of certification to alien seeking live-in maid work which could be performed by available American live-out maids or day workers is interpretative rule exempted from requirements of [5 USCS § 553](#). [Pesikoff v. Secretary of Labor, 501 F.2d 757, 163 U.S. App. D.C. 197, 1974 U.S. App. LEXIS 8836 \(D.C. Cir.\), cert. denied, 419 U.S. 1038, 95 S. Ct. 525, 42 L. Ed. 2d 315, 1974 U.S. LEXIS 3524 \(1974\).](#)

1978 amendment to [29 CFR § 1903.4\(d\)](#) whereby term "compulsory process" was defined to include ex parte warrants was interpretive rule and therefore properly made effective on date of publication in Federal Register without notice and comment pursuant to express terms of [5 USCS § 553](#). [Marshall v. W & W Steel Co., 604 F.2d 1322, 7 O.S.H. Cas. \(BNA\) 1670, 1979 U.S. App. LEXIS 12201 \(10th Cir. 1979\).](#)

Interpretative rule explaining social security benefits offset to unemployment benefits is exempt from notice and comment requirements, despite substantial impact of rule. [Rivera v. Becerra, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\), cert. denied, 465 U.S. 1099, 104 S. Ct. 1591, 80 L. Ed. 2d 124, 5 Employee Benefits Cas. \(BNA\) 1981, 1984 U.S. LEXIS 1452 \(1984\).](#)

Even if Department of Labor previously failed to articulate "risk of loss" test, whereby growers' "collaboration" in loaning funds to Jamaican migrant farmworkers for travel expenses to United States for seasonal employment did not constitute "advance" under regulations requiring growers to afford same collaboration and benefits to domestic workers, on theory that growers did not bear any risk of loss in event of Jamaican workers' default on loan obligations, risk of loss test was permissible interpretation of Department's regulations and is therefore exempt from notice and comment requirements of [5 USCS § 553](#). [Caraballo v. Reich, 11 F.3d 186, 304 U.S. App. D.C. 142, 1993 U.S. App. LEXIS 32016 \(D.C. Cir. 1993\).](#)

Since Secretary of Labor's advisory setting \$250 threshold for de minimis exception to reporting requirement was interpretive rule, district court did not err in holding that Secretary was not required to engage in notice and comment rulemaking. [Warshauer v Solis \(2009, CA11 Ga\) 577 F3d 1330, 186 BNA LRRM 3293, 22 FLW Fed C 755.](#)

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Secretary of Labor's advisory applying Form LM-10 reporting requirement to designated legal counsels did not require notice and comment rulemaking because it was interpretive rule; Secretary characterized rule as interpreting [29 USCS § 433\(a\)\(1\)](#), Secretary's interpretation was drawn directly from plain language of statute, and rule only reminded affected parties of existing duties required by plain language of statute and did not create any new law, right, duty, or have any effect independent of statute. *Warshauer v Solis* (2009, CA11 Ga) 577 F3d 1330, 186 BNA LRRM 3293, 22 FLW Fed C 755.

There was no evidence that Secretary of Labor consistently and explicitly advised designated legal counsels that they were not required to comply with [29 USCS § 433\(a\)](#), and evidence of agency's prior enforcement policy (representing mere acquiescence to non-filing) was not sufficient to trigger notice and comment rulemaking. *Warshauer v Solis* (2009, CA11 Ga) 577 F3d 1330, 186 BNA LRRM 3293, 22 FLW Fed C 755.

Memo issued by Secretary of Labor with respect to affirmative action program of government contractors was not merely interpretative where Secretary, in requiring contractors to declare underutilization whenever number of incumbent minorities or women is less, by at least one or more persons, than number available, intended to exercise his delegated power to make rule having force of law; thus, memo was not enforceable, Secretary having failed to observe requirements of Administrative Procedure Act ([5 USCS § 553](#)). [Firestone Synthetic Rubber & Latex Co. v. Marshall](#), 507 F. Supp. 1330, 28 Cont. Cas. Fed. (CCH) ¶181144, 25 Empl. Prac. Dec. (CCH) ¶131590, 24 Fair Empl. Prac. Cas. (BNA) 1699, 1981 U.S. Dist. LEXIS 18016 (E.D. Tex. 1981).

Rule implementing congressional direction to reduce pay of military retirees by amount equal to cost of living adjustment in military retirement pay is interpretive rule. [American Federation of Government Employees v. United States](#), 622 F. Supp. 1109, 1984 U.S. Dist. LEXIS 21013 (N.D. Ga. 1984), aff'd, 780 F.2d 720, 1986 U.S. App. LEXIS 19962 (Fed. Cir. 1986).

228. —Civil Service Commission

Civil Service Commission's denial of increased annuity payments based on interpretation of statute providing for cost-of-living increase to retired federal civil service employees whose annuities commenced before certain date did not constitute rule-making with concomitant rule-making procedures under [5 USCS § 553](#). [Kenny v. Hampton](#), 475 F.2d 1323, 155 U.S. App. D.C. 54, 1973 U.S. App. LEXIS 11119 (D.C. Cir. 1973).

Determination by Civil Service Commission that it need not follow notice and comment rulemaking procedures in formulating hiring standards is reasonable interpretation of plain language of personnel and management exemption. [Stewart v. Smith](#), 673 F.2d 485, 218 U.S. App. D.C. 94, 28 Empl. Prac. Dec. (CCH) ¶132509, 28 Fair Empl. Prac. Cas. (BNA) 374, 1982 U.S. App. LEXIS 21151 (D.C. Cir. 1982).

229. —Equal Employment Opportunity Commission

Regulation of Equal Employment Opportunity Commission, under which information regarded as confidential by employer is promulgated to certain parties interested in antidiscrimination suits against employer, is interpretive and does not require formal prepromulgation procedures of [5 USCS § 553\(b\)](#). [Sears, Roebuck & Co. v. EEOC](#), 435 F. Supp. 751, 14 Empl. Prac. Dec. (CCH) ¶17746, 15 Fair Empl. Prac. Cas. (BNA) 1434, 1977 U.S. Dist. LEXIS 14808 (D.D.C. 1977), aff'd in part and rev'd in part, 581 F.2d 941, 189 U.S. App. D.C. 163, 16 Empl. Prac. Dec. (CCH) ¶18348, 17 Fair Empl. Prac. Cas. (BNA) 897, 1978 U.S. App. LEXIS 10810 (D.C. Cir. 1978).

Equal Employment Opportunity Commission's "accelerated procedures" memorandum of 1976, by which backlog of Title VII employment discrimination charges is to be reduced, is interpretive, and thus not subject to notice requirements under [5 USCS § 553\(b\)](#), since Congress has not delegated to EEOC any authority to enact legislative rules. [Hall v. EEOC](#), 456 F. Supp. 695, 17 Empl. Prac. Dec. (CCH) ¶18492, 17 Fair Empl. Prac. Cas. (BNA) 1212, 1978 U.S. Dist. LEXIS 16489 (N.D. Cal. 1978).

Labor regulations under which Equal Pay Act (EPA) ([29 USCS § 206\(d\)](#)) reports of employer are sought were not invalidated by device of incorporating them by reference without prior publication and opportunity for public

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comment, where existing regulations were simply carried over when Equal Employment Opportunity Commission took over Department of Labor's EPA enforcement authority, because neither [5 USCS § 901\(c\)](#) nor [5 USCS § 553](#) required notice and comment rulemaking for continuation of these regulations. [EEOC v. Merrill Lynch, Pierce, Fenner & Smith, 677 F. Supp. 918, 45 Empl. Prac. Dec. \(CCH\) ¶37633, 108 Lab. Cas. \(CCH\) ¶35022, 1987 U.S. Dist. LEXIS 16737 \(N.D. Ill. 1987\)](#).

230. —Mine safety and health

Secretary of Labor's position that, under Mine Safety and Health Act, independent contractor who operates, controls, or supervises mine is mine "operator" required to file "legal identity reports" with Administration is interpretive rule, and not subject to notice and comment procedure. [D.H. Blattner & Sons v. Secretary of Labor, Mine Safety & Health Admin., 152 F.3d 1102, 98 Cal. Daily Op. Service 6244, 98 D.A.R. 8649, 1998 O.S.H. Dec. \(CCH\) ¶31624, 1998 U.S. App. LEXIS 18337 \(9th Cir. 1998\)](#).

Because Mine Safety and Health Administration's respirable dust sampling policy was rule of agency procedure which did not impose new substantive burden on mine operators, and was not intended by Congress to comprise new standards or regulations, Guidelines were interpretive rules, and thus exempt from requirements of notice-and-comment rulemaking under Administrative Procedures Act, [5 USCS § 553\(b\)\(A\)](#). [Chao v. Rothermel, 327 F.3d 223, 2003 U.S. App. LEXIS 8515 \(3d Cir. 2003\)](#).

In case awarding benefits under Black Lung Benefits Act, [30 USCS §§ 901](#) et seq., coal company unsuccessfully argued that ALJ violated Administrative Procedures Act (APA), [5 USCS §§ 701](#) et seq., by relying on preamble to Black Lung Benefits Act regulations to evaluate credibility of two doctors because preamble was not subjected to notice-and-comment; Department of Labor's (DOL) Benefits Review Board concluded that ALJ permissibly consulted preamble as authoritative statement of medical principles accepted by DOL when it revised definition of pneumoconiosis; there was nothing in preamble in present case to suggest that it was binding as ALJ simply looked to preamble, in addition to applicable regulations, to assess doctors' credibility. [A & E Coal Co. v. Adams, 694 F.3d 798, 2012 FED App. 0323P, 2012 U.S. App. LEXIS 19027 \(6th Cir. 2012\)](#).

231. —Occupational safety and health

Administrative rule declaring per se discriminatory failure of employer to compensate employee representative for walk around time was attempted exercise of legislative power and must be vacated for failure to comply with procedures specified by APA ([5 USCS § 553](#)). [Chamber of Commerce v. Occupational Safety & Health Administration, 636 F.2d 464, 204 U.S. App. D.C. 192, 8 O.S.H. Cas. \(BNA\) 1648, 1980 O.S.H. Dec. \(CCH\) ¶24596, 1980 U.S. App. LEXIS 15875 \(D.C. Cir. 1980\)](#).

Amendment of regulation of Occupational Safety and Health Administration defining "compulsory process" to mean institution of any appropriate action, including ex parte application for inspection warrant for equivalent is only interpretation of prior version and therefore exempt from rule-making procedures. [Rockford Drop Forge Co. v. Donovan, 672 F.2d 626, 10 O.S.H. Cas. \(BNA\) 1410, 1982 O.S.H. Dec. \(CCH\) ¶25960, 1982 U.S. App. LEXIS 21057 \(7th Cir. 1982\)](#).

Occupational Safety and Health Administration (OSHA) did not amend [29 CFR § 1910.1030\(d\)\(2\)\(vii\)\(A\)](#) without employing procedures required under [5 USCS § 553](#) by starting to enforce 1991 rule in 2003 where (1) OSHA never interpreted § 1910.1030(d)(2)(vii)(A) to allow use of reusable blood tube holders in all situations, but only in situations where there was no feasible alternative or such was required due to nature of medical procedure; (2) OSHA thus never established authoritative interpretation that laboratory company, which was cited in 2004 for using reusable holders, could have relied on to its detriment; (3) guidance documents that OSHA issued over years were consistent with each other and with § 1910.1030(d)(2)(vii)(A); and (4) change in enforcement policy was expected, as availability of disposable blood tube holders had become widespread by 2003. [Metwest Inc. v. Sec'y of Labor, 560 F.3d 506, 385 U.S. App. D.C. 176, 22 O.S.H. Cas. \(BNA\) 1617, 2009 O.S.H. Dec. \(CCH\) ¶32995, 2009 U.S. App. LEXIS 6925 \(D.C. Cir. 2009\)](#).

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1978 amendment to regulation providing that when employer refuses entry to OSHA compliance officer, regional solicitor shall take action, including compulsory process, to define compulsory process as being institution of any appropriate action, including ex parte application for inspection warrant, is interpretative rule by which Secretary of Labor reaffirms his consistent prior interpretations of term compulsory process, as including ex parte warrants, and such being case amendment was exempt from notice and comment provisions of [5 USCS § 553\(b\)\(A\)](#). *In re Worksite Inspection of S. D. Warren, Div. of Scott Paper*, 481 F. Supp. 491, 7 O.S.H. Cas. (BNA) 2010, 1979 O.S.H. Dec. (CCH) ¶24100, 1979 U.S. Dist. LEXIS 7971 (D. Me. 1979), disapproved, *Cerro Metal Products v. Marshall*, 620 F.2d 964, 29 Fed. R. Serv. 2d (Callaghan) 828, 8 O.S.H. Cas. (BNA) 1196, 1980 O.S.H. Dec. (CCH) ¶24411, 1980 U.S. App. LEXIS 18292 (3d Cir. 1980).

Neither Administrative Procedure Act nor due process require Secretary of Labor to institute new notice and comment rulemaking procedures before making direct and logical application of existing regulations to retail donut house, since regulation, which prohibits employment of minors in certain hazardous occupations involved in operation of bakery machines, was issued on occupational basis, rather than industry basis, and applies to occupations listed regardless of where they are performed. *Winchell's Donut House v. United States Dep't of Labor*, 526 F. Supp. 608, 89 Lab. Cas. (CCH) ¶133913, 24 Wage & Hour Cas. (BNA) 819, 1980 U.S. Dist. LEXIS 12362 (D.D.C. 1980), aff'd, 672 F.2d 898, 25 Wage & Hour Cas. (BNA) 202 (D.C. Cir. 1981).

232. —Office of Personnel Management

Office of Personnel Management's changes in methodology for computing cost of living adjustments are not interpretive rules where changes are not intended to explain existing rule and do not represent merely agency view on interpretation of statute but implement agency's delegated responsibility to set adjustment rates and thus affect amount of compensation due federal employees. *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1984 U.S. App. LEXIS 14863 (Fed. Cir. 1984).

Policy of Office of Personnel Management barring air traffic controllers who had participated in nationwide strike from employment with FAA was interpretive rule of existing statute and regulation, and not subject to notice and comment procedure; policy did not create new law, rights, or duties. *Clarry v. United States*, 85 F.3d 1041, 152 L.R.R.M. (BNA) 2528, 1996 U.S. App. LEXIS 14165 (2d Cir. 1996).

233. Parole Board or Commission

Section in Parole Commission's Notes and Procedures Manual relied on by commission in making determination of how long to delay prisoner's parole date due to additional conviction for submitting false federal tax returns is clearly interpretative rather than substantive rule and thus was properly promulgated without notice and comment under [5 USCS § 553\(b\)\(A\)](#), because no prior contrary interpretation of substantive provision governing "new criminal conduct in community" had ever been rendered and thus rule did not change any existing rights or obligations. *Sturm v. James*, 684 F. Supp. 1218, 1988 U.S. Dist. LEXIS 3555 (S.D.N.Y. 1988).

234. Patents

Commissioner of Patents was not required to comply with notice requirement of [5 USCS § 553](#) before issuing rule that Patent Office would now consider animals to be patentable, because rule was interpretative of previous agency action and did not represent change in law by Commissioner; thus, petitioners suffered no injury through lack of notice and have no standing. *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 18 U.S.P.Q.2d (BNA) 1677, 1991 U.S. App. LEXIS 7884 (Fed. Cir. 1991).

Patent office rule that nonnaturally occurring, nonhuman multicellular organisms are patentable is interpretative rule under [5 USCS § 553\(b\)\(A\)](#) and is exempt from public notice and comment requirements, because rule is merely notice to public of relevant precedent that will be considered in patent applications of this type. *Animal Legal Defense Fund v. Quigg*, 710 F. Supp. 728, 9 U.S.P.Q.2d (BNA) 1816, 1989 U.S. Dist. LEXIS 3397 (N.D. Cal. 1989),

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transferred, [900 F.2d 195, 14 U.S.P.Q.2d \(BNA\) 1485, 1990 U.S. App. LEXIS 4971 \(9th Cir. 1990\)](#), aff'd, [932 F.2d 920, 18 U.S.P.Q.2d \(BNA\) 1677, 1991 U.S. App. LEXIS 7884 \(Fed. Cir. 1991\)](#).

Unpublished decision: United States Patent and Trademark Office's (USPTO's) Interim Patent Subject Matter Eligibility Examination Instructions are interpretive, rather than substantive, and are thus exempt from notice and comment requirements of § 553 ([5 USCS § 553](#)) of Administrative Procedure Act. [Mikkilineni v. Stoll, 410 Fed. Appx. 311, 2010 U.S. App. LEXIS 23283 \(Fed. Cir. 2010\)](#), reh'g denied, reh'g, en banc, denied, [2010 U.S. App. LEXIS 27043 \(Fed. Cir. Dec. 22, 2010\)](#).

235. Postal Service

Postal Service Manual § 134.57—being regulation issued by United States Postal Service to define conditions under which nonprofit organizations qualify for special third-class mailing privileges—constitutes exercise of interpretive discretion by Postal Service and would fall within interpretive rule exception to notice and comment procedures of ([5 USCS § 553\(b\)\(A\)](#)). [National Retired Teachers Asso. v. United States Postal Service, 593 F.2d 1360, 193 U.S. App. D.C. 206, 1979 U.S. App. LEXIS 16883 \(D.C. Cir. 1979\)](#).

Postal regulation requiring commercial mail receiving agencies and customers to file forms disclosing information including names and addresses of customers and agents, authorized by USPC Domestic Mail Manual to further goal of promoting more efficient and business-like practices on part of reorganized postal system, was exempted from procedures for rule-making, including public comment, established by Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) where form was authorized by internal operations and managerial functions of postal service and represented proper exercise of business discretion afforded to USPC by congressional mandate. [Kuzma v. United States Postal Service, 798 F.2d 29, 1986 U.S. App. LEXIS 27498 \(2d Cir. 1986\)](#), cert. denied, 479 U.S. 1043, 107 S. Ct. 906, 93 L. Ed. 2d 856, 1987 U.S. LEXIS 230 (1987).

236. Securities and Exchange Commission

Securities and Exchange Commission was not legally obligated to publish its interpretation of term “unrealized profits” in connection with application of “net capital rule” established under [15 USCS § 78o\(c\)\(3\)](#), since interpretation was not substantive rule, but only explained what more general terms of Act and regulations already provide. [Stuart-James Co. v. SEC, 857 F.2d 796, 273 U.S. App. D.C. 5, Fed. Sec. L. Rep. \(CCH\) ¶ 94015, Fed. Sec. L. Rep. \(CCH\) ¶94015, 1988 U.S. App. LEXIS 12856 \(D.C. Cir. 1988\)](#), cert. denied, 490 U.S. 1098, 109 S. Ct. 2448, 104 L. Ed. 2d 1002, 1989 U.S. LEXIS 2760 (1989).

SEC's “no action” letter, in which it announced that it was changing its interpretation of SEC Rule 14a-8(c)(7), was interpretive, not legislative and therefore not subject to APA's notice and comment requirement applicable during adoption of Rule. [New York City Employees' Retirement Sys. v. SEC, 45 F.3d 7, 66 Fair Empl. Prac. Cas. \(BNA\) 1197, 66 Fair Empl. Prac. Cas. \(BNA\) 1198, Fed. Sec. L. Rep. \(CCH\) ¶ 98493, Fed. Sec. L. Rep. \(CCH\) ¶98493, 1995 U.S. App. LEXIS 92 \(2d Cir. 1995\)](#).

237. Treasury and internal revenue

IRS interpretive ruling regarding tax-exempt status of hospitals under [26 USCS § 501\(c\)\(3\)](#), and eliminating “charitable” requirement of free services to indigents, was not invalid though promulgated absent prior hearing, and did not constitute abuse of discretion under [5 USCS § 706](#), where no hearing was required under [5 USCS § 553](#), and where ruling paralleled change in Treasury Regulations made after notice and public hearings. [E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 165 U.S. App. D.C. 239, 34 A.F.T.R.2d \(RIA\) 5985, 35 A.F.T.R.2d \(RIA\) 414, 1975-1 U.S. Tax Cas. \(CCH\) ¶ 9177, 75-1 U.S. Tax Cas. \(CCH\) ¶9177, 1974 U.S. App. LEXIS 5769 \(D.C. Cir. 1974\)](#).

Assuming that 30-day notice requirement applies to treasury regulations, amendment of regulation properly characterized as interpretive rule is not subject to requirement of publication in Federal Register in final form 30 days before effective date. [Redhouse v Commissioner, 728 F.2d 1249, 53 A.F.T.R.2d \(RIA\) 995 \(CA9 1984\)](#).

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IRS form establishing bank Currency Transaction Reporting requirements for structured transactions under [31 USCS § 5313](#) is not mere statutory interpretation but is rulemaking regulation where form implemented statute by creating new duties and thus constitutes legislative rule promulgated without proper notice or hearing. [United States v. Shearson Lehman Bros., Inc., 650 F. Supp. 490, 1986 U.S. Dist. LEXIS 16943 \(E.D. Pa. 1986\)](#).

IRS's National and Local Standards, adopted pursuant to [26 USCS § 7122\(d\)\(2\)\(A\)](#), were interpretive rules which were not subject to notice and comment procedure under Administrative Procedures Act, [5 USCS §§ 551](#) et seq., because Standards did not create rights, impose obligations, or effect change in existing law pursuant to authority delegated by Congress. [In re Wedblad, 109 A.F.T.R.2d \(RIA\) 717, 67 Collier Bankr. Cas. 2d \(MB\) 276 \(BC DC Or 2012\)](#).

238. —Revenue rulings

Revenue ruling which required that employers keep records of charge tips paid over to employees, and report—in addition to wage figure—sum of hourly wages paid, cash tips reported by employee, and amount shown by employee records to have been paid to employee as charge tips represented “interpretive” rule exempt from rule making requirements under [5 USCS § 553\(b\)\(A\)](#). [National Restaurant Assn. v. Simon, 411 F. Supp. 993, 37 A.F.T.R.2d \(RIA\) 1144 \(DC Dist Col 1976\)](#).

Revenue rulings (which are merely opinion of lawyer in agency) are not intended to create legally binding rights and/or obligations, and they are consistently treated as such by Internal Revenue Service for purposes of procedural requirements of Administrative Procedure Act ([5 USCS § 553](#)); revenue rulings thus fit classic definition of interpretative rule. [Investment Annuity v. Blumenthal, 442 F. Supp. 681, 40 A.F.T.R.2d \(RIA\) 6151 \(DC Dist Col 1977\)](#).

[Revenue Ruling 69-545](#) which sets forth policy of Internal Revenue Service as to what is required to qualify as “charitable” organization for special tax treatment under Internal Revenue Code of 1954 ([26 USCS §§ 501\(a\)](#) and (c)(3)), is founded on permissible definition of term “charitable” and is not contrary to any express Congressional intent; as such it is interpretative ruling which under [5 USCS § 553\(b\)\(A\)](#) is exempt from notice and comment provisions of § 553. [Lugo v. Simon, 453 F. Supp. 677, 41 A.F.T.R.2d \(RIA\) 1311 \(ND Ohio 1978\)](#).

Revenue ruling subjecting to federal highway use tax trucks equipped with pintle hooks, which were classified as truck-trailer combinations rather than single unit vehicles exempt from taxation, was interpretive rule exempt from rulemaking procedural requirements set forth in [5 USCS §§ 551](#) et seq., where rule was originally enunciated by Secretary of Treasury in Treasury Regulations promulgated in accordance with law, and revenue ruling which merely represented Internal Revenue Services’ explanation of rule as proper interpretation was exempt from notice and comment requirements. [Northern Ill. Gas Co. v. United States, 12 Cl. Ct. 84, 59 A.F.T.R.2d \(RIA\) 1292 \(1987\)](#).

239. Veterans

Veterans Administration program of transferring custodial care patients to nursing homes does not constitute new rule for purposes of notice and comment procedures since promulgation of rules interpreting established policy does not require formal rulemaking procedures; decision to accelerate transfers under rule is, at most, new policy which acts as clarification of existing law and as such is exempt from formal rulemaking procedures. [Hanke v. Walters, 740 F.2d 654, 1984 U.S. App. LEXIS 19746 \(8th Cir. 1984\)](#).

Consideration of state law by Court of Veterans Appeals as one factor of many in defining “willful misconduct” for purpose of denying benefits for injury caused by petitioner’s willful misconduct in automotive injury was not “adoption” of state law but interpretation for purpose of [5 USCS § 553](#). [Yeoman v. West, 140 F.3d 1443, 1998 U.S. App. LEXIS 6757 \(Fed. Cir. 1998\)](#).

Foreclosure avoidance rules are binding on both Veterans Administration and private lenders notwithstanding fact that they were not published in Federal Register pursuant to Administrative Procedure Act ([5 USCS § 553](#)) where such rules regarding servicing of mortgage constituted only definitive interpretation of statutory requirement of

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adequate loan servicing contained in [38 USCS §§ 1801](#) et seq. and [38 CFR §§ 36.4300](#) et seq. [Rank v. Cleland, 460 F. Supp. 920, 1978 U.S. Dist. LEXIS 15170 \(C.D. Cal. 1978\)](#), disapproved, [United States v. Harvey, 659 F.2d 62, 1981 U.S. App. LEXIS 16845 \(5th Cir. 1981\)](#), rev'd, [677 F.2d 692, 1982 U.S. App. LEXIS 21549 \(9th Cir. 1982\)](#).

Construing, as it must, interpretative-rule exception in [5 USCS § 553\(A\)](#) narrowly, Court of Appeals for Veterans Claims holds that March 2000 amendment to [38 C.F.R. § 3.57\(a\)\(1\)\(iii\)](#) extends beyond merely clarifying or explaining existing law; instead, it makes new substantive law by excluding home-school programs wholesale from classification as part of category educational institution and, because amendment affects individual rights and obligations, it is substantive, legislative rule that is subject to notice-and-comment requirements of [5 USCS § 553\(b\)](#) and (c). [Theiss v. Principi, 18 Vet. App. 204, 2004 U.S. App. Vet. Claims LEXIS 486 \(U.S. App. Vet. Cl. July 27, 2004\)](#).

240. Miscellaneous

Promulgation of Application Note 1 of Sentencing Guidelines did not constitute improper rulemaking in violation of enabling statute, 28 USCS § 944; statute indicates that it requires no more than that promulgation of Guidelines themselves shall be subject to rulemaking procedures of APA and Note 1 is no more than interpretative aid. [United States v. Piper, 35 F.3d 611, 1994 U.S. App. LEXIS 24287 \(1st Cir. 1994\)](#), cert. denied, 513 U.S. 1158, 115 S. Ct. 1118, 130 L. Ed. 2d 1082, 1995 U.S. LEXIS 1163 (1995).

Rule of Federal Maritime Commission stating Commission's view of meaning of section of Federal Shipping Act on voluntary termination by shipping conferences of conference-wide rate schedules, and specifying parties to whom notice must be given and circumstances under which rate schedules will be permitted to be reinstated after termination, is interpretive rule not subject to formal notice requirements of [5 USCS § 553\(b\)](#). [American President Lines, Ltd. v. Federal Maritime Com., 316 F.2d 419, 114 U.S. App. D.C. 418, 1963 U.S. App. LEXIS 5753 \(D.C. Cir. 1963\)](#).

Regulation promulgated by Office of Economic Preparedness, freezing wages and prices and forming basis for suit against professional football team which has raised its season ticket prices during freeze, constitutes interpretive rule exempted by [5 USCS § 553\(b\)](#) from prepromulgation notice and comment requirements, since bulk of regulation merely rephrases and interprets Executive order under which it was promulgated. [De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1974 U.S. App. LEXIS 8054 \(Temp. Emer. Ct. App.\)](#), cert. denied, 419 U.S. 896, 95 S. Ct. 176, 42 L. Ed. 2d 141, 1974 U.S. LEXIS 2938 (1974).

Part of regulation of Federal Savings Loan Insurance Corporation requiring audits of insured institutions is interpretation of unchallenged regulation permitting examinations of such institutions, and is thus exempt under [5 USCS § 553\(b\)](#) from prepromulgation notice procedures. [Guardian Federal Sav. & Loan Asso. v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 191 U.S. App. D.C. 135, 1978 U.S. App. LEXIS 7834 \(D.C. Cir. 1978\)](#).

Forest Service memorandum governing administration of carry-forward provisions for surpluses or deficits in surplus timber purchased in small business set-aside program is not invalid for not having been promulgated in accordance with formal rulemaking procedures of [5 USCS § 553](#), since memorandum is interpretative rather than legislative in nature, intended to clarify set-aside program and provide interpretation to be applied consistently to carry-forward provisions, and is thus exempt from notice and comment requirements of § 553. [Louisiana-Pacific Corp. v. Block, 694 F.2d 1205 \(CA9 Cal 1982\)](#).

Standard operation procedure rule of Small Business Administration, pursuant to which date of first default determines interest rate of guaranteed loan, falls under exception to notice and hearing requirement of APA. [First Nat'l Bank v. Sanders, 946 F.2d 1185, 1991 U.S. App. LEXIS 19736 \(6th Cir. 1991\)](#).

Department of Commerce's interpretation of term "principal markets" did not constitute rulemaking without compliance with APA. [Zenith Elecs. Corp. v. United States, 988 F.2d 1573, 11 Fed. Cir. \(T\) 57, 93 D.A.R. 9650, 15](#)

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[Int'l Trade Rep. \(BNA\) 1001, 1993 U.S. App. LEXIS 5585 \(Fed. Cir. 1993\)](#), reh'g, en banc, denied, [1993 U.S. App. LEXIS 10358 \(Fed. Cir. Apr. 29, 1993\)](#).

Administrative case decided by Department of Interior imposing royalty obligations on settlements of take-or-pay obligations or contractual provisions, including settlement with debtor of bankrupt gas producer, was interpretive rule and therefore not subject to notice and comment procedure. [United States v. Century Offshore Mgmt. Corp. \(In re Century Offshore Mgmt. Corp.\)](#), 111 F.3d 443, 1997 FED App. 0124P, 136 Oil & Gas Rep. 40, 1997 U.S. App. LEXIS 6752 (6th Cir. 1997), reh'g, en banc, denied, [1997 U.S. App. LEXIS 19260 \(6th Cir. July 23, 1997\)](#), cert. denied, 522 U.S. 1090, 118 S. Ct. 880, 139 L. Ed. 2d 868, 1998 U.S. LEXIS 674 (1998).

Regulatory guidance issued by Federal Highway Administration for private parties seeking to comply with motor carriers safety regulations and consisting of 3 questions and answers, was interpretive rule and not subject to notice and comment requirements. [Truckers United for Safety v. FHA](#), 139 F.3d 934, 329 U.S. App. D.C. 241, 1998 U.S. App. LEXIS 6696 (D.C. Cir. 1998).

Railroad administration's technical bulletin interpreting safety regulation regarding red flags did not require notice and comment where it was clear that Administration had never adopted definitive interpretation that could be changed only through notice and comment procedure. [Association of Am. R.R. v. DOT](#), 198 F.3d 944, 339 U.S. App. D.C. 197, 1999 U.S. App. LEXIS 33979 (D.C. Cir. 1999).

Commodities Futures Trading Commission regulation permitting guarantee agreements between futures commission merchants and introducing brokers, as alternative to requiring that introducing brokers meet minimum financial standards does not "require" or "impose" anything, but is merely option and valid interpretation of Congressional intent to keep introducing brokers viable while ensuring that they meet their obligations. [First Am. Discount Corp. v. CFTC](#), 222 F.3d 1008, 343 U.S. App. D.C. 71, 2000 U.S. App. LEXIS 20939 (D.C. Cir. 2000).

Mineral Management Service letter was not rule subject to notice and comment required under [5 USCS § 553\(b\)\(3\)\(A\)](#) because letter was not agency rule at all, legislative or otherwise; letter's author was not vested with authority to announce rules binding on Department of Interior. [Amoco Prod. Co. v. Watson](#), 410 F.3d 722, 366 U.S. App. D.C. 215, 160 Oil & Gas Rep. 424, 2005 U.S. App. LEXIS 10824 (D.C. Cir. 2005), reh'g denied, [2005 U.S. App. LEXIS 18273 \(D.C. Cir. Aug. 24, 2005\)](#), cert. granted, 547 U.S. 1068, 126 S. Ct. 1768, 164 L. Ed. 2d 515, 2006 U.S. LEXIS 2851 (2006), aff'd, [549 U.S. 84, 127 S. Ct. 638, 166 L. Ed. 2d 494, 20 Fla. L. Weekly Fed. S 19, 163 Oil & Gas Rep. 807, 2006 U.S. LEXIS 9586 \(2006\)](#).

State requirement that "variable purchase option" be included on face of ADT card could not be construed as "interpretive rule" within exception provided by [5 USCS § 553\(b\)](#) where such instruction, prescribing single, uniform and specific means of implementing variable purchase option, was mandatory and was intended to have force of law. [Reyes v. Klein](#), 411 F. Supp. 1241, 1976 U.S. Dist. LEXIS 15597 (D.N.J. 1976).

Interpretative rule leaving room for exercise of administrative discretion as to land acquisition policy is not subject to requirements of [5 USCS § 553](#). [Greenwald v. Olsen](#), 583 F. Supp. 1002, 1984 U.S. Dist. LEXIS 17879 (D. Mass. 1984).

Federal Home Loan Bank Board's (FHLBB) enforcement of promulgated rule requiring application and review of plaintiffs' proposed charter conversion and subsequent merger will not be enjoined, where FHLBB's adoption of rule interpreting [12 USCS § 1464\(i\)\(3\)](#) so as to require FHLBB approval of proposed transaction does not require notice and comment procedures of [5 USCS § 553](#), rule is consistent with FHLBB counsel's past interpretations and rationally related to effort to meet current condition of thrift industry, because preliminary injunction might harm FHLBB and public interest, but enforcement of rule will not cause irreparable harm to plaintiffs. [MetroBanc v. Federal Home Loan Bank Bd.](#), 666 F. Supp. 981, 1987 U.S. Dist. LEXIS 7744 (E.D. Mich. 1987).

Secretary of Housing and Urban Development's (HUD) letter interpreting definition of "manufactured home" found at [42 USCS § 5402\(6\)](#) simply states what HUD thinks statute means, where Congress apparently limited HUD's

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authority to promulgate legislative rules to issuance of construction and safety standards under [42 USCS § 5403](#), and letter is thus merely interpretive rule not subject to requirements of notice and comment rulemaking under [5 USCS § 553](#). [Association for Regulatory Reform v. Pierce](#), 670 F. Supp. 1041, 1987 U.S. Dist. LEXIS 8664 (D.D.C. 1987), aff'd in part, vacated in part, [849 F.2d 649](#), 270 U.S. App. D.C. 318, 1988 U.S. App. LEXIS 7993 (D.C. Cir. 1988).

Memorandum issued by Army Corps of Engineers official listing standards which would indicate sufficient interstate commerce connection to warrant Corps' jurisdiction over isolated waters and wetlands to include waters used or which could be used as habitat by other migratory birds which cross state lines does not fall within exceptions to [5 USCS § 553](#) and require notice and comment under Administrative Procedure Act, because memorandum was not merely interpretive but had significant effect on public interests and resulted in change in Corps' policy intended to have full force of substantive rule and memorandum was not general statement of policy because Corps intended memorandum to be binding, take effect immediately, and not give district personnel discretion. [Tabb Lakes, Ltd. v. United States](#), 715 F. Supp. 726, 19 Env'tl. L. Rep. 20672, 1988 U.S. Dist. LEXIS 16867 (E.D. Va. 1988), aff'd, 885 F.2d 866, 30 Env't Rep. Cas. (BNA) 1510, 1989 U.S. App. LEXIS 14057 (4th Cir. 1989).

Office of Surface Mining Reclamation and Enforcement's approval of program enhancements document submitted by Pennsylvania Department of Environmental Protection regarding state's compliance with Surface Mining Control and Reclamation Act of 1977, [30 USCS §§ 1201–1328](#), was not subject to notice and comment requirements of [5 USCS § 553](#); approval of document fell within interpretive rules exemption under § 553(b)(A) because document summarized various actions taken and planned and did not alter or contradict existing program requirements. [Pa. Fed'n of Sportsmen's Clubs v. Norton](#), 413 F. Supp. 2d 358, 62 Env't Rep. Cas. (BNA) 1465, 2006 U.S. Dist. LEXIS 6699 (M.D. Pa. 2006), rev'd, remanded, [497 F.3d 337](#), 65 Env't Rep. Cas. (BNA) 1856, 37 Env'tl. L. Rep. 20197, 2007 U.S. App. LEXIS 18347 (3d Cir. 2007).

Insurance company that issued commercial automobile liability policy to trailer owner was entitled to declaration under [28 USCS § 2201](#) that it had no duty to indemnify trailer lessee in underlying tort action that arose from tractor-trailer/automobile accident because MCS-90 endorsement, which arose from [49 USCS § 13906](#) and [49 CFR § 387.15](#), did not negate lessee exclusion under policy; regulatory guidance provided by Federal Motor Carrier Safety Administration pursuant to [5 USCS § 553](#) supported interpretation of "the insured" in MCS-90 as referring only to named insured under policy. [Armstrong v. United States Fire Ins. Co.](#), 606 F. Supp. 2d 794, 2009 U.S. Dist. LEXIS 25693 (E.D. Tenn. 2009).

Governor of Montana, Montana Department of Revenue, and State of New Jersey (jointly, States) were entitled to summary judgment on their action against IRS, its Commissioner, and Department of the Treasury (jointly, IRS) to hold unlawful and set aside IRS's promulgation of Rev. Proc. 18-38, 18-31, year-2018 I.R.B. 280, and to order IRS to follow procedure for rulemaking required by APA because States' interests were related to, and well within relevant zone of interests of, purposes of information sharing policies and requirement that exempt organizations submit substantial-contributor information, and IRS admittedly failed to follow APA's public notice-and-comment procedure. [Bullock v. IRS](#), 401 F. Supp. 3d 1144, 2019-2 U.S. Tax Cas. (CCH) ¶150245, 2019 U.S. Dist. LEXIS 126921 (D. Mont. 2019).

Bid protest seeking injunctive relief failed because agency did not act arbitrarily or capriciously in conducting technical evaluation in which it interpreted information provided by National Institute of Standards and Technology on website about cryptographic modules, which was interpretive rule lacking force and effect of law, as permitting assessment of historically validated hardware without risk assessment as to services. [Ace-Federal Reporters, Inc. v. United States](#), 150 Fed. Cl. 94, 2020 U.S. Claims LEXIS 1805 (Fed. Cl. Sept. 22, 2020).

3. General Statements of Policy

a. In General

241. Generally

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For purposes of [5 USCS § 553\(b\)\(3\)\(A\)](#), general statement of policy does not impose any rights and obligations on any operator. [Texaco, Inc. v. Federal Power Com., 412 F.2d 740, 34 Oil & Gas Rep. 125, 80 Pub. Util. Rep. 3d \(PUR\) 107, 1969 U.S. App. LEXIS 11967 \(3d Cir. 1969\).](#)

For purposes of [5 USCS § 553\(b\)\(A\)](#), general statement of policy is statement by administrative agency announcing motivating factors agency will consider, or tentative goals toward which it will aim, in determining resolution of substantive question of regulation. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\).](#)

In deciding whether agency's pronouncement is general policy statement or is in fact binding norm, general rule is that unless pronouncement acts prospectively, it is binding norm; pronouncement is general policy statement if it leaves agency and its decision-makers free to exercise discretion. [American Bus Asso. v. United States, 627 F.2d 525, 201 U.S. App. D.C. 66, 1980 U.S. App. LEXIS 16331 \(D.C. Cir. 1980\).](#)

Claim of exemption from rulemaking requirements is strictly scrutinized where agency seeks, by adoption of policy, to informally undo all it accomplished through rulemaking without giving parties opportunity to comment on wisdom of repeal. [Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 230 U.S. App. D.C. 8, 19 Env't Rep. Cas. \(BNA\) 1410, 13 Env'tl. L. Rep. 20712, 1983 U.S. App. LEXIS 25519 \(D.C. Cir. 1983\).](#)

Whether particular agency proceeding announces rule or general policy statement depends upon whether agency action establishes "binding norm"; key inquiry is extent to which challenged policy leaves agency free to exercise discretion to follow or not to follow general policy in individual case; as long as agency remains free to consider individual facts in various cases that arise, agency action in question has not established binding norm; explicit statement in policy that agency will continue to examine each case upon totality of facts is not controlling. [Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1983 U.S. App. LEXIS 16179 \(11th Cir. 1983\)](#), cert. denied, 466 U.S. 927, 104 S. Ct. 1708, 80 L. Ed. 2d 181, 1984 U.S. LEXIS 1709 (1984).

Question for determining whether statement falls under exception for general statements of policy is whether it is rule of present by binding effect and answer depends on whether it constrains agency's discretion. [McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 267 U.S. App. D.C. 367, 27 Env't Rep. Cas. \(BNA\) 1288, 18 Env'tl. L. Rep. 20473, 1988 U.S. App. LEXIS 1626 \(D.C. Cir. 1988\).](#)

General principles to be utilized in distinguishing policy statement from rule are (1) whether announcement is subject to change prior to its implementation, (2) whether announcement focuses agency's attention on fixed set of criteria that might have been formulated differently if there had been opportunity for public comment, (3) whether inquiry in subsequent rulemakings be whether facts fit alleged policy or whether policy itself is subject to challenge in such proceedings, and (4) whether announcement has substantial impact on regulated parties so as to make process of public comment important requirement. [Dow Chemical, USA v. Consumer Product Safety Com., 464 F. Supp. 904, 9 Env'tl. L. Rep. 20307, 26 Fed. R. Serv. 2d \(Callaghan\) 1304, 1979 U.S. Dist. LEXIS 14474 \(W.D. La. 1979\).](#)

Rule is general statement of policy where administrator is free to exercise his discretion in situations that arise and where rule does not establish binding norm and is not finally determinative of issues or rights to which it is addressed. [Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 8 Ct. Int'l Trade 214, 1984 Ct. Intl. Trade LEXIS 1890 \(Ct. Int'l Trade 1984\).](#)

General policy statement is agency action that does not establish binding nor pronounces agency's tentative intentions for future; general policy statements leave agency free to exercise informed discretion; by contrast, rule is considered legislative if by its action agency intends to create new law, rights, or duties. [United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 616 F. Supp. 1200, 1985 U.S. Dist. LEXIS 16977 \(D. Minn. 1985\).](#)

b. Particular Cases

242. Agriculture

Memorandum issued by deputy administrator for family nutrition program stating that civil money penalty could not be imposed in second sanction case, if new sanction was greater than one year disqualification, was not general statement of policy or guideline under § 553 since it provided reviewing officer no discretion to impose civil money penalty in lieu of disqualification and was therefore invalid and ineffective modification or repeal of existing regulation, allowing discretion, properly adopted by Department of Agriculture. [Dalton v. United States, 816 F.2d 971, 1987 U.S. App. LEXIS 5293 \(4th Cir. 1987\)](#).

Department of Agriculture adoption of definition of word "imitation" developed by Food and Drug Administration is statement of general policy pending outcome of rulemaking proceedings, and is not subject to notice and comment requirements where agency, after reviewing definition of word, stated that tentative position of agency was to follow FDA definition pending further comment in formal rulemaking proceedings. [Grocery Mfrs. of America, Inc. v. Gerace, 581 F. Supp. 658, 1984 U.S. Dist. LEXIS 18790 \(S.D.N.Y. 1984\)](#), aff'd in part and rev'd in part, [755 F.2d 993, 1985 U.S. App. LEXIS 29399 \(2d Cir. 1985\)](#).

243. Bureau of Prisons

Bureau of Prison's rule that inmate, convicted of possession of firearm during drug offense, could not have his sentence reduced for completing substance abuse treatment program pursuant to [18 USCS § 3621](#) was policy not subject to notice and comment requirement. [Pelissero v. Thompson, 170 F.3d 442, 1999 U.S. App. LEXIS 4025 \(4th Cir. 1999\)](#).

Federal Bureau of Prisons (BOP) policy was invalid for failure to follow notice and comment provision of [5 USCS § 553](#), Administrative Procedure Act and, because court had no authority to determine place or location of imprisonment under [18 USCS § 3621](#), court enjoined BOP from exercising its discretion on inmate's place of incarceration based on invalid BOP policy and ordered BOP to reconsider designation of place of incarceration without consideration of invalid policy. [Hurt v. Fed. Bureau of Prisons, 323 F. Supp. 2d 1358, 2003 U.S. Dist. LEXIS 25589 \(M.D. Ga. 2003\)](#).

244. Energy and power

Secretary of Energy's ruling regarding Low-Level Radio Active Waste Policy Act, [42 USCS §§ 2021b](#) et seq., simply publicized standards she intended to use in applying Act, clarifying her view of what existing law required, and was therefore exempt from notice and comment requirements. [Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 43 Env't Rep. Cas. \(BNA\) 1065, 26 Env'tl. L. Rep. 21632, 1996 U.S. App. LEXIS 21001 \(3d Cir. 1996\)](#), reh'g denied, [126 F.3d 193, 28 Env'tl. L. Rep. 20022, 1997 U.S. App. LEXIS 25233 \(3d Cir. 1997\)](#).

245. —Federal Power Commission/Federal Energy Regulatory Commission

Regulation requiring payment of interest compounded monthly on refunds ordered by Federal Power Commission, now part of Department of Energy, is not general statement of policy under [5 USCS § 553\(b\)](#), and is not exempt from procedural requirements, since it adopts substantive rule imposing rights and obligations on operator. [Texaco, Inc. v. Federal Power Com., 412 F.2d 740, 34 Oil & Gas Rep. 125, 80 Pub. Util. Rep. 3d \(PUR\) 107, 1969 U.S. App. LEXIS 11967 \(3d Cir. 1969\)](#).

Order by Federal Power Commission indicating that it would continue to follow policy adopted in administrative case regarding treatment of taxes in ratemaking case is statement of policy based essentially on interpretation of Tax Reform Act and is properly issued without notice or opportunity for hearing. [Memphis Light, Gas & Water Div. v Federal Power Com., 462 F.2d 853, 149 U.S. App. D.C. 238, 29 A.F.T.R.2d \(RIA\) 1283, 29 A.F.T.R.2d \(RIA\) 696 \(App DC 1972\)](#).

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FPC's policy statement regarding priorities of deliveries by pipelines during periods of curtailment during natural gas shortages was exempt under [5 USCS § 553\(b\)\(A\)](#) from APA rule-making requirements. [Pacific Gas & Electric Co. v. Federal Power Com., 506 F.2d 33, 164 U.S. App. D.C. 371, 50 Oil & Gas Rep. 395, Util. L. Rep. \(CCH\) ¶11552, 1974 U.S. App. LEXIS 7945 \(D.C. Cir. 1974\).](#)

Order of Federal Power Commission is statement of commission policy and not rule, and is therefore exempt from notice and hearing requirements of Administrative Procedure Act. [Pacific Lighting Service Co. v. Federal Power Com., 518 F.2d 718, 11 Pub. Util. Rep. 4th \(PUR\) 89, 1975 U.S. App. LEXIS 14960 \(9th Cir.\), cert. denied, 423 U.S. 1000, 96 S. Ct. 432, 46 L. Ed. 2d 376, 1975 U.S. LEXIS 3548 \(1975\), cert. denied, 423 U.S. 1000, 96 S. Ct. 433, 46 L. Ed. 2d 376, 1975 U.S. LEXIS 3549 \(1975\).](#)

246. Environmental Protection Agency

While informal rulemaking is pending, agency is not barred from any information-gathering process other than issuance of new or revised notices of proposed rulemaking; accordingly, EPA policy statement and draft technical support document, prepared and informally circulated to implement NPDES permit regulations, were not "rules" requiring notice and comment under [5 USCS § 553](#). [Natural Resources Defense Council, Inc. v. U.S. EPA, 859 F.2d 156, 273 U.S. App. D.C. 180, 28 Env't Rep. Cas. \(BNA\) 1401, 19 Env'tl. L. Rep. 20016, 1988 U.S. App. LEXIS 13319 \(D.C. Cir. 1988\).](#)

Environmental Protection Agency policy statement for negotiating settlements under [42 USCS § 9622](#) was excluded by [5 USCS § 553\(b\)\(3\)\(A\)](#). [Chemical Mfrs. Ass'n v. EPA, 26 F. Supp. 2d 180, 47 Env't Rep. Cas. \(BNA\) 1705, 29 Env'tl. L. Rep. 20306, 1998 U.S. Dist. LEXIS 18165 \(D.D.C. 1998\).](#)

247. Federal Aviation Administration

FAA letter informing parachuting business that parachute jumping would no longer be authorized in area was immediate substantive rule and was not exempt from rulemaking requirements; letter was not general statement of policy nor response to immediate emergency. [San Diego Air Sports Center, Inc. v. Federal Aviation Admin., 887 F.2d 966, 1989 U.S. App. LEXIS 15713 \(9th Cir. 1989\).](#)

FAA refusal to promulgate, through public notice and comment, or publish in CFR, rule authorizing suspension of airmen's certificate does not violate [5 USCS § 553](#) because it is agency policy, depends on underlying statute for substantive meaning, and is not itself substantive. [Rochna v. National Transp. Safety Bd., 929 F.2d 13, 1991 U.S. App. LEXIS 4824 \(1st Cir.\), cert. denied, 502 U.S. 910, 112 S. Ct. 305, 116 L. Ed. 2d 248, 1991 U.S. LEXIS 5805 \(1991\).](#)

Issuance of policy statement by FAA stating that analysis of data rather than full demonstration may be acceptable in cases of increase in airplane seating capacity by 5 or more percent did not require notice and comment. [Hudson v. FAA, 192 F.3d 1031, 338 U.S. App. D.C. 194, 1999 U.S. App. LEXIS 25036 \(D.C. Cir. 1999\).](#)

Memorandum by Federal Aviation Administration permitting airlines to use X-ray inspection system was not general statement of policy exempt from requirements of [5 USCS § 553](#), even though FAA claimed that memorandum was not mandatory in that carriers were not required to use X-ray system, since memorandum gave carrier new right to discontinue previous systems and inaugurate use of X-rays. [Nader v. Butterfield, 373 F. Supp. 1175, 6 Env't Rep. Cas. \(BNA\) 1360, 4 Env'tl. L. Rep. 20431, 1974 U.S. Dist. LEXIS 12075 \(D.D.C. 1974\).](#)

248. Federal Communications Commission

Statement of Federal Communications Commission, announcing that applications for rural radio stations which would be within range of major urban markets would be regarded as applications in urban areas, is policy statement and thus exempt from prepromulgation notice and public comment requirements of [5 USCS § 553\(b\)](#). [Fischer v. Federal Communications Com., 417 F.2d 551, 135 U.S. App. D.C. 134, 1969 U.S. App. LEXIS 11515 \(D.C. Cir. 1969\).](#)

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Announcement stating change in method by which agency would grant substantive rights was not general statement of policy; thus, Interstate Commerce Commission's notice of elimination of notification to competing carriers of application for emergency temporary authority was not exempt under [5 USCS § 553\(b\)\(A\)](#) as general statement of policy inasmuch as immediately upon effective date of notice formal practice of giving notification was no longer to be followed. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

FCC's denial that it required separate retail and wholesale operations in cellular phone markets was merely resolution of ambiguity rather than rule change, and Commission properly issued it without notice and comment. [Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 296 U.S. App. D.C. 144, Util. L. Rep. \(CCH\) ¶13872, 1992 U.S. App. LEXIS 12964 \(D.C. Cir. 1992\)](#).

FCC schedule of base penalties and adjustments, which schedule was used to determine appropriate fines for violations of Communications Act, was not policy statement and therefore should have been put out for comment under requirements of APA. [United States Tel. Ass'n v. FCC, 28 F.3d 1232, 307 U.S. App. D.C. 365, 1994 U.S. App. LEXIS 17002 \(D.C. Cir. 1994\)](#).

249. Health and human services

Directives issued and contracts entered into by Department of Health and Human Services in implementing system of "peer review" of Medicare outlays called for by Congress in 1982 amendments to Medicare Act constitute mere procedural rules or general statements of policy that do not substantially alter rates or interests of regulated hospitals and Department was not required to undertake notice and comment procedure prescribed by [5 USCS § 553](#). [American Hospital Asso. v. Bowen, 834 F.2d 1037, 266 U.S. App. D.C. 190, 1987 U.S. App. LEXIS 15999 \(D.C. Cir. 1987\)](#).

Indian health service policy authorizing denial of "contract health care" to off-reservation Indians otherwise within scope of IHS program is subject to general notice and comment requirements of [5 USCS § 553](#) since policy effected substantial change in existing statutes and regulations and had direct and significant impact upon substantive rights of segment of general public, and under these circumstances policy statement was not exempt from § 553 requirements as "interpretive rule" or "general statement of policy". [Lewis v. Weinberger, 415 F. Supp. 652, 1976 U.S. Dist. LEXIS 14886 \(D.N.M. 1976\)](#).

250. Housing and urban development

HUD-published guideline pertaining to economic development assistance to local governments is "policy statement" rather than "rule," and thus is exempt from notice and hearing requirements under [5 USCS § 553\(b\)\(A\)](#), where (1) guideline creates rebuttable presumption that proposed development projects involve relocation of existing businesses rather than creating new businesses, and (2) applicants may overcome presumption—and thus that obstacle to assistance—by demonstration to HUD, because publication of guideline did not change fact that HUD retains discretion to make determination at issue. [Jersey City v. Pierce, 669 F. Supp. 103, 1987 U.S. Dist. LEXIS 8603 \(D.N.J. 1987\)](#).

Handbook of HUD, providing procedures for processing rent increase requests, prepared to promote efficient management and viability of projects was general statement of policy to which APA did not apply. [Reynolds Assocs. v. United States, 31 Fed. Cl. 335, 1994 U.S. Claims LEXIS 98 \(Fed. Cl. May 18, 1994\)](#).

251. Immigration and aliens

Immigration and Naturalization Service directive to district directors that Western Hemisphere aliens should be offered extended voluntary departure date only where compelling circumstances warranted such relief, is general statement of policy exempted from notice requirements of [5 USCS § 553](#). [Noel v. Chapman, 508 F.2d 1023, 1975 U.S. App. LEXIS 16746 \(2d Cir.\)](#), cert. denied, 423 U.S. 824, 96 S. Ct. 37, 46 L. Ed. 2d 40, 1975 U.S. LEXIS 2325 (1975).

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Intra-agency guideline which sets forth policy for granting deferred action status falls into exception from publication requirement as internal directive not having force and effect of law; agency may validly amend operating instruction without going through notice and comment rulemaking. [Romeiro De Silva v. Smith, 773 F.2d 1021, 1985 U.S. App. LEXIS 23457 \(9th Cir. 1985\).](#)

Immigration and Naturalization Service operating instruction, under which Mexican alien, convicted for narcotics violation, was denied deferred action status in deportation proceedings, was valid notwithstanding agency's failure to implement notice and comment procedures under § 553 since both repealed and newly promulgated operating instructions qualified as general statements of policy exception to § 553 because directive merely provided guidance to agency officials in exercising discretionary powers while preserving agency flexibility and opportunity to make individualized determinations. [Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1987 U.S. App. LEXIS 4030 \(9th Cir. 1987\), app. after remand, 874 F.2d 816, 1989 U.S. App. LEXIS 5694 \(9th Cir. 1989\).](#)

District court erred in dismissing workers' action on ground that they lacked standing because workers had standing to challenge failure of Department of Labor to engage in notice and comment procedures required by Administrative Procedure Act; under competitor standing doctrine, Training and Employment Guidance Letters Department issued affected concrete interests of individuals seeking work as herders. [Mendoza v. Perez, 754 F.3d 1002, 410 U.S. App. D.C. 210, 2014 U.S. App. LEXIS 11005 \(D.C. Cir. 2014\)](#), reh'g, en banc, denied, [2014 U.S. App. LEXIS 15437 \(D.C. Cir. Aug. 11, 2014\)](#).

Workers fell within zone of interests of Immigration and Nationality Act of 1952 (INA) and had legislatively conferred cause of action to raise their claim regarding Department of Labor's administration of H-2A program as it regarded herders because they were able, willing, qualified, and available to work as herders; workers displaced by lax visa policies from jobs they otherwise would hold fall within class of individuals whom INA seeks to protect. [Mendoza v. Perez, 754 F.3d 1002, 410 U.S. App. D.C. 210, 2014 U.S. App. LEXIS 11005 \(D.C. Cir. 2014\)](#), reh'g, en banc, denied, [2014 U.S. App. LEXIS 15437 \(D.C. Cir. Aug. 11, 2014\)](#).

Because Training and Employment Guidance Letters (TEGLs) issued by Department of Labor change regulatory scheme for herding operations, they are legislative rules; rather than interpreting existing statute or regulation, TEGLs endeavor to implement [8 USCS § 1188](#), effect of legislative rule, and they provide policy decision Congress omitted in § 1188, namely, how to ensure admission of foreign herders does not adversely affect American workers. [Mendoza v. Perez, 754 F.3d 1002, 410 U.S. App. D.C. 210, 2014 U.S. App. LEXIS 11005 \(D.C. Cir. 2014\)](#), reh'g, en banc, denied, [2014 U.S. App. LEXIS 15437 \(D.C. Cir. Aug. 11, 2014\)](#).

Because Training and Employment Guidance Letters (TEGLs) issued by Department of Labor change regulatory scheme for herding operations, they are legislative rules and are subject to notice and comment requirements; TEGLs substantively affect regulated public because they set bar for what employers must do to obtain approval. [Mendoza v. Perez, 754 F.3d 1002, 410 U.S. App. D.C. 210, 2014 U.S. App. LEXIS 11005 \(D.C. Cir. 2014\)](#), reh'g, en banc, denied, [2014 U.S. App. LEXIS 15437 \(D.C. Cir. Aug. 11, 2014\)](#).

Policy statement by Immigration and Naturalization Service to district directors, which had no binding effect on district directors, but only requested that they review their local policies, is exempted from rulemaking requirements of [5 USCS § 553](#) as general statement of policy. [Dimaren v. INS, 398 F. Supp. 556, 1974 U.S. Dist. LEXIS 6685 \(S.D.N.Y. 1974\)](#).

Operating instruction changing Immigration and Naturalization Service policy relating to extension of time for voluntary departure of person subject to deportation is not general statement of policy exempted from rulemaking under [5 USCS § 553](#), where instruction did not guide conduct of agency discretionary function but had effect of requiring denial of extensions in all cases. [United States ex rel. Parco v. Morris, 426 F. Supp. 976, 1977 U.S. Dist. LEXIS 17633 \(E.D. Pa. 1977\)](#).

Haitian organizations' attack on policy change based on lack of formal rulemaking must fail, where in-house memorandum attacked is directed solely to INS officials, instructing them on implementation of new policy for rescreening of "screened-in" Haitians, because memo constitutes general statement of policy excepted from [5](#)

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[USCS § 553](#) rulemaking requirements. [Haitian Ctrs. Council v. McNary, 807 F. Supp. 928, 1992 U.S. Dist. LEXIS 20809 \(E.D.N.Y. 1992\)](#).

252. Interior Department

Order issued by Secretary of Interior which stated Secretary's decision to issue no more coal prospecting permits until further notice and to reject all pending applications in order to prepare program for orderly development of coal resources with proper regard for protection of environment constituted general application of policy and concerned federal property within meaning of [5 USCS § 553](#). [Hunter v. Morton, 529 F.2d 645, 1976 U.S. App. LEXIS 13170 \(10th Cir. 1976\)](#).

Administrative Procedure Act (APA) did not authorize court to review Bureau of Indian Affairs' (BIA) allocation of law enforcement funding in Indian Country as there was no statutory constraint on BIA's discretion, and even if BIA had unwritten policy of not funding law enforcement in Public Law 280 states, it was general statement of policy that was not subject to notice and comment requirements of APA. [Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 2013 U.S. App. LEXIS 18354 \(9th Cir. 2013\)](#).

Interior Secretary's policy change permitting sale by single tract competitive bidding of federal coal tracts with nontransferable surface owner consents is upheld, where such change was allowable under [30 USCS § 1304\(c\)](#) and did not require notice and comment procedure of [5 USCS § 553](#), because bidding practice guideline was merely general statement of policy having no substantial impact on regulated parties or general public since tracts must still be leased for fair market value and in accordance with complex regulations. [National Wildlife Federation v. Burford, 677 F. Supp. 1445, 1985 U.S. Dist. LEXIS 16306 \(D. Mont. 1985\)](#).

253. Interstate Commerce Commission/Surface Transportation Board

Pronouncement by Interstate Commerce Commission which was intended to lessen constraints imposed upon motor carriers seeking authority to transport goods and people to and from Canada was not general statement of policy exempt from notice and comment requirements of [5 USCS § 553](#) where pronouncement did not operate only prospectively and where it was not simply general pronouncement on broad policy considerations which would motivate agency as it addressed itself to its appointed task, but was in reality flat rule of eligibility. [American Bus Asso. v. United States, 627 F.2d 525, 201 U.S. App. D.C. 66, 1980 U.S. App. LEXIS 16331 \(D.C. Cir. 1980\)](#).

Pronouncement by Interstate Commerce Commission amending criteria used to decide railroad abandonment application was policy statement and not new rule even though Commission followed procedures statutorily proscribed for rulemaking ([5 USCS § 553](#)) where Commission used rulemaking procedure in order to obtain comments from carriers and other interested parties. [Farmland Industries, Inc. v. United States, 642 F.2d 208, 1981 U.S. App. LEXIS 19717 \(7th Cir. 1981\)](#).

254. Labor and employment

Enforcement policy of Secretary of Labor of holding mine operators and independent contractors liable for safety violations, published in Federal Register as appendix to regulations governing mining safety and deliberately excluded from final published rule, was only guideline and not binding, substantive rule by which Secretary curtailed own discretion to cite operators, thus, citation by Secretary of mine-operator arguably not liable under general policy guidelines was discretionary exercise of general enforcement policy. [Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 254 U.S. App. D.C. 242, 1986 O.S.H. Dec. \(CCH\) ¶127646, 1986 U.S. App. LEXIS 27327 \(D.C. Cir. 1986\)](#).

"Program policy letters" of Mine Safety and Health Administration, stating agency's position that certain x-ray readings qualify as diagnoses of lung disease within meaning of agency reporting regulations are interpretive rules under APA; rule does not become amendment merely because it supplies crisper and more detailed lines than authority being interpreted. [American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 302 U.S. App. D.C. 38, 1993 O.S.H. Dec. \(CCH\) ¶130096, 1993 U.S. App. LEXIS 13767 \(D.C. Cir. 1993\)](#).

255. Parole Board or Commission

Guidelines which are not binding on agency cannot be treated as laws, although they may be required to be promulgated or modified with procedural regularity ([5 USCS § 551](#)). [Rifai v. United States Parole Com., 586 F.2d 695, 1978 U.S. App. LEXIS 7597 \(9th Cir. 1978\)](#).

256. Miscellaneous

[5 USCS § 553](#) contemplates that Securities & Exchange Commission may make request to stock exchanges to change their procedures without following formal procedure required in case of orders, and does not require procedures required for rule making, including notice and opportunity for hearing, for general statements of policy. [Independent Broker-Dealers' Trade Asso. v. SEC, 442 F.2d 132, 142 U.S. App. D.C. 384, Fed. Sec. L. Rep. \(CCH\) ¶92963, Fed. Sec. L. Rep. \(CCH\) ¶92963, 1971 U.S. App. LEXIS 11553 \(D.C. Cir.\)](#), cert. denied, 404 U.S. 828, 92 S. Ct. 63, 30 L. Ed. 2d 57, 1971 U.S. LEXIS 3807 (1971).

Regulation issued by Federal Savings and Loan Insurance Corporation, without prior notice and comment procedures would qualify as general statement of policy within [5 USCS § 553\(b\)\(A\)](#) where (1) agency's discretion in matter was extremely broad, (2) challenged provisions had quality of filling in details of one aspect of comprehensive regulatory framework, and (3) standards outlined by regulations were not unfamiliar but were in large part reiterative of guidelines promulgated for accounting profession by American Institute of Certified Public Accountants. [Guardian Federal Sav. & Loan Asso. v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 191 U.S. App. D.C. 135, 1978 U.S. App. LEXIS 7834 \(D.C. Cir. 1978\)](#).

FDA Compliance Policy Guide issued to combat problems of bulk compounding of drugs by pharmacies before receiving valid prescription did not effect substantive change in already applicable regulations but merely provided guidance on old problem and thus was not substantive rule subject to notice and comment requirements. [Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 1995 U.S. App. LEXIS 14781 \(5th Cir. 1995\)](#).

Veterans' Administration circular, stating that Administration will not designate as appraiser for VA guaranteed home mortgages any person holding appointive or elective position which might result in conflict of interest, is statement of policy not required to be promulgated in accordance with notice procedures of [5 USCS § 553\(b\)](#), however, such policy statement has no legal efficacy unless properly published in accordance with [5 USCS § 553\(d\)](#). [Hartnett v. Cleland, 434 F. Supp. 18, 1977 U.S. Dist. LEXIS 15948 \(D.S.C. 1977\)](#).

Federal Trade Commission's statement that in future prosecutions for violations of § 5 of Federal Trade Commission Act through interlocking directorates between banks and savings and loan associations, it would prosecute not only organizations themselves, but directors as well, is statement of policy not subject to procedural requirements of [5 USCS § 553\(b\)](#). [Courshon v. Federal Trade Com., 435 F. Supp. 24, 1977-1 Trade Cas. \(CCH\) ¶161263, 1977 U.S. Dist. LEXIS 17616 \(D.D.C. 1977\)](#).

Trigger price mechanism devised by Department of Treasury for determining existence of Antidumping Act violations is general statement of policy and may be promulgated without adherence to notice requirements of [5 USCS § 553\(b\)](#). [Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283, 1978 U.S. Dist. LEXIS 17533 \(D.D.C. 1978\)](#).

Failure of Federal Home Loan Bank Board to follow provisions of [5 USCS § 553\(b\)](#), (d) in promulgating Statements of Policy setting forth detailed guidelines under which, in exceptional cases, Board might approve mergers, consolidations and acquisitions of federally regulated savings and loan associations resulting in interstate branch operations, in order to prevent failure of institution, did not constitute violation of § 553, since Statements of Policy in question are exempt as interpretive rules or general statements of policy. [Independent Bankers Asso. v. Federal Home Loan Bank Bd., 557 F. Supp. 23, 1982 U.S. Dist. LEXIS 17125 \(D.D.C. 1982\)](#).

Unpublished decision: In case in which chief executive officer of trading company and securities trader argued that application of Section 21(e)(1) of Securities Exchange Act, [15 USCS § 78u\(e\)\(1\)](#), to them violated their due process

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rights because Security and Exchange Commission's (SEC) decision to begin enforcing sanctions under that section was new agency policy requiring fair notice to them which they did not receive, that argument failed; SEC's decision in press release to begin utilizing [15 USCS § 78u\(e\)\(1\)](#) was not new rule requiring notice and publication under Administrative Procedures Act; press release represented decision to act on authority previously given to SEC, did not involve any change or interpretation of statute, and in no way created new binding norm on parties. [SEC v. Markowski, 277 Fed. Appx. 903, Fed. Sec. L. Rep. \(CCH\) ¶ 94723, Fed. Sec. L. Rep. \(CCH\) ¶ 94723, 2008 U.S. App. LEXIS 10655 \(11th Cir. 2008\)](#).

4. Agency Organization, Procedure or Practice Rules

a. In General

257. Generally

Proper test to be applied in considering whether rule may fall within exemption under [5 USCS § 553](#) for procedural rules is that when proposed regulation of general applicability has substantial impact on regulated industry, or important class of members or products of that industry, notice and opportunity for comments should first be provided. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

Internal procedures, like policy statements, are exempt from coverage of [5 USCS § 553](#). [Vietnam Veterans of America v. Secretary of Navy, 843 F.2d 528, 269 U.S. App. D.C. 35, 1988 U.S. App. LEXIS 3920 \(D.C. Cir. 1988\)](#).

While agency is not required under [5 USCS § 553\(b\)\(A\)](#) to give notice of proposed rule making with invitation to comment on rules of agency organization procedure and practice, publication in Federal Register of promulgated rules of agency organization and procedures is required under [5 USCS § 552\(a\)\(1\)\(A\)](#), (B), (C). [Anderson v. Butz, 428 F. Supp. 245, 1975 U.S. Dist. LEXIS 16377 \(E.D. Cal. 1975\)](#), aff'd, [550 F.2d 459, 1977 U.S. App. LEXIS 10253 \(9th Cir. 1977\)](#).

Procedural rules relate to and deal with methods of operation and are not subject to notice and comment requirements of [5 USCS § 553](#). [American Meat Institute v. Bergland, 459 F. Supp. 1308, 1978 U.S. Dist. LEXIS 14620 \(D.D.C. 1978\)](#).

Agency handbooks that have not been published in accordance with [5 USCS § 553](#) are generally considered to be non-binding instructions or internal operating procedures. [Rousseau v. Philadelphia, 589 F. Supp. 961, 1984 U.S. Dist. LEXIS 18883 \(E.D. Pa. 1984\)](#).

Since it is specifically provided that rule making relating to military function of United States ([5 USCS § 553\(a\)\(1\)](#)), and that rules of agency organization, procedure or practice ([5 USCS § 553\(b\)\(3\)\(A\)](#)), are exempt from notice and comment requirements, such rules, including delegations and reservations, can be effective regardless of publication in Federal Register or Code of Federal Regulations. [Nolan v. United States, 44 Fed. Cl. 49, 1999 U.S. Claims LEXIS 118 \(Fed. Cl. May 28, 1999\)](#).

258. "Substantial impact"

Exemption of [5 USCS § 553\(b\)\(3\)\(A\)](#) from duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have substantial impact on those regulated; thus, inquiry is not whether rule is substantive or procedural, but rather whether rule will have substantial impact on those regulated. [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

Under "substantial impact" test, notion that applicability of § 4 of Administrative Procedure ([5 USCS § 553](#)) is governed by formal distinction that may exist between substantive rules and rules of procedure, policy or interpretation, has been rejected; crucial factor in this determination is actual effect and impact of regulation in question on public, and if regulation alters rights or obligations of persons affected then agency must utilize notice and comment procedure. [Sannon v. United States, 460 F. Supp. 458, 1978 U.S. Dist. LEXIS 15012 \(S.D. Fla.](#)

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1978), remanded, [631 F.2d 1247, 30 Fed. R. Serv. 2d \(Callaghan\) 964, 1980 U.S. App. LEXIS 11720 \(5th Cir. 1980\)](#).

259. Substantive impact of rules

To draw line between substance and procedure in context of administrative rule-making, courts have generally held that notice and comment is required if rule makes substantive impact on rights and duties of persons subject to regulation, but if rule does not have such impact, it is exempt from notice and comment requirements of [5 USCS § 553](#), and United States Court of Appeals would conclude that there would be no need to follow notice and comment procedures of § 553 where rule providing for exchange of information and notification procedure between agencies (1) had no impact on party objecting to rule, (2) neither diminished nor increased party's rights and duties under applicable Executive Order and statute, and (3) simply provided expeditious means of transmitting to Equal Employment Opportunity Commission complaints that should have been mailed to it in first place. [Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 15 Empl. Prac. Dec. \(CCH\) ¶7878, 15 Fair Empl. Prac. Cas. \(BNA\) 1185, 1977 U.S. App. LEXIS 11171 \(4th Cir. 1977\)](#), cert. denied, 435 U.S. 995, 98 S. Ct. 1646, 56 L. Ed. 2d 84, 16 Empl. Prac. Dec. (CCH) ¶8251, 17 Fair Empl. Prac. Cas. (BNA) 409, 1978 U.S. LEXIS 1610 (1978).

Rules concerning agency organization, procedure, or practice are exempted from notice and comment requirement and hence procedural rules with substantive impact are not subject to notice and comment; exemption extends to technical regulation of form of agency action and proceedings. [Southern California Edison Co. v. Federal Energy Regulatory Com., 770 F.2d 779, Util. L. Rep. \(CCH\) ¶13059, 1985 U.S. App. LEXIS 22709 \(9th Cir. 1985\)](#).

Substantive impact of rule on rights of parties regulated by agency promulgating rule requires that rule be promulgated in accordance with requirements under [5 USCS § 553\(b\)](#), even where rule is ostensibly "procedural." [Pharmaceutical Mfrs. Asso. v. Finch, 307 F. Supp. 858, 1970 U.S. Dist. LEXIS 13179 \(D. Del. 1970\)](#), disapproved, [Rivera v. Becerra, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\)](#).

Fact that "procedural" rule for which exemption under [5 USCS § 553\(b\)](#) is sought has some substantive impact on parties subject to agency's regulation does not, by itself, render exception inapplicable to rule in question. [EEOC v. National Cash Register Co., 405 F. Supp. 562, 12 Empl. Prac. Dec. \(CCH\) ¶11046, 14 Fair Empl. Prac. Cas. \(BNA\) 1118, 1975 U.S. Dist. LEXIS 14940 \(N.D. Ga. 1975\)](#).

To draw line between substance and procedure in context of administrative rulemaking ([5 USCS § 553](#)), courts generally hold that notice and comment is required if rule makes substantive impact on rights and duties of persons subject to regulation. [McDonnell Douglas Corp. v. Marshall, 465 F. Supp. 22, 19 Empl. Prac. Dec. \(CCH\) ¶8963, 19 Fair Empl. Prac. Cas. \(BNA\) 227, 1978 U.S. Dist. LEXIS 14124 \(E.D. Mo. 1978\)](#), aff'd, [609 F.2d 898, 21 Empl. Prac. Dec. \(CCH\) ¶30390, 21 Fair Empl. Prac. Cas. \(BNA\) 475, 1979 U.S. App. LEXIS 10270 \(8th Cir. 1979\)](#).

260. Distinguished from substantive rules

Substantive or procedural nature of rule, for purposes of [5 USCS § 553\(b\)\(A\)](#) exception, may be determined by reference to content of rule. [Kessler v. Federal Communications Com., 326 F.2d 673, 117 U.S. App. D.C. 130, 1963 U.S. App. LEXIS 3388 \(D.C. Cir. 1963\)](#).

Exemption covers agency actions that do not in themselves alter rights or interests of parties, although they may alter manner in which parties present themselves or viewpoints to agency; in determining whether rule is substantive, court looks at its effect upon interests ultimately at stake in agency proceeding. [Neighborhood TV Co. v. FCC, 742 F.2d 629, 239 U.S. App. D.C. 292, Util. L. Rep. \(CCH\) ¶12949, 1984 U.S. App. LEXIS 19472 \(D.C. Cir. 1984\)](#).

Federal execution protocol and addendum providing for use of pentobarbital did not violate APA's notice-and-comment requirement because they were rules of agency organization, procedure, or practice exempt from requirements for notice-and-comment rulemaking. [In re Fed. Bureau of Prisons' Execution Protocol Cases, 955](#)

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[F.3d 106, 2020 U.S. App. LEXIS 10847 \(D.C. Cir.\)](#), cert. denied, 207 L. Ed. 2d 1109, 2020 U.S. LEXIS 3406 (U.S. 2020).

Word “substantive” does not appear in [5 USCS § 553\(b\)\(A\)](#) and characterization of “substantive” and “procedural” does not inexorably guide to correct result as to whether provisions of § 553 are applicable. [National Motor Freight Traffic Asso. v. United States, 268 F. Supp. 90, 1967 U.S. Dist. LEXIS 9268 \(D.D.C. 1967\)](#), aff’d, 393 U.S. 18, 89 S. Ct. 49, 21 L. Ed. 2d 19, 1968 U.S. LEXIS 590 (1968).

Under [5 USCS § 553\(b\)](#), substantive rules are those which change standards, and procedural rules are those dealing with method of operation utilized in dispatch of agency’s business. [EEOC v. National Cash Register Co., 405 F. Supp. 562, 12 Empl. Prac. Dec. \(CCH\) ¶11046, 14 Fair Empl. Prac. Cas. \(BNA\) 1118, 1975 U.S. Dist. LEXIS 14940 \(N.D. Ga. 1975\)](#).

Unpublished decision: U.S. Army Corps of Engineers’ Regulatory Guidance Letter did not impose any rights and obligations, continued to leave agency free to exercise discretion when making wetland mitigation determinations, and stated that it did not modify existing mitigation policies, regulations, or guidance; therefore, it was not binding upon Corps, pursuant to [5 USCS § 553\(b\)\(3\)\(A\)](#). [Northwest Bypass Group v. United States Army Corps of Eng’rs, 552 F. Supp. 2d 97, 2008 U.S. Dist. LEXIS 33202 \(D.N.H. 2008\)](#).

b. Particular Cases

261. Agriculture

USDA was not required to engage in notice and comment rulemaking in promulgating rule that controls manner in which agency receives requests for approval of food labeling; new rule fell within APA’s procedural rules exception. [James V. Hurson Assocs. v. Glickman, 229 F.3d 277, 343 U.S. App. D.C. 313, 47 Fed. R. Serv. 3d \(Callaghan\) 1238, 2000 U.S. App. LEXIS 26640 \(D.C. Cir. 2000\)](#).

Rule would be procedural in nature and exempt from notice and comment requirement of [5 USCS § 553](#) where it did no more than inform bacon producers and general public of procedures which Department of Agriculture would use to detect and monitor nitroamines in bacon to secure enforcement of Department’s requirements. [American Meat Institute v. Bergland, 459 F. Supp. 1308, 1978 U.S. Dist. LEXIS 14620 \(D.D.C. 1978\)](#).

262. Environmental Protection Agency

Procedurally, it seems clear that normal listing of substance as toxic pollutant under [33 USCS § 1317\(a\)](#) is rule making, and various procedural requirements of rule making, including notice and comment period, will apply pursuant to [5 USCS § 553](#); it is more doubtful that final agency decision in response to primary jurisdiction referral about meaning of regulation constitutes rule making, and so it may be that various procedural requirements for listing, including notice and comment period, do not apply as of right. [Narragansett Elec. Co. v. United States EPA, 407 F.3d 1, 60 Env’t Rep. Cas. \(BNA\) 1353, 35 Env’tl. L. Rep. 20093, 2005 U.S. App. LEXIS 7901 \(1st Cir. 2005\)](#).

EPA’s deferral of consideration of applications for ocean incineration permits required by Marine Protection, Research and Sanctuaries Act ([33 USCS §§ 1401](#) et seq.) is procedural rule not subject to notice-and-comment provisions under [5 USCS § 553\(b\)\(A\)](#), where incineration had been covered by regulations covering ocean dumping, then EPA recognized need for new regulations addressing peculiar problems and ramifications of ocean burning in more specific fashion, and ultimately decided to put freeze on issuance of ocean incineration permits until new regulations are in place, because neither effect nor intent of agency’s action touches upon plaintiff’s ultimate interest in obtaining ocean incineration permits—rule merely alters EPA’s method of operations or procedure for considering permit applications. [Waste Management, Inc. v. United States EPA, 669 F. Supp. 536, 26 Env’t Rep. Cas. \(BNA\) 1489, 18 Env’tl. L. Rep. 20218, 1987 U.S. Dist. LEXIS 8670 \(D.D.C. 1987\)](#).

263. Federal Communications Commission

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Change by Federal Communications Commission in regulations relating to cut off date for receipt of competing applications for broadcast licenses was procedural and exempt from formal rulemaking procedure under [5 USCS § 553](#). *Ranger v. Federal Communications Com.*, 294 F.2d 240, 111 U.S. App. D.C. 44, 1961 U.S. App. LEXIS 4754 (D.C. Cir. 1961).

Order of Federal Communications Commission imposing freeze on acceptance of applications for most classes of standard radio broadcast stations, pending adoption of new rules on subject, was procedural in nature and was not subject to formal rule-making requirements. *Kessler v. Federal Communications Com.*, 326 F.2d 673, 117 U.S. App. D.C. 130, 1963 U.S. App. LEXIS 3388 (D.C. Cir. 1963).

Federal Communications Commission does not violate notice and comment requirement with respect to decision to freeze all opposed translator applications and later to reorder processing of applications according to tiered, rather than first filed first processed system; freezing and processing reorder decisions are characterized as procedural since they have effect only of delaying consideration of applications and of subjecting applications to increased competition. *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 239 U.S. App. D.C. 292, Util. L. Rep. (CCH) ¶12949, 1984 U.S. App. LEXIS 19472 (D.C. Cir. 1984).

Commission's adoption of financial qualification requirements for licensing domestic satellite applicants did not violate [5 USCS § 553](#), notwithstanding contentions that Commission erred by classifying regulation as "procedural" rule not requiring notice and comment, that final financial qualification rules did not restate existing Commission policies, and that Commission was prevented from making proposed rules effective upon adoption. Re Licensing Space Stations in Domestic Fixed-Satellite Service; Applications of Nat. Exchange Inc. & RCA American Communications Inc. FCC 86-497 (adopted Oct. 30, 1986).

264. Health and human services

Administrative instruction of Secretary of Health and Human Services directing free standing Home Health Agencies to begin using 49 government-designated, state-wide intermediaries for all Medicare reimbursement determinations and payments, without complying with notice and comment provisions of [5 USCS § 553](#), is invalid, since it is more than rule of agency procedure in that it substantially affects rights and interests of free standing HHAs and is thus not within exception of § 553(b)(A). *National Asso. of Home Health Agencies v. Schweiker*, 690 F.2d 932, 223 U.S. App. D.C. 209, 1982 U.S. App. LEXIS 25703 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205, 103 S. Ct. 1193, 75 L. Ed. 2d 438, 1983 U.S. LEXIS 3406 (1983).

Rules promulgated by Provider Reimbursement Review Board to establish procedures for handling appeals, such as former Provider Reimbursement Manual § 2921.4E, did not require compliance with administrative notice-and-comment procedures. *NovaCare, Inc. v. Thompson*, 357 F. Supp. 2d 268, 2005 U.S. Dist. LEXIS 2249 (D.D.C. 2005).

265. Immigration and aliens

Contention by Haitian refugees, arguing that they were unlawfully detained by Immigration and Naturalization Service, that government violated notice and comment procedures of [5 USCS §§ 551](#) et seq. and that therefore discretionary function exception does not apply fails because attack is on legality of rulemaking process, issue not covered by Federal Tort Claims Act. *Adras v. Nelson*, 917 F.2d 1552, 1990 U.S. App. LEXIS 20769 (11th Cir. 1990).

Immigration and Naturalization Service regulation directing that aliens applying for permanent residence status be examined by selective civil surgeons rather than by medical officers of Department of Health falls within exception of [5 USCS § 553\(b\)](#) for rules relating to agency procedure. *New York Pathological & X-Ray Laboratories, Inc. v. Immigration & Naturalization Service*, 389 F. Supp. 1007, 1974 U.S. Dist. LEXIS 6170 (S.D.N.Y. 1974), rev'd, 523 F.2d 79, 1975 U.S. App. LEXIS 13078 (2d Cir. 1975).

266. Interstate Commerce Commission/Surface Transportation Board

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Mere fact that rule would guide Interstate Commerce Commission procedures did not mean that notice of elimination of notification to competing carriers of application for emergency temporary authority was procedural rule under [5 USCS § 553\(b\)\(A\)](#). [Brown Express, Inc. v. United States, 607 F.2d 695, 1979 U.S. App. LEXIS 10076 \(5th Cir. 1979\)](#).

ICC issuance of expedited procedural schedule for particular merger is rule of agency procedure exempt from notice and comment requirements where procedural schedule was issued in order to comply with congressional directive to expedite merger application. [Lamoille V. R. Co. v. Interstate Commerce Com., 711 F.2d 295, 229 U.S. App. D.C. 17, 1983-1 Trade Cas. \(CCH\) ¶65469, 1983 U.S. App. LEXIS 26338 \(D.C. Cir. 1983\)](#).

Even though Interstate Commerce Commission contended that rule relating to establishment of informal procedure for restoration to shippers of illegal charges by carriers merely provided procedure which may voluntarily be used to settle reparation claims and conferred no new substantive right other than that conferred by statute, rule was not exempt from requirements of [5 USCS § 553](#) by exception to rules of agency organization, procedure, or practice. [National Motor Freight Traffic Asso. v. United States, 268 F. Supp. 90, 1967 U.S. Dist. LEXIS 9268 \(D.D.C. 1967\)](#), aff'd, 393 U.S. 18, 89 S. Ct. 49, 21 L. Ed. 2d 19, 1968 U.S. LEXIS 590 (1968).

New rules adopted by ICC to expedite determination of applications by railroads for abandonment of lines make only procedural changes rather than substantive changes and therefore need not be promulgated in compliance with [5 USCS § 553](#) requiring public notice and opportunity for interested persons to participate in rule making. [Pennsylvania v. United States, 361 F. Supp. 208, 1973 U.S. Dist. LEXIS 13373 \(M.D. Pa.\)](#), aff'd, 414 U.S. 1017, 94 S. Ct. 440, 38 L. Ed. 2d 310, 1973 U.S. LEXIS 1358 (1973).

267. Labor and employment

National Labor Relations Board rule requiring employer to furnish union with list of names and addresses of employees who will be eligible to vote in representation election involves matter of substance and not procedure, and therefore does not fall within Administrative Procedure Act exception ([5 USCS § 553\(b\)\(A\)](#)) which provides that procedural requirements for rulemaking by administrative agencies do not apply to interpretative rules, general statements of policy, or rule of agency organization, procedure, or practice. [NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709, 70 L.R.R.M. \(BNA\) 3345, 60 Lab. Cas. \(CCH\) ¶10032, 1969 U.S. LEXIS 3101 \(1969\)](#).

Change in certain procedure of Secretary of Labor in connection with entry of aliens for purpose of performing labor in United States changed existing rights and obligations of aliens and employers and did not constitute general statement of agency procedure or practice. [Lewis--Mota v. Secretary of Labor, 469 F.2d 478, 1972 U.S. App. LEXIS 6685 \(2d Cir. 1972\)](#).

Inspection plan of Occupational Safety and Health Administration which prioritizes agency inspections by kind of industry, hazards experienced to industry, and safety record is procedural rule and is not subject to notice and comment requirement where plan does not create new law but contains policy of simplifying and scheduling procedures in order to concentrate inspection resources in industries with highest potential for safety and health violations. [United States Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 12 O.S.H. Cas. \(BNA\) 1045, 1984 O.S.H. Dec. \(CCH\) ¶27093, 1984 U.S. App. LEXIS 17259 \(5th Cir. 1984\)](#).

Challenged portions of 2019 Elections Rule prescribing certain procedures that employers, employees, and labor unions had to implement with respect to election of employee representatives for collective bargaining purposes, were not procedural rules exempt from that rulemaking requirement, and thus those provisions had to be held unlawful and set aside. [AFL-CIO v. NLRB, 466 F. Supp. 3d 68, 170 Lab. Cas. \(CCH\) ¶11240, 2020 U.S. Dist. LEXIS 99491 \(D.D.C. 2020\)](#).

268. —Equal Employment Opportunity Commission

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Title VII of Civil Rights Act of 1964 ([42 USCS §§ 2000e](#) et seq.), as amended, does not require Equal Employment Opportunity Commission (EEOC) to utilize notice-and-comment procedures, because (1) section 713(a) of 1964 Act ([42 USCS § 2000e-12\(a\)](#)) requires EEOC's procedural regulations to "be in conformity with standards and limitations" of Administrative Procedure Act (APA) ([5 USCS §§ 551-559](#)), and (2) APA, in [5 USCS § 553\(b\)](#), excepts "rules of agency organization, procedure, or practice" from notice-and-comment procedures unless required by statute. [Edelman v. Lynchburg College, 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188, 15 Fla. L. Weekly Fed. S 156, 2002 Cal. Daily Op. Service 2471, 2002 D.A.R. 3011, 82 Empl. Prac. Dec. \(CCH\) ¶40920, 88 Fair Empl. Prac. Cas. \(BNA\) 321, 2002 U.S. LEXIS 1935 \(2002\)](#).

Since memorandum of understanding providing for sharing of information between Equal Employment Opportunity Commission and Department of Labor's Office of Federal Contract Compliance Program was merely procedural in nature, agencies were not required to comply with notice and comment provisions of Administrative Procedure Act ([5 USCS § 553](#)). [Emerson Electric Co. v. Schlesinger, 609 F.2d 898, 21 Empl. Prac. Dec. \(CCH\) ¶30390, 21 Fair Empl. Prac. Cas. \(BNA\) 475, 1979 U.S. App. LEXIS 10270 \(8th Cir. 1979\)](#).

EEOC rule permitting disclosure of information obtained by it in course of investigation to charging parties, which does not affect rights or impose any obligation on any party, is within exemption for procedural and interpretative rules; there is no "substantial impact" on employer's rights by granting charging party access to investigative file of charge after that party's right to sue has accrued. [Associated Dry Goods Corp. v. EEOC, 720 F.2d 804, 32 Empl. Prac. Dec. \(CCH\) ¶31253, 32 Empl. Prac. Dec. \(CCH\) ¶33887, 33 Fair Empl. Prac. Cas. \(BNA\) 181, 1983 U.S. App. LEXIS 15659 \(4th Cir. 1983\)](#).

Memorandum of understanding between Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs of Department of Labor—providing for exchange of information between agencies which were parties thereto concerning employer compliance with antidiscrimination laws and regulations—would be procedural since (1) it involved little more than exchange of information between agencies concerned and (2) Memorandum had no substantial effect upon plaintiffs in that it neither diminished nor increased plaintiffs' rights and duties under Executive Order 11246, as amended by Executive Order 11375, and Title VII. [McDonnell Douglas Corp. v. Marshall, 465 F. Supp. 22, 19 Empl. Prac. Dec. \(CCH\) ¶8963, 19 Fair Empl. Prac. Cas. \(BNA\) 227, 1978 U.S. Dist. LEXIS 14124 \(E.D. Mo. 1978\)](#), aff'd, [609 F.2d 898, 21 Empl. Prac. Dec. \(CCH\) ¶30390, 21 Fair Empl. Prac. Cas. \(BNA\) 475, 1979 U.S. App. LEXIS 10270 \(8th Cir. 1979\)](#).

269. Miscellaneous

Rule relating to practice or procedure is technical regulation of form of agency action and proceedings, and does not include any action which goes beyond formality and substantially affects rights of those over whom agency exercises authority. [Pickus v. United States Bd. of Parole, 507 F.2d 1107, 165 U.S. App. D.C. 284, 1974 U.S. App. LEXIS 6536 \(D.C. Cir. 1974\)](#), disapproved, [Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192, 1977 U.S. LEXIS 49 \(1977\)](#).

Regulations issued by Commissioner of Food and Drugs which promulgate new standards of evidence necessary to demonstrate effectiveness of drug products are not procedural or interpretive under [5 USCS § 553\(b\)](#). [Pharmaceutical Mfrs. Assn. v. Finch, 307 F. Supp. 858, 1970 U.S. Dist. LEXIS 13179 \(D. Del. 1970\)](#), disapproved, [Rivera v. Becerra, 714 F.2d 887, 5 Employee Benefits Cas. \(BNA\) 1917, 1983 U.S. App. LEXIS 24456 \(9th Cir. 1983\)](#).

Federal Trade Commission rules allowing special employees to have access to line of business data are procedural, and therefore are not subject to notice and comment procedures; rule allowing special employees to have access to individual company line of business data has no substantive impact, and companies have no fewer rights or greater obligations as result of rule which enables FTC to more effectively use data without measurably sacrificing confidentiality. [Aluminum Co. of America v. FTC, 589 F. Supp. 169, 1984-1 Trade Cas. \(CCH\) ¶65995, 1984 U.S. Dist. LEXIS 16883 \(S.D.N.Y. 1984\)](#).

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Housing and urban development, in issuing handbook to loan recipients, did not intend that handbook set forth substantive rule or regulation; provisions of handbook may confer rights as operative element of contract with agency, and recourse in that event would be action under state law for breach of contract; recipient of rehabilitation funds may not rely upon provisions of agency handbook as basis for rights against agency resulting in inadequate and unworkmanlike construction by private contractor who sought to rehabilitate property utilizing funds provided by agency. [Rousseau v. Philadelphia, 589 F. Supp. 961, 1984 U.S. Dist. LEXIS 18883 \(E.D. Pa. 1984\).](#)

Securities and Exchange Commission could adopt regulation allowing business to be conducted by quorum of 2 out of 5 authorized members, without first giving notice of intent to adopt regulation in Federal Register and allowing for comment, as provided generally under [5 USCS § 553\(b\)\(3\)\(A\)](#), where SEC brought enforcement action against brokers, alleging securities fraud through imposition of excessive markups and kickback scheme, and brokers argued that SEC lacked authority to commence action in that quorum did not exist, because establishment of quorum involved rule of agency organization, procedure, or practice, exempted from Administrative Procedure Act (APA) requirements. [SEC v. Feminella, 947 F. Supp. 722, Fed. Sec. L. Rep. \(CCH\) ¶ 99374, Fed. Sec. L. Rep. \(CCH\) ¶99374, 1996 U.S. Dist. LEXIS 17429 \(S.D.N.Y. 1996\).](#)

5. Notice and Public Participation Are Impracticable, Unnecessary or Contrary to Public Interest

a. In General

270. Generally

Legislative history of Administrative Procedure Act demonstrates that Congress intended exceptions in [5 USCS § 553\(b\)\(B\)](#) to be narrow ones. [National Nutritional Foods Asso. v. Kennedy, 572 F.2d 377, 1978 U.S. App. LEXIS 12572 \(2d Cir. 1978\).](#)

Legislative history of impracticability standard of [5 USCS § 553\(b\)\(B\)](#) reveals that Congress intended this exemption to operate when regular course of rulemaking procedure would interfere with agency's ability to perform its function within time constraints imposed by Congress. [United States Steel Corp. v. United States Environmental Protection Agency, 605 F.2d 283, 13 Env't Rep. Cas. \(BNA\) 1449, 9 Env'tl. L. Rep. 20560, 1979 U.S. App. LEXIS 12791 \(7th Cir. 1979\)](#), cert. denied, 444 U.S. 1035, 100 S. Ct. 710, 62 L. Ed. 2d 672, 13 Env't Rep. Cas. (BNA) 2103, 10 Env'tl. L. Rep. 20081, 1980 U.S. LEXIS 166 (1980).

Mere recital of good cause does not create good cause for dispensing with normal notice and comment requirements of [5 USCS § 553\(b\)](#); similarly, desire to provide immediate guidance, without more, does not suffice for good cause. [Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 1979 U.S. App. LEXIS 10377 \(Temp. Emer. Ct. App. 1979\)](#), cert. denied, 446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790, 1980 U.S. LEXIS 1578 (1980), app. after remand, [647 F.2d 142, 1981 U.S. App. LEXIS 14575 \(Temp. Emer. Ct. App. 1981\).](#)

In order to avail itself of "good cause exception" for waiving 30 day notice rule, agency must determine that compliance with 30 day requirement is either impracticable, unnecessary or contrary to public interest. [Buschmann v. Schweiker, 676 F.2d 352, 1982 U.S. App. LEXIS 19597 \(9th Cir. 1982\).](#)

"Good cause" is found when circumstances pre-existing rulemaking call for immediate agency response and waiver is required to accomplish necessary speed; in special circumstances, good cause can exist when announcement of proposed rule itself can be expected to precipitate activity by affected parties that would harm public welfare; agency is justified in using emergency rulemaking procedures to promulgate rule where advance notice would result in severe market dislocations and erosion of scheme central to regulations. [Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\)](#), cert. denied, 467 U.S. 1255, 104 S. Ct. 3545, 82 L. Ed. 2d 849, 1984 U.S. LEXIS 2738 (1984).

Pre-promulgation notice requirement is inoperative when agency for good cause finds that notice and public procedures for comment are impracticable, unnecessary, or contrary to public interests; inquiry into whether agency

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properly invokes good cause exceptions proceeds on case by case basis. [Alcaraz v. Block, 746 F.2d 593, 1984 U.S. App. LEXIS 17086 \(9th Cir. 1984\).](#)

Provision of [5 USCS § 553](#) dispensing with requirement of notice and public proceedings when rulemaking agency for good cause finds it impracticable, unnecessary, or contrary to public interest to provide notice and public proceedings is not limited to interpretive rules, but applies in any situation. [Durkin v. Edward S. Wagner Co., 115 F. Supp. 118, 24 Lab. Cas. \(CCH\) ¶67834, 11 Wage & Hour Cas. \(BNA\) 601, 1953 U.S. Dist. LEXIS 2372 \(D.N.Y. 1953\)](#), aff'd, [217 F.2d 303, 27 Lab. Cas. \(CCH\) ¶68826, 12 Wage & Hour Cas. \(BNA\) 331, 1954 U.S. App. LEXIS 4027 \(2d Cir. 1954\).](#)

271. Construction

Under [5 USCS § 553\(b\)\(3\)\(B\)](#), term “unnecessary” refers to rules which are minor in character or deal with emergency. [Texaco, Inc. v. Federal Power Com., 412 F.2d 740, 34 Oil & Gas Rep. 125, 80 Pub. Util. Rep. 3d \(PUR\) 107, 1969 U.S. App. LEXIS 11967 \(3d Cir. 1969\).](#)

Exception of [5 USCS § 553\(b\)](#) providing that notice is not required when agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to public interest, is to be narrowly construed. [American Iron & Steel Institute v. Environmental Protection Agency, 568 F.2d 284, 10 Env't Rep. Cas. \(BNA\) 1689, 7 Env'tl. L. Rep. 20738, 1977 U.S. App. LEXIS 11571 \(3d Cir. 1977\).](#)

Under [5 USCS § 553\(b\)\(3\)\(B\)](#), term “unnecessary” means unnecessary so far as public is concerned, as where minor or merely technical amendment is involved, in which public is not particularly interested. [National Nutritional Foods Asso. v. Kennedy, 572 F.2d 377, 1978 U.S. App. LEXIS 12572 \(2d Cir. 1978\).](#)

Under [5 USCS § 553\(b\)\(B\)](#), term “public interest” supplements terms “impracticable” or “unnecessary,” and insures that public rulemaking procedures will not prevent agency from operating, where lack of public interest in particular rule warrants agency to dispense with public participation. [National Nutritional Foods Asso. v. Kennedy, 572 F.2d 377, 1978 U.S. App. LEXIS 12572 \(2d Cir. 1978\).](#)

Exceptions to notice and comment requirements are narrowly construed and reluctantly countenanced, and are to be invoked only in emergency situations when delay would do actual harm; bald assertions that agency does not believe comments would be useful do not constitute good cause to forego notice and comment procedures. [Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 230 U.S. App. D.C. 1, 17 Av. Cas. \(CCH\) ¶18585, 1983 U.S. App. LEXIS 26261 \(D.C. Cir. 1983\).](#)

Exception to notice and comment requirement of [5 USCS § 553](#), permitting agency to promulgate regulation without prior notice and comment where agency finds that good cause exists is narrowly construed. [Mobil Oil Corp. v. Department of Energy, 547 F. Supp. 1246, 1982 U.S. Dist. LEXIS 9672 \(N.D.N.Y. 1982\)](#), aff'd in part and rev'd in part, vacated, in part, [728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\).](#)

272. Finding and statement by agency

Agency invoking good cause exception must incorporate finding and brief statement of reasons therefor in rules issued; exception is not ordinarily appropriate since court avoids providing agencies with escape clause from requirements imposed by Congress. [United States v. Garner, 767 F.2d 104, 1985 U.S. App. LEXIS 20996 \(5th Cir. 1985\).](#)

Exception to notice and comment requirement of [5 USCS § 553](#), permitting agency to promulgate regulation without prior notice and comment where agency finds that good cause exists is not satisfied by mere statement of agency that good cause exists, in absence of showing of compelling circumstances or exigency warranting suspension of normal rulemaking procedures. [Mobil Oil Corp. v. Department of Energy, 547 F. Supp. 1246, 1982 U.S. Dist. LEXIS 9672 \(N.D.N.Y. 1982\)](#), aff'd in part and rev'd in part, vacated, in part, [728 F.2d 1477, 1983 U.S. App. LEXIS 14335 \(Temp. Emer. Ct. App. 1983\).](#)

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Where plaintiffs argued for first time that Department of Commerce violated APA when it withdrew regulation that stated that Commerce would normally limit application of average-to-transaction (A-to-T) method to those sales that constituted targeted dumping without notice and comment, Court of International Trade would not consider their argument, as they did not exhaust administrative remedies by raising their arguments in their case briefs before Commerce or at any other point during investigation, and neither pure question of law nor futility exception applied. [*Samsung Elecs. Co. v. United States*, 72 F. Supp. 3d 1359, 37 Int'l Trade Rep. \(BNA\) 1524, 2015 Ct. Intl. Trade LEXIS 57 \(Ct. Intl. Trade 2015\).](#)

273. Deadline imposed by statute or court

Mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for exception under [5 USCS § 553\(b\)\(B\)](#); deadline is factor to be considered, but agency must still show impracticability of affording notice and comment. [*United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207, 13 Env't Rep. Cas. \(BNA\) 1149, 9 Env'tl. L. Rep. 20311, 1979 U.S. App. LEXIS 14959 \(5th Cir.\), review or reh'g granted, in part, 598 F.2d 915, 13 Env't Rep. Cas. \(BNA\) 1383, 9 Env'tl. L. Rep. 20597, 1979 U.S. App. LEXIS 13315 \(5th Cir. 1979\).](#)

Existence of pressing statutory deadline does not provide good cause justification for failure of agency to notify public in advance of its intention to adopt certain proposals, or to solicit public comment on those proposals; procedure providing for comments after promulgation of rules does not provide viable substitute in such situation. [*United States Steel Corp. v. Environmental Protection Agency*, 633 F.2d 671, 15 Env't Rep. Cas. \(BNA\) 1368, 10 Env'tl. L. Rep. 20970, 1980 U.S. App. LEXIS 12799 \(3d Cir. 1980\).](#)

Mere existence of pressing statutory deadlines does not constitute good cause for EPA to dispense with notice and comment requirements under [5 USCS § 553](#) in promulgating attainment status designations for California. [*Western Oil & Gas Ass'n v. United States Environmental Protection Agency*, 633 F.2d 803, 15 Env't Rep. Cas. \(BNA\) 1487, 10 Env'tl. L. Rep. 20985, 1980 U.S. App. LEXIS 11868 \(9th Cir. 1980\).](#)

Agency's inability to promulgate final rule within time limit and its reluctance to place licensees in jeopardy of enforcement action pending issuance of final rule are insufficient to justify conclusion that notice and comment may be avoided due to impracticality. [*Union of Concerned Scientists v. Nuclear Regulatory Com.*, 711 F.2d 370, 229 U.S. App. D.C. 92, 19 Env't Rep. Cas. \(BNA\) 1329, 1983 U.S. App. LEXIS 26262 \(D.C. Cir. 1983\).](#)

Agency is not required to follow notice and comment requirements where legislation changing agency's procedures became effective immediately and provided no transition period for developing new procedures to implement significant legislative changes; failure to follow notice and comment procedures is permissible where it was necessary that agency have new rules in place immediately following enactment of legislation, and agency was required to develop procedures to deal with backlog of old cases and increased number of new cases. [*American Transfer & Storage Co. v. Interstate Commerce Com.*, 719 F.2d 1283, 1983 U.S. App. LEXIS 15118 \(5th Cir. 1983\).](#)

Need for timely action alone does not warrant dispensing with rulemaking procedures; although such procedures may be dispensed with when Congress commands agency to act within particular time, mere command that agency act with dispatch does not suggest that Congress intended agency to abandon public participation in rulemaking; agency's desire to save money does not provide good cause to dispense with rulemaking procedures; public participation is not "unnecessary" when rule has significant impact on economy and eligibility of many participants. [*Levesque v. Block*, 723 F.2d 175, 1983 U.S. App. LEXIS 14292 \(1st Cir. 1983\).](#)

Good cause exception applies where time constraints beyond agency's control make it impracticable for agency to fulfill its functions without dispensing with public comment period before rules become effective; although rules governing public hearings have substantive effect, failure to comply with requirement to publish notice of proposed rule 30 days before rule takes effect may be dispensed with where agency was under command of Congress to complete task within particular date and agency was required to conduct extensive hearings to guarantee public involvement in process, and where congressional goal could be achieved only through swift implementation of rules

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governing hearings. [Central Lincoln Peoples' Utility Dist. v. Johnson, 735 F.2d 1101, Util. L. Rep. \(CCH\) ¶12844, 1984 U.S. App. LEXIS 25621 \(9th Cir. 1984\).](#)

Good cause exists to waive notice and comment procedures where strict adherence to notice and comment procedure of Administrative Procedure Act is matter of agency policy rather than statutory mandate, Congress has practically speaking allowed only 49 days for promulgation of implementing regulations, and post hoc comments have been solicited, since regular course of rule-making procedure would interfere with agency's ability to perform functions within time constraints imposed by Congress. [Coalition of Michigan Nursing Homes, Inc. v. Dempsey, 537 F. Supp. 451, 1982 U.S. Dist. LEXIS 11664 \(E.D. Mich. 1982\).](#)

b. Particular Cases

274. Agriculture

Good cause to suspend notice and comment requirements of [5 USCS § 553](#) must be supported by more than need to have regulations and public interest in expeditious issuance of safety standards for hand harvesting crops with short harvest season does not fall within good cause exception. [National Asso. of Farmworkers Organizations v. Marshall, 628 F.2d 604, 202 U.S. App. D.C. 317, 88 Lab. Cas. \(CCH\) ¶33892, 1980 O.S.H. Dec. \(CCH\) ¶24309, 24 Wage & Hour Cas. \(BNA\) 564, 1980 U.S. App. LEXIS 19480 \(D.C. Cir. 1980\).](#)

Under [5 USCS § 553\(b\)\(B\)](#), when Department of Agriculture issues regulation specifying health related standard, good cause exemption may not be used to circumvent legal requirements designed to protect public by insuring that interested persons have opportunity to bring to agency's attention all relevant aspects of proposed action. [Community Nutrition Institute v. Butz, 420 F. Supp. 751, 1976 U.S. Dist. LEXIS 13280 \(D.D.C. 1976\).](#)

Discretionary determination by Secretary of Agriculture to impose 50 cent per hundredweight deduction from proceeds of sale of all milk marketed commercially by producers, to be remitted to Commodity Credit Corporation to offset portion of cost of milk price support program, is not exempt from notice and comment requirements of [5 USCS § 553](#) on grounds that notice and comment were impracticable, unnecessary, or contrary to public interest, where (1) Secretary was neither required by law to implement deduction nor to implement it by specific date, and determination was not inconsequential or unimportant matter rendering publication unnecessary, (2) no emergency or legislative, judicial or other mandate rendered observance of notice and comment requirements impracticable, and (3) public interest would have been served by allowing notice and comment for those affected by determination. [South Carolina ex rel. Patrick v. Block, 558 F. Supp. 1004, 1983 U.S. Dist. LEXIS 19356 \(D.S.C. 1983\).](#)

Regulations required by § 4.28G(a)(15) of 1985 Farm Credit Amendments Act, (12 USCS § 2216f(a)(15)) establishing criteria for required purchases of Farm Credit System Capital Corporation obligations and assessments are procedurally invalid because Farm Credit Administration (FCA) did not have "good cause" under [5 USCS § 553\(b\)](#) to waive Administrative Procedure Act's notice and comments provisions since FCA did not have specific deadline for promulgation of compelled regulations. [Federal Lank Bank v. Farm Credit Admin., 676 F. Supp. 1239, 1987 U.S. Dist. LEXIS 5042 \(D. Mass. 1987\).](#)

275. Cost of Living Council

Price control regulations issued by Cost by Living Council without prior notice or opportunity to comment, in order to initiate "phrase II" of stabilization program, are valid, where good cause exists for Council's avoidance of rulemaking procedure under [5 USCS § 553\(b\)](#). [Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005, 1975 U.S. App. LEXIS 11357 \(Temp. Emer. Ct. App. 1975\).](#)

Even though Cost of Living Council, without hearing, amended its regulations to permit average ceiling price of "old" oil to increase immediately, procedure was sufficient to meet requirements of [5 USCS § 553](#) where as result of Arab oil embargo, there was immediate need for action to provide production incentives for domestic producers and that advance notice of price increase would affect sales and deliveries adversely during increasingly difficult period of

supply. [Nader v. Sawhill, 387 F. Supp. 1208, 1974 U.S. Dist. LEXIS 11617 \(D.D.C. 1974\)](#), aff'd, [514 F.2d 1064, 1975 U.S. App. LEXIS 15209 \(Temp. Emer. Ct. App. 1975\)](#).

276. Energy and power

Order of Federal Energy Regulatory Commission issued in conformity with public law which waives certain provisions of federal law governing construction and operation of Alaskan Natural Gas Pipeline is appropriately issued without notice and comment as nondiscretionary ministerial action; notice and comment is unnecessary, and might even be contrary to public interest. [Metzenbaum v. Federal Energy Regulatory Com., 675 F.2d 1282, 219 U.S. App. D.C. 57, Util. L. Rep. \(CCH\) ¶12572, 1982 U.S. App. LEXIS 19966 \(D.C. Cir. 1982\)](#).

Although FERC's interim rule requiring advance notice and disclosure by pipeline company of construction or replacement of facilities has minimal reach, change is not within good cause exception and Commission improperly promulgated rule without notice and comment. [Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 297 U.S. App. D.C. 141, 124 Oil & Gas Rep. 194, 133 Pub. Util. Rep. 4th \(PUR\) 608, Util. L. Rep. \(CCH\) ¶13876, 1992 U.S. App. LEXIS 15700 \(D.C. Cir. 1992\)](#).

277. —Federal Energy Administration

Regulation promulgated by Federal Energy Office, predecessor to Federal Energy Administration, requiring routine gasoline and diesel fuel dealers not to discriminate between "regular" and "nonregular" customers in sale of fuels which were at that time in short supply as result of Arab oil embargo of 1973, is proper under [5 USCS § 553\(b\)\(B\)](#), despite failure to provide notice and opportunity for comment where agency notes serious alteration in established business practices as result of fuel shortage, normal rulemaking procedure is impracticable, and good cause exists for making regulation effective in less than 30 days because its purpose is to provide immediate guidance and information with respect to mandatory petroleum allocation and price regulations. [Reeves v. Simon, 507 F.2d 455, 1974 U.S. App. LEXIS 5878 \(Temp. Emer. Ct. App. 1974\)](#), cert. denied, 420 U.S. 991, 95 S. Ct. 1426, 43 L. Ed. 2d 672, 1975 U.S. LEXIS 1060 (1975).

Federal Energy Administration (FEA) regulation, making unlawful any resale of crude oil unless provided with required certifications, promulgated without notice or opportunity for comment was valid rule under [5 USCS § 553](#) where FEA determined that certification provisions would be modified without notice and comment since delay would be detrimental to refiners, explanation was published in Federal Regulations, and where [15 USCS § 766](#) allowed FEA to proceed without notice and opportunity to comment where strict compliance was found to cause serious harm or injury to public health, safety, or welfare, and such finding was set out in detail in such rule, regulation, or order. [United States v. Sutton, 795 F.2d 1040, 21 Fed. R. Evid. Serv. \(CBC\) 30, 1986 U.S. App. LEXIS 37327 \(Temp. Emer. Ct. App. 1986\)](#), cert. denied, 479 U.S. 1030, 107 S. Ct. 873, 93 L. Ed. 2d 828, 1987 U.S. LEXIS 48 (1987).

Federal Energy Administration's interim price regulations are not validly promulgated under [5 USCS § 553\(b\)\(B\)](#), where emergency gasoline shortage does not constitute good cause for forgoing public participation, where, there is ample opportunity to solicit public comments. [Consumers Union of United States, Inc. v. Sawhill, 393 F. Supp. 639, 1975 U.S. Dist. LEXIS 13130 \(D.D.C.\)](#), aff'd, [523 F.2d 1404, 1975 U.S. App. LEXIS 12715 \(Temp. Emer. Ct. App. 1975\)](#).

Regulations of Federal Energy Administration which state method of cost recovery in petroleum industry and prohibit industry from "banking" nonproduct cost increases are not validly promulgated under [5 USCS § 553\(b\)\(B\)](#), where FEA fails to make any express finding of good cause that notice and comment are impracticable. [Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 1978 U.S. Dist. LEXIS 19131 \(D. Del.\)](#), aff'd, [596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

278. Environmental Protection Agency

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Exceptions of [5 USCS § 553\(b\)\(B\)](#) are generally applicable to exempt pronouncement of Environmental Protection Agency from compliance with normal rulemaking requirements of Administrative Procedure Act. [Natural Resources Defense Council v. Train, 510 F.2d 692, 166 U.S. App. D.C. 312, 7 Env't Rep. Cas. \(BNA\) 1209, 5 Env'tl. L. Rep. 20046, 1974 U.S. App. LEXIS 5795 \(D.C. Cir. 1974\)](#).

Environmental Protection Agency, in promulgating redesignation of county as nonattainment area under Clean Air Act ([42 USCS §§ 7401–7642](#)) without prior notice or opportunity for comment, instead providing 60-day post-promulgation comment period, violated [5 USCS § 553](#), and contention that imminence of congressionally imposed deadlines for submission of state implementation plans for attainment of primary ambient standards did not justify such procedural course under good cause exception of [5 USCS § 553\(b\)\(B\)](#). [Waco v. Environmental Protection Agency, 620 F.2d 84, 15 Env't Rep. Cas. \(BNA\) 1174, 10 Env'tl. L. Rep. 20545, 1980 U.S. App. LEXIS 16247 \(5th Cir. 1980\)](#).

Assuming that regulations could plausibly be classified as legislative, agency properly invoked good cause exception to [5 USCS § 553](#) notice and comment requirement where agency published, along with final rule, statement setting forth reasons for finding that notice and comment procedures would be impracticable, unnecessary, or contrary to public interests in that (1) Congress explicitly authorized use of good cause exception in promulgation of specific regulations at issue; (2) need for immediate action existed; and (3) nature of regulations was such that agency would not be likely to reap any benefits from allowing public comment. [United Technologies Corp. v. U.S. EPA, 821 F.2d 714, 261 U.S. App. D.C. 226, 26 Env't Rep. Cas. \(BNA\) 1110, 17 Env'tl. L. Rep. 21015, 1987 U.S. App. LEXIS 7949 \(D.C. Cir. 1987\)](#).

Because only purpose of respondent Environmental Protection Agency's [42 USCS § 7525\(g\)](#) interim final rule permitting manufacturers to pay nonconformance penalties in exchange selling noncompliant engines was to rescue intervenor, lone noncompliant diesel engine manufacturer, from folly of its own choices and did not remedy any emergency save “emergency” facing that manufacturer’s bottom line, petitioner heavy-duty diesel engine manufacturers correctly argued that there was no good cause under [5 USCS § 553\(b\)\(B\)](#) to dispense with notice and comment requirements. [Mack Trucks, Inc. v. EPA, 682 F.3d 87, 401 U.S. App. D.C. 194, 74 Env't Rep. Cas. \(BNA\) 1929, 42 Env'tl. L. Rep. 20133, 2012 U.S. App. LEXIS 11851 \(D.C. Cir. 2012\)](#), reh'g denied, [2012 U.S. App. LEXIS 17191 \(D.C. Cir. Aug. 15, 2012\)](#), reh'g, en banc, denied, [2012 U.S. App. LEXIS 17273 \(D.C. Cir. Aug. 15, 2012\)](#).

Where respondent Environmental Protection Agency's [42 USCS § 7525\(g\)](#) interim final rule permitting manufacturers to pay nonconformance penalties in exchange selling noncompliant engines solely benefitted intervenor noncompliant manufacturer, because interim rule was one in which petitioner heavy-duty diesel engine manufacturers were greatly interested, notice and comment were not “unnecessary” under [5 USCS § 553\(b\)\(B\)](#). [Mack Trucks, Inc. v. EPA, 682 F.3d 87, 401 U.S. App. D.C. 194, 74 Env't Rep. Cas. \(BNA\) 1929, 42 Env'tl. L. Rep. 20133, 2012 U.S. App. LEXIS 11851 \(D.C. Cir. 2012\)](#), reh'g denied, [2012 U.S. App. LEXIS 17191 \(D.C. Cir. Aug. 15, 2012\)](#), reh'g, en banc, denied, [2012 U.S. App. LEXIS 17273 \(D.C. Cir. Aug. 15, 2012\)](#).

Where respondent Environmental Protection Agency's [42 USCS § 7525\(g\)](#) interim final rule permitting manufacturers to pay nonconformance penalties in exchange selling noncompliant engines solely benefitted intervenor noncompliant manufacturer, serious harm to noncompliant manufacturer and its employees, and ripple effect on its customers and suppliers, did not supply sufficient “public interest” under [5 USCS § 553\(b\)\(B\)](#) to dispense with notice and comment requirements, as same could be said for any manufacturer facing standard with which its product did not comply. [Mack Trucks, Inc. v. EPA, 682 F.3d 87, 401 U.S. App. D.C. 194, 74 Env't Rep. Cas. \(BNA\) 1929, 42 Env'tl. L. Rep. 20133, 2012 U.S. App. LEXIS 11851 \(D.C. Cir. 2012\)](#), reh'g denied, [2012 U.S. App. LEXIS 17191 \(D.C. Cir. Aug. 15, 2012\)](#), reh'g, en banc, denied, [2012 U.S. App. LEXIS 17273 \(D.C. Cir. Aug. 15, 2012\)](#).

279. Health and human services

5 USCS § 553

Regulations promulgated by Secretary of Health, Education, and Welfare governing practice and procedure for hearings determining conformity of state public assistance plans with federal requirements come within exception to notice requirements provided by [5 USCS § 553](#) rendering notice requirements inapplicable when agency for good cause finds that notice is impracticable and unnecessary, and statement by Secretary that notice of proposed rule making had been dispensed with as impracticable because hearings with respect to conformity of plans of number of states were scheduled in near future and it is urgent that parties to such hearings know forthwith rules of procedure and practice applicable to such hearings stated good cause for foregoing notice. [Arizona State Dep't of Public Welfare v. Department of Health, Education & Welfare, 449 F.2d 456, 1971 U.S. App. LEXIS 8086 \(9th Cir. 1971\)](#), cert. denied, 405 U.S. 919, 92 S. Ct. 945, 30 L. Ed. 2d 789, 1972 U.S. LEXIS 3627 (1972).

Congress is not obligated to state explicitly that statutes it enacts fit within exceptions to regulations or policies formulated solely by administrative agency; thus, congressional silence in no way reveals intent on its part that good cause exception not apply; Congress, by setting effective date so close to date of enactment, expresses belief that implementation of amendments to AFDC program is urgent, and it cannot be said that Department of Health and Human Services, by paying heed to that congressional concern in determining that it has good cause to promulgate interim final rules without full notice and comment, errs as matter of law. [Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 1982 U.S. App. LEXIS 22575 \(3d Cir. 1982\)](#).

280. —Medicare and Medicaid

Congressional amendments completely revising scheme for reimbursing Medicare hospitals constituted sufficiently “good cause” under [5 USCS § 553](#) for bypassing notice and comment requirement, and prospective-only policy toward error correction constituted sufficiently logical outgrowth of initial statement indicating that errors would be recalculated; thus, final rules fell within allowance for modifications following public comment pursuant to [42 USCS § 1395ww. Methodist Hosp. v. Shalala, 38 F.3d 1225, 309 U.S. App. D.C. 37, 46 Soc. Sec. Rep. Service 63, 1994 U.S. App. LEXIS 33187 \(D.C. Cir. 1994\)](#).

Secretary of Health and Human Services did not violate Administrative Procedure Act by simply electing to employ “median” of physician’s charges to derive physician’s “actual charge” for purposes of monitoring compliance with “maximum allowable actual charge” for Part B Medicare patients as required by Omnibus Budget Reconciliation Act of 1986, where decision was not subject to rulemaking procedures, because (1) decision was required by statute and thus was not [5 USCS § 551\(4\)](#) rule, (2) even if rule, it was interpretative as opposed to legislative rule, and (3) even if legislative rule, it was exempt from notice and comment provisions because of impracticable 71-day time frame under [5 USCS § 553\(b\)\(B\)](#). [American Medical Asso. v. Bowen, 659 F. Supp. 1143, 1987 U.S. Dist. LEXIS 3546 \(N.D. Tex. 1987\)](#), vacated, [857 F.2d 267, 1988 U.S. App. LEXIS 14067 \(5th Cir. 1988\)](#).

Health and Human Services Secretary had good cause to proceed without notice and comment in promulgating reclassification guidelines for Medicare provider hospitals seeking to change their geographic classification, where 1989 OBRA legislation was major, complex legislative scheme which imposed numerous and complex administrative duties upon Secretary and that burden caused late creation of board and process for handling reclassification requests which required immediate effectiveness of rules to allow processing of requests prior to fiscal year 1992, because this situation falls within [5 USCS § 553\(b\)\(B\)](#) “narrowly construed and reluctantly countenanced” good-cause exception to formal rulemaking procedures. [Universal Health Services of McAllen, Inc. v. Sullivan, 770 F. Supp. 704, 1991 U.S. Dist. LEXIS 11602 \(D.D.C. 1991\)](#), aff’d, [978 F.2d 745, 298 U.S. App. D.C. 248, 1992 U.S. App. LEXIS 35825 \(D.C. Cir. 1992\)](#).

281. Transportation

Civil Aeronautics Board need not comply with notice provisions of predecessor to [5 USCS § 553\(b\)\(B\)](#) in regulating traffic patterns for certain airport, where regulation is adopted without delay in order to promote safety of flying public, in that previous traffic pattern was deemed unsafe. [Alleghney Airlines, Inc. v. Cedarhurst, 132 F. Supp. 871, 1955 U.S. Dist. LEXIS 3883 \(D.N.Y. 1955\)](#), aff’d, [238 F.2d 812, 1956 U.S. App. LEXIS 4929 \(2d Cir. 1956\)](#).

5 USCS § 553

Regulations which require airports to provide at least one law enforcement officer at each final passenger screening point throughout boarding process to prevent hijacking are valid, despite back of notice of hearing, where under [5 USCS § 553\(b\)\(B\)](#) promulgation is justifiable because of agency's statement that emergency threat to safety of air commerce has been created by recent air piracies. [Airport Operators Council International v. Shaffer, 354 F. Supp. 79, 1973 U.S. Dist. LEXIS 14952 \(D.D.C. 1973\)](#).

Exemptions from notice and hearing requirements provided by [5 USCS § 553\(b\)\(A\)](#) or (b)(B) do not apply to ex parte Interstate Commerce Commission ruling that carriers must publish proposed new tariffs to subscribers and others before such tariffs are filed with Commission. [Akron, C. & Y. R. Co. v. United States, 370 F. Supp. 1231, 1974 U.S. Dist. LEXIS 12807 \(D. Md. 1974\)](#).

282. —Federal Aviation Administration

Rule by FAA closing shoreline to fixed-wing aircraft was substantive, and agency's failure to comply with notice and comment requirement was not justified by safety concerns, since rule did not contain reasons for noncompliance as required by § 553(b)(3)(B). [Southern California Aerial Advertisers' Assn. v. Federal Aviation Admin., 881 F.2d 672, 1989 U.S. App. LEXIS 11119 \(9th Cir. 1989\)](#).

Defense claimed by FAA in promulgating body of regulations governing adjudication of administrative penalty actions without notice and comment proceedings, that it was justified in dispensing with notice and comment under good cause exception, is without merit because penalty rules fall outside scope of [5 USCS § 553](#) exception by substantially altering rights of regulated parties to avail themselves of adjudication. [Air Transport Ass'n v. Department of Transp., 900 F.2d 369, 283 U.S. App. D.C. 385, 1990 U.S. App. LEXIS 5712 \(D.C. Cir. 1990\)](#), cert. granted, 498 U.S. 1023, 111 S. Ct. 669, 112 L. Ed. 2d 662, 1991 U.S. LEXIS 32 (1991), vacated, remanded, 498 U.S. 1077, 111 S. Ct. 944, 112 L. Ed. 2d 1033, 1991 U.S. LEXIS 675 (1991), overruled, [Jem Broadcasting Co. v. FCC, 22 F.3d 320, 306 U.S. App. D.C. 11, 1994 U.S. App. LEXIS 10036 \(D.C. Cir. 1994\)](#).

FAA's invocation of "good cause" exception in promulgating special operating rules for airplane and helicopter air tours in Hawaii was justified by record of recent escalation of fatal air tour accidents and finding of urgent safety problem that could not be addressed by enforcement of existing regulations. [Hawaii Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 95 Cal. Daily Op. Service 2290, 95 D.A.R. 3966, 1995 U.S. App. LEXIS 6237 \(9th Cir. 1995\)](#).

Where Federal Aviation Administration (FAA) revoked two non-resident alien pilots' airman certificates for posing security threat, court rejected pilots' argument that FAA regulations at issue were unlawfully promulgated without notice and comment; under [5 USCS § 553\(b\)\(3\)\(B\)](#), "good cause" exception to notice and comment rulemaking applied based upon legitimate concern over threat of future terrorist acts involving aircraft. [Jifry v. FAA, 370 F.3d 1174, 361 U.S. App. D.C. 450, 2004 U.S. App. LEXIS 11570 \(D.C. Cir. 2004\)](#), reh'g denied, [2004 U.S. App. LEXIS 16389 \(D.C. Cir. Aug. 9, 2004\)](#), reh'g, en banc, denied, [2004 U.S. App. LEXIS 16390 \(D.C. Cir. Aug. 9, 2004\)](#), cert. denied, 543 U.S. 1146, 125 S. Ct. 1299, 161 L. Ed. 2d 107, 2005 U.S. LEXIS 1473 (2005).

Motion by airport owners for preliminary injunction against enforcement of Federal Aviation Administration regulation effective December 6, 1972, requiring airport operators to amend master security plans by January 6, 1973, in order to provide by February 6, 1973, at least one law enforcement officer at each final passenger screening point throughout boarding process in order to protect against armed hijackers, was denied, where only issue was whether Administrator's failure to give notice and time for comment was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law; Administrator may issue regulations effective within 30 days without notice or public procedures whenever Administrator finds that notice and public procedures are impracticable, unnecessary or contrary to public interest; plaintiff had not shown irreparable injury nor had it shown a likelihood of success on merits, safety of air traveling public would be substantially jeopardized by failure to implement such regulations. [Airport Operators Council International v. Shaffer, 354 F. Supp. 79, 1973 U.S. Dist. LEXIS 14952 \(D.D.C. 1973\)](#).

283. —Federal Highway Administration

5 USCS § 553

Fact that procedures in Federal Highway Administration's training manual gives regional directors "crisper and more detailed" guidance than statute on identifying carriers whose operations pose imminent hazards does not render manual's provisions subject to notice and comment requirements. [Aulenback, Inc. v. FHA, 103 F.3d 156, 322 U.S. App. D.C. 250, 1997 U.S. App. LEXIS 36 \(D.C. Cir. 1997\)](#).

Because of "Savings Provision" of Department of Transportation Act (former 49 USCS § 1651), Federal Highway Administration, granted power and duty to regulate motor carrier safety under 49 USCS § 1655(f)(3)(B), was not required to republish accident reporting regulations under Administrative Procedure Act for regulations previously issued by Interstate Commerce Commission to be binding on motor carrier subject to Department of Transportation Act; under [5 USCS § 553\(b\)\(B\)](#), notice of minor revisions of regulations was not necessary, where revisions merely reflected technical changes necessitated by adoption of Department of Transportation Act and were not intended to create, alter, or revoke pre-existing substantive rights and duties. [United States v. United States Trucking Corp., 317 F. Supp. 69, 1970 U.S. Dist. LEXIS 10131 \(S.D.N.Y. 1970\)](#).

284. Miscellaneous

There was good cause to find that advance notice of price freeze was impracticable, unnecessary, or contrary to public interest within meaning of [5 USCS § 553](#), since had advance notice issued, there would have been massive rush to increase prices prior to freeze. [De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1974 U.S. App. LEXIS 8054 \(Temp. Emer. Ct. App.\)](#), cert. denied, 419 U.S. 896, 95 S. Ct. 176, 42 L. Ed. 2d 141, 1974 U.S. LEXIS 2938 (1974).

Rule extending deadline for filing claims for medical benefits under Part C of Black Lung Act ([30 USCS §§ 901–945](#)) was adopted in substantial compliance with requirements of Administrative Procedure Act, although rule was adopted and published in Federal Register without notice and without opportunity for public comment under [5 USCS § 553](#), since Secretary of Labor, for "good cause", found that notice and public comment were contrary to public interest, since delay caused by public notice and comment period would cause real harm by causing loss or delay of medical benefits to many eligible coal miners, and extension of filing deadline operated as safety valve to prevent this harm. [North American Coal Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 854 F.2d 386, 1988 U.S. App. LEXIS 11252 \(10th Cir. 1988\)](#).

National Marine Fisheries Service's recitation of good cause did not excuse compliance with [5 USCS § 553\(b\)\(B\)](#)'s notice and comment requirement, as it did not show exigency, apart from generic constraints, interfered with its ability to make specifications and management measures; notice and comment did not interfere with agency's ability to fulfill its statutory mandate to manage Pacific Coast Groundfish fishery. [NRDC v. Evans, 316 F.3d 904, 2003 Cal. Daily Op. Service 306, 2003 D.A.R. 397, 33 Env'tl. L. Rep. 20153, 2003 U.S. App. LEXIS 388 \(9th Cir. 2003\)](#).

Where National Marine Fisheries Service (NMFS) invoked "good cause" exception under [5 USCS § 553\(b\)\(B\)](#) when it adopted fishery management measures that closed commercial fishing for several months, NMFS's failure to solicit public comment before measures' effective date was adequately justified by season-specific reasons about time pressure and data collection difficulties; thus, NMFS did not have obligation under [5 USCS §§ 603](#) and [604](#) of Regulatory Flexibility Act, [5 USCS §§ 601](#) et seq., to issue regulatory flexibility analysis. [Or. Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 36 Env'tl. L. Rep. 20133, 2006 U.S. App. LEXIS 16840 \(9th Cir. 2006\)](#), cert. denied, 549 U.S. 1338, 127 S. Ct. 2028, 167 L. Ed. 2d 762, 2007 U.S. LEXIS 3949 (2007).

Regulations promulgated by United States Attorney General pursuant to Sex Offender Registration and Notification Act (SORNA), [42 USCS § 16913\(d\)](#), did not violate Administrative Procedure Act, [5 USCS § 553](#), as "good cause" exception to notice and comment period requirement applied; Attorney General stated that regulations were enacted without notice or comment in order to prevent delay in implementation that could have jeopardized safety of public and thwarted purposes of SORNA. [United States v. Shenandoah \(2008, MD Pa\) 572 F Supp 2d 566affd 595 F.3d 151 \(CA3 Pa 2010\)](#).

5 USCS § 553

Because Attorney General was granted sole discretion to determine Sex Offender Registration and Notification Act's retroactivity, and his statement of good cause for bypassing notice and comment (N&C) under [5 USCS § 553\(b\)](#), (d), to (1) providing guidance to eliminate uncertainty, and (2) preventing delay in registration of those who would evade registration requirements during N&C period, commit additional assaults, and be harder to apprehend, related to public interest for more timely apprehension of sex offenders, [28 CFR § 72.3](#) was valid and defendant's challenge to his conviction for failing to register as sex offender under [18 USCS § 2250\(a\)](#) failed. [United States v. Dean, 604 F.3d 1275, 22 Fla. L. Weekly Fed. C 738, 2010 U.S. App. LEXIS 8789 \(11th Cir.\)](#), cert. denied, 562 U.S. 1066, 131 S. Ct. 642, 178 L. Ed. 2d 486, 2010 U.S. LEXIS 9083 (2010).

Treasury decision establishing temporary rules relating to unincorporated business enterprises electing to be taxed as domestic corporations is validly promulgated, despite failure of Commissioner of Internal Revenue to provide prior notice and opportunity for comment, where notice and public hearing is impracticable, in that election must be exercised within 60 days after close of taxable year of enterprise, and decision is issued in February. [Warrick v. United States, 177 F. Supp. 481, 4 A.F.T.R.2d \(RIA\) 5691 \(ED Mich 1959\)](#).

Announcement by Pay Board that it is impracticable to issue regulations with notice and public procedure under 5 USCS § 533(b) or subject to effective date limitation of [5 USCS § 553\(d\)](#) obviates necessity of providing administrative hearing before regulations may become effective. [United States v. Great Atlantic & Pacific Tea Co., 342 F. Supp. 272, 20 Wage & Hour Cas. \(BNA\) 577, 1972 U.S. Dist. LEXIS 14119 \(D. Md.\)](#), aff'd, [Amalgamated Meat Cutters & Butcher Workmen v. United States, 468 F.2d 946, 20 Wage & Hour Cas. \(BNA\) 939, 1972 U.S. App. LEXIS 7076 \(Temp. Emer. Ct. App. 1972\)](#).

Publication by Secretary of Housing and Urban Development, without prior notice or opportunity for comment, of "interim rule" which is effective upon publication and designed to effectuate provisions of Housing and Community Development Act of 1974 by determining income criterion for tenant selection for low-income public housing is valid under [5 USCS § 553\(b\)\(B\)](#) where notice of rule would result in waiting lists which are inconsistent with policy of Act. [Crawford v. Metropolitan Dev. & Housing Agency, 415 F. Supp. 41, 1976 U.S. Dist. LEXIS 16247 \(M.D. Tenn. 1976\)](#).

Good cause existed to find that advance notice and comment on regulation directing Iranian nonimmigrant postsecondary students to report to Immigration and Naturalization Service by specified date with evidence of their residence and student status was impractical, unnecessary, or contrary to public interest within meaning of [5 USCS § 553\(b\)\(B\)](#), since, assuming regulation was valid, any delay in its promulgation and effective date would have proportionately weakened any effect it might have had on Iranian crisis that triggered its creation. [Narenji v. Civiletti, 481 F. Supp. 1132, 1979 U.S. Dist. LEXIS 8047 \(D.D.C.\)](#), rev'd, [617 F.2d 745, 199 U.S. App. D.C. 163, 1979 U.S. App. LEXIS 9371 \(D.C. Cir. 1979\)](#).

Agency may adopt regulation without notice and comment period, making regulations effective immediately where prior regulations had been declared invalid, where agency had good cause to move expeditiously to conform regulation to understanding of law resulting from judicial decision, and where regulations are necessary to provide guidance to grant recipients following judicial disapproval of prior regulations. [Disabled in Action v. Bridwell, 593 F. Supp. 1241, 1984 U.S. Dist. LEXIS 23320 \(D. Md. 1984\)](#).

Office of Thrift Supervision (OTS) is enjoined from enforcing interim final rule governing mutual-to-stock conversions of savings associations, where OTS issued rule without prior notice and opportunity for comment, in reliance on good cause exception of Administrative Procedure Act ([5 USCS § 553\(b\)\(3\)\(B\)](#)), because (1) OTS could not rely on fact that it received public comments in response to another rule since that rule discussed different matters from interim rule, (2) use of good cause exception cannot be justified out of fear that savings association would apply for conversion before new rule becomes effective, (3) practical reach of rule is quite expansive, and (4) rule is not limited in time. [Thrift Depositors of Am. v. Office of Thrift Supervision, 862 F. Supp. 586, 1994 U.S. Dist. LEXIS 14374 \(D.D.C. 1994\)](#), remanded, [1996 U.S. App. LEXIS 14234 \(D.C. Cir. Apr. 4, 1996\)](#).

5 USCS § 553

In case in which defendant had been indicted on one count of failure to register or update his registration as sex offender as required by Sex Offender Registration and Notification Act (SORNA), in violation of [18 USCS § 2250\(a\)](#), he unsuccessfully moved to dismiss indictment by arguing that regulations issued by U.S. Attorney General violated Administrative Procedure Act; Congress specified that purpose of SORNA was to protect public and to create comprehensive national system for registering sex offenders, and it would have been contrary to public interest to require notice and comment period for Interim Rule issued by U.S. Attorney General. [United States v. Johnson, 652 F. Supp. 2d 720, 2009 U.S. Dist. LEXIS 60258 \(S.D. Miss. 2009\)](#).

Unpublished decision: Issuing regulations making criminal provisions of [18 USCS § 2250](#) retroactive without providing 30-day notice required by [5 USCS § 553](#) did not violate Administrative Procedure Act, [5 USCS §§ 500](#) et seq., because Attorney General had good cause to invoke exception to providing such notice. [United States v. Talada, 380 Fed. Appx. 255, 2010 U.S. App. LEXIS 11228 \(4th Cir.\)](#), cert. denied, 562 U.S. 1111, 131 S. Ct. 821, 178 L. Ed. 2d 561, 2010 U.S. LEXIS 9733 (2010).

In suit by psychiatric institution against Civilian Health and Medical Program for Uniformed Services challenging penalties for overbilling on ground that waiver and education regulations of CHAMPUS were issued without notice and comment procedure, good cause exception to notice and comment requirements was shown where delay in promulgation would have been against public interest. [Woods Psychiatric Inst. v. United States, 20 Cl. Ct. 324, 1990 U.S. Cl. Ct. LEXIS 169 \(Cl. Ct. Apr. 26, 1990\)](#), aff'd, adopted, in part, [925 F.2d 1454, 1991 U.S. App. LEXIS 2791 \(Fed. Cir. 1991\)](#).

6. Rules Not Affecting Substantive Rights or Not Having Substantial Impact

a. In General

285. Generally

When questioned agency action does not jeopardize substantive rights or have substantial impact on purportedly regulated parties, or create substantive effects upon rights of parties not involved in proceedings, then lack of compliance with prior notice and comment requirements of Administrative Procedure Act is not fatal, and lack of notice and opportunity to comment on amending regulations would not invalidate price control program for natural gas procession where change was largely technical and did not substantively alter existing regulatory framework or in any way affect application of refiner rules to gas processors, and because there was ultimately no detrimental impact on rights of parties regulated ([5 USCS § 553\(b\)\(3\)\(B\)](#)). [National Helium Corp. v. Federal Energy Administration, 569 F.2d 1137, 1977 U.S. App. LEXIS 5521 \(Temp. Emer. Ct. App. 1977\)](#).

When questioned agency action does not jeopardize substantive rights or have substantial impact on purportedly regulated parties, or create substantive effects upon rights of parties not involved in proceedings, lack of compliance with prior notice and comment requirements of Administrative Procedure Act ([5 USCS § 553](#)) is not fatal. [Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1978 U.S. App. LEXIS 7084 \(Temp. Emer. Ct. App. 1978\)](#).

If agency's recent enforcement efforts do not constitute substantive change from previous policy, requirements of Administrative Procedure Act, that agency publish notice in Federal Register and hold hearing on proposed new substantive rules, are inapplicable. [Moran Maritime Associates v. United States Coast Guard, 526 F. Supp. 335, 1981 U.S. Dist. LEXIS 9959 \(D.D.C. 1981\)](#), aff'd, [679 F.2d 261 \(D.C. Cir. 1982\)](#).

b. Particular Cases

286. Environmental matters

Because decision to approve application for industrial discharge under [33 USCS § 1342](#) is essentially factual determination, EPA need not provide notice and comment under [5 USCS § 553](#). [Natural Resources Defense](#)

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[Council, Inc. v. United States EPA, 966 F.2d 1292, 92 Cal. Daily Op. Service 4703, 92 D.A.R. 7542, 34 Env't Rep. Cas. \(BNA\) 2017, 22 Env't. L. Rep. 20950, 123 Oil & Gas Rep. 599, 1992 U.S. App. LEXIS 12517 \(9th Cir. 1992\).](#)

Designation of sulfuric acid mist as known carcinogen on 9th Report of Carcinogens by National Toxicology Program (NTP) was proper because NTP supported its findings by substantial evidence through peer reviewed studies that sulfuric acid mist was carcinogenic and that there were significant number of people in U.S. that were exposed to it; listing was not substantive ruling and NTP was not required to go through notice and comment period as required by [5 USCS § 553](#), part of Administrative Procedure Act before making listing. [Fertilizer Inst. v. United States HHS, 355 F. Supp. 2d 123, 2004 U.S. Dist. LEXIS 27115 \(D.D.C. 2004\).](#)

287. Health and human services

Provisions of Social Security Claims Manual relating to overpayments were not required to be published in Federal Register pursuant to either Freedom of Information Act ([5 USCS § 552](#)) or Administrative Procedures Act (§ 553), where such provisions constitute interpretative rules explaining what more general terms of Social Security Act ([42 USCS § 404](#)) and agency regulations already provide, rather than substantive rules of general applicability, since they change no existing law, policy or regulation, nor do they affect any previously existing rights of social security recipients. [Powderly v. Schweiker, 704 F.2d 1092, 1983 U.S. App. LEXIS 28542 \(9th Cir. 1983\).](#)

Policy statement by Secretary of Health and Human Services requiring offset of black lung benefits against social security disability benefits, which effectively decreased claimants' monthly income, was interpretation of amendment to law not requiring notice and comment under [5 USCS § 553](#) where claimants were never entitled to receipt of inflated benefits thus reduction of benefits was not tantamount to retraction by Secretary of substantive rights, and black lung claimants had no statutory basis for offset prohibition upon which to avail themselves. [McCown v. Secretary of Health & Human Services, 796 F.2d 151, 1986 U.S. App. LEXIS 26776 \(6th Cir. 1986\), cert. denied, 479 U.S. 1037, 107 S. Ct. 893, 93 L. Ed. 2d 845, 1987 U.S. LEXIS 154 \(1987\).](#)

Failure to follow APA's formal rule-making requirements in adopting procedure for calculating Title II and Title XVI benefits is not fatal to approach taken by HHS Secretary, since random order of calculating such benefits is hardly "procedure" at all and does not change any existing law or policy, nor does it remove any previously existing right of claimants or their attorneys. [Guadamuz v. Bowen, 859 F.2d 762, Unemployment Ins. Rep. \(CCH\) ¶ 14220, Unemployment Ins. Rep. \(CCH\) ¶14220A, 1988 U.S. App. LEXIS 14177 \(9th Cir. 1988\).](#)

Summary judgment for Secretary of HHS in widows' class action was precluded where record required development of whether Social Security internal rulings substantially changed right of widow disability claimant to receive individual assessment of her medical condition, and thus whether procedural requirements for substantive rules applied. [Hill v. Sullivan, 125 F.R.D. 86, Unemployment Ins. Rep. \(CCH\) ¶ 14859, Unemployment Ins. Rep. \(CCH\) ¶14859A, 1989 U.S. Dist. LEXIS 3713 \(S.D.N.Y. 1989\).](#)

288. Immigration and aliens

Legitimate question existed concerning whether directive issued by BIA, ordering all immigration judges to cease granting suspension of deportation orders nor process appeals that might result in grant of suspension, was substantive rule, which would have violated APA's requirement for notice and comment procedures. [Barahona-Gomez v. Reno, 167 F.3d 1228, 99 Cal. Daily Op. Service 1118, 99 D.A.R. 1391, 42 Fed. R. Serv. 3d \(Callaghan\) 1147, 1999 U.S. App. LEXIS 1938 \(9th Cir. 1999\), on reh'g, reaff'd, remanded, 236 F.3d 1115, 2001 Cal. Daily Op. Service 277, 2001 D.A.R. 393, 2001 U.S. App. LEXIS 357 \(9th Cir. 2001\).](#)

Immigration and Naturalization Service did not fail to comply with notice and comment provisions of Administrative Procedure Act in resumption of active processing of Cuban adjustment applications because resumption is merely continuation of past policy practice. [Federation for Am. Immigration Reform v. Meese, 643 F. Supp. 983, 1986 U.S. Dist. LEXIS 20437 \(S.D. Fla. 1986\).](#)

289. Interior Department

5 USCS § 553

Amendment of regulations authorizing Department of Interior to use geographic areas to allocate royalty crude oil under Mineral Leasing Act ([30 USCS § 192](#)) to reflect geographic changes was governed by exception to notice and comment requirements of Administrative Procedure Act ([5 USCS § 553\(a\)\(2\)](#)), since amendment did not affect plaintiff's substantive rights. [Laketon Asphalt Refining, Inc. v. United States Dep't of Interior, 624 F.2d 784, 1980 U.S. App. LEXIS 15995 \(7th Cir. 1980\)](#).

Secretary of Interior is not required to publish his interpretation of [43 USCS § 1610\(a\)\(1\)](#) defining what are "valid existing rights" since ruling is interpretive ruling that clarifies meaning of provision, and is not "substantive" ruling that changes existing law or policy. [Aleknagik Natives, Ltd. v. United States, 635 F. Supp. 1477, 1985 U.S. Dist. LEXIS 21613 \(D. Alaska 1985\)](#), aff'd, [806 F.2d 924, 1986 U.S. App. LEXIS 34917 \(9th Cir. 1986\)](#).

290. Labor and employment

OSHA's general schedule inspection selection process did not have to be promulgated pursuant to notice and comment requirements of [5 USCS § 553](#) as process was not promulgated as legislative rule by Secretary of Labor and did not have "substantial impact" to justify procedure under § 553. [Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 8 O.S.H. Cas. \(BNA\) 2055, 1980 O.S.H. Dec. \(CCH\) ¶24790, 1980 U.S. App. LEXIS 14126 \(9th Cir. 1980\)](#).

Rule which concentrates agency inspection resources in industries with highest potential for safety and health violations is within exemption from informal rulemaking since plan does not have substantial impact upon firms. [United States Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 12 O.S.H. Cas. \(BNA\) 1045, 1984 O.S.H. Dec. \(CCH\) ¶27093, 1984 U.S. App. LEXIS 17259 \(5th Cir. 1984\)](#).

Action of Construction Industry Stabilization Commission which limited wage increase scheduled under collective bargaining agreement did not involve substantive rules and actions did not impose rights or obligations upon any party and require hearing. [Carpenters 46 County Conference Bd. v. Construction Industry Stabilization Committee, 393 F. Supp. 480, 22 Wage & Hour Cas. \(BNA\) 367, 1975 U.S. Dist. LEXIS 12725 \(N.D. Cal.\), dismissed, Carpenters 46 County Conference Board v. Construction Industry Stabilization Committee, 522 F.2d 637, 22 Wage & Hour Cas. \(BNA\) 432, 1975 U.S. App. LEXIS 13398 \(Temp. Emer. Ct. App. 1975\)](#).

291. Miscellaneous

Notice and order issued by Federal Communications Commission regarding "drug oriented" music allegedly played by some radio stations was not imposition of new duty on licensees but merely reminder to broadcasters of already existing duty, so that Commission's action was not subject to public debate and scrutiny of rule-making proceedings. [Yale Broadcasting Co. v. Federal Communications Com., 478 F.2d 594, 155 U.S. App. D.C. 390, 1973 U.S. App. LEXIS 12315 \(D.C. Cir.\), cert. denied, 414 U.S. 914, 94 S. Ct. 211, 38 L. Ed. 2d 152, 1973 U.S. LEXIS 4113 \(1973\)](#).

Manual of Examination Policies of Federal Deposit Insurance Corporation does not have force of law where Corporation did not issue Manual as substantive rule, promulgation of which would have required notice and comment under [5 USCS § 553](#). [First State Bank v. United States, 599 F.2d 558, 1979 U.S. App. LEXIS 14349 \(3d Cir. 1979\)](#), cert. denied, [444 U.S. 1013, 100 S. Ct. 662, 62 L. Ed. 2d 642, 1980 U.S. LEXIS 274 \(1980\)](#).

Rule which does not affect individual rights and obligations is not subject to notice and comment provision; discretionary plan of Army Corps of Engineers to operate floodway is not substantive rule where operation of floodway involves public property and that issue is action taken pursuant to flowage easements owned by government. [Story v. Marsh, 732 F.2d 1375, 14 Envtl. L. Rep. 20608, 1984 U.S. App. LEXIS 23575 \(8th Cir. 1984\)](#).

As informal interpretation of requirements of [19 USCS § 1675c](#) of Byrd Amendment in light of [19 USCS § 1677f](#), International Trade Commission's position did not constitute substantive rule having force and effect of law and therefore was not subject to notice and comment requirements of [5 USCS § 553](#); instead, Commission's position that party must waive its right to confidentiality of questionnaire response prior to being placed on list forwarded to Bureau of Customs and Border Protection was merely statement of what Commission regarded as legal

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requirement of [19 USCS § 1677f](#), and thus fell comfortably within [5 USCS § 553\(b\)\(3\)\(A\)](#) exception for interpretive statements. [Cathedral Candle Co. v. United States ITC, 400 F.3d 1352, 26 Int'l Trade Rep. \(BNA\) 2384, 2005 U.S. App. LEXIS 3910 \(Fed. Cir. 2005\)](#).

Promulgation by Small Business Administration of bulletin providing SBA staff with rating and evaluation system for determining Fixed Program Participation Terms in particular cases, providing guidance and criteria for staff to use in negotiating Terms, without publication in Federal Register or opportunity for public comment, does not violate [5 USCS § 553](#), since bulletin does not constitute substantive rule and is thus exempt from notice and comment requirements of § 553 as guidelines and instructions for staff. [Minority Business Legal Defense & Education Fund, Inc. v Small Business Admin., 557 F. Supp. 37 \(DC Dist Col 1982\)](#).

Notice and comment procedures do not apply to Federal Trade Commission rule allowing “special employees” access to individual company line of business data since company submitting such data has no fewer rights nor greater obligations as result of rule, which effectively enables Federal Trade Commission to more effectively use line of business data without measurably sacrificing confidentiality. [Aluminum Co. of America v. FTC, 589 F. Supp. 169, 1984-1 Trade Cas. \(CCH\) ¶65995, 1984 U.S. Dist. LEXIS 16883 \(S.D.N.Y. 1984\)](#).

Notice and comment were not required when Dept. of Agriculture, Dept. Reg. 2510-001 pertained to internal policies that did not affect substantial rights, as it was not substantive rule of general applicability but internal guidance for USDA employees; however, [Fed. R. Civ. P. 26\(b\)\(3\)](#), and not regulation promulgated by any Executive Branch department or agency, defined parameters for withholding documents under Exemption 5 of Freedom of Information Act (FOIA), [5 USCS § 552](#). [Hertzberg v. Veneman, 273 F. Supp. 2d 67, 2003 U.S. Dist. LEXIS 12830 \(D.D.C. 2003\)](#).

V. PUBLICATION OF RULES AND EFFECTIVE DATE OF RULES [[5 USCS § 553\(d\)](#)]

A. In General

292. Generally

[5 USCS § 553\(b\)](#) providing that regulation may be made effective not less than 30 days after publication merely establishes minimum period of notice and does not authorize use of effective date that is arbitrary or unreasonable. [National Asso. of Independent Television Producers & Distributors v. FCC, 502 F.2d 249, 1974 U.S. App. LEXIS 8074 \(2d Cir. 1974\)](#).

Required publication of substantive rule referred to in [5 USCS § 553\(b\)](#) relates back to [5 USCS § 552\(a\)\(1\)\(D\)](#) which requires that agencies shall separately state in currently published Federal Register substantive rules of general applicability adopted as authorized by law; purpose of [5 USCS § 553\(b\)](#) is to afford persons affected reasonable time to prepare for effective date of rule or rules or take any other action which issuance of rule may prompt. [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\)](#).

Required publication of adopted rule under [5 USCS § 553](#), and time lapse required before its effective date cannot be dispensed with by agency merely because final rule turns out to be same as proposed rule. [Rowell v. Andrus, 631 F.2d 699, 68 Oil & Gas Rep. 116, 1980 U.S. App. LEXIS 13399 \(10th Cir. 1980\)](#).

“Required publication” under [5 USCS § 553\(d\)](#) is not satisfied by publication of “general notice of proposed rulemaking” required by § 553(b); § 553(d) refers to required publication of substantive rules as actually adopted by agency. [Rowell v. Andrus, 631 F.2d 699, 68 Oil & Gas Rep. 116, 1980 U.S. App. LEXIS 13399 \(10th Cir. 1980\)](#).

Since [5 USCS § 553\(b\)](#) specifies publication as opposed to mere filing, 30-day period required prior to regulation’s effective date commences with date it is published rather than date it is filed with Office of Federal Register. [Rowell v. Andrus, 631 F.2d 699, 68 Oil & Gas Rep. 116, 1980 U.S. App. LEXIS 13399 \(10th Cir. 1980\)](#).

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Attorney General lacked good cause to waive procedural requirements of notice and comment when promulgating Interim Rule, and this procedural error prejudiced defendant; thus, Sex Offender Registration and Notification Act did not apply to defendant in 2007, so his conviction for failing to register was invalid. *United States v. Brewer*, 766 F.3d 884, 2014 U.S. App. LEXIS 17454 (8th Cir. 2014).

Appropriate remedy for putting plan into effect less than 30 days after its issuance is to delay effective date rather than invalidate rule; where time for altering effective date of plan has long since passed and order would have no practical effect on case, issue is moot. *Conservation Law Foundation, Inc. v. Clark*, 590 F. Supp. 1467, 21 Env't Rep. Cas. (BNA) 1256, 1984 U.S. Dist. LEXIS 15479 (D. Mass. 1984).

293. Failure to publish rules and effect thereof

Department of Agriculture handbook distributed to County Office Committees for use in applying 1970 Agricultural Act ([7 USCS § 1344b](#)) cannot be accorded dignity of regulation and is not binding on parties because it was not published in Federal Register; however, guidelines set out in handbook are to be accorded considerable weight by court in interpreting Act. *Thomas v. County Office Committee*, 327 F. Supp. 1244, 1971 U.S. Dist. LEXIS 13516 (S.D. Tex. 1971).

Even though regulations relating to mailing of sexually oriented advertisements were not published for 30 days prior to effective date as required by [5 USCS § 553](#), regulations were validated where Postal Service sought to compensate for abbreviated time by promising to consider additional comments after effective date of regulations and amended regulations were later issued. *Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297, 1971 U.S. Dist. LEXIS 12924 (E.D.N.Y. 1971).

While Department of Housing and Urban Development regulations governing maintenance of HUD properties were not published in Federal Register and thus could not be accorded same force of law as duly promulgated regulations, in action brought by private individuals against HUD for violation of these regulations, regulations were persuasive since (1) plaintiffs were seeking to enforce regulations against that agency rather than against private party which would have needed advance notice of enforcement; (2) defendants did not assert that regulations were mere statements of policy; and (3) failure to file its own regulations was evidence of HUD's subversion of statutory obligation to produce housing of sound standards of livability. *Estrada v. Hills*, 401 F. Supp. 429, 1975 U.S. Dist. LEXIS 16636 (N.D. Ill. 1975).

Failure to publish with final regulation statement of basis and purpose of selected rule does not invalidate rule where regulation as finally promulgated does not alter implicit and explicit terms of proposed rule and accordingly does not require reiteration of basis and purpose. *Dorchester Gas Producing Co. v. United States Dep't of Energy*, 582 F. Supp. 911, 82 Oil & Gas Rep. 602, 1983 U.S. Dist. LEXIS 16010 (N.D. Tex. 1983).

Customs form determined to constitute rule which was not published in Federal Register is invalid. *United States v. Two Hundred Thousand Dollars (\$200,000) in United States Currency*, 590 F. Supp. 866, 1984 U.S. Dist. LEXIS 15054 (S.D. Fla. 1984).

294. —Subsequent publication

Failure to publish regulation within prescribed period of time after adoption will not defeat effectiveness after adequate notice is effected by subsequent publication, thus, subsequent publication, more than 20 years after initial publication of notice of proposed rule making and draft release of revised rule, of regulation in Federal Register served legal function of notice under [5 USCS § 553](#). *Go Leasing v. National Transp. Safety Bd.*, 800 F.2d 1514, 1986 U.S. App. LEXIS 31388 (9th Cir. 1986).

Failure to publish regulation within prescribed period of time after adoption will not defect effectiveness after adequate notice is effected by subsequent publication, thus, subsequent publication, more than 20 years after initial publication of notice of proposed rule making and draft release of revised rule, of regulation in Federal Register served legal function of notice under § 553. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 1987 A.M.C. 1, 1986 U.S. App.

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[LEXIS 32876 \(2d Cir. 1986\)](#), cert. denied, 480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762, 1987 A.M.C. 2407, 1987 U.S. LEXIS 1252 (1987).

295. —Interior Department

Failure by Secretary of Interior to publish memo defining as existing rights exception segregated but unsubdivided town sites from conveyance as public lands to native corporations under Alaska Native Claims Settlement Act (43 USCS § 1602-28) was not violation of publishing requirement of § 553 since memo was not substantive as term was used in statutes. [Aleknagik Natives, Ltd. v. United States, 806 F.2d 924, 1986 U.S. App. LEXIS 34917 \(9th Cir. 1986\)](#).

296. —Veterans

Statement of policy by agency does not have any legal efficacy unless promptly published in accordance with provisions of Administrative Procedure Act ([5 USCS § 553](#)), and Veterans Administration's circular would establish neither binding norm, nor would it be finally determinative of issues or rights to which it was addressed, where there was no showing that such circular was ever published in Federal Register. [Hartnett v. Cleland, 434 F. Supp. 18, 1977 U.S. Dist. LEXIS 15948 \(D.S.C. 1977\)](#).

Foreclosure avoidance rules are binding on both Veterans Administration and private lenders notwithstanding fact that they were not published in Federal Register pursuant to Administrative Procedure Act ([5 USCS § 553](#)) where such rules regarding servicing of mortgage constituted only definitive interpretation of statutory requirement of adequate loan servicing contained in [38 USCS §§ 1801](#) et seq. and [38 CFR §§ 36.4300](#) et seq. [Rank v. Cleland, 460 F. Supp. 920, 1978 U.S. Dist. LEXIS 15170 \(C.D. Cal. 1978\)](#), disapproved, [United States v. Harvey, 659 F.2d 62, 1981 U.S. App. LEXIS 16845 \(5th Cir. 1981\)](#), rev'd, [677 F.2d 692, 1982 U.S. App. LEXIS 21549 \(9th Cir. 1982\)](#).

Lenders Handbook of Veterans Administration and HUD Handbook not published in Federal Register were not promulgated pursuant to publication requirements of Administrative Procedure Act and cannot be considered regulations having force and effect of law; but court hearing mortgage foreclosure action should impose equitable obligation on mortgagee to comply with very clear directives expressed in Handbooks before granting mortgagee relief it seeks. [Federal Nat'l Mortg. Ass'n v. Ricks, 83 Misc. 2d 814, 372 N.Y.S.2d 485, 1975 N.Y. Misc. LEXIS 2992 \(N.Y. Sup. Ct. 1975\)](#).

297. Particular Cases

Agencies may not publish regulations pursuant to Administrative Procedure Act ([5 USCS § 553](#)) while at same time producing ad hoc, unpublished decisions, and when Department of Housing and Urban Development enters into rent supplements contract with housing owner, it must follow its own regulations. [Griffin v. Harris, 571 F.2d 767, 1978 U.S. App. LEXIS 12645 \(3d Cir. 1978\)](#).

Indians not included in prior compensation award were estopped by seven-year delay from asserting any rights based on Secretary of Interior's alleged illegal waiver of 30-day deferment of effective date of regulations governing enrollment of Indians in distribution of funds. [Rogers v. United States, 877 F.2d 1550, 1989 U.S. App. LEXIS 8543 \(Fed. Cir. 1989\)](#).

Because November 2000 USSG § 2D1.1 temporary amendment increased ecstasy's ratio retroactively, and plea agreement contained no conspiracy end date, and defendant never admitted one, applying enhancement retroactivity was invalid and on remand, government had to prove end date by preponderance of evidence; since under [5 USCS § 553](#), amendment became effective on June 6, 2001, when it was initially published, on remand, if preponderance of evidence showed conspiracy continued to October 2001, enhancement could apply because it ended after June 6 2001, when enhanced ratio became effective. [United States v. Forrester, 592 F.3d 972, 2010 U.S. App. LEXIS 140 \(9th Cir.\)](#), op. withdrawn, sub. op., remanded, [616 F.3d 929, 2010 U.S. App. LEXIS 15779 \(9th Cir. 2010\)](#).

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Courts may not enforce 60-day notice and comment provision of Executive Order No. 12044 ([5 USCS § 553](#) note) as to administrative regulations, since Order has no legislative foundation and thus being without force and effect of law, is enforceable only at discretion of President. [United States v. Wayte, 549 F. Supp. 1376, 1982 U.S. Dist. LEXIS 9802 \(C.D. Cal. 1982\)](#), rev'd, [710 F.2d 1385, 1983 U.S. App. LEXIS 25944 \(9th Cir. 1983\)](#).

Requiring immediate registration of sex offenders served important purposes identified by Attorney General, so Attorney General demonstrated good cause for foregoing the 30-day waiting period and even if defendant was unaware of law, his ignorance would not excuse him of his requirement to register under Sex Offender Registration and Notification Act (SORNA), [42 USCS §§ 16901](#) et seq., because at very minimum he knew, or was presumed to know, he was required to register as sex offender under West Virginia State law; therefore, defendant's due process rights were not violated by Attorney General's failure to promulgate notification rules. [United States v. Talada, 631 F. Supp. 2d 797, 2009 U.S. Dist. LEXIS 47630 \(S.D. W. Va. 2009\)](#), aff'd, [380 Fed. Appx. 255, 2010 U.S. App. LEXIS 11228 \(4th Cir. 2010\)](#).

Commission's rule easing restrictions on carrier's transfer of inactive rights is effective immediately upon publication, since [5 USCS § 553\(d\)](#) permits immediate effective date for rule changes which relieve restriction. [Walker Freight Lines, Inc., Transferee, 127 M.C.C. 472](#).

298. —Health and human services

[5 USCS § 553\(d\)](#) requires 30 day delay between publication of final rule and effective date, therefore, Secretary of Health and Human Services does not comply with 30 day notice requirement where he releases proposed form of regulation at least 30 days in advance of effective date. [Ngou v. Schweiker, 535 F. Supp. 1214, 1982 U.S. Dist. LEXIS 17778 \(D.D.C. 1982\)](#).

Rule used to determine Medicaid eligibility under [42 USCS § 1396a](#), known as \$6,000/6 percent rule, had no legal force until November 21, 1985, even though rule had been internally used by Department of Health and Human Services since 1974, where rule was part of rule published in proposed form, was inadvertently left out of resulting final rule in 1975, but was included in HHS Secretary's program operations manual, then was properly adopted through [5 USCS § 553](#) notice and comment procedures and made effective immediately upon publication on October 22, 1985, because compliance with § 553 was necessary for promulgation of \$6,000/6 percent rule, and long delay in proper promulgation due to Secretary's dilatory conduct did not meet "good cause" standard for immediate effectiveness under § 553(d)(3) so that rule became effective 30 days after publication. [Maine Asso. of Interdependent Neighborhoods v. Petit, 659 F. Supp. 1309, 1987 U.S. Dist. LEXIS 3761 \(D. Me. 1987\)](#).

299. —Postal Service

Regulations implementing statutes concerned with mailing of sexually oriented advertisements ([18 USCS §§ 1735–1737](#); [39 USCS §§ 3010, 3011](#)) must be published as required under [5 USCS § 553](#) in order to be enforceable. [Universal Specialties, Inc. v. Blount, 331 F. Supp. 52, 1971 U.S. Dist. LEXIS 13487 \(C.D. Cal. 1971\)](#).

Post Office Department cannot disregard explicit Congressional directions which govern issuance of significant regulations and must publish them at least 30 days prior to effective date as required by Administrative Procedure Act, [5 USCS § 553](#). [Universal Specialties, Inc. v. Blount, 331 F. Supp. 52, 1971 U.S. Dist. LEXIS 13487 \(C.D. Cal. 1971\)](#).

B. Exceptions

1. In General

300. Substantive rule granting or recognizing exemption or relieving restriction (§ 553(d)(1))

Department of Energy's amendment of rule defining recoupable allowed expenses under Tertiary Incentive Program ([10 CFR § 212.78\(c\)](#)) to permit recovery of in-house expenses incurred between affiliated entities,

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provided they do not exceed price that would have been paid in arms-length transaction, was properly made effective upon publication of final rule in Federal Register, since amendment relieves restriction existing in definition prior to amendment and is entitled to exception from 30 day waiting period by virtue of [5 USCS § 553\(d\)\(1\)](#). *Union Oil Co. v. United States Dep't of Energy*, 688 F.2d 797, 1982 U.S. App. LEXIS 26000 (Temp. Emer. Ct. App. 1982), cert. denied, 459 U.S. 1202, 103 S. Ct. 1186, 75 L. Ed. 2d 433, 1983 U.S. LEXIS 3366 (1983).

Since Maritime Administration rule allowing 3 tankers to repay construction subsidies in return for permission to ship domestically relieved restriction under [5 USCS § 553\(d\)\(1\)](#), 30-day waiting period was not applicable, even though waiting period might have benefited third parties. *Independent U.S. Tanker Owners Committee v. Skinner*, 884 F.2d 587, 280 U.S. App. D.C. 148, 1989 U.S. App. LEXIS 12543 (D.C. Cir. 1989), cert. denied, 495 U.S. 904, 110 S. Ct. 1922, 109 L. Ed. 2d 286, 1990 U.S. LEXIS 2124 (1990).

301. Interpretive rules and statements of policy (§ 553(d)(2))

Defendant National Park Service's prior policies did not require Service to designate part of Grand Canyon National Park as wilderness because policies were not substantive rules, could be waived or modified, and were never published in Federal Register as required by [5 USCS § 553\(d\)](#), thus, contrary to argument of plaintiff wilderness groups, Service's decision to continue to allow motorized river rafts was not arbitrary and capricious under [5 USCS § 706\(2\)\(A\)](#) as violating Policies. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 2010 U.S. App. LEXIS 2131 (9th Cir. 2010).

Consumer Product Safety Commission's regulations banning use of TRIS flame retardant in children's sleep wear would be null and void where (1) such regulations were not interpretive rules and statement of policy constituting exception under [5 USCS § 553\(d\)\(2\)](#), but were new rules, and (2) Commission had failed to follow procedural safeguards enacted by Congress, had failed to provide rule-making hearing with respect to any of its TRIS bans, and had deprived plaintiff manufacturer of due process of law. *Springs Mills, Inc. v. Consumer Product Safety Com.*, 434 F. Supp. 416, 1977 U.S. Dist. LEXIS 15299 (D.S.C. 1977).

HHS rule defining which funds in Medicare provider's funded depreciation account must be spent on capital projects is not invalid, even though rule has substantial financial impact on providers and was not promulgated through notice and comment procedures, because rule appears to be helpful recitation of Health Care Financing Administration's view of which funds are available for use on capital projects—interpretive rule exempt from formal procedures under [5 USCS § 553\(d\)\(2\)](#). *Sentara Hampton General Hosp. v. Sullivan*, 799 F. Supp. 128, 38 Soc. Sec. Rep. Service 698 (D.D.C. 1991), modified, aff'd, 980 F.2d 749, 298 U.S. App. D.C. 372, 39 Soc. Sec. Rep. Service 520, 1992 U.S. App. LEXIS 32340 (D.C. Cir. 1992).

2. Good Cause (§ 553(d)(3))

a. In General

302. Generally

In determining whether good cause exception of [5 USCS § 553\(d\)](#) is to be invoked to avoid 30-day publication requirement, administrative agency is required to balance necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded reasonable time to prepare for effective date of its ruling; when consequence of agency rule making is to make previously lawful conduct unlawful and to impose criminal sanctions, balance of those competing policies imposes heavy burden upon agency to show public necessity. *United States v. Gavrilovic*, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 (8th Cir. 1977).

Statement in Federal Register that notice of proposed rulemaking procedure is being waived because further delay would prejudice beneficiaries of statute is insufficient where no supporting reasons are stated and where over year had elapsed between amendment of statute and amendment of regulations, but no explanation was given why additional 30 day delay was critical, and agency's explanation that 30 day comment period should be implied, even though regulations stated they were effective upon publication did not obviate need to provide 30 day period prior to

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effective date. [Kelly v. United States Dep't of Interior, 339 F. Supp. 1095, 1972 U.S. Dist. LEXIS 14985 \(E.D. Cal. 1972\)](#), disapproved, [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\)](#).

Good cause exception of [5 USCS § 553\(d\)\(3\)](#) has been construed strictly by courts and this exception is typically applicable only in emergency situations or where interim rule is necessary prior to completion of more formal rulemaking procedures. [Sannon v. United States, 460 F. Supp. 458, 1978 U.S. Dist. LEXIS 15012 \(S.D. Fla. 1978\)](#), remanded, [631 F.2d 1247, 30 Fed. R. Serv. 2d \(Callaghan\) 964, 1980 U.S. App. LEXIS 11720 \(5th Cir. 1980\)](#).

Demonstration of good cause under [5 USCS § 553\(b\)\(3\)\(B\)](#) does not mean that applicability of [5 USCS § 553\(d\)\(3\)](#) exemption need not also be considered where challenged rules become effective in less than 30 days. [Wells v. Schweiker, 536 F. Supp. 1314, 34 Fed. R. Serv. 2d \(Callaghan\) 951, 1982 U.S. Dist. LEXIS 17785 \(E.D. La. 1982\)](#).

b. Particular Cases

303. Agriculture

System employed by Secretary of Agriculture to limit weekly sales of oranges, by which it issues quotas on weekly basis, was within good cause exception to 30-day notice requirement, but Secretary must still publish notice of its weekly meetings in Federal Register. [Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 92 Cal. Daily Op. Service 2277, 92 D.A.R. 3585, 1992 U.S. App. LEXIS 4467 \(9th Cir.\)](#), cert. denied, 506 U.S. 999, 113 S. Ct. 598, 121 L. Ed. 2d 535, 1992 U.S. LEXIS 7468 (1992).

Secretary of Agriculture does not have “good cause” to issue regulations giving formal approval to use of mechanically deboned meat as constituent element of certain food products without providing for period of 30 days after publication before new rules become effective; need to obtain data and information for use in proposed rulemaking does not supply “good cause” for not delaying effective date of regulations but rather supplies compelling reason for Secretary to follow procedure provided for in Act since Secretary should gather needed information in data first before determining what regulation is needed. [Community Nutrition Institute v. Butz, 420 F. Supp. 751, 1976 U.S. Dist. LEXIS 13280 \(D.D.C. 1976\)](#).

Farmers challenging regulations which govern elections for Farmers Home Administration county committee posts are denied injunction against 1987 elections, even though they appear likely to succeed on claims that (1) no good cause existed under [5 USCS § 553](#) for avoiding normal notice and comment rulemaking procedures in order to make interim final rules effective immediately, and (2) [7 USCS § 1982](#) is violated by interpretation of regulations precluding politically active farmers from running for county committee posts, because farmers who have already withstood alleged illegalities of 1986 elections will not be irreparably harmed by 1987 elections. [Hedge v. Lyng, 689 F. Supp. 884, 1987 U.S. Dist. LEXIS 13560 \(D. Minn. 1987\)](#).

304. Energy and power

Federal Energy Office establishes “good cause” within meaning of [5 USCS § 553\(d\)\(3\)](#) to have regulation prohibiting retail gasoline dealers from giving preference to “regular customers” become effective immediately without publication where it finds that preferential treatment for regular customers is serious alteration in established business practices which may result in some purchasers being served while others are wholly excluded and that gasoline shortage engendering regulation is temporary but highly disruptive national emergency requiring immediate action. [Reeves v. Simon, 507 F.2d 455, 1974 U.S. App. LEXIS 5878 \(Temp. Emer. Ct. App. 1974\)](#), cert. denied, 420 U.S. 991, 95 S. Ct. 1426, 43 L. Ed. 2d 672, 1975 U.S. LEXIS 1060 (1975).

Regulation promulgated by FEA governing pricing of petroleum products in Puerto Rico was immediately effective upon publication, notwithstanding failure of such regulation to expressly so provide in conformity with [5 USCS § 553\(d\)](#), where record disclosed that good cause existed in fact to make such regulation effective immediately, implication was that was what was intended, and where, inter alia, predecessor interim regulations were immediately effective, parties were aware of urgency of problem, and where all appellants acted as if regulation was effective without delay by raising their oil prices accordingly. [Texaco, Inc. v. Federal Energy Administration, 531](#)

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[F.2d 1071, 1976 U.S. App. LEXIS 12946 \(Temp. Emer. Ct. App.\)](#), cert. denied, 426 U.S. 941, 96 S. Ct. 2662, 49 L. Ed. 2d 394, 1976 U.S. LEXIS 2094 (1976).

305. Environmental Protection Agency

Environmental Protection Agency has good cause under [5 USCS § 553\(d\)\(3\)](#) to issue list designating those areas which do not meet national primary or secondary ambient air quality standards less than 30 days before effective date of standards where effect of list is to require those states not meeting standards to develop implementation plans. [United States Steel Corp. v. United States Environmental Protection Agency, 605 F.2d 283, 13 Env't Rep. Cas. \(BNA\) 1449, 9 Env'tl. L. Rep. 20560, 1979 U.S. App. LEXIS 12791 \(7th Cir. 1979\)](#), cert. denied, 444 U.S. 1035, 100 S. Ct. 710, 62 L. Ed. 2d 672, 13 Env't Rep. Cas. (BNA) 2103, 10 Env'tl. L. Rep. 20081, 1980 U.S. LEXIS 166 (1980).

Environmental Protection Agency does not have "good cause" to issue attainment status designations for particular state under Clean Air Act Amendments ([42 USCS §§ 4701](#) et seq.) without allowing 30 days after publication for regulations to become effective. [Western Oil & Gas Ass'n v. United States Environmental Protection Agency, 633 F.2d 803, 15 Env't Rep. Cas. \(BNA\) 1487, 10 Env'tl. L. Rep. 20985, 1980 U.S. App. LEXIS 11868 \(9th Cir. 1980\)](#).

306. Federal Communications Commission

Federal Communication Commission's statement of good cause for not complying with 30 day requirement of [5 USCS § 553](#) was sufficient where notice stated that commission believed that good cause existed for effective date chosen citing factors that (1) widespread notice in fact would be provided affected parties, (2) first of month effective date was required for administrative prorating of yearly fees, and (3) in accordance with Congressional directives, Commission wanted fee schedule to cover as much of fiscal year as reasonably possible. [Clay Broadcasting Corp. v. United States, 464 F.2d 1313, 1972 U.S. App. LEXIS 8290 \(5th Cir. 1972\)](#), rev'd, [415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370, 5 Pub. Util. Rep. 4th \(PUR\) 466, 1974 U.S. LEXIS 107 \(1974\)](#).

Federal Communications Commission shows "good cause" to adopt fee schedule to become effective immediately where (1) widespread notice would be provided to affected parties, (2) first of month effective date is required for administrative proration of yearly fees, and (3) in accordance with congressional directives, Commission wants fee schedule to cover as much of fiscal year as reasonably possible. [Clay Broadcasting Corp. v. United States, 464 F.2d 1313, 1972 U.S. App. LEXIS 8290 \(5th Cir. 1972\)](#), rev'd, [415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370, 5 Pub. Util. Rep. 4th \(PUR\) 466, 1974 U.S. LEXIS 107 \(1974\)](#).

While Federal Communications Commission technically has authority under [5 USCS § 553](#) to delay effective date of newly adopted rule, this delay is not mandatory where "good cause" exists. [Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 180 U.S. App. D.C. 276, 2 Media L. Rep. \(BNA\) 1155, 1976 U.S. App. LEXIS 5817 \(D.C. Cir. 1976\)](#).

307. Interior Department

Interim game code, promulgated by Secretary of Interior, designed to establish controlled hunting to preserve wildlife on Indian reservation, was effective on publication notwithstanding lack of notice and comment procedures, where (1) code was issued on temporary, emergency basis in view of immediate need to protect wildlife and ensure propagation, (2) Secretary recounted various refusals by occupying Indian tribes to agree on game code, and (3) minimal cost to Indian tribes of compliance with regulations did not outweigh harm unrestricted hunting might cause, thus, since Secretary balanced necessity for immediate implementation against principle of fundamental fairness, good cause exception of § 553 applied. [Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 17 Env'tl. L. Rep. 20682, 6 Fed. R. Serv. 3d \(Callaghan\) 1248, 1987 U.S. App. LEXIS 873 \(10th Cir. 1987\)](#).

Suspension of 30-day delay period in effectiveness of regulations implementing management measure for management of fishery conservation zone is for good cause found and published with rule where concurrent

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closure of fishery conservation zone and state waters is sole objective. [Louisiana v. Baldrige, 538 F. Supp. 625, 1982 U.S. Dist. LEXIS 17811 \(E.D. La. 1982\).](#)

308. Miscellaneous

Revocation of state and local exemption from petroleum price controls effective as of date of commencement of rule-making proceedings was proper, notwithstanding that good cause for early effective date was not published with new rule, as required by [5 USCS § 553\(d\)\(3\)](#), in view of urgency of Economic Stabilization and Emergency Petroleum Allocation Acts. [California by State Lands Com. v. Simon, 504 F.2d 430, 1974 U.S. App. LEXIS 7471 \(Temp. Emer. Ct. App.\)](#), cert. denied, 419 U.S. 1021, 95 S. Ct. 496, 42 L. Ed. 2d 294, 1974 U.S. LEXIS 3372 (1974).

Where Cost of Living Council amended its price regulations covering domestic crude petroleum to permit immediate \$1 per barrel increase in maximum ceiling price charge for “old” oil, “good cause” to dispense with 30-day publication notice is shown by Council’s statement that announcement of price increase at future date would result in producers withholding crude oil from market until such time as they could take advantage of price increase. [Nader v. Sawhill, 514 F.2d 1064, 1975 U.S. App. LEXIS 15209 \(Temp. Emer. Ct. App. 1975\).](#)

Administrator of Drug Enforcement Administration fails to show “good cause” within meaning of [5 USCS § 553\(d\)\(3\)](#) to justify making regulation which makes drug mecloqualone “controlled substance” 2 days after publication of decision in Federal Register where regulation appears to be aimed at particular defendants convicted of manufacturing controlled substance. [United States v. Gavrilovic, 551 F.2d 1099, 1977 U.S. App. LEXIS 14714 \(8th Cir. 1977\).](#)

Commodity Futures Trading Corporation does not show “good cause” to justify having new regulations become effect less than 30 days after publication where agency’s statement notes only that public interest requires that new rules be adopted without further delay since public has been without protection of comprehensive regulatory program in area historically filled with abuses. [British American Commodity Options Corp. v. Bagley, 552 F.2d 482, 1977 U.S. App. LEXIS 13987 \(2d Cir.\)](#), cert. denied, 434 U.S. 938, 98 S. Ct. 427, 54 L. Ed. 2d 297, 1977 U.S. LEXIS 3890 (1977).

Civil Aeronautics Board has good cause to make filing fee schedule effective 4 days after publication where new fee schedule reduces many fees and board properly expedited effective date so that no person would be disadvantaged or treated discriminatorily. [Air Transp. Ass’n v. CAB, 732 F.2d 219, 235 U.S. App. D.C. 333, 18 Av. Cas. \(CCH\) ¶ 17746, 1984 U.S. App. LEXIS 23338 \(D.C. Cir. 1984\).](#)

Amendments to U.S. Sentencing Guidelines Manual under Ecstasy Anti-Proliferation Act of 2000 increasing penalties for ecstasy distribution could not be applied retroactively to defendant, who was arrested prior to publication of increased penalties in Federal Register; publication date was earliest possible effective date, even under good cause exception to 30-day publication requirement. [United States v. DeLeon, 330 F.3d 1033, 2003 U.S. App. LEXIS 11220 \(8th Cir. 2003\).](#)

Federal Circuit did not have jurisdiction to review Knee Joint Stability Rule, as set forth in Vet. Benefits Adjudication P. Manual (M21-1), as agency action to which [5 U.S.C.S. § 553](#) referred, as it was not substantive rule that should have gone through notice-and-comment, and petitioner did not argue that it was denied right to petition for issuance, amendment, or repeal of rule. [Nat’l Org. of Veterans’ Advocates v. Sec’y of Veterans Affairs, 2020 U.S. App. LEXIS 38240 \(Fed. Cir. Dec. 8, 2020\).](#)

Post Office Department has “good cause” to make regulations implementing law prohibiting mailing of sexually oriented advertisements to persons who have notified postal service that they did not wish to receive such material effective upon publication in Federal Register where (1) interested parties have had constructive notice of substance of regulation for period of 5 months, (2) most interested persons have actual knowledge of substance of regulations, and (3) delay of effective date might mean that privacy of people who do not want to receive sexually

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oriented advertisements through mail could be invaded with impunity contrary to explicit congressional directions. [*Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297, 1971 U.S. Dist. LEXIS 12924 \(E.D.N.Y. 1971\)](#).

Announcement by Pay Board that it is impracticable to issue regulations with notice and public procedure under 5 USCS § 553(b) or subject to effective date limitation of [5 USCS § 553\(d\)](#) obviates necessity of providing administrative hearing before regulations may become effective. [*United States v. Great Atlantic & Pacific Tea Co.*, 342 F. Supp. 272, 20 Wage & Hour Cas. \(BNA\) 577, 1972 U.S. Dist. LEXIS 14119 \(D. Md.\)](#), aff'd, [*Amalgamated Meat Cutters & Butcher Workmen v. United States*, 468 F.2d 946, 20 Wage & Hour Cas. \(BNA\) 939, 1972 U.S. App. LEXIS 7076 \(Temp. Emer. Ct. App. 1972\)](#).

Unique circumstances demonstrated by Secretary of Health and Human Services establish good cause to dispense with notice and comment procedures in promulgating regulations implementing Omnibus Budget Reconciliation Act; where Secretary is allowed only 49 days to compose and promulgate extensive and intricate rules implementing changes, Secretary has no feasible alternative to dispensing with notice and comment procedures; haphazard or tentative implementation may result in loss of opportunity for substantial budgetary savings, thereby frustrating one prime objective of Act. [*Wells v. Schweiker*, 536 F. Supp. 1314, 34 Fed. R. Serv. 2d \(Callaghan\) 951, 1982 U.S. Dist. LEXIS 17785 \(E.D. La. 1982\)](#).

Attorney General did not violate [5 USCS § 553](#) when it promulgated interim rule under Sex Offender Registration and Notification Act without notice and comment procedures because Attorney General provided adequate rationale for its decision to set aside requirements in order to protect general public and, in particular, to protect children. [*United States v. Benevento*, 633 F. Supp. 2d 1170, 2008 U.S. Dist. LEXIS 110559 \(D. Nev. 2008\)](#).

VI. RIGHT TO PETITION FOR ISSUANCE, AMENDMENT OR REPEAL OF RULE [[5 USCS § 553\(e\)](#)]

309. Generally

Right of interested persons to petition for issuance, amendment, or repeal of rule under [5 USCS § 553\(e\)](#) is not substitute for nor alternative to compliance with requirement of § 553(b) that notice be given before rulemaking. [*Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1972 U.S. App. LEXIS 7718 \(3d Cir. 1972\)](#); [*Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 180 U.S. App. D.C. 281, 1977 U.S. App. LEXIS 10522 \(D.C. Cir. 1977\)](#).

Agency does not violate [5 USCS § 553\(e\)](#) by not having detailed procedures governing petitions to begin rulemakings; agency is required to respond to petition, and in denying request, must set forth reasons; requirement of reasons is implicit in structure of Administrative Procedure Act if judicial review is to be meaningful. [*Wisconsin Electric Power Co. v. Costle*, 715 F.2d 323, 19 Env't Rep. Cas. \(BNA\) 1774, 13 Env'tl. L. Rep. 20803, 1983 U.S. App. LEXIS 24785 \(7th Cir. 1983\)](#).

310. Particular cases

Under provisions of Interstate Land Sales Full Disclosure Act whereby private real estate developers, in filing statements of record as to new subdivisions with Department of Housing and Urban Development and furnishing property reports to prospective purchasers of lots, must disclose some environmental aspects of subdivision and provide information on such factors as roads, water, sewage, drainage, soil erosion, climate, nuisances, natural hazards, municipal services, and zoning restrictions ([15 USCS § 1705\(5\)](#)), and whereby Secretary of Department may require "other information" from developers in their statements of record and property reports, both for protection of purchasers and in public interest ([15 USCS §§ 1705\(12\)](#), [1707\(a\)](#)), if Secretary finds it necessary for protection of purchasers or in public interest, Secretary may adopt rules requiring developers to incorporate wide range of environmental information into property reports to be furnished prospective purchasers, and under [5 USCS § 553\(e\)](#), organizations concerned with environmental protection may request Secretary to institute rulemaking proceeding to consider desirability of ordering such disclosure. [*Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426](#)

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[U.S. 776, 96 S. Ct. 2430, 49 L. Ed. 2d 205, 8 Env't Rep. Cas. \(BNA\) 2137, 6 Env'tl. L. Rep. 20528, 1976 U.S. LEXIS 107](#), reh'g denied, [429 U.S. 875, 97 S. Ct. 199, 50 L. Ed. 2d 159, 1976 U.S. LEXIS 3041 \(1976\)](#).

Petitioner seeking to have Department of Agriculture impose ban on use of meat preservatives claimed to be deleterious under [21 USCS § 601\(m\)\(1\)](#) must file rule-making petition with department pursuant to [5 USCS § 553](#) rather than seek imposition of ban by petition to district court requesting repeal of department regulation. [Schuck v. Butz, 500 F.2d 810, 163 U.S. App. D.C. 142, 1974 U.S. App. LEXIS 7486 \(D.C. Cir. 1974\)](#).

Even though petitioners contended that letters sent to Administrator of Environmental Protection Agency requesting reopening of hearings on air pollution standards was request for initiation of rulemaking under [5 USCS § 553\(e\)](#) and that Administrator's refusal was reviewable under Administrative Procedure Act, sole method of review of air pollution standards is pursuant to § 307 of Clean Air Act, [42 USCS § 1857h-5. *Ojato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 169 U.S. App. D.C. 195, 7 Env't Rep. Cas. \(BNA\) 2190, 5 Env'tl. L. Rep. 20481, 1975 U.S. App. LEXIS 13842 \(D.C. Cir. 1975\)](#).

In action against state and federal defendants, medicaid recipients' failure to exhaust their administrative remedies was excused, where regional administrators of Health Care Financing Administration (HCFA) indicated in letters to recipients their general unwillingness to consider changing regulation evidencing that it would have been futile to petition Department of Health and Human Services (HHS) for rule making. [Skubel by Skubel v. Fuoroli, 113 F.3d 330, 53 Soc. Sec. Rep. Service 368, 1997 U.S. App. LEXIS 10741 \(2d Cir. 1997\)](#).

Where letters described problems organization perceived in existing regulatory scheme under Title IX of Education Amendments of 1972 but requested no particular action by Department of Education, Department was under no obligation to treat letters as valid petition. [Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.](#), [366 F.3d 930, 361 U.S. App. D.C. 257, 2004 U.S. App. LEXIS 9426 \(D.C. Cir.\)](#), reh'g denied, [383 F.3d 1047, 363 U.S. App. D.C. 239, 2004 U.S. App. LEXIS 21004 \(D.C. Cir. 2004\)](#), cert. denied, [545 U.S. 1104, 125 S. Ct. 2537, 162 L. Ed. 2d 274, 2005 U.S. LEXIS 4519 \(2005\)](#).

National Marine Fisheries Service's (NMFS's) reasons for denying 2005 emergency rule-making petition filed by environmental groups under [5 USCS § 553\(e\)](#), seeking promulgation of rules imposing speed limits on shipping vessels in U.S. coastal waterways in order to prevent fatal vessel collisions with members of endangered species, North Atlantic right whale, were judicially upheld; court deferred to NMFS's reasons for eschewing emergency rule-making, i.e., that it was already engaged in formal rule-making process to impose vessel speed limits in coastal passages, which NMFS had initiated in 2004, and found that NMFS's decision was not arbitrary or capricious under [5 USCS § 706\(2\)\(A\)](#). [Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 382 U.S. App. D.C. 312, 67 Env't Rep. Cas. \(BNA\) 1097, 38 Env'tl. L. Rep. 20181, 2008 U.S. App. LEXIS 15294 \(D.C. Cir. 2008\)](#).

Department of Homeland Security's (DHS) delay of almost two-and-one-half years in responding to plaintiffs' petition to promulgate regulations governing conditions in immigration detention facilities was unreasonable as matter of law, and DHS was ordered to decide plaintiffs' petition within 30 days; concerns of human health and welfare were undeniably at stake, where plaintiffs alleged that detainees in DHS custody were dying as result of substandard conditions under which they were held, and expediting DHS's decision would not interfere with any agency activities of higher or competing priority, for concerns raised by plaintiffs were of utmost importance, and risk of prejudice due to further delay was severe. [Families for Freedom v. Napolitano, 628 F. Supp. 2d 535, 2009 U.S. Dist. LEXIS 56092 \(S.D.N.Y. 2009\)](#).

VII. JUDICIAL PROCEEDINGS

A. In General

311. Availability of review

Order of Federal Power Commission directing all independent producers to make certain contract filings and apply for certain certificates, which is not directly applicable to any single petitioner and is not issued in adversary

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proceeding to determine violation of Natural Gas Act ([15 USCS §§ 717](#) et seq.), is issued under general rule-making power and is not final appealable order. [Amerada Petroleum Corp. v. Federal Power Com.](#), 231 F.2d 461, 5 *Oil & Gas Rep.* 819, 13 *Pub. Util. Rep.* 3d (PUR) 595, 1956 U.S. App. LEXIS 3413 (10th Cir. 1956).

Judicial review is available under [5 USCS § 706](#) to attack effective date of FCC's amendment of its prime time access rule, on grounds that eight-month period unreasonably infringes upon independent producer's rights under existing rule, notwithstanding [5 USCS § 553\(d\)](#) providing that regulations may become effective "not less than 30 days" after publication. [National Asso. of Independent Television Producers & Distributors v. FCC](#), 502 F.2d 249, 1974 U.S. App. LEXIS 8074 (2d Cir. 1974).

Judicial review envisioned by [12 USCS §§ 1724–1730a](#) is subject to provisions of Administrative Procedure Act, [5 USCS §§ 551–559](#). [York Bank & Trust Co. v. Federal Sav. & Loan Ins. Corp.](#), 851 F.2d 637, 1988 U.S. App. LEXIS 8799 (3d Cir. 1988), cert. denied, 488 U.S. 1005, 109 S. Ct. 785, 102 L. Ed. 2d 777, 1989 U.S. LEXIS 107 (1989).

Plaintiff will not be allowed to raise [5 USCS § 553](#) violation after complete hearing has been held and final decision has been reached by agency. [Moore v. Madigan](#), 990 F.2d 375, 1993 U.S. App. LEXIS 6674 (8th Cir. 1993), reh'g denied, 1993 U.S. App. LEXIS 10330 (8th Cir. May 5, 1993), cert. denied, 510 U.S. 823, 114 S. Ct. 83, 126 L. Ed. 2d 51, 1993 U.S. LEXIS 5078 (1993).

Statutory scheme of [5 USCS §§ 552](#), [553](#), and [38 USCS §§ 1155](#), [7252](#), consistently excluded from judicial review all content of ratings schedule, as well as actions of Secretary of Veterans Affairs in adopting or revising that content, and [38 USCS § 7261\(a\)\(3\)\(C\)](#) only provides standards of review to be applied by U.S. Court of Appeals for Veterans Claims when reviewing decision from Board of Veterans' Appeals and, thus, under [38 USCS § 7252](#), such court lacked jurisdiction to review content of diagnostic codes as part of schedule of ratings for disabilities; accordingly, Court of Appeals for Federal Circuit reversed determination of U.S. Court of Appeals for Veterans Claims that [38 C.F.R. § 4.87a](#), Diagnostic Code 6260, was invalid as inconsistent with [38 USCS § 1110](#). [Wanner v. Principi](#), 370 F.3d 1124, 2004 U.S. App. LEXIS 10756 (Fed. Cir. 2004).

Farmers' claim that no good cause existed under [5 USCS § 553](#) for avoiding normal notice and comment rulemaking procedures in order to make interim final rules implementing [7 USCS § 1982](#) is moot, because even if farmers prevail on their claim, appropriate relief would be opportunity for public comment and adoption of new final regulations after consideration thereof, and Farmers Home Administration (FmHA) already provided such relief subsequent to exigency of 1986 FmHA county committee elections. [Hedge v. Lyng](#), 689 F. Supp. 898, 1988 U.S. Dist. LEXIS 5993 (D. Minn. 1988).

312. —Cases involving petition for issuance, amendment or repeal of rule

Even though petitioners contended that letters sent to Administrator of Environmental Protection Agency requesting reopening of hearings on air pollution standards was request for initiation of rulemaking under [5 USCS § 553\(e\)](#) and that Administrator's refusal was reviewable under Administrative Procedure Act, sole method of review of air pollution standards is pursuant to § 307 of Clean Air Act, [42 USCS § 1857h-5](#). [Oljato Chapter of Navajo Tribe v. Train](#), 515 F.2d 654, 169 U.S. App. D.C. 195, 7 *Env't Rep. Cas.* (BNA) 2190, 5 *Env'tl. L. Rep.* 20481, 1975 U.S. App. LEXIS 13842 (D.C. Cir. 1975).

Court will compel agency to institute rulemaking proceedings only in extremely rare circumstances. [Arkansas Power & Light Co. v. Interstate Commerce Com.](#), 725 F.2d 716, 233 U.S. App. D.C. 189, 1984 U.S. App. LEXIS 26587 (D.C. Cir. 1984).

Review of refusal to initiate rulemaking is governed by § 10(e) of Administrative Procedure Act ([5 USCS § 706](#)). [General Motors Corp. v. United States EPA](#), 738 F.2d 97, 21 *Env't Rep. Cas.* (BNA) 1380, 21 *Env't Rep. Cas.* (BNA) 1381, 14 *Env'tl. L. Rep.* 20553, 1984 U.S. App. LEXIS 21077 (3d Cir. 1984).

Individual's argument that FCC failed to adequately set forth its reasoning for upholding dismissal of his proposal to amend FCC's Table of Allotments for FM radio channels—failed because FCC's order made clear that dismissal

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of individual's proposal was dictated by application of cutoff rule, and underlying rationale for FCC's cutoff rules was well-recognized and oft-repeated. [Crawford v. FCC, 417 F.3d 1289, 368 U.S. App. D.C. 40, 2005 U.S. App. LEXIS 16184 \(D.C. Cir. 2005\)](#).

An improper denial of petition brought under [5 USCS § 553\(e\)](#) constitutes concrete and particularized injury, directly caused by agency to which petition was addressed, and redressable by court through remand to agency for proper consideration of petition. [Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ., 263 F. Supp. 2d 82, 2003 U.S. Dist. LEXIS 9677 \(D.D.C. 2003\)](#), aff'd, [366 F.3d 930, 361 U.S. App. D.C. 257, 2004 U.S. App. LEXIS 9426 \(D.C. Cir. 2004\)](#).

Unpublished decision: Although Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875, relieved district courts of concurrent jurisdiction over bid protests, it did not divest district courts of jurisdiction over claim that U.S. Forest Service (USFS) promulgated "regulation" but failed to comply with rule-making procedures laid out in [5 USCS § 553](#); thus, district court erred by dismissing for lack of jurisdiction manufacturer's claim that USFS was required but failed to comply with § 553 when it made "rule" that it would only purchase particular type of wildfire retardant—district court had jurisdiction over that claim per [28 USCS § 1331. Fire-Trol Holdings LLC v. United States Forest Serv., 209 Fed. Appx. 625, 2006 U.S. App. LEXIS 27322 \(9th Cir. 2006\)](#).

313. Exhaustion of administrative remedies

In action against state and federal defendants, medicaid recipients' failure to exhaust their administrative remedies was excused, where regional administrators of Health Care Financing Administration (HCFA) indicated in letters to recipients their general unwillingness to consider changing regulation evidencing that it would have been futile to petition Department of Health and Human Services (HHS) for rule making. [Skubel by Skubel v. Fuoroli, 113 F.3d 330, 53 Soc. Sec. Rep. Service 368, 1997 U.S. App. LEXIS 10741 \(2d Cir. 1997\)](#).

314. Ripeness

Claim that regulation is interpretative rather than legislative does not necessarily make regulation unripe for review. [Toilet Goods Asso. v. Gardner, 360 F.2d 677, 1966 U.S. App. LEXIS 6498 \(2d Cir. 1966\)](#), aff'd, [387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697, 1967 U.S. LEXIS 1401 \(1967\)](#), aff'd, [387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704, 1967 U.S. LEXIS 3001 \(1967\)](#).

Issue as to whether establishment by Department of Agriculture of news network violated First Amendment rights of private news services was not ripe for adjudication where Department did not comply with requirement of [5 USCS § 553](#) to provide concise statement of basis for action. [P. A. M. News Corp. v. Hardin, 440 F.2d 255, 142 U.S. App. D.C. 227, 1971 U.S. App. LEXIS 11965 \(D.C. Cir. 1971\)](#), app. after remand, [514 F.2d 272, 168 U.S. App. D.C. 376, 1975 U.S. App. LEXIS 14336 \(D.C. Cir. 1975\)](#).

Complaints relating to ex parte contacts and to commission's anticipated failure to give genuine consideration to comments may only be considered after completion of rulemaking, should rulemaking produce rule with which petitioners continued to disagree; after rulemaking proceedings have begun under former [49 USCS § 10326](#), court does not intervene until rulemaking is complete. [Central Louisiana Electric Co. v. Interstate Commerce Com., 724 F.2d 173, 233 U.S. App. D.C. 41, 1983 U.S. App. LEXIS 14058 \(D.C. Cir. 1983\)](#).

Agency announcement of intent to preempt inconsistent state regulations in response to state petition does not constitute reviewable final action by agency since announcement indicates intent of agency to conduct further administrative proceedings to determine whether given state regulation is inconsistent with national policy and does not purport to preempt specific state regulation. [Alascom, Inc. v. FCC, 727 F.2d 1212, 234 U.S. App. D.C. 113, Util. L. Rep. \(CCH\) ¶12847, 1984 U.S. App. LEXIS 25387 \(D.C. Cir. 1984\)](#).

Controversy as to whether agency's rule-making complies with requirements of [5 USCS § 553](#) raises legal issues ripe for controversy where plaintiff oil companies brought suit challenging Federal Energy Administration's

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interpretation of act, and contemplated application of regulatory scheme governing methods by which plaintiffs priced their petroleum products. [Phillips Petroleum Co. v. Federal Energy Administration, 435 F. Supp. 1239, 1977 U.S. Dist. LEXIS 14515 \(D. Del. 1977\)](#).

Arbitrary/capricious review of Food and Drug Administration (FDA) Import Alert would be premature, where court has ruled Alert invalid for lack of notice-and-comment rulemaking, because only after rulemaking procedures are completed is court equipped to decide whether possibly modified Alert is arbitrary, capricious or issued in excess of statutory authority. [Bellarno International, Ltd. v. Food & Drug Admin., 678 F. Supp. 410, 1988 U.S. Dist. LEXIS 2043 \(E.D.N.Y. 1988\)](#).

Unpublished decision: Because [5 USCS § 603](#) and [5 USCS § 604](#) demonstrated that requirements of initial and final regulatory flexibility analysis went hand-in-hand with notice-and-comment requirement of [5 USCS § 553](#), claims that “Dear State Health Official” letter (SHO Letter) was invalid substantive rule because it was not subject to notice and comment rulemaking or initial or final regulatory flexibility analysis would both become ripe when alleged failure to comply with those requirements occurred; therefore, taking allegation that SHO Letter constituted substantive rule as true, those claims were ripe. [Alabama v. Ctrs. for Medicare & Medicaid Servs., 2010 U.S. Dist. LEXIS 30533 \(M.D. Ala. Mar. 30, 2010\)](#), aff’d, [674 F.3d 1241, 23 Fla. L. Weekly Fed. C 837, 2012 U.S. App. LEXIS 5674 \(11th Cir. 2012\)](#).

315. Jurisdiction

Charge that regulation regarding pricing practices under Emergency Petroleum Allocation Act ([15 USCS §§ 751](#) et seq.) was invalid because it was issued without compliance with notice and comment procedure of [5 USCS § 553](#) fell within jurisdiction of former Temporary Emergency Court of Appeals. [United States v. Wyatt, 680 F.2d 1080, 1982 U.S. App. LEXIS 17258 \(5th Cir. 1982\)](#).

OSHA’s rule amending reporting requirements in cases of workplace death or multiple injury is regulation aimed at information gathering for range of potential hazards rather than “standard” aimed at correction of particular risk; Court of Appeals therefore lacks jurisdiction to hear petition claiming that Department of Labor failed to address variety of claims raised in petitioner’s comments to rule proposal and claim that rule itself is unconstitutional. [Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 312 U.S. App. D.C. 395, 17 O.S.H. Cas. \(BNA\) 1272, 1995 O.S.H. Dec. \(CCH\) ¶30831, 1995 U.S. App. LEXIS 15102 \(D.C. Cir. 1995\)](#).

Court of Federal Claims jurisdiction is not governed by APA; therefore Supreme Court decision holding that APA does not preclude District Court from reviewing administrative decision disallowing reimbursement under grant program does not have bearing on Court of Federal Claims jurisdiction in similar suits. [Wheeling v. United States, 20 Cl. Ct. 659, 1990 U.S. Cl. Ct. LEXIS 219 \(Cl. Ct. June 11, 1990\)](#), aff’d, [1991 U.S. App. LEXIS 1775 \(Fed. Cir. Feb. 6, 1991\)](#).

316. Standing

One who refrains from participating in rulemaking proceedings may not obtain direct judicial review of resulting regulations. [Nader v. Nuclear Regulatory Com., 513 F.2d 1045, 168 U.S. App. D.C. 255, 7 Env’t Rep. Cas. \(BNA\) 2059, 5 Env’t. L. Rep. 20342, 1975 U.S. App. LEXIS 14453 \(D.C. Cir. 1975\)](#).

Hospital has standing to assert claim that HCFA regulation that required disclosure of Medicare cost reports had become arbitrary and capricious due to increased health care market competition, but complainant must first have filed rule-making petition with agency before seeking judicial review. [South Hills Health System v. Bowen, 864 F.2d 1084, 1988 U.S. App. LEXIS 17726 \(3d Cir. 1988\)](#).

Homeless families seeking to require Department of Health and Human Services to monitor and enforce state compliance with Emergency Assistance Plans have no standing to bring suit under APA. [Coker v. Sullivan, 902 F.2d 84, 284 U.S. App. D.C. 119, 1990 U.S. App. LEXIS 7037 \(D.C. Cir. 1990\)](#).

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Travel agency that competed unsuccessfully for government travel office contracts had standing to bring suit challenging Department of Defense requirement that on-site travel agencies contribute portion of their revenues to local “morale, welfare, and recreation” fund for benefit of military community. [Scheduled Airlines Traffic Offices v. DOD](#), 87 F.3d 1356, 318 U.S. App. D.C. 347, 1996 U.S. App. LEXIS 16116 (D.C. Cir. 1996).

Where Department of Agriculture issued amendment to federal milk marketing orders prohibiting paper pooling with distant plants, [7 USCS § 1033.7\(c\)\(2\)](#), dairy farmers had standing to challenge amendment, but adequate notice was provided to farmers. [Alto Dairy v. Veneman](#), 336 F.3d 560, 2003 U.S. App. LEXIS 14181 (7th Cir. 2003).

Although nonprofit corporation, which operated halfway houses, had prudential standing to raise procedural challenge under [5 USCS § 553](#), part of Administrative Procedure Act, to Bureau of Prisons’ new interpretation of [18 USCS § 3621\(b\)](#), notice and opportunity for comment procedures that were sought by corporation clearly were not required because rule-making requirements of [5 USCS § 553](#) did not apply to interpretative rules. [Dismas Charities, Inc. v. United States DOJ](#), 401 F.3d 666, 2005 FED App. 0128P, 2005 U.S. App. LEXIS 4103 (6th Cir. 2005).

Because defendant, who pleaded guilty under [18 USCS § 2250\(a\)](#) to failing to register as sex offender, was not unable to comply with initial registration requirements under [42 USCS § 16913\(b\)](#) of Sex Offender Registration and Notification Act (SORNA), [42 USCS §§ 16901–16991](#), defendant lacked standing to claim that U.S. Attorney General’s interim order regarding retroactive application of SORNA violated notice and comment requirements under [5 USCS § 553\(d\)](#) of Administrative Procedure Act. [United States v. Hacker](#), 565 F.3d 522, 2009 U.S. App. LEXIS 10294 (8th Cir.), cert. denied, 558 U.S. 915, 130 S. Ct. 302, 175 L. Ed. 2d 200, 2009 U.S. LEXIS 6308 (2009), abrogated in part, [Bond v. United States](#), 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269, 22 Fla. L. Weekly Fed. S 1156, 2011 U.S. LEXIS 4558 (2011).

In plaintiff building association’s challenge to defendant agencies’ traditional navigable waters Determination, association had no procedural standing to challenge agencies’ failure to provide notice and opportunity to submit comments pursuant to [5 USCS § 553\(b\)](#), (c), because no imminent injury in fact was alleged and deprivation of procedural right without some concrete interest that was affected by deprivation—procedural right in vacuo—was insufficient to create U.S. Const. art. III standing. [Nat’l Ass’n of Home Builders v. EPA](#), 667 F.3d 6, 399 U.S. App. D.C. 124, 73 Env’t Rep. Cas. (BNA) 1865, 42 Env’tl. L. Rep. 20357, 2011 U.S. App. LEXIS 24430 (D.C. Cir. 2011).

Organization lacked standing to bring notice-and-comment claim regarding guidance memorandum issued by Federal Highway Administration, which interpreted Highway Beautification Act’s prohibition on flashing, intermittent or moving lights to permit state approval of those digital billboards that met certain timing and brightness requirements, because organization failed to demonstrate that vacatur of guidance would redress its alleged injury. [Scenic Am., Inc. v. United States DOT](#), 836 F.3d 42, 425 U.S. App. D.C. 422, 2016 U.S. App. LEXIS 16330 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 2, 199 L. Ed. 2d 271, 2017 U.S. LEXIS 6268 (2017).

Nonprofit organization interested in transportation safety issues, which monitors activities of Federal Highway Administration, has standing to allege that Federal Highway Administrator failed to comply with rulemaking provisions of [5 USCS § 553](#). [Center for Auto Safety v. Tiemann](#), 414 F. Supp. 215, 1976 U.S. Dist. LEXIS 15349 (D.D.C. 1976), remanded, 580 F.2d 689, 188 U.S. App. D.C. 426, 1978 U.S. App. LEXIS 10813 (D.C. Cir. 1978).

Individuals and groups who were interested in nutrition and soft drink manufacturers who faced economic losses from regulation, promulgated by Secretary of Labor, which prohibited sale of certain nonnutritious foods on school premises until after lunch had standing to seek judicial review of such regulation. [Community Nutrition Institute v. Bergland](#), 493 F. Supp. 488, 1980 U.S. Dist. LEXIS 14212 (D.D.C. 1980).

Even if safe harbor provision of 42 C.F.R. § 411.351, published by defendants, United States Department of Health and Human Services and Center for Medicare and Medicaid Services as part of § 1877 of Social Security Act, [42 USCS § 1395nn](#), was rescinded by court, § 1395nn would remain in effect, and facilities could still set compensation rates at safe-harbored levels, thus, physician association’s challenge to validity of regulation failed for lack of standing as any injury was not redressable, and thus, even if there was failure to comply with

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Administrative Procedure Act by defendants' decision under [5 USCS § 5553\(b\)](#) to published Phase II as interim final rule with comment period, there was no showing it was likely injury was redressable. [Renal Physicians Ass'n v. HHS, 422 F. Supp. 2d 75, 2006 U.S. Dist. LEXIS 32578 \(D.D.C. 2006\)](#), aff'd, [489 F.3d 1267, 376 U.S. App. D.C. 431, 2007 U.S. App. LEXIS 13702 \(D.C. Cir. 2007\)](#).

Association alleged that Department of Education's denial of its [5 USCS § 553\(e\)](#) "Petition to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics" violated Administrative Procedure Act, [5 USCS §§ 706](#) et seq., and was thus itself cognizable injury conferring constitutional standing; this theory could not survive in light of extensive circuit precedent holding that grant of procedural right alone could not serve as basis for U.S. Const. art. III standing unless procedures in question were designed to protect some threatened concrete interest of petitioner that was ultimate basis of his standing. [Am. Sports Council v. United States Dep't of Educ., 850 F. Supp. 2d 288, 2012 U.S. Dist. LEXIS 41233 \(D.D.C. 2012\)](#).

Environmental group has standing to intervene in litigation brought by industry group challenging adoption by Environmental Protection Agency of procedures for pesticide registration; although EPA and environmental groups apparently have same interest in demonstrating lawfulness of regulations, environmental group is entitled to intervene since interests of EPA and environmental groups cannot always be expected to coincide. [Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 99 F.R.D. 607, 38 Fed. R. Serv. 2d \(Callaghan\) 1119, 1983 U.S. Dist. LEXIS 12862 \(D.D.C. 1983\)](#).

Where no solicitation of bids had occurred, business that intended to bid on contract to provide wildfire retardant to U.S. Forest Service was not "an actual or prospective bidder or offeror" within meaning of [31 USCS § 3551\(2\)](#) and was not "interested party" within meaning of [28 USCS § 1491\(b\)\(1\)](#); thus, business lacked standing to challenge, as violative of Administrative Procedures Act, [5 USCS § 553](#), and Competition in Contracting Act, 41 USCS § 253, modification to agency's rules about what retardants it would purchase. [Fire-Trol Holdings, LLC v. United States, 62 Fed. Cl. 440, 2004 U.S. Claims LEXIS 266 \(Fed. Cl. Oct. 12, 2004\)](#).

317. Timeliness

Indians not included in prior compensation award were estopped by seven-year delay from asserting any rights based on Secretary of Interior's alleged illegal waiver of 30-day deferment of effective date of regulations governing enrollment of Indians in distribution of funds. [Rogers v. United States, 877 F.2d 1550, 1989 U.S. App. LEXIS 8543 \(Fed. Cir. 1989\)](#).

In determining whether federal fishing regulations allow over fishing in violation of Magnuson Fishery Conservation and Management Act, regulations were not "promulgated" until they were published, and petition filed 34 days after regulations were "filed" with Federal Register, but less than 30 days after publication, is not time-barred for purpose of judicial review. [Northwest Env'tl. Def. Ctr. v. Brennen, 958 F.2d 930, 92 Cal. Daily Op. Service 2076, 1992 U.S. App. LEXIS 3806 \(9th Cir. 1992\)](#).

Confusion caused by Federal Aviation Administration with respect to scope of changes in flight patterns at city airport provided reasonable ground to explain delay of neighboring towns in filing petition for review. [Huron v. Richards, 997 F.2d 1168, 1993 U.S. App. LEXIS 16911 \(6th Cir. 1993\)](#).

FDA's announcement in its "Notice of Applicability of Final Rule" that human heart valve allografts were subject to regulations governing replacement heart valves was not logical outgrowth of established regulation where allografts had been distributed for years with no indication from FDA that they were subject to regulations, and judicial review of manufacturer's claim was not foreclosed by limitations period. [Northwest Tissue Ctr. v. Shalala, 1 F.3d 522, 1993 U.S. App. LEXIS 19474 \(7th Cir. 1993\)](#), reh'g, en banc, denied, [1993 U.S. App. LEXIS 24957 \(7th Cir. Sept. 24, 1993\)](#).

Challenges to procedural lineage of agency regulations, whether raised by direct appeal, by petition for amendment or rescission of regulation, or as defense to agency enforcement proceeding, will not be entertained outside 60-day

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period provided by statute. [Jem Broadcasting Co. v. FCC, 22 F.3d 320, 306 U.S. App. D.C. 11, 1994 U.S. App. LEXIS 10036 \(D.C. Cir. 1994\)](#).

Delay in bringing violation to court's attention does not prevent judicial enforcement of APA's notice and comment requirements; judicial action is not precluded by raising issue 14 years after agency's invalid action where delay is not unfair to agency. [Baylor University Medical Center v. Schweiker, 571 F. Supp. 374, 1983 U.S. Dist. LEXIS 13842 \(N.D. Tex. 1983\)](#), aff'd in part and rev'd in part, [758 F.2d 1052, 1985 U.S. App. LEXIS 29143 \(5th Cir. 1985\)](#).

Plaintiffs cannot challenge rule on basis of failure to include concise statement explaining basis of rule where plaintiffs have waited 7 years to challenge regulations, where affected plaintiffs either did not submit comments or otherwise participate in rulemaking process, or participated in rulemaking process which specifically proposed challenged rule. [American Trading Transp. Co. v. United States, 610 F. Supp. 457, 1985 U.S. Dist. LEXIS 21194 \(D.D.C. 1985\)](#), vacated, remanded, [791 F.2d 942, 253 U.S. App. D.C. 40, 1986 U.S. App. LEXIS 25305 \(D.C. Cir. 1986\)](#).

318. Dismissals

Unprecedented nature of plaintiff's tort theory, i.e., that government was liable under Federal Tort Claims Act because FAA's failure to comply with APA in promulgating rule constituted breach of duty owed to plaintiff, together with explicit remedies provided by APA requires dismissal of plaintiff's action. [Sky Ad, Inc. v. McClure, 951 F.2d 1146, 91 Cal. Daily Op. Service 10069, 91 D.A.R. 15894, 1991 U.S. App. LEXIS 29816 \(9th Cir. 1991\)](#), cert. denied, [506 U.S. 816, 113 S. Ct. 58, 121 L. Ed. 2d 26, 1992 U.S. LEXIS 5585 \(1992\)](#).

Action by operator of private mail forwarding service against Postal Service challenging postal regulation requiring individual customers to complete information forms is dismissed, where operator alleged promulgation was done in violation of Administrative Procedures Act (APA) ([5 USCS § 553](#)), because regulation was substantively unchanged from former Post Office 1960 regulation continued in effect by Postal Reorganization Act ([39 USCS §§ 101 et seq.](#)), and further because Postal Service is generally exempt from provisions of APA under [39 USCS § 410\(a\)](#) unless proposed change has nationwide effect requiring approval of Postal Rate Commission under [39 USCS § 3661](#), and instant regulation did not have impact contemplated by § 3661. [Shane v. Buck, 658 F. Supp. 908, 1985 U.S. Dist. LEXIS 18414 \(D. Utah 1985\)](#), aff'd, [817 F.2d 87, 1987 U.S. App. LEXIS 5622 \(10th Cir. 1987\)](#).

Borrowers' claim that FmHA violated [5 USCS § 553\(b\)](#) is dismissed where FmHA did not publish in proposed rules sentences included in final version of rule, since FmHA is not required to publish in proposed rules precise text of final rules, and sentences at issue do not change character or purpose of subsection, but rather make it more detailed and specific. [Coleman v. Block, 663 F. Supp. 1315, 1987 U.S. Dist. LEXIS 5190 \(D.N.D. 1987\)](#), vacated, [Coleman v. Lyng, 864 F.2d 604, 1988 U.S. App. LEXIS 17585 \(8th Cir. 1988\)](#), cert. denied, [Coleman v. Yeutter, 493 U.S. 953, 110 S. Ct. 364, 107 L. Ed. 2d 351, 1989 U.S. LEXIS 5268 \(1989\)](#).

Veterans' challenge to Veterans Administration (VA) implementation of Gramm-Rudman-Hollings federal deficit reduction directive is dismissed, where VA summarily adopted policy that pro rata reduced certain veterans' benefits awarded after February 28, 1986, because (1) action involving benefits is expressly exempt from rulemaking requirements by [5 USCS § 553\(a\)\(2\)](#), and (2) action was not unreasonable, arbitrary, capricious, or ultra vires under [5 USCS § 706](#). [Hoerner v. United States Veterans Admin., 675 F. Supp. 999, 1987 U.S. Dist. LEXIS 11896 \(D. Md. 1987\)](#), aff'd, [859 F.2d 150, 1988 U.S. App. LEXIS 13836 \(4th Cir. 1988\)](#).

Act of Federal Bureau of Prisons (BOP) in increasing long-distance telephone rate at BOP institutions was not reviewable under [5 USCS § 702](#) because [18 USCS § 4042](#) granted BOP broad discretion to provide suitable quarters and care for inmates, which included provision of telephone services; thus, [5 USCS § 701\(a\)\(2\)](#) precluded judicial review of BOP's rate increase; accordingly, inmate's claim that BOP did not comply with [5 USCS § 553](#) before promulgating rate increase was dismissed. [Harrison v. Fed. Bureau of Prisons, 464 F. Supp. 2d 552, 2006 U.S. Dist. LEXIS 90646 \(E.D. Va. 2006\)](#).

319. —Lack of standing or subject matter jurisdiction

Action by alien against Department of State and Immigration and Naturalization Service alleging due process violation of [5 USCS § 553](#) notice and comment requirements resulting from revocation of wife and children's visas was properly dismissed by District Court since alien did not allege standing as representative of children and, as husband, had no standing to contest revocation of wife's visa. [Wong v. Department of State, 789 F.2d 1380, 1986 U.S. App. LEXIS 25201 \(9th Cir. 1986\)](#).

Credit union's challenge to repeal of National Credit Union Administration regulation requiring disclosure of confidential financial information by credit unions was dismissed for lack of subject matter jurisdiction and lack of standing. [Nat'l Cmty. Reinvestment Coalition v. NCUA, 290 F. Supp. 2d 124, 2003 U.S. Dist. LEXIS 19786 \(D.D.C. 2003\)](#).

320. Summary judgment

District Court properly granted summary judgment to Secretary of Health and Human Services in case brought by state university, which was owner-operator of Medicare providers, challenging Secretary's interpretation of regulation that disallows reimbursement for interest on loans between related organizations, such as between owners and providers. [Regents of the Univ. of Cal. v. Shalala, 82 F.3d 291, 96 Cal. Daily Op. Service 2677, 96 D.A.R. 4434, 50 Soc. Sec. Rep. Service 592, 1996 U.S. App. LEXIS 8001 \(9th Cir.\)](#), cert. denied, 519 U.S. 991, 117 S. Ct. 479, 136 L. Ed. 2d 374, 1996 U.S. LEXIS 6980 (1996).

Summary judgment is granted to Committee for Purchase from Blind in action by private contractor challenging decision under 41 USCS § 47 to purchase directly from handicapped shelter, where contractor alleged inability to cross examine figures submitted by shelter to obtain procurement decision was denial of right to participate in decisionmaking process, because informal rulemaking under [5 USCS § 553](#) is more legislative in nature and does not embody judicial features of formal rulemaking under §§ 556 and 557 and is designed to permit interested parties to comment on pending matters rather than assert rights. [HLI Lordship Industries, Inc. v. Committee for Purchase from Blind & Other Severely Handicapped, 663 F. Supp. 246, 1987 U.S. Dist. LEXIS 9754 \(E.D. Va. 1987\)](#).

Summary judgment for Secretary of HHS in widows' class action was precluded where record required development of whether Social Security internal rulings substantially changed right of widow disability claimant to receive individual assessment of her medical condition, and thus whether procedural requirements for substantive rules applied. [Hill v. Sullivan, 125 F.R.D. 86, Unemployment Ins. Rep. \(CCH\) ¶14859, Unemployment Ins. Rep. \(CCH\) ¶14859A, 1989 U.S. Dist. LEXIS 3713 \(S.D.N.Y. 1989\)](#).

321. Evidence

Since court review of regulations promulgated pursuant to [5 USCS § 553](#) is not wide-ranging de novo review, but is limited to administrative record compiled by agency, petitioners for judicial review are not entitled to discovery. [National Petroleum Refiners Asso. v. Federal Trade Com., 392 F. Supp. 1052, 1974-1 Trade Cas. \(CCH\) ¶175119, 1974 U.S. Dist. LEXIS 8046 \(D.D.C. 1974\)](#).

Court would take judicial notice of Federal Register entries describing Environmental Protection Agency's policy setting standard of acute dietary exposure for performing risk assessments necessary to set pesticide tolerances under [21 USCS § 346a](#) in action alleging that EPA adopted standard without following rulemaking requirements of 3 USCS § 553(b). [American Farm Bureau v. United States EPA, 121 F. Supp. 2d 84, 51 Env't Rep. Cas. \(BNA\) 2027, 2000 U.S. Dist. LEXIS 16940 \(D.D.C. 2000\)](#).

322. —Presumptions and burden of proof

To have regulations promulgated pursuant to notice and comment procedure of [5 USCS § 553](#) set aside, opponents must prove that regulations are without rational support in record. [Independent Meat Packers Asso. v.](#)

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[Butz, 526 F.2d 228, 1975 U.S. App. LEXIS 11929 \(8th Cir. 1975\)](#), cert. denied, 424 U.S. 966, 96 S. Ct. 1461, 47 L. Ed. 2d 733, 1976 U.S. LEXIS 291 (1976).

Burden is on objectors to demonstrate invalidity of regulation. [Texaco, Inc. v. Federal Energy Administration, 531 F.2d 1071, 1976 U.S. App. LEXIS 12946 \(Temp. Emer. Ct. App.\)](#), cert. denied, 426 U.S. 941, 96 S. Ct. 2662, 49 L. Ed. 2d 394, 1976 U.S. LEXIS 2094 (1976).

Requesters for rulemaking have burden of proving that their proposal should have been adopted. [General Motors Corp. v. United States EPA, 738 F.2d 97, 21 Env't Rep. Cas. \(BNA\) 1380, 21 Env't Rep. Cas. \(BNA\) 1381, 14 Env'tl. L. Rep. 20553, 1984 U.S. App. LEXIS 21077 \(3d Cir. 1984\)](#).

There is strong presumption that procedural guarantees of [5 USCS § 553](#) are sufficient unless Congress specifically indicates to contrary. [National Classification Committee v. United States, 765 F.2d 1146, 246 U.S. App. D.C. 393, 1985 U.S. App. LEXIS 31419 \(D.C. Cir. 1985\)](#).

While reviewing courts start with presumption against changes in current policy that are not justified by agency rulemaking record, agency which examines relevant data and articulates satisfactory explanation for action, has met burden of justification for reversal of previously held policy position. [Center for Science in Public Interest v. Department of Treasury, 797 F.2d 995, 254 U.S. App. D.C. 328, 1986 U.S. App. LEXIS 27486 \(D.C. Cir. 1986\)](#).

Since rulemaking requirements of Administrative Procedure Act ([5 USCS § 553](#)) apply only to substantive rules, party complaining of agency's failure to adhere to these requirements must show that rules involved imposed rights or obligations on some party. [Carpenters 46 County Conference Bd. v. Construction Industry Stabilization Committee, 393 F. Supp. 480, 22 Wage & Hour Cas. \(BNA\) 367, 1975 U.S. Dist. LEXIS 12725 \(N.D. Cal.\)](#), dismissed, [Carpenters 46 County Conference Board v. Construction Industry Stabilization Committee, 522 F.2d 637, 22 Wage & Hour Cas. \(BNA\) 432, 1975 U.S. App. LEXIS 13398 \(Temp. Emer. Ct. App. 1975\)](#).

There is presumption of validity in rules duly noticed and made by administrative agency pursuant to specific statutory delegation of power, which is rebuttable, but only on showing that challenged regulation is unreasonable exercise of delegated power, that is, inconsistent with statute. [United States v. Eureka Pipeline Co., 401 F. Supp. 934, 16 Env'tl. L. Rep. 20088, 1975 U.S. Dist. LEXIS 15832 \(N.D. W. Va. 1975\)](#).

Burden is on agency to show good cause that will justify its avoidance of requirements of [5 USCS § 553](#). [Tosco Corp. v. Department of Energy, 532 F. Supp. 686, 1982 U.S. Dist. LEXIS 9328 \(D. Nev.\)](#), aff'd in part and rev'd in part, [688 F.2d 797, 1982 U.S. App. LEXIS 26000 \(Temp. Emer. Ct. App. 1982\)](#).

Tax regulation is not entitled to usual presumption of validity under [5 USCS § 553](#) in suit by taxpayer, where IRS did not comply with publication, notice, and comment requirements, notwithstanding claim that regulation still is reasonable determination by IRS. [American Medical Ass'n v. United States, 691 F. Supp. 1170, 63 A.F.T.R.2d \(RIA\) 1120 \(ND Ill 1988\)](#).

323. Questions of law and fact

Whether regulation issued by agency is in harmony with statute is question of law for reviewing court to determine, and it is court's duty to declare invalid any regulation which frustrates congressional intent. [Findrilakis v. Secretary of Dep't of Housing & Urban Development, 357 F. Supp. 547, 1973 U.S. Dist. LEXIS 15360 \(N.D. Cal. 1973\)](#).

Existence of good cause for purposes of good cause exception to Administrative Procedure Act rulemaking procedure is essentially question of law. [Ohio State Consumer Educ. Ass'n v. Schweiker, 541 F. Supp. 915, 1982 U.S. Dist. LEXIS 17788 \(S.D. Ohio 1982\)](#).

Determination whether rules are interpretive or substantive is question of law for court to decide. [Westcott v. United States Dep't of Agriculture, 611 F. Supp. 351, 1984 U.S. Dist. LEXIS 25023 \(D. Neb. 1984\)](#), aff'd, [765 F.2d 121, 1985 U.S. App. LEXIS 19940 \(8th Cir. 1985\)](#).

324. Deference by court

Where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to informed experience and judgment of agency to whom Congress has delegated appropriate authority. [Mourning v. Family Publications Serv.](#), 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318, 1973 U.S. LEXIS 129 (1973).

Case for deference to agency's decision not to undertake rulemaking is stronger when alternative is not maintenance of status quo but formulation of standards through case-by-case adjudication. [Arkansas Power & Light Co. v. Interstate Commerce Com.](#), 725 F.2d 716, 233 U.S. App. D.C. 189, 1984 U.S. App. LEXIS 26587 (D.C. Cir. 1984).

While regulations promulgated by Secretary of Health and Human Services must be granted deferential consideration and courts must therefore exercise caution in overturning them, court will not "rubber stamp" Secretary's decision where there is no justification for promulgation of regulation and regulation is obviously inconsistent with appropriate statute. [Bedford County General Hospital v. Heckler](#), 757 F.2d 87, 1985 U.S. App. LEXIS 29688 (6th Cir. 1985).

Because Resource Conservation and Recovery Act does not define type of change that qualifies as regulatory change under statute, court will defer to EPA's reasonable interpretation. [New Mexico v. Watkins](#), 969 F.2d 1122, 297 U.S. App. D.C. 122, 35 Env't Rep. Cas. (BNA) 1228, 22 Env'tl. L. Rep. 21262, 1992 U.S. App. LEXIS 15502 (D.C. Cir. 1992).

Although court will not lightly consider its duty under Administrative Procedure Act to weigh validity of administrative rules, judicial deference to expertise is not boundless and expertise is not sufficient in itself to sustain decision. [Connor v. Andrus](#), 453 F. Supp. 1037, 1978 U.S. Dist. LEXIS 17356 (W.D. Tex. 1978), disapproved, [Louisiana ex rel. Guste v. Verity](#), 853 F.2d 322, 18 Env'tl. L. Rep. 21351, 1988 U.S. App. LEXIS 11816 (5th Cir. 1988).

Challenged regulations enunciated under statutory delegation to administrative agency are considered legislative rules entitled to deference similar to that given statutes passed by Congress. [Wyoming Hospital Asso. v. Harris](#), 527 F. Supp. 551, 1981 U.S. Dist. LEXIS 9975 (D. Wyo. 1981), aff'd, 727 F.2d 936, 1984 U.S. App. LEXIS 25770 (10th Cir. 1984).

Deference to administrative decision is particularly great in area of milk regulation. [Smyser v. Block](#), 580 F. Supp. 1397, 1984 U.S. Dist. LEXIS 19144 (M.D. Pa. 1984), rev'd, 760 F.2d 514, 1985 U.S. App. LEXIS 23630 (3d Cir. 1985).

In action by parents of disabled student involving payment of costs of student's independent educational evaluation not covered by parents' insurance, court will give substantial deference to U.S. Department of Education regulations regarding public expense, because regulations were promulgated after appropriate notice and comment procedures. [Raymond S. v. Ramirez](#), 918 F. Supp. 1280, 15 Am. Disabilities Dec. 296, 1996 U.S. Dist. LEXIS 3464 (N.D. Iowa 1996).

Affidavit of former Department of Housing and Urban Development (HUD) attorney, with his personal impression of HUD's understanding of Interstate Land Sales Full Disclosure Act while he worked there, was insufficient to overcome precedent that [15 USCS § 1703\(d\)](#) applied even though defendant seller's project from which plaintiff buyer purchased his condominium had fewer than 100 lots and was not exempt under [15 USCS § 1702\(b\)](#); attorney's opinion was not entitled to Chevron deference as affidavit represented neither rule promulgated pursuant to notice-and-comment procedure under [5 USCS § 553](#), nor rule arising from formal administrative adjudication under 5 USCS § 556-557. [Trotta v. Lighthouse Point Land Co., LLC](#), 551 F. Supp. 2d 1359, 2008 U.S. Dist. LEXIS 10559 (S.D. Fla. 2008), rev'd, remanded, 319 Fed. Appx. 803, 2009 U.S. App. LEXIS 5473 (11th Cir. 2009).

325. Scope of review

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Scope of court review of FCC channel allocation to community in rule making proceeding was exhausted where court determined that commission did not summarily depart from established principles or program, thereby making ruling not arbitrary or capricious, commission met all procedural requirements as to rule making, as prescribed under [5 USCS § 553](#), conclusion reached by commission was clearly stated, basis and purpose of order were ample and understandably, even though succinctly, stated, order was consistent with provisions of Communication Act ([47 USCS §§ 303, 307](#)) and reasons for ruling were rational and supported conclusion. [Van Curler Broadcasting Corp. v. United States, 236 F.2d 727, 98 U.S. App. D.C. 432, 1956 U.S. App. LEXIS 2825 \(D.C. Cir.\), cert. denied, 352 U.S. 935, 77 S. Ct. 226, 1 L. Ed. 2d 163, 1956 U.S. LEXIS 1815 \(1956\).](#)

Scope of review of agency decision to deny rulemaking petition is limited to insuring that agency has adequately explained facts and policy concerns relied on and that facts have basis in record. [Arkansas Power & Light Co. v. Interstate Commerce Com., 725 F.2d 716, 233 U.S. App. D.C. 189, 1984 U.S. App. LEXIS 26587 \(D.C. Cir. 1984\).](#)

Scope of review under “arbitrary and capricious” standard is narrow and court is not to substitute its judgment for that of agency. [Neighborhood TV Co. v. FCC, 742 F.2d 629, 239 U.S. App. D.C. 292, Util. L. Rep. \(CCH\) ¶12949, 1984 U.S. App. LEXIS 19472 \(D.C. Cir. 1984\).](#)

In suit by children’s advocacy group challenging FCC’s amendment of agency’s broadcast application form, claim that agency failed to address group’s comments is foreclosed where group did not raise issue in petition for reconsideration. [Action for Children’s Television v. FCC, 906 F.2d 752, 285 U.S. App. D.C. 58, Util. L. Rep. \(CCH\) ¶13660, 1990 U.S. App. LEXIS 10150 \(D.C. Cir. 1990\).](#)

Where regulations produced by administrative agency through informal rule making powers are challenged on substantive level, scope of review granted federal court under Administrative Procedure Act is narrow. [Wyoming Hospital Asso. v. Harris, 527 F. Supp. 551, 1981 U.S. Dist. LEXIS 9975 \(D. Wyo. 1981\), aff’d, 727 F.2d 936, 1984 U.S. App. LEXIS 25770 \(10th Cir. 1984\).](#)

326. Power and action of court on review

In reviewing Environmental Protection Agency plan for control of sulphur dioxide pollution, court must be aware that decision making is primary responsibility of agency and not responsibility of court. [Cincinnati Gas & Electric Co. v. Environmental Protection Agency, 578 F.2d 660, 11 Env’t Rep. Cas. \(BNA\) 2009, 1978 U.S. App. LEXIS 10434 \(6th Cir. 1978\), cert. denied, 439 U.S. 1114, 99 S. Ct. 1017, 59 L. Ed. 2d 72, 12 Env’t Rep. Cas. \(BNA\) 1620, 1979 U.S. LEXIS 164 \(1979\).](#)

Court will not order notice and comment rulemaking procedures to be used in development of interpretative rule. [Granville House, Inc. v. Department of Health, Education & Welfare, 772 F.2d 451, 1985 U.S. App. LEXIS 22746 \(8th Cir. 1985\).](#)

Where court has previously remanded case for compliance with OSHA regulations, OSHA need not reopen administrative record and engage in additional rulemaking proceedings, and court will not order it to do so where original record was fully developed. [National Grain & Feed Ass’n v. OSHA, 903 F.2d 308, 14 O.S.H. Cas. \(BNA\) 1529, 1990 O.S.H. Dec. \(CCH\) ¶128963, 1990 U.S. App. LEXIS 9527 \(5th Cir. 1990\), corrected, 1990 U.S. App. LEXIS 9656 \(5th Cir. June 18, 1990\).](#)

In reviewing proposed consent decree between Antitrust Division of Department of Justice and manufacturer of computer software, District Court was not empowered to review actions or behavior of Department, only decree itself, and Court exceeded its authority by refusing to enter decree as not in public interest; although [15 USCS § 16\(f\)\(1\)](#) authorizes district judge to “take testimony of government officials as court may deem fit”, this does not authorize judge to seek kind of information concerning government’s investigation and settlement negotiations that he wished to obtain; even when court is explicitly authorized to review government action under APA, there must be strong showing of bad faith or improper behavior before court may inquire into mental processes of administrative

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decision makers. [United States v. Microsoft Corp., 56 F.3d 1448, 312 U.S. App. D.C. 378, 95 Cal. Daily Op. Service 4570, 1995-1 Trade Cas. \(CCH\) ¶71027, 1995 U.S. App. LEXIS 14757 \(D.C. Cir. 1995\).](#)

In action in which environmental groups challenged final rule issued by National Marine Fisheries Service increasing allowable incidental interactions that occurred between Hawaii longline fishery and loggerhead sea turtles, Administrative Procedure Act (APA), including public notice and comment requirements under [5 USCS § 553\(b\)](#), was not applicable to court's inquiry regarding parties' joint motion to enter stipulated injunction as order of court; consent decree was judicial act rather than agency act and, therefore, APA was not applicable to proposed consent decree. [Turtle Island Restoration Network v. United States DOC, 834 F. Supp. 2d 1004, 2011 U.S. Dist. LEXIS 9778 \(D. Haw. 2011\)](#), aff'd, [672 F.3d 1160, 74 Env't Rep. Cas. \(BNA\) 1257, 42 Env'tl. L. Rep. 20058, 2012 U.S. App. LEXIS 5352 \(9th Cir. 2012\).](#)

327. —Remand

Action challenging FCC's second reconsideration order, which set forth method for compensating payphone service providers for coinless calls made from payphones, was remanded to FCC for further consideration because FCC did not have authority to promulgate second reconsideration order without first giving notice and opportunity for comment under [5 USCS § 553\(b\)](#), where order did not merely clarify rules promulgated earlier but was changing rules because telephone companies reporting and payment responsibilities had been changed. [Sprint Corp. v. FCC, 315 F.3d 369, 354 U.S. App. D.C. 288, 2003 U.S. App. LEXIS 910 \(D.C. Cir. 2003\).](#)

Remand to National Marine Fisheries Service was unnecessary where Service conducted two new rule-makings, both of which sought public comment, after determining that sliding scale method was best method to calculate number of Pacific whiting passing through Makah Indian Tribe's fishing grounds. [Midwater Trawlers Coop. v. DOC, 393 F.3d 994, 35 Env'tl. L. Rep. 20006, 2004 U.S. App. LEXIS 26896 \(9th Cir. 2004\).](#)

EPA believed that vacatur and remand was appropriate remedy because Agency's approval of Virginia's State Implementation Plan (SIP) submission was in material part based on Plan Requirements Rule, but relevant portions of that were vacated by D.C. Circuit; therefore, EPA sought vacatur and remand of Virginia SIP Approval Rule. [Sierra Club v. United States EPA, 2018 U.S. App. LEXIS 32292 \(4th Cir. Nov. 14, 2018\).](#)

District Court will remand to Office of Personnel Management proceedings challenging validity of agency's changes in formulation of methodology for setting rates for cost of living allowances for Federal employees in Anchorage, Alaska area, on grounds of violation of notice and comment requirements of [5 USCS § 553](#), since agency's actions constituted rulemaking within meaning of § 551 and require compliance with § 553. [Alaniz v. Office of Personnel Management, 545 F. Supp. 1182, 1982 U.S. Dist. LEXIS 18435 \(D. Alaska 1982\)](#), aff'd in part and rev'd in part, [728 F.2d 1460, 1984 U.S. App. LEXIS 14863 \(Fed. Cir. 1984\).](#)

Department of Interior's Notice of Inquiry (NOI), announcing that subsidence would not be considered to fall within surface mining prohibitions of [30 USCS § 1272\(e\)](#), is legislative rulemaking and must be invalidated and remanded for compliance with Administrative Procedure Act, [5 USCS § 553](#), where NOI defines "surface impacts incident to underground coal mine," because Congress did not define surface impacts and department's definition is exercise of delegated legislative power which requires notice and comment under [5 USCS § 553](#). [National Wildlife Fed'n v. Babbitt, 835 F. Supp. 654, 23 Env'tl. L. Rep. 21464, 1993 U.S. Dist. LEXIS 13430 \(D.D.C. 1993\).](#)

An improper denial of petition brought under [5 USCS § 553\(e\)](#) constitutes concrete and particularized injury, directly caused by agency to which petition was addressed, and redressable by court through remand to agency for proper consideration of petition. [Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ., 263 F. Supp. 2d 82, 2003 U.S. Dist. LEXIS 9677 \(D.D.C. 2003\)](#), aff'd, [366 F.3d 930, 361 U.S. App. D.C. 257, 2004 U.S. App. LEXIS 9426 \(D.C. Cir. 2004\).](#)

District of South Dakota, Southern Division, court rejects argument that it has to wait until summary judgment stage and that it can not remand final administrative rule to U.S. Department of Agriculture (USDA) for additional notice

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and comment pursuant to [5 USCS § 553\(b\)](#) at preliminary injunction stage where record clearly shows that USDA did not engage in proper notice and comment procedures prior to adopting rule and rule does not reflect reasoned decisionmaking, as USDA relied on old notice and comment record and did not consider new evidence relevant to rule; court would not promote USDA's ultimate mission or show respect for law if it allowed USDA to shortcut Administrative Procedure Act's notice and comment requirements. [Ranchers Cattlemen Action Legal Fund v. USDA, 566 F. Supp. 2d 995, 30 Int'l Trade Rep. \(BNA\) 1595, 2008 U.S. Dist. LEXIS 51604 \(D.S.D. 2008\)](#).

328. —Invalidation and vacation of rule

Even though District Court properly found that second announcement of peanut price differentials was defective because of procedural inadequacies, it erred in ordering Secretary of Agriculture to implement earlier announcement which was properly promulgated, and should have remanded case to Secretary with directions to adopt new program utilizing procedures complying with Administrative Procedure Act ([5 USCS § 553](#)). [Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1976 U.S. App. LEXIS 6138 \(5th Cir.\)](#), reh'g denied, [545 F.2d 168 \(5th Cir. 1976\)](#).

Upon judicial declaration that regulation is invalid, prior regulation is reinstated until agency promulgates valid alternative regulation. [Abington Memorial Hospital v. Heckler, 750 F.2d 242, 1984 U.S. App. LEXIS 15933 \(3d Cir. 1984\)](#), cert. denied, [474 U.S. 863, 106 S. Ct. 180, 88 L. Ed. 2d 149, 1985 U.S. LEXIS 3836 \(1985\)](#).

Unless special circumstances are present, prior regulations remain valid until replaced by valid regulation or invalidated by court; accordingly, regulations existing prior to adoption of invalid regulation remain in effect. [Menorah Medical Center v. Heckler, 768 F.2d 292, 1985 U.S. App. LEXIS 20891 \(8th Cir. 1985\)](#).

District court approval of consent decree between environmental groups and National Marine Fisheries Service (NMFS), which had effect of vacating new regulation and remanding to NMFS for reconsideration, did not violate Administrative Procedure Act's notice and comment requirements because consent decree did not effect substantive change, but instead restored previous regulation during remand and reconsideration process. [Turtle Island Restoration Network v. United States DOC, 672 F.3d 1160, 74 Env't Rep. Cas. \(BNA\) 1257, 42 Env'tl. L. Rep. 20058, 2012 U.S. App. LEXIS 5352 \(9th Cir. 2012\)](#).

Fact that parole commission did not comply with Administrative Procedure Act in setting parole guidelines is not sufficient, in and of itself, to warrant release of affected prisoners on habeas corpus since departure by board does not make custody illegal; as remedy, parole commission is required to halt further parole hearing utilizing improperly promulgated standards. [Guerra v. Meese, 614 F. Supp. 1430, 1985 U.S. Dist. LEXIS 17276 \(D.D.C. 1985\)](#).

Given that Permit Revocation Rule, codified at [50 C.F.R. §§ 17.22\(b\), 17.32\(b\)](#), was adopted without observance of procedure required by law, [5 USCS § 706\(2\)\(D\)](#), court reviewing regulation need not reach question of whether regulation was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, [5 USCS § 706\(2\)\(A\)](#), but rather, appropriate remedy was to vacate rule and remand it with instructions to begin anew because Administrative Procedure Act mandated notice and comment procedures. [Spirit of the Sage Council v. Norton, 294 F. Supp. 2d 67, 57 Env't Rep. Cas. \(BNA\) 2103, 34 Env'tl. L. Rep. 20008, 2003 U.S. Dist. LEXIS 22203 \(D.D.C. 2003\)](#), vacated, remanded, [411 F.3d 225, 366 U.S. App. D.C. 249, 60 Env't Rep. Cas. \(BNA\) 1481, 35 Env'tl. L. Rep. 20110, 2005 U.S. App. LEXIS 9885 \(D.C. Cir. 2005\)](#).

329. Injunctions

District Court erred in issuing permanent injunction barring FDA from preventing importation of garlic until its 10 percent rule of thumb in procedure for sampling garlic met notice and comment requirements of [5 USCS § 553](#), since court did not notify parties that it was consolidating proceedings seeking preliminary and permanent relief, and no affidavits or documents addressed notice and comment issue. [Caribbean Produce Exchange, Inc. v. Secretary of Health & Human Services, 893 F.2d 3, 1989 U.S. App. LEXIS 19528 \(1st Cir. 1989\)](#).

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Regulations exceeded authority of FEC under Federal Election Campaign Act, [Pub. L. No. 92-255](#), [86 Stat. 3](#). [Emily's List v. FEC](#), [581 F.3d 1](#), [388 U.S. App. D.C. 150](#), [2009 U.S. App. LEXIS 20768 \(D.C. Cir. 2009\)](#).

Determination by Secretary of Agriculture to impose deduction of 50 cents per hundredweight from proceeds of sale of all milk marketed commercially by producers, to be remitted to Commodity Credit Corporation to offset portion of cost of milk price support program, without observing notice and comment requirements of [5 USCS § 553](#), is null and void, giving milk producers right to have collection of deduction enjoined, where plaintiffs will suffer irreparable injury if injunction does not issue. [South Carolina ex rel. Patrick v. Block](#), [558 F. Supp. 1004](#), [1983 U.S. Dist. LEXIS 19356 \(D.S.C. 1983\)](#).

Office of Thrift Supervision (OTS) is enjoined from enforcing interim final rule governing mutual-to-stock conversions of savings associations, where OTS issued rule without prior notice and opportunity for comment, in reliance on good cause exception of Administrative Procedure Act ([5 USCS § 553\(b\)\(3\)\(B\)](#)), because (1) OTS could not rely on fact that it received public comments in response to another rule since that rule discussed different matters from interim rule, (2) use of good cause exception cannot be justified out of fear that savings association would apply for conversion before new rule becomes effective, (3) practical reach of rule is quite expansive, and (4) rule is not limited in time. [Thrift Depositors of Am. v. Office of Thrift Supervision](#), [862 F. Supp. 586](#), [1994 U.S. Dist. LEXIS 14374 \(D.D.C. 1994\)](#), remanded, [1996 U.S. App. LEXIS 14234 \(D.C. Cir. Apr. 4, 1996\)](#).

Immigrant, who was arrested in wake of September 11 for overstaying his visa, did not have strong likelihood of succeeding on his claim that Government's closure of his deportation proceedings violated claim under Administrative Procedures Act, [5 USCS §§ 551](#) et seq., to extent that Creppy directive was viewed as amending Act; although Creppy directive appeared to have been final agency rule generally requiring adherence to Act's notice-and-comment procedures, "foreign policy" exception set forth in [5 USCS § 553\(a\)\(1\)](#) applied to exempt it from those requirements. [Haddad v. Ashcroft](#), [221 F. Supp. 2d 799](#), [31 Media L. Rep. \(BNA\) 1209](#), [2002 U.S. Dist. LEXIS 17990 \(E.D. Mich. 2002\)](#), remanded, [76 Fed. Appx. 672](#), [2003 U.S. App. LEXIS 19768 \(6th Cir. 2003\)](#).

Federal Bureau of Prisons (BOP) policy was invalid for failure to follow notice and comment provision of [5 USCS § 553](#), Administrative Procedure Act and, because court had no authority to determine place or location of imprisonment under [18 USCS § 3621](#), court enjoined BOP from exercising its discretion on inmate's place of incarceration based on invalid BOP policy and ordered BOP to reconsider designation of place of incarceration without consideration of invalid policy. [Hurt v. Fed. Bureau of Prisons](#), [323 F. Supp. 2d 1358](#), [2003 U.S. Dist. LEXIS 25589 \(M.D. Ga. 2003\)](#).

330. —Preliminary injunctions

Denial of preliminary injunction to halt Department of Agriculture rulemaking proceedings allegedly unfavorable to domestic hop growers is proper since promulgation of new order by Secretary of Agriculture was still pending. [Friends of Hop Marketing Order v. Block](#), [753 F.2d 777](#), [1985 U.S. App. LEXIS 20155 \(9th Cir. 1985\)](#).

Air cargo and mail carrier was entitled to preliminary injunction against enforcement of new policy established by Postmaster General whereby all categories of mail would be routed abroad by most expeditious air service, without regard to type of aircraft used, which policy had effect of depriving plaintiff of most of its mail revenue, where there was no publication or opportunity for interested persons to submit written data or brief on proposed change. [Seaboard World Airlines, Inc. v. Gronouski](#), [230 F. Supp. 44](#), [1964 U.S. Dist. LEXIS 8013 \(D.D.C. 1964\)](#).

Coast Guard captain of port did not act ultra vires or run afoul of Administrative Procedure Act ([5 USCS § 553](#)) by emergency enactment of "security zone" rule to protect defense contractor's boatyard from sailboat protesters, where [50 USCS § 191](#) authorizes establishment of such "security zones"; however, enforcement of security zone will be preliminarily enjoined since it seems captain's enforcement runs afoul of First Amendment by being arbitrary and capricious use of regulation to suppress antinuclear views with which he disagrees. [Kellam v. Burnley](#), [673 F. Supp. 71](#), [1987 U.S. Dist. LEXIS 10623 \(D.R.I. 1987\)](#).

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USDA is preliminarily enjoined from enforcing or implementing new interim rule on mandatory labeling for meat and poultry products, although USDA states that new rule, aimed at preventing problems like recent outbreaks of foodborne illness due to mishandling and undercooking, is in public interest and falls within good cause exception of [5 USCS § 553\(b\)\(B\)](#), because food industry organizations have shown that USDA has been considering problem for sometime, that no emergency exists, and that normal rulemaking procedures—allowing affected parties and general public to participate in process—can and should be followed. [Texas Food Indus. Ass'n v. United States Dep't of Agric.](#), 842 F. Supp. 254, 1993 U.S. Dist. LEXIS 19037 (W.D. Tex. 1993).

Prisoner was entitled to preliminary injunction enjoining government from transferring her from community corrections center (CCC) to federal prison camp based upon Federal Bureau of Prison's (Bureau) new policy prohibiting direct commitment of felons to CCCs under any circumstances because prisoner was likely to succeed on her claim that new Bureau policy was administrative rule that required notice and comment, as policy was exact opposite from Bureau's past policy and practice. [Ferguson v. Ashcroft](#), 248 F. Supp. 2d 547, 2003 U.S. Dist. LEXIS 5620 (M.D. La. 2003).

District court entered preliminary injunction barring last-minute rule change by National Parks Service, imposing terms of settlement agreement, where rule change was arbitrary and capricious and caused great harm to local businesses, which were entitled to notice and participation in agency's rulemaking process. [Int'l Snowmobile Mfrs. Ass'n v. Norton](#), 304 F. Supp. 2d 1278, 2004 U.S. Dist. LEXIS 1796 (D. Wyo.), remanded, 340 F. Supp. 2d 1249, 59 Env't Rep. Cas. (BNA) 1822, 34 Env'tl. L. Rep. 20116, 2004 U.S. Dist. LEXIS 20622 (D. Wyo. 2004).

Motion for preliminary injunction was partially granted under [Fed. R. Civ. P. 65](#) because plaintiffs were likely to succeed on merits of their legal challenge to final rule adopted by U.S. Department of Agriculture (USDA) when they demonstrated that they would suffer irreparable injury if injunction was not granted, and balance of harms and public interest weighed in favor of granting injunction; plaintiffs challenged final rule that was promulgated pursuant to Secretary of USDA's authority under [7 USCS § 8303\(a\)\(1\)](#) to prohibit or restrict importation of animals and animal products in order to prevent introduction of livestock disease in U.S.; challenged rule, "Bovine Spongiform Encephalopathy (BSE); Minimal-Risk Regions; Importation of Live Bovines and Products Derived From Bovines," [72 Fed. Reg. 53,314 \(September 18, 2007\)](#), among other things, reversed prior restriction and allowed cattle more than 30 months old to be imported from Canada, where cases of BSE had been reported; (USDA violated its duty under [5 USCS § 553\(b\)](#) by failing to provide public with legally sufficient notice and opportunity to comment on its decision to relax ban on importing older beef, as USDA had relied on notice and comment that it published with regard to earlier rule, which USDA had subsequently suspended on ground that further notice and comment was needed; fact that USDA relied on several year old data and did not discuss recent BSE outbreaks in Canada did not reflect reasoned decisionmaking; irreparable harm might result if rule was not remanded back for notice and comment because USDA admitted that there was risk, under new rule, that BSE-infected tissue would reach human food supply in U.S. and could lead to variant Creutzfeldt-Jakob Disease, chronic and fatal neuro-degenerative disease; additionally, record was complete enough to conclude that further notice and comment were legally required, and district court had authority to remand rule back to USDA for proper notice and comment; and there was no need to require plaintiffs to post bond or provide other security in connection with injunctive relief granted. [Ranchers Cattlemen Action Legal Fund v. USDA](#), 566 F. Supp. 2d 995, 30 Int'l Trade Rep. (BNA) 1595, 2008 U.S. Dist. LEXIS 51604 (D.S.D. 2008).

Preliminary injunction barring implementation of regulations that gave United States government control over immigration into and out of Commonwealth of Northern Mariana Islands (CNMI) was granted because upon consideration of totality of circumstances that surrounded Department of Homeland Security's (DHS) promulgation of Interim Permit Rule, court concluded that CNMI was likely to succeed on its claim that agency did not have "good cause" to dispense with notice-and-comment procedures and thus violated Administrative Procedure Act (APA), [5 USCS §§ 501](#) et seq., since DHS cited no analogous case in which agency had 18 months to issue rule and still was found to have good cause to omit notice-and-comment procedures. [N. Mariana Islands v. United States](#), 686 F. Supp. 2d 7, 2009 U.S. Dist. LEXIS 127335 (D.D.C. 2009).

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Two states were entitled to a nation-wide preliminary injunction enjoining, inter alia, federal agencies from enforcing two Final Rules that granted exemptions to ACA requirement that health plans cover women's preventive services for religion and moral purposes because, if Rules went into effect, States would likely succeed, balance of hardships and public interest would be in their favor, their choice of venue was proper, Agencies did not meet APA's requirements for notice-and-comment rulemaking, Agencies did not have authority to promulgate Religious Exemption under ACA or RFRA, and States were likely to suffer irreparable harm as result of the Rules' impact on their fiscs and welfare of their citizens. [Pennsylvania v. Trump, 351 F. Supp. 3d 791, 2019 U.S. Dist. LEXIS 6161 \(E.D. Pa. 2019\)](#).

331. Miscellaneous

Board of Immigration Appeals (BIA) rule exempting airlines from liability for bringing undocumented alien to United States when alien received post-arrival waiver pursuant to regulation exempting alien from visa requirement was reasonable and consistent with statute providing for penalty for bringing to United States alien who did not have valid passport and visa. [United Airlines, Inc. v. Brien, 588 F.3d 158, 2009 U.S. App. LEXIS 25518 \(2d Cir. 2009\)](#).

Local public housing authorities ("PHAs") are entitled to declaration that HUD violated under [5 USCS § 553](#), where HUD applied retroactively new method for calculating its operating subsidies, because new method constituted legislative or substantive rules since it involved major changes in evaluating subsidies, including imposing new and mandatory obligations on PHAs and contradicting existing regulation, and HUD failed to follow formal requirements of Administrative Procedures Act in implementing these rules until several years after their implementation. [Committee for Fairness v. Kemp, 791 F. Supp. 888, 1992 U.S. Dist. LEXIS 6254 \(D.D.C. 1992\)](#).

Chemical corporation failed to state cause of action under notice and comment requirements of [5 USCS § 553\(b\)](#) when it challenged decision of Federal Mediation and Conciliation Service (FMCS) to appoint three arbitrators to hear chemical corporation's data compensation dispute with crop corporation because decision of FMCS merely applied its existing regulations, was not codified, was not published in Federal Register, was not de facto legislative rule, and had no binding effect on future exercise of discretion. [SRM Chem. Ltd., Co. v. Fed. Mediation & Conciliation Serv., 355 F. Supp. 2d 373, 59 Env't Rep. Cas. \(BNA\) 2085, 2005 U.S. Dist. LEXIS 882 \(D.D.C. 2005\)](#).

Unpublished decision: Inmate had not established claim for habeas corpus relief when he did not receive early release credit for participation in substance abuse program, because federal Bureau of Prisons (BOP) had provided sufficient rationale for excluding prisoners whose sentences had been enhanced for use of firearms from receiving credit as set forth in [28 CFR § 550.58](#) and promulgation of regulation did not violate [5 USCS §§ 553](#) or [706](#). [Keith v. Grondolsky, 2009 U.S. Dist. LEXIS 75462 \(D.N.J. Aug. 25, 2009\)](#).

B. Standard of Review**332. Generally**

Agency, if its rulemaking is to be sustained, must demonstrate that it has considered relevant factors brought to its attention by interested parties during course of rulemaking, and that it has made reasoned choice among various alternatives presented. [National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 1979 O.S.H. Dec. \(CCH\) ¶123576, 1979 U.S. App. LEXIS 14658 \(3d Cir. 1979\)](#).

Agency interpretations, unlike legislative rules, are not controlling on courts and weight given to agency interpretation depends on many factors, including validity of its reasoning, its consistency with earlier and later agency pronouncements and whether administrative document was issued contemporaneously with passage of statute being interpreted. [Doe v. Reivitz, 830 F.2d 1441, 842 F.2d 194, 1987 U.S. App. LEXIS 13931 \(7th Cir. 1987\)](#), amended, [842 F.2d 194 \(7th Cir. 1988\)](#).

Validity of administrative regulations is determined under trinary test which examines whether regulations are promulgated in excess of statutory authority, whether regulations are arbitrary, capricious or otherwise not in accordance with law, and whether appropriate procedures were followed in implementing statute. [First Bank & Trust](#)

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[Co. v. Board of Governors of Federal Reserve System, 605 F. Supp. 555, 1984 U.S. Dist. LEXIS 20960 \(E.D. Ky. 1984\).](#)

333. Substantial evidence

Substantial evidence review of rule making proceedings is applicable only where statute requires agency hearing and proceeding is under [5 USCS §§ 556, 557](#), and not where rule making was pursuant to informal procedures of [5 USCS § 553](#). [Boating Industry Asso. v. Boyd, 409 F.2d 408, 1969 U.S. App. LEXIS 13076 \(7th Cir. 1969\).](#)

Court does not apply “substantial evidence” test on review of rule making proceedings. [Mobil Oil Corp. v. Federal Power Com., 469 F.2d 130, 152 U.S. App. D.C. 119, 44 Oil & Gas Rep. 124, Util. L. Rep. \(CCH\) ¶11346, 1972 U.S. App. LEXIS 7276 \(D.C. Cir. 1972\)](#), cert. denied, 412 U.S. 931, 93 S. Ct. 2749, 37 L. Ed. 2d 159, 1973 U.S. LEXIS 2233 (1973).

Substantial evidence is not appropriate standard in reviewing informal rule making proceeding under [5 USCS § 553](#). [Western Union Tel. Co. v. Federal Communications Com., 665 F.2d 1126, 214 U.S. App. D.C. 308, 1981 U.S. App. LEXIS 17962 \(D.C. Cir. 1981\).](#)

Regulation need not be sustained by evidence. [Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, 1965 U.S. Dist. LEXIS 7745 \(D.D.C. 1965\).](#)

Substantial evidence standard for setting aside agency action does not apply where no public adjudicatory hearing is held, and Administrative Procedure Act does not require rulemaking hearing and such hearing is not held. [Aeron Marine Shipping Co. v. United States, 525 F. Supp. 527, 1981 U.S. Dist. LEXIS 10055 \(D.D.C. 1981\)](#), aff'd in part and rev'd in part, 695 F.2d 567, 224 U.S. App. D.C. 373, 1984 A.M.C. 607, 1982 U.S. App. LEXIS 23871 (D.C. Cir. 1982).

Under substantial evidence test, judicial review of agency's action is authorized only when agency's action is taken pursuant to rulemaking provisions of [5 USCS § 553](#), or when agency's action is based upon public adjudicatory hearing. [Kennerly v. United States, 534 F. Supp. 269, 1982 U.S. Dist. LEXIS 9378 \(D. Mont. 1982\)](#), aff'd in part and rev'd in part, [721 F.2d 1252, 1983 U.S. App. LEXIS 14463 \(9th Cir. 1983\).](#)

334. —Particular cases

Arbitrary and capricious standard found in APA and substantial evidence standard found in Toxic Substance Control Act (15 USCS §§ 2600 et seq.) are different even in context of informal rule making; latter is more rigorous standard. [Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 33 Env't Rep. Cas. \(BNA\) 1961, 22 Env'tl. L. Rep. 20037, 22 Env'tl. L. Rep. 20304, 1991 U.S. App. LEXIS 24922 \(5th Cir. 1991\).](#)

FERC decision increasing minimum water flow standards, thereby hindering hydroelectric developer's plans, was not made without substantial evidence, and although party may argue that its own methodology for arriving at flow standards is “better,” FERC decision will not be overturned absent showing that FERC employed invalid methodology or that decision was not based on substantial evidence. [State ex rel. State Water Resources Control Bd. v. FERC, 966 F.2d 1541, 92 Cal. Daily Op. Service 2905, 92 D.A.R. 4606, 22 Env'tl. L. Rep. 21397, Util. L. Rep. \(CCH\) ¶13855, 1992 U.S. App. LEXIS 5726 \(9th Cir. 1992\).](#)

Judicial review of rulemaking concerning handling of milk is limited to determination whether secretary's decision is supported by substantial evidence and whether procedures used in rulemaking were illegal. [Smyser v. Block, 580 F. Supp. 1397, 1984 U.S. Dist. LEXIS 19144 \(M.D. Pa. 1984\)](#), rev'd, [760 F.2d 514, 1985 U.S. App. LEXIS 23630 \(3d Cir. 1985\).](#)

Substantial evidence standard applied only to agency findings of fact made after hearing, rather than rulemaking process that was at issue under [5 USCS § 553](#); therefore, court could not find that conclusions of Center for Medicare and Medicaid Service were not supported by substantial evidence because substantial evidence standard

did not apply in case. [Select Specialty Hosp. - Akron, LLC v. Sebelius, 820 F. Supp. 2d 13, 2011 U.S. Dist. LEXIS 123062 \(D.D.C. 2011\)](#).

335. Conformity to statute

Where empowering provision of statute states simply that agency may make such rules and regulations as may be necessary to carry out provisions of statute, validity of regulation promulgated thereunder will be sustained so long as it is reasonably related to purposes of enabling legislation. [Mourning v. Family Publications Serv., 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318, 1973 U.S. LEXIS 129 \(1973\)](#).

Before regulations promulgated by federal agency pursuant to grant of legislative authority by Congress can be binding on courts in manner akin to statutes, reviewing court must reasonably be able to conclude that grant of authority contemplates regulations issued; court is not required to give effect to interpretive regulation; varying degrees of deference are accorded to administrative interpretations, based on such factors as timing and consistency of agency's position, and nature of its expertise. [Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208, 26 Cont. Cas. Fed. \(CCH\) ¶83181, 19 Empl. Prac. Dec. \(CCH\) ¶9121, 19 Fair Empl. Prac. Cas. \(BNA\) 475, 4 Media L. Rep. \(BNA\) 2441, 1979 U.S. LEXIS 34 \(1979\)](#).

Regulation or ruling which creates rule out of harmony with statute is nullity. [United States v Eddy Bros., Inc., 291 F.2d 529, 8 A.F.T.R.2d \(RIA\) 6099 \(CA8 Mo 1961\)](#).

Court's deference to agency's statutory construction is constrained by court's obligation to honor clear meaning of statute, as revealed by its language, purpose and history; less judicial deference is required when agency has taken inconsistent positions in promulgating interpretative regulations, and similarly less deference may be called for when agency is interpreting scope of its own jurisdiction. [National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 1979 O.S.H. Dec. \(CCH\) ¶23576, 1979 U.S. App. LEXIS 14658 \(3d Cir. 1979\)](#).

Regulation governing sale of soft drinks in schools prior to closing of food service facilities is in excess of statutory authority where prior regulations limited ban on competing foods to time and place of meal service, and where Congress is presumed to have been aware of interpretation of same language and to have intended continued consistent interpretation by re-enacting governing statute. [National Soft Drink Asso. v. Block, 721 F.2d 1348, 232 U.S. App. D.C. 187, 1983 U.S. App. LEXIS 15296 \(D.C. Cir. 1983\)](#).

While regulations promulgated by Secretary of Health and Human Services must be granted deferential consideration and courts must therefore exercise caution in overturning them, court will not "rubber stamp" Secretary's decision where there is no justification for promulgation of regulation and regulation is obviously inconsistent with appropriate statute. [Bedford County General Hospital v. Heckler, 757 F.2d 87, 1985 U.S. App. LEXIS 29688 \(6th Cir. 1985\)](#).

District Court committed serious error in holding that Corps of Engineers, Port Authority, and EPA complied with EPA regulations relating to ocean dumping of dredged materials; while Marine Protection, Research, and Sanctuaries Act ([33 USCS § 1415](#)) gives EPA broad rule-making authority under which it could have reserved discretion it claims to have exercised, EPA simply failed to do so, and District Court must weigh balance of harms. [Clean Ocean Action v. York, 57 F.3d 328, 40 Env't Rep. Cas. \(BNA\) 1025, 41 Env't Rep. Cas. \(BNA\) 1025, 25 Env'tl. L. Rep. 21236, 1995 U.S. App. LEXIS 14460 \(3d Cir. 1995\)](#).

Whether regulation issued by agency is in harmony with statute is question of law for reviewing court to determine, and it is court's duty to declare invalid any regulation which frustrates congressional intent; circular issued by Department of Housing and Urban Development, setting forth mandatory requirements for eligibility in rental subsidy housing project, which operated to exclude from eligibility very people Congress mandated preference in favor of, was inconsistent with National Housing Act and unenforceable. [Findrilakis v. Secretary of Dep't of Housing & Urban Development, 357 F. Supp. 547, 1973 U.S. Dist. LEXIS 15360 \(N.D. Cal. 1973\)](#).

336. Conformity to procedural requirements

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Agency rulemaking action that substantially and prejudicially violates agency's rules cannot stand; thus, where FCC had rule prescribing cutoff date for consideration of comments on proposed rule, which further provided that no additional comments may be filed thereafter without request from commission or showing of good cause, parties could not thereafter make off record contentions. [Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 106 U.S. App. D.C. 30, 1959 U.S. App. LEXIS 3909 \(D.C. Cir. 1959\).](#)

Agency reliance on scientific studies completed by its staff after close of comment period without giving interested parties opportunity to comment on staff studies does not require invalidation of rulemaking proceedings where there is no showing that new studies were defective in any way and where there is no showing of prejudice. [Community Nutrition Institute v. Block, 749 F.2d 50, 242 U.S. App. D.C. 28, 1984 U.S. App. LEXIS 16192 \(D.C. Cir. 1984\).](#)

Where Department of Veterans Affairs (VA) issued letter, requiring manufacturers of drugs covered by health care benefits program of Department of Defense (DOD) to refund to DOD difference between drugs' wholesale commercial price and their federal ceiling prices, letter was set aside because letter was substantive rule, and VA did not comply with notice and comment procedures of [5 USCS § 553](#). [Coalition for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs, 464 F.3d 1306, 2006 U.S. App. LEXIS 23079 \(Fed. Cir. 2006\).](#)

FCC's legal conclusion that it had good cause for bypassing Administrative Procedure Act's notice-and-comment requirement was not entitled to deference and was reviewed de novo; although court did not exclude possibility that fiscal calamity could conceivably justify bypassing notice-and-comment requirement, FCC's record was too scant to establish fiscal emergency. [Sorenson Communs. Inc. v. FCC, 755 F.3d 702, 410 U.S. App. D.C. 278, 2014 U.S. App. LEXIS 11618 \(D.C. Cir. 2014\).](#)

Summary judgment would be granted in favor of carrier in action to enjoin enforcement of regulation of Civil Aeronautics Board where regulation was issued without granting carrier hearing. [American Air Transport, Inc. v. Civil Aeronautics Board, 98 F. Supp. 660, 1951 U.S. Dist. LEXIS 1929 \(D.D.C. 1951\).](#)

Rules adopted without complying with provisions of [5 USCS § 553](#) may be declared invalid. [Crown Zellerbach Corp. v. Marshall, 441 F. Supp. 1110, 24 Cont. Cas. Fed. \(CCH\) ¶ 81793, 15 Empl. Prac. Dec. \(CCH\) ¶ 7898, 15 Fair Empl. Prac. Cas. \(BNA\) 1628, 1977 U.S. Dist. LEXIS 13301 \(E.D. La. 1977\).](#)

Rule promulgated by Secretary of Department of Health and Human Services (HHS) changing method of reimbursement to hospitals for malpractice insurance expenses incurred as result of treating Medicare patients was invalid under [5 USCS § 553](#) upon review of full rule-making record where requisite basis and purpose statement failed to address critical issues of commentators regarding HHS's justification for change, relied upon single study criticized by authors in its application, and failed to consider various proposed alternatives. [Walter O. Boswell Memorial Hospital v. Heckler, 628 F. Supp. 1121, 1985 U.S. Dist. LEXIS 13735 \(D.D.C. 1985\).](#)

Secretary of Health and Human Service's promulgation of rule implementing new survey process for determining whether nursing facilities receiving federal Medicaid funds are providing quality medical care is invalid, where (1) 60-day comment period was inadequate and Secretary's failure to extend period pursuant to numerous requests was arbitrary and capricious, (2) notice of proposed rulemaking did not include guidelines and forms constituting system, (3) rule did not include details of methodology defining level of care and duty of state survey agency, and (4) statement of basis and purpose was flawed. [Estate of Smith v. Bowen, 656 F. Supp. 1093, 1987 U.S. Dist. LEXIS 2620 \(D. Colo. 1987\).](#)

Any procedural deficiencies committed by United States Department of Commerce when it promulgated its reseller policy and did not label it "proposed rule" were harmless because Commerce complied with notice and comment procedures and interested persons had opportunity to participate. [Impact Steel Can. Corp. v. United States, 533 F. Supp. 2d 1298, 31 Ct. Int'l Trade 2065, 30 Int'l Trade Rep. \(BNA\) 1207, 2007 Ct. Intl. Trade LEXIS 190 \(Ct. Int'l Trade 2007\), dismissed, 276 Fed. Appx. 981, 2008 U.S. App. LEXIS 11126 \(Fed. Cir. 2008\).](#)

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Interests asserted by trade association, employers association, and insurer were informational interests, public policy favored public access to administrative proceedings, and same public policy favored public access to administrative records; also, common law provided press limited right of access to judicial records; those informational interests were substantive and were entitled to protection under Administrative Procedure Act (APA), [5 USCS §§ 551](#) et seq.; therefore, administrative rule requiring use of claimants' initials instead of their full names in decisions and orders of ALJs in cases under Longshore and Harbor Workers' Compensation Act and Black Lung Benefits Act. should have been subject to APA formal rulemaking procedures under [5 USCS § 553\(a\)](#), and because Secretary of Labor did not engage in formal notice and comment rulemaking, rule had to be set aside and its enforcement enjoined. [Nat'l Ass'n of Waterfront Emplrs. v. Solis, 665 F. Supp. 2d 10, 2009 U.S. Dist. LEXIS 99817 \(D.D.C. 2009\)](#).

337. Prejudice

Agency reliance on scientific studies completed by its staff after close of comment period without giving interested parties opportunity to comment on staff studies does not require invalidation of rulemaking proceedings where there is no showing that new studies were defective in any way and where there is no showing of prejudice. [Community Nutrition Institute v. Block, 749 F.2d 50, 242 U.S. App. D.C. 28, 1984 U.S. App. LEXIS 16192 \(D.C. Cir. 1984\)](#).

Any failure to disclose information pertaining to environmental hazard calculation that led to final rule listing manufacturing facility on National Priorities List caused no prejudice because owner did not show how it would have responded if agency had provided information earlier. [Troy Chem. Corp. v. EPA, 2020 U.S. App. LEXIS 35833 \(D.C. Cir. Nov. 13, 2020\)](#).

Showing of prejudice is normally required before rulemaking procedures will be invalidated; harmless procedural error affords no basis for reversing administrative decision. [Smyser v. Block, 580 F. Supp. 1397, 1984 U.S. Dist. LEXIS 19144 \(M.D. Pa. 1984\)](#), rev'd, [760 F.2d 514, 1985 U.S. App. LEXIS 23630 \(3d Cir. 1985\)](#).

338. Reasonableness and rationality

Scope of court review of FCC channel allocation to community in rule making proceeding was exhausted where court determined that commission did not summarily depart from established principles or program, thereby making ruling not arbitrary or capricious, commission met all procedural requirements as to rule making, as prescribed under [5 USCS § 553](#), conclusion reached by commission was clearly stated, basis and purpose of order were ample and understandably, even though succinctly, stated, order was consistent with provisions of Communication Act ([47 USCS §§ 303, 307](#)) and reasons for ruling were rational and supported conclusion. [Van Curler Broadcasting Corp. v. United States, 236 F.2d 727, 98 U.S. App. D.C. 432, 1956 U.S. App. LEXIS 2825 \(D.C. Cir.\), cert. denied, 352 U.S. 935, 77 S. Ct. 226, 1 L. Ed. 2d 163, 1956 U.S. LEXIS 1815 \(1956\)](#).

On judicial review of rule making proceeding, court may determine that rule was accompanied by satisfactory procedural safeguards, rested within commission's delegated authority, and is reasonable. [Mobil Oil Corp. v. Federal Power Com., 469 F.2d 130, 152 U.S. App. D.C. 119, 44 Oil & Gas Rep. 124, Util. L. Rep. \(CCH\) ¶11346, 1972 U.S. App. LEXIS 7276 \(D.C. Cir. 1972\)](#), cert. denied, 412 U.S. 931, 93 S. Ct. 2749, 37 L. Ed. 2d 159, 1973 U.S. LEXIS 2233 (1973).

Where rules of United States Fish and Wildlife Service pursuant to Endangered Species Act of 1973 ([16 USCS §§ 1531](#) et seq.) were not based on all relevant factors which Fish and Wildlife Service should have considered, court could accordingly find no rational basis for decision of agency and could not sustain it. [Connor v. Andrus, 453 F. Supp. 1037, 1978 U.S. Dist. LEXIS 17356 \(W.D. Tex. 1978\)](#), disapproved, [Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 18 Env'tl. L. Rep. 21351, 1988 U.S. App. LEXIS 11816 \(5th Cir. 1988\)](#).

339. Arbitrary, capricious, abuse of discretion or otherwise not in accordance with law

Objective of review is to see whether agency, given essentially legislative task, has carried it out in manner calculated to negate dangers of arbitrariness and irrationality in formulation of rules of general application for future.

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[Automotive Parts & Accessories Asso. v. Boyd, 407 F.2d 330, 132 U.S. App. D.C. 200, 1968 U.S. App. LEXIS 4351 \(D.C. Cir. 1968\).](#)

When issue on appeal is whether rule made under [5 USCS § 553](#) meets criteria of [5 USCS § 706](#), paramount objective is to see whether agency, given essentially legislative task to perform, has carried it out in manner calculated to negate dangers of arbitrariness and irrationality in formulation of rules of general application in future, and there must be some assurance discernible that administrative action was reasoned and based on consideration of relevant factors. [H & H Tire Co. v. United States Dep't of Transp., 471 F.2d 350, 1972 U.S. App. LEXIS 6440 \(7th Cir. 1972\).](#)

Judicial review of informal rule making under [5 USCS § 553](#) is to see whether agency has carried out its essentially legislative task in manner calculated to negate dangers of arbitrariness and irrationality in formulation of rules for general application in future. [Associated Industries of New York State, Inc. v. United States Dep't of Labor, 487 F.2d 342, 1 O.S.H. Cas. \(BNA\) 1340, 1973 U.S. App. LEXIS 7645 \(2d Cir. 1973\).](#)

Under arbitrary and capricious standard of review, court is to consider only whether disputed regulations were based on consideration of relevant factors or whether there is clear error of judgment, and court is not empowered to substitute its judgment for that of expert agency. [Independent Meat Packers Asso. v. Butz, 526 F.2d 228, 1975 U.S. App. LEXIS 11929 \(8th Cir. 1975\), cert. denied, 424 U.S. 966, 96 S. Ct. 1461, 47 L. Ed. 2d 733, 1976 U.S. LEXIS 291 \(1976\).](#)

Judicial review is meaningless where administrative record is insufficient to determine whether action of agency in promulgating regulation is arbitrary and capricious. [National Welfare Rights Organization v. Mathews, 533 F.2d 637, 174 U.S. App. D.C. 410, 1976 U.S. App. LEXIS 12767 \(D.C. Cir. 1976\).](#)

Scope of review of agency action in adopting final rules is restricted to review whether rules are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. [American Transfer & Storage Co. v. Interstate Commerce Com., 719 F.2d 1283, 1983 U.S. App. LEXIS 15118 \(5th Cir. 1983\).](#)

Order requiring new subscribers to pay at least \$75 for Internet Protocol Captioned Telephone Service (IP CTS) capable phone was arbitrary and capricious, as FCC failed to articulate satisfactory explanation, and its predictive judgment about likely economic effects of rule were based on sheer speculation; further, requirement that IP CTS phones have default setting of captions off was not only unsupported by evidence, but contradicted by it; as challenges were resolved on APA grounds, it was not necessary to reach question of whether rules ran afoul of Title IV of ADA or First Amendment. [Sorenson Communs. Inc. v. FCC, 755 F.3d 702, 410 U.S. App. D.C. 278, 2014 U.S. App. LEXIS 11618 \(D.C. Cir. 2014\).](#)

Where agency has complied with rulemaking procedures, such as where rules are exempt from requirements of [5 USCS § 553](#), and rules are challenged as arbitrary and capricious, focus of reviewing court is on substance of regulation and its relationship to relevant statute, rather than on process by which rule came into being, and burden of showing unreasonableness is on party challenging regulation, and where reviewing court is faced with problem of statutory construction, interpretation given statute by agency is normally entitled to great weight. [Opelika Nursing Home, Inc. v. Richardson, 356 F. Supp. 1338, 1973 U.S. Dist. LEXIS 15542 \(M.D. Ala. 1973\), app. after remand, 490 F.2d 841 \(5th Cir. 1974\).](#)

Standard by which court may review informal rulemaking under [5 USCS § 553](#), is “arbitrary and capricious” standard of [5 USCS § 706\(2\)\(A\)](#). [Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 11 Env't Rep. Cas. \(BNA\) 1961, 1977 U.S. Dist. LEXIS 14196 \(D. Kan. 1977\).](#)

340. —Environmental Protection Agency

Arbitrary and capricious standard found in APA and substantial evidence standard found in Toxic Substance Control Act (15 USCS §§ 2600 et seq.) are different even in context of informal rule making; latter is more rigorous

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standard. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 33 Env't Rep. Cas. (BNA) 1961, 22 Env'tl. L. Rep. 20037, 22 Env'tl. L. Rep. 20304, 1991 U.S. App. LEXIS 24922 (5th Cir. 1991).

Petition for review was denied because Environmental Protection Agency's (EPA) Designations of Areas for Air Quality Planning Purposes; [Technical Correction, 67 Fed. Reg. 12474 \(Mar. 19, 2002\)](#) (2002 Nevada Rule) specifying that Nevada was divided into more than 250 baseline areas for purposes of prevention of significant deterioration program under Clean Air Act was neither arbitrary nor capricious nor out of accordance with law and because 2002 Nevada Rule was interpretive law and not substantive law EPA did not err when it did not offer notice and comment procedures. [Reno-Sparks Indian Colony v. United States EPA](#), 336 F.3d 899, 2003 Cal. Daily Op. Service 6259, 2003 D.A.R. 7866, 2003 D.A.R. 7871, 56 Env't Rep. Cas. (BNA) 1833, 33 Env'tl. L. Rep. 20240, 2003 U.S. App. LEXIS 14206 (9th Cir. 2003).

341. —Health and human services

Secretary of Health and Human Services did not act arbitrarily or capriciously in not factoring use of part-time workers into wage index for Medicare healthcare workers. [Mount Diablo Hosp. v. Sullivan](#), 963 F.2d 1175, 92 Cal. Daily Op. Service 3602, 92 D.A.R. 5693, 37 Soc. Sec. Rep. Service 284, 1992 U.S. App. LEXIS 7902 (9th Cir. 1992), vacated, remanded, 508 U.S. 969, 113 S. Ct. 2955, 125 L. Ed. 2d 657, 1993 U.S. LEXIS 4057 (1993), op. withdrawn, sub. op., 3 F.3d 1226, 93 Cal. Daily Op. Service 6366, 93 D.A.R. 10959, 42 Soc. Sec. Rep. Service 213, 1993 U.S. App. LEXIS 21590 (9th Cir. 1993).

Claim of Head Start grantees is denied summarily, where grantees sought to set aside Department of Health and Human Services (HHS) regulation allowing grantees to use grant funds to pay attorney's fees in connection with hearings on denials of refund applications, where regulation changed settled course of behavior, because HHS gave rational reasons for change and regulation is not arbitrary or capricious. [Meriden Community Action Agency v. Shalala](#), 880 F. Supp. 882, 1995 U.S. Dist. LEXIS 3427 (D.D.C. 1995), aff'd, 80 F.3d 524, 317 U.S. App. D.C. 48, 1996 U.S. App. LEXIS 6870 (D.C. Cir. 1996).

342. —Miscellaneous

Scope of court review of FCC channel allocation to community in rule making proceeding was exhausted where court determined that commission did not summarily depart from established principles or program, thereby making ruling not arbitrary or capricious, commission met all procedural requirements as to rule making, as prescribed under [5 USCS § 553](#), conclusion reached by commission was clearly stated, basis and purpose of order were ample and understandably, even though succinctly, stated, order was consistent with provisions of Communication Act ([47 USCS §§ 303, 307](#)) and reasons for ruling were rational and supported conclusion. [Van Curler Broadcasting Corp. v. United States](#), 236 F.2d 727, 98 U.S. App. D.C. 432, 1956 U.S. App. LEXIS 2825 (D.C. Cir.), cert. denied, 352 U.S. 935, 77 S. Ct. 226, 1 L. Ed. 2d 163, 1956 U.S. LEXIS 1815 (1956).

Requirement in [5 USCS § 553\(c\)](#) that agency promulgating rules pursuant to "notice and comment" procedure incorporate concise general statement of basis and purpose certainly does not require agency to supply specific and detailed findings and conclusions of kind customarily associated with formal proceedings, but this position does not lessen or excuse agency's obligation to publish statement of reasons sufficiently detailed to permit judicial review; agency action will not be upheld even under "arbitrary, capricious" standard where inadequacy of explanation frustrates review, and remedy is to obtain from agency additional explanation of reasons, and not new evidentiary hearing in district court. [National Nutritional Foods Asso. v. Weinberger](#), 512 F.2d 688, 1975 U.S. App. LEXIS 16268 (2d Cir.), cert. denied, 423 U.S. 827, 96 S. Ct. 44, 46 L. Ed. 2d 44, 1975 U.S. LEXIS 2351 (1975), app. after remand, [557 F.2d 325](#), 1977 U.S. App. LEXIS 13042 (2d Cir. 1977).

Regulations issued by National Highway Traffic Safety Administration establishing uniform tire quality grading standards for pneumatic passenger car tires as required by National Traffic and Motor Safety Act ([15 USCS §§ 1381](#) et seq.) were reviewable under "arbitrary and capricious" standard set forth in [5 USCS § 706\(2\)\(A\)](#). [B. F.](#)

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Goodrich Co. v. Department of Transp., 541 F.2d 1178, 1976 U.S. App. LEXIS 7280 (6th Cir. 1976), cert. denied, 430 U.S. 930, 97 S. Ct. 1549, 51 L. Ed. 2d 773, 1977 U.S. LEXIS 2103 (1977).

Agency refusal to initiate rulemaking must be upheld unless it is arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. *General Motors Corp. v. United States EPA*, 738 F.2d 97, 21 Env't Rep. Cas. (BNA) 1380, 21 Env't Rep. Cas. (BNA) 1381, 14 Env'tl. L. Rep. 20553, 1984 U.S. App. LEXIS 21077 (3d Cir. 1984).

Where agency is interpreting language already found in its regulations, and is not adding or amending regulatory language, it is not subject to notice and comment procedures, and court will apply "arbitrary and capricious" standard of review. *Beazer East, Inc. v. United States EPA, Region III*, 963 F.2d 603, 34 Env't Rep. Cas. (BNA) 1937, 22 Env'tl. L. Rep. 21161, 1992 U.S. App. LEXIS 10414 (3d Cir. 1992).

Action of ICC in exempting competing carrier from regulation pursuant to adoption of Supreme Court ruling permitting case-by-case exceptions constitutes informal rulemaking under [5 USCS § 553](#) and will therefore be reviewed under arbitrary and capricious standard. *Minnesota Transp. Regulation Bd. v. United States*, 966 F.2d 335, 1992 U.S. App. LEXIS 11424 (8th Cir. 1992).

Small Business Administration (SBA) did not arbitrarily or capriciously fail to award contract to minority-owned small business, which graduated from small-business status, where SBA elected not to release contract from small business program and rejected Navy's recommendation, as procuring agency, to award to that business, because (1) SBA policy allowing release of contract from program was not rule, and therefore SBA had discretion not to release, and (2) SBA is allowed to reject agency recommendations. *Information Systems & Networks Corp. v Abdnor*, 687 F. Supp. 674 (DC Dist Col 1988).

Unpublished decision: Inmate's petition for relief under [28 USCS § 2241](#) was dismissed, pursuant to [18 USCS § 2243](#), because inmate was not entitled to reduction in his sentence after completing drug rehabilitation program and categorical denial of early release to defendants convicted under [18 USCS § 922\(g\)\(1\)](#), as promulgated in [28 CFR § 550.58 \(2000\)](#) was not arbitrary or capricious regulation promulgated by Bureau of Prisons. *George v. Grondolsky*, 2009 U.S. Dist. LEXIS 78099 (D.N.J. Aug. 26, 2009).

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Even though protestants argued that method of promulgation of regulations denied them due process of law, court would consider argument as based on Administrative Procedure Act ([5 USCS § 553](#)), since APA provides at least much protection as does Fifth Amendment. *Forester v. Consumer Product Safety Com.*, 559 F.2d 774, 182 U.S. App. D.C. 153, 1977 U.S. App. LEXIS 13151 (D.C. Cir. 1977).

In evaluating regulation of technically complex regulated activity, court is reluctant to substitute its conclusions for those of Commission; court refuses to overturn Commission's order because of absence of cost data, particularly where parties protesting regulation fail to produce estimates suggesting that regulation would increase costs. *III. Bell Tel. Co. v. FCC*, 740 F.2d 465, 1984 U.S. App. LEXIS 26811 (7th Cir. 1984).

Reviewing court is to take "hard look" at relevant issues and agency consideration of reasonable alternatives to its decided course of action; court will uphold administrative determination if it can discern reasoned path from facts and considerations before commission to decision it reached; interim processing decisions designed to insure that orders entered during pending comprehensive rulemaking concerning interim licensing did not frustrate ends of rules ultimately adopted are not arbitrary and capricious. *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 239 U.S. App. D.C. 292, Util. L. Rep. (CCH) ¶12949, 1984 U.S. App. LEXIS 19472 (D.C. Cir. 1984).

Court would not overturn decision of Department of Energy that formulation of cost allocation methodology for disposal of high-level radioactive waste would not have direct binding, regulatory impact on public which constituted reasoned determination that cost allocation methodology was interpretive, rather than legislative rule, and therefore exempt from rule-making requirements of APA. *National Ass'n of Regulatory Utility Comm'rs v. U.S. Dep't of*

[Energy](#), [851 F.2d 1424](#), [271 U.S. App. D.C. 197](#), [27 Env't Rep. Cas. \(BNA\) 2161](#), [1988 U.S. App. LEXIS 9073 \(D.C. Cir. 1988\)](#).

Determination by Secretary of Health and Human Services that good cause exists to dispense with procedures under [5 USCS § 553](#) is subject to independent review. [Wells v. Schweiker](#), [536 F. Supp. 1314](#), [34 Fed. R. Serv. 2d \(Callaghan\) 951](#), [1982 U.S. Dist. LEXIS 17785 \(E.D. La. 1982\)](#).

Research References & Practice Aids

Cross References:

“Rule” and “rulemaking” defined, [5 USCS § 551](#).

Judicial review of administrative action, including rulemaking, [5 USCS §§ 701](#) et seq.

Prescribing of rules as to priorities in connection with grants for construction of undergraduate academic facilities by the Secretary of Education, [20 USCS § 1132b-1](#).

Federal Register Act, [44 USCS §§ 1502](#) et seq.

This section is referred to in [2 USCS §§ 501](#), [502](#), [1383](#), [1384](#); [5 USCS §§ 552a](#), [556](#), [561](#), [566](#), [601](#), [603](#), [604](#), [611](#), [1103](#), [1105](#), [5304](#); [6 USCS § 441](#); [7 USCS §§ 499c](#), [499f](#), [927](#), [944a](#), [2013](#), [2014](#), [2707](#), [4604](#), [4906](#), [6802](#), [6804](#), [7251](#), [7253](#), [7281](#), [7412](#), [7804](#), [7981](#), [7991](#); [8 USCS §§ 1288](#), [1372](#); [9 USCS § 306](#); [12 USCS §§ 635](#), [1441a](#), [1710](#), [1735f-17](#), [1828](#), [3336](#), [4004](#), [4008](#), [4112](#), [4308](#), [4526](#), [4589](#), [4611](#); [15 USCS §§ 18a](#), [45a](#), [57a](#), [77f](#), [78l](#), [78m](#), [78n](#), [78s](#), [78ee](#), [78ggg](#), [1193](#), [1203](#), [1262](#), [1277](#), [1474](#), [1476](#), [1604](#), [1693b](#), [2058](#), [2079](#), [2082](#), [2309](#), [2603](#), [2604](#), [2605](#), [2618](#), [2643](#), [2703](#), [2823](#), [3412](#), [3803](#), [4017](#), [4404](#), [5624](#), [5711](#), [5721](#), [5724](#), [6004](#), [6102](#), [6502](#), [6765](#), [7607](#), [7711](#); [16 USCS §§ 460nnn-105](#), [620a](#), [839b](#), [971d](#), [1379](#), [1381](#), [1383b](#), [1463](#), [1533](#), [1535](#), [1604](#), [1821](#), [1822](#), [3341](#), [3604](#), [3636](#), [3801](#), [5504](#); [19 USCS § 2561](#); [20 USCS §§ 1098a](#), [1221e-4](#), [1232](#), [1406](#), [1461](#), [6104](#), [9581](#); [21 USCS §§ 358](#), [463](#); [25 USCS §§ 450c](#), [450k](#); [28 USCS § 994](#); [30 USCS §§ 185](#), [811](#), [936](#), [1211](#), [1468](#), [1751](#); [33 USCS §§ 1231](#), [1322](#), [1504](#); [35 USCS §§ 2](#), [3](#); [38 USCS §§ 501](#), [502](#); [40 USCS § 3704](#); [41 USCS §§ 1502](#), [6509](#), [8503](#); [42 USCS §§ 289d](#), [290aa-10](#), [300g-1](#), [300h](#), [421](#), [902](#), [1320a-7c](#), [1395ff](#), [1395hh](#), [1437d](#), [1437u](#), [1437z-3](#), [1796c](#), [2210a](#), [2282c](#), [2992b-1](#), [4029](#), [4905](#), [5403](#), [5404](#), [5419](#), [5422](#), [5506](#), [5919](#), [6239](#), [6250d](#), [6306](#), [7191](#), [7407](#), [7502](#), [7511a](#), [7607](#), [8275](#), [8411](#), [9112](#), [9127](#), [9204](#), [9605](#), [10155](#), [10193](#), [11023](#), [11376](#), [11387](#), [12725](#), [12879](#), [12898](#), [12898a](#), [13603](#), [13643](#), [14923](#), [14941](#); [43 USCS § 1740](#); [44 USCS § 2206](#); [46 USCS §§ 7702](#), [9303](#), [14104](#); [46 USCS Appx §§ 1241f](#), [1716](#); [47 USCS § 336](#); [49 USCS §§ 5103](#), [20103](#), [24308](#), [31136](#), [31317](#), [32502](#), [32902](#), [40103](#), [44940](#), [60102](#); [50 USCS Appx §§ 2158](#), [2159](#), [2412](#).

Code of Federal Regulations:

Office of the Secretary, Department of Homeland Security—Petitions for rulemaking, [6 CFR 3.1](#) et seq.

Food Safety and Inspection Service, Department of Agriculture—Petitions for rulemaking, [9 CFR 392.1](#) et seq.

Nuclear Regulatory Commission—Agency rules of practice and procedure, [10 CFR 2.1](#) et seq.

Nuclear Regulatory Commission—Statement of organization and general information, [10 CFR 10.1](#) et seq.

Nuclear Regulatory Commission—Export and import of nuclear equipment and material, [10 CFR 110.1](#) et seq.

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Federal Election Commission—Petitions for rulemaking, [11 CFR 200.1](#) et seq.

Export-Import Bank of the United States—Conference and other fees, [12 CFR 414.1](#) et seq.

Federal Financial Institutions Examination Council—Appraiser regulation, [12 CFR 1102.1](#) et seq.

Office of the Secretary of Commerce—Disclosure of government information, [15 CFR 4.1](#) et seq.

Bureau of the Census, Department of Commerce—Public information, [15 CFR 60.1](#) et seq.

National Oceanic and Atmospheric Administration, Department of Commerce—Public information, [15 CFR 903.1](#) et seq.

National Oceanic and Atmospheric Administration, Department of Commerce—Environmental data and information, [15 CFR 950.1](#) et seq.

Consumer Product Safety Commission—Display of control numbers for collection of information requirements under the Paperwork Reduction Act, [16 CFR 1033.1](#) et seq.

Consumer Product Safety Commission—Procedure for petitioning for rulemaking, [16 CFR 1051.1](#) et seq.

Consumer Product Safety Commission—Procedural regulations for informal oral presentations in proceedings before the Consumer Product Safety Commission, [16 CFR 1052.1](#) et seq.

Consumer Product Safety Commission—Information disclosure under section 6(b) of the Consumer Product Safety Act, [16 CFR 1101.1](#) et seq.

Consumer Product Safety Commission—Reporting of choking incidents involving marbles, small balls, latex balloons, and other small parts, [16 CFR 1117.1](#) et seq.

Consumer Product Safety Commission—Safety standard for architectural glazing materials, [16 CFR 1201.1](#) et seq.

Consumer Product Safety Commission—Standard for the flammability of children's sleepwear: Sizes 0 through 6X (FF 3-71), [16 CFR 1615.1](#) et seq.

Consumer Product Safety Commission—Standard for the flammability of children's sleepwear: Sizes 7 through 14 (FF 5-74), [16 CFR 1616.1](#) et seq.

Securities and Exchange Commission—Organization; conduct and ethics; and information and requests, [17 CFR 200.1](#) et seq.

Federal Energy Regulatory Commission, Department of Energy—Rate schedules and tariffs, [18 CFR 154.1](#) et seq.

Federal Energy Regulatory Commission, Department of Energy—Procedures for shortages of electric energy and capacity under section 206 of the Public Utility Regulatory Policies Act of 1978, [18 CFR 294.101](#) et seq.

Federal Energy Regulatory Commission, Department of Energy—Oil pipeline tariffs: Oil pipeline companies subject to section 6 of the Interstate Commerce Act, [18 CFR 341.0](#) et seq.

Federal Energy Regulatory Commission, Department of Energy—The Commission, 18 CFR 375.1 et seq.

Federal Energy Regulatory Commission, Department of Energy—Organization, mission, and functions; operations during emergency conditions, 18 CFR 376.1 et seq.

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Federal Energy Regulatory Commission, Department of Energy—Information and requests, [18 CFR 388.101](#) et seq.

Federal Energy Regulatory Commission, Department of Energy—Electronic registration, [18 CFR 390.1](#) et seq.

Employment and Training Administration, Department of Labor—Standard for benefit payment promptness—unemployment compensation, [20 CFR 640.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Public hearing before the Commissioner, [21 CFR 15.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Over-the-counter (OTC) human drugs which are generally recognized as safe and effective and not misbranded, [21 CFR 330.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Antacid products for over-the-counter (OTC) human use, [21 CFR 331.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Antiflatulent products for over-the-counter human use, [21 CFR 332.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Antiemetic drug products for over-the-counter human use, [21 CFR 336.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Stimulant drug products for over-the-counter human use, [21 CFR 340.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Cold, cough, allergy, bronchodilator, and antiasthmatic drug products for over-the-counter human use, [21 CFR 341.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Topical otic drug products for over-the-counter human use, [21 CFR 344.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Ophthalmic drug products for over-the-counter human use, [21 CFR 349.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Miscellaneous internal drug products for over-the-counter human use, [21 CFR 357.101](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Current good manufacturing practice for blood and blood components, [21 CFR 606.3](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Establishment registration and product listing for manufacturers of human blood and blood products, [21 CFR 607.3](#) et seq.

Food and Drug Administration, Department of Health and Human Services—General biological products standards, [21 CFR 610.1](#) et seq.

Food and Drug Administration, Department of Health and Human Services—Additional standards for human blood and blood products, [21 CFR 640.1](#) et seq.

Agency for International Development—Regulations for implementation of Privacy Act of 1974, [22 CFR 215.1](#) et seq.

Department of Justice—Production or disclosure of material or information, [28 CFR 16.1](#) et seq.

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Office of the Secretary of Labor—General regulations, [29 CFR 2.1](#) et seq.

Office of the Secretary of Labor—Protection of individual privacy and access to records under the Privacy Act of 1974, [29 CFR 71.1](#) et seq.

National Labor Relations Board—Other rules, [29 CFR 103.1](#) et seq.

National Labor Relations Board—Notification of employee rights; obligations of employers, [29 CFR 104.201](#) et seq.

Wage and Hour Division, Department of Labor—Child labor regulations, orders, and statements of interpretation, [29 CFR 570.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Inspections, citations and proposed penalties, [29 CFR 1903.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Recording and reporting occupational injuries and illnesses, [29 CFR 1904.0](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Occupational safety and health standards, [29 CFR 1910.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Rules of procedure for promulgating, modifying, or revoking occupational safety or health standards, [29 CFR 1911.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Marine terminals, [29 CFR 1917.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Safety and health regulations for longshoring, [29 CFR 1918.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Occupational safety and health standards for agriculture, [29 CFR 1928.1](#) et seq.

Occupational Safety and Health Administration, Department of Labor—Basic program elements for Federal employee occupational safety and health programs and related matters, [29 CFR 1960.1](#) et seq.

Occupational Safety and Health Review Commission—Regulations implementing the Privacy Act., [29 CFR 2400.1](#) et seq.

Office of the Secretary of Defense—Restoration Advisory Boards, [32 CFR 202.1](#) et seq.

Coast Guard, Department of Homeland Security—General provisions, [33 CFR 1.01-1](#) et seq.

National Park Service, Department of the Interior—Commercial and private operations, [36 CFR 5.1](#) et seq.

National Park Service, Department of the Interior—National Military Parks; licensed guide service regulations, [36 CFR 25.1](#) et seq.

Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation—Public availability of documents and records, [36 CFR 1600.1](#) et seq.

United States Patent and Trademark Office, Department of Commerce—Disclosure of government information, [37 CFR 102.1](#) et seq.

Environmental Protection Agency—Public information, [40 CFR 2.100](#) et seq.

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Chemical Safety and Hazard Investigation Board—Procedures for disclosure of records under the Freedom of Information Act, [40 CFR 1601.1](#) et seq.

Chemical Safety and Hazard Investigation Board—Protection of privacy and access to individual records under the Privacy Act of 1974, [40 CFR 1602.1](#) et seq.

Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor—Affirmative action programs, [41 CFR 60-2.1](#) et seq.

Office of the Secretary of the Interior—Petitions for rulemaking, [43 CFR 14.1](#) et seq.

Bureau of Reclamation, Department of the Interior—Offstream storage of Colorado River water and development and release of intentionally created unused apportionment in the Lower Division States, [43 CFR 414.1](#) et seq.

Bureau of Reclamation, Department of the Interior—Acreage limitation rules and regulations, [43 CFR 426.1](#) et seq.

Bureau of Reclamation, Department of the Interior—Water conservation rules and regulations, [43 CFR 427.1](#) et seq.

Bureau of Reclamation, Department of the Interior—Information requirements for certain farm operations in excess of 960 acres and the eligibility of certain formerly excess lands, [43 CFR 428.1](#) et seq.

Federal Emergency Management Agency, Department of Homeland Security—Rulemaking; policy and procedures, [44 CFR 1.1](#) et seq.

Federal Emergency Management Agency, Department of Homeland Security—New restrictions on lobbying, [44 CFR 18.100](#) et seq.

Federal Maritime Commission—Rules of practice and procedure, [46 CFR 502.1](#) et seq.

Federal Maritime Commission—Public information, [46 CFR 503.1](#) et seq.

Federal Maritime Commission—Procedures for environmental policy analysis, [46 CFR 504.1](#) et seq.

Federal Maritime Commission—Employee ethical conduct standards and financial disclosure regulations, [46 CFR 508.101](#) et seq.

Federal Maritime Commission—Licensing, financial responsibility requirements, and general duties for ocean transportation intermediaries, [46 CFR 515.1](#) et seq.

Federal Maritime Commission—Carrier automated tariffs, [46 CFR 520.1](#) et seq.

Federal Maritime Commission—Agreements by ocean common carriers and other persons subject to the Shipping Act of 1984, [46 CFR 535.1](#) et seq.

Federal Maritime Commission—Passenger vessel financial responsibility, [46 CFR 540.1](#) et seq.

Federal Maritime Commission—Interpretations and statements of policy, [46 CFR 545.1](#) et seq.

Federal Maritime Commission—Regulations to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States, [46 CFR 550.101](#) et seq.

Federal Maritime Commission—Actions to address adverse conditions affecting U.S.-flag carriers that do not exist for foreign carriers in the United States, [46 CFR 555.1](#) et seq.

5 USCS § 553

Federal Maritime Commission—Actions to address conditions unduly impairing access of U.S.-flag vessels to ocean trade between foreign ports, [46 CFR 560.1](#) et seq.

Federal Communications Commission—Commercial radio operators, [47 CFR 13.1](#) et seq.

Federal Communications Commission—Access charges, [47 CFR 69.1](#) et seq.

Federal Communications Commission—Cable television relay service, [47 CFR 78.1](#) et seq.

Federal Communications Commission—Private land mobile radio services, [47 CFR 90.1](#) et seq.

Federal Communications Commission—Personal radio services, [47 CFR 95.1](#) et seq.

Federal Railroad Administration, Department of Transportation—Regulations on safety integration plans governing railroad consolidations, mergers, and acquisitions of control, [49 CFR 244.1](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Rules governing applications for operating authority, [49 CFR 365.101](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Standards for registration with States, [49 CFR 367.1](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Application for a certificate of registration to operate in municipalities in the United States on the United States-Mexico international border or within the commercial zones of such municipalities, [49 CFR 368.1](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Reports of motor carriers, [49 CFR 369.1](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Brokers of property, [49 CFR 371.1](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Transportation of household goods in interstate or foreign commerce, [49 CFR 375.101](#) et seq.

Federal Motor Carrier Safety Administration, Department of Transportation—Lease and interchange of vehicles, [49 CFR 376.1](#) et seq.

Surface Transportation Board, Department of Transportation—Fees, [49 CFR 1002.1](#) et seq.

Surface Transportation Board, Department of Transportation—Forms, [49 CFR 1003.1](#) et seq.

Surface Transportation Board, Department of Transportation—Records containing information about individuals, [49 CFR 1007.1](#) et seq.

Surface Transportation Board, Department of Transportation—Board organization; delegations of authority, [49 CFR 1011.1](#) et seq.

Surface Transportation Board, Department of Transportation—Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the Surface Transportation Board, [49 CFR 1014.101](#) et seq.

Surface Transportation Board, Department of Transportation—Civil monetary penalty inflation adjustment, [49 CFR 1022.1](#) et seq.

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- Surface Transportation Board, Department of Transportation—Car service, [49 CFR 1033.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Routing of traffic, [49 CFR 1034.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Bills of lading, [49 CFR 1035.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Filing with the Board-copies-verification-service-pleadings, generally, [49 CFR 1104.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Procedures for implementation of environmental laws, [49 CFR 1105.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Procedures for Surface Transportation Board consideration of safety integration plans in cases involving railroad consolidations, mergers, and acquisitions of control, [49 CFR 1106.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Appellate procedures, [49 CFR 1115.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Certificate to construct, acquire, or operate railroad lines, [49 CFR 1150.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Recordation of documents, [49 CFR 1177.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Railroad acquisition, control, merger, consolidation project, trackage rights, and lease procedures, [49 CFR 1180.0](#) et seq.
- Surface Transportation Board, Department of Transportation—Purchase, merger, and control of motor passenger carriers, [49 CFR 1182.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Interlocking officers, [49 CFR 1185.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Railroad companies, [49 CFR Part 1201](#).
- Surface Transportation Board, Department of Transportation—Preservation of records, [49 CFR 1220.0](#) et seq.
- Surface Transportation Board, Department of Transportation—Annual, special, or periodic reports-Carriers subject to Part I of the Interstate Commerce Act, [49 CFR 1241.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Waybill analysis of transportation of property—railroads, [49 CFR 1244.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Classification of railroad employees; reports of service and compensation, [49 CFR 1245.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Number of railroad employees, [49 CFR 1246.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Freight commodity statistics., [49 CFR 1248.1](#) et seq.
- Surface Transportation Board, Department of Transportation—Rate-making organization; records and reports, [49 CFR 1253.10](#) et seq.

5 USCS § 553

Surface Transportation Board, Department of Transportation—Regulations for the publication, posting, and filing of tariffs for the transportation of property by or with a water carrier in noncontiguous domestic trade, [49 CFR 1312.1](#) et seq.

Surface Transportation Board, Department of Transportation—Applications under [49 U.S.C. 10706](#) and [13703](#), [49 CFR 1331.1](#) et seq.

Am Jur:

2 Am Jur 2d, Administrative Law §§ 138, 147, 149, 151, 152, 154, 156, 159–161, 163, 166–168, 171–174, 177, 211, 435, 475, 485.

3 Am Jur 2d, Agriculture § 29.

17 Am Jur 2d, Consumer Product Warranty Acts § 2.

37A Am Jur 2d, Freedom of Information Acts § 352.

[48 Am Jur 2d, Labor and Labor Relations § 612.](#)

61 Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 21.

61B Am Jur 2d, Pollution Control §§ 149, 180.

61C Am Jur 2d, Pollution Control § 1058.

62B Am Jur 2d, Private Franchise Contracts § 33.

[70 Am Jur 2d, Shipping § 174.](#)

[70A Am Jur 2d, Social Security and Medicare §§ 10](#), 18.

74 Am Jur 2d, Telecommunications § 146.

77 Am Jur 2d, Veterans and Veterans' Laws § 161.

Am Jur Trials:

81 Am Jur Trials, Arbitrating International Claims—At Home and Abroad, p. 1.

114 Am Jur Trials, Litigation Under the Privacy Act, p. 89.

Am Jur Proof of Facts:

58 Am Jur Proof of Facts 3d, Denial of Wetland Permit As Basis for Landowner's Regulatory Taking Claim, p. 81.

40 Am Jur Proof of Facts 2d, Administrative Procedure Act, p. 517.

Law Review Articles:

[Mobil Oil Corp. v. Federal Power Com., 483 F.2d 1238, 157 U.S. App. D.C. 235, 47 Oil & Gas Rep. 67, 1973 U.S. App. LEXIS 8855 \(D.C. Cir. 1973\)](#)) and the flexibility of the Administrative Procedure Act. 26 Admin L Rev 287, Summer 1974.

Campbell; Harrison; Ligon; Rosch; Wiley; Williams; Zener; Zwerdling. Decision-Making in Agency Proceedings. 26 Admin L Rev 489, Fall 1974.

5 USCS § 553

Ross. ABA Legislative Proposals to Improve Administrative Procedures in Federal Departments and Agencies. 27 Admin L Rev 395, Fall 1975.

1976 Bicentennial Institute—Oversight and Review of Agency Decision Making. 28 Admin L Rev 569, Fall 1976.

Davis. Revising the Administrative Procedure Act. 29 Admin L Rev 35, Winter 1977.

Wright. New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process. 29 Admin L Rev 59, Winter 1977.

Nathanson. Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings. 30 Admin L Rev 377, Summer 1978.

Wright. Commentary: Rulemaking and Judicial Review. 30 Admin L Rev 461, Summer 1978.

Saks. Holding the Independent Agencies Accountable: Legislative Veto of Agency Rules. 36 Admin L Rev 41, Winter 1984.

Jordan. The Administrative Procedure Act's "Good Cause" Exemption. 36 Admin L Rev 113, Spring 1984.

Fiftieth anniversary of the Administrative Procedure Act. [48 Admin L Rev 307, Summer 1996](#).

Reed. Must Quasi-Legislators, Like Caesar's Wife, Be Above Suspicion? Recusal of Rulemakers for Prejudice and Bias. 19 Am Bus L J 1, Spring 1981.

Rosenberg. Presidential control of agency rulemaking: an analysis of constitutional issues that may be raised by Executive Order 12,291. (Symposium: Cost-benefit analysis agency decision making). 23 Ariz L Rev 1199, Fall 1981.

Sohn. Can't the PTO Get a Little Respect? [26 Berkeley Tech LJ 1603, Fall 2011](#).

Administrative Investigative Authority and APA Rulemaking Procedures. 57 Boston U L Rev 227, January 1977.

Lederman. The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation. 92 BUL Rev 643, March 2012.

Cortez. Adverse Publicity by Administrative Agencies in the Internet Era. 2011 BYUL Rev 1371, 2011.

Sinaiko. Due Process Rights of Participation in Administrative Rulemaking. 63 Calif L Rev 886, July 1975.

Ames; McCracken. Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study. 64 Calif L Rev 14, January 1976.

Currie; Goodman. Judicial Review of Federal Administrative Action: Quest for the Optimum Forum. 75 Colum L Rev 1, January 1975.

Gellhorn; Robinson. Perspective on Administrative Law. 75 Colum L Rev 771, May 1975.

Mezell. Deference and Dialogue in Administrative Law. [111 Colum L Rev 1722, December 2011](#).

Marashlian; Hankins; McReynolds. The Mis-Administration and Misadventures of the Universal Service Fund: A Study in the Importance of the Administrative Procedure Act to Government Agency Rulemaking. [19 CommLaw Conspectus 343, 2011](#).

Bain. Informal Rulemaking: In Quest of Nuclear Licensing Reform. 55 Denver L J 177, 1978.

White. Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis. 1974 Duke LJ 195, April 1974; 43 ICC Prac J 79, November-December 1975.

5 USCS § 553

Rulemaking or Adjudication in Administrative Policy Formation: *Rock v Hard Place?* 13 *Duquesne L Rev* 967, Summer 1975.

Greene. *Informal FDA Hearings*. 32 *Food, Drug, Cosm L J* 354, August 1977.

Agency rulemaking must conform strictly with requirements of Administrative Procedure Act. 44 *Fordham L Rev* 402, November 1975.

Bell. *Administrative Law: Rulemaking and Hearing*. 8 *Ga L Rev* 19, Fall 1973.

Criddle. *When Delegation Begets Domination: Due Process of Administrative Lawmaking*. [46 *Ga L Rev* 117, Fall 2011](#).

Koch. *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*. 64 *Geo L J* 1047, May 1976.

Healy. *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*. [19 *Geo Mason L Rev* 1, Fall 2011](#).

Agency decisionmakers should refuse to discuss merits of informal rulemaking proceedings after issuance of the notice of proposed rulemaking. 46 *Geo Wash L Rev* 442, March 1978.

The Judicial Role in Defining Procedural Requirements for Agency Rule Making. 87 *Harv L Rev* 782, February 1974.

Stewart. *Reformation of American Administrative Law*. 88 *Harv L Rev* 1667, June 1975.

Stewart. *Vermont Yankee and the Evolution of Administrative Procedure*. 91 *Harv L Rev* 1805, June 1978.

Byse. *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 *Harv L Rev* 1823, June 1978.

Breyer. *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*. 91 *Harv L Rev* 1833, June 1978.

Kusano. *Rewarding Bad Behavior: EPA's Regime of Industry Self-Regulation*. 12 *Hastings W-NW J Envtl L & Pol'y* 167, Spring 2006.

Davis. *Administrative Law: Today and Tomorrow*. 22 *J Pub L* 335, 1973.

FTC Denied Substantive Rulemaking Power. 21 *Kan L Rev* 198, Winter 1973.

Judicial Review of Administrative Decisions—Requirement of Hybrid Procedures in Informal Rulemaking. 10 *Loyola of Los Angeles L Rev* 270, December 1976.

Thomford, Jr. *Controlling Administrative Sanctions*. 74 *Mich L Rev* 709, March 1976.

Asinow. *Public Participation in the Adoption of Interpretive Rules and Policy Statements*. 75 *Mich L Rev* 520, January 1977.

Bruff. *Judicial Review in Local Government Law: A Reappraisal*. 60 *Minn L Rev* 669, 1975–1976.

Harrington; Frick. *Opportunities for Public Participation in Administrative Rulemaking*. 15 *Natural Resources L* 537, 1983.

Ex Parte Contacts in Informal Rulemaking. 57 *Neb L Rev* 843, 1978.

Legislative-Interpretative Distinction: Semantical Feinting within Exception to Rulemaking Procedures. 54 *NC L Rev* 421, February 1976.

5 USCS § 553

Auerbach. Informal Rulemaking: A Proposed Relationship between Administrative Procedures and Judicial Review. 72 NW U L Rev 15, March-April 1977.

Fuchs. Development and Diversification in Administrative Rulemaking. 72 NW U L Rev 83, March-April 1977.

Lipman. The SEC's Reluctant Police Force: A New Role for Lawyers. 49 NYU L Rev 437, October 1974.

Zamir. Administrative Control of Administrative Action: The Exceptions. 51 NYU L Rev 587, October 1976.

Garner. Rulemaking in the United States. 1976 Pub L 307, Winter 1976.

Gifford. Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework. [57 So Calif L Rev 101, November 1983](#).

Applying the Administrative Procedure Act to Federal Parole Decision Making. 6 St. Mary's L J 478, Summer 1974.

Samaha. Undue Process. [59 Stan L Rev 601, December 2006](#).

Freedman. Crisis and Legitimacy in the Administrative Process. 27 Stanford L Rev 1041, April 1975.

Russell. Agricultural Law—Federal Administrative Procedures. 19 SD L Rev 603, Summer 1974.

Hutchins. Legislative Vetoes and the Administrative Process: A Constitutional and Operational Analysis. 15 Tex Tech L Rev 307, 1984.

McDonald. Are agency advisory opinions worth anything more than the government paper they're printed on? [37 Tex Tech L Rev 99, Winter 2004](#).

Kennedy. Beyond "Sunshine": Promoting Effective Citizen Participation in Federal Administrative Process. 13 Trial, 41, June 1977.

Morgan. Toward a Revised Strategy for Ratemaking. 1978 U of Ill LF 21.

Freedman. Summary Action by Administrative Agencies. 40 U Chi L Rev 1, Fall 1972.

Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy. 43 U Chi L Rev 431, Winter 1976.

Verkuil. A Study of Informal Adjudication Procedures. 43 U Chi L Rev 739, Summer 1976.

Strauss. Changing times: the APA at fifty, [63 U Chi L Rev 1389, Fall 1996](#).

Bonfield. Public Participation in Federal Rule Making Relating to Public Property, Loans, Grants, Benefits or Contracts. 118 U Pa L Rev 540, February 1970.

[Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Com., 547 F.2d 633, 178 U.S. App. D.C. 336, 9 Env't Rep. Cas. \(BNA\) 1149, 9 Env't Rep. Cas. \(BNA\) 1150, 6 Envtl. L. Rep. 20615, 1976 U.S. App. LEXIS 7935 \(D.C. Cir. 1976\)](#), rev'd, [435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460, 11 Env't Rep. Cas. \(BNA\) 1439, 8 Envtl. L. Rep. 20288, 1978 U.S. LEXIS 21 \(1978\)](#), vacated, [435 U.S. 964, 98 S. Ct. 1600, 56 L. Ed. 2d 55, 1978 U.S. LEXIS 162 \(1978\)](#)). 126 U Pa L Rev 148, November 1977.

Hickman. Unpacking the Force of Law. [66 Vand L Rev 465, March 2013](#).

Howarth. Informal Agency Rulemaking and the Courts: A Theory for Procedural Review. 61 Wash U L Q 891, Winter 1984.

5 USCS § 553

Nicholson. Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident Management System. [12 Widener L Rev 491, 2006](#).

Revenue Rulings and the Federal Administrative Procedure Act. 1975 Wis L Rev 1135, 1975.

Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard. 84 Yale L J 1750, July 1975.

Pedersen, Jr. Formal Records and Informal Rulemaking. 85 Yale L J 38, November 1975.

Bruff. Presidential Power and Administrative Rulemaking. 88 Yale L J 451, January 1979.

Administrative Law. 1972–1973 Ann Survey Am L 303, Winter 1973.

Administrative Inspections. Right to an Administrative Hearing. 1973–1974 Ann Survey Am L 441, Spring 1974.

Federal Procedure:

1 Administrative Law (Matthew Bender), ch 1, Introduction §§ 1.01, 1.02.

1 Administrative Law (Matthew Bender), ch 5, Officers and Employees § 5.07.

1 Administrative Law (Matthew Bender), ch 6, Administrative Law Judges § 6.01.

2 Administrative Law (Matthew Bender), ch 7, Public Information Generally: Access to Public Records; Disclosure of Confidential Information; Open Meetings §§ 7.07, 7.08.

2 Administrative Law (Matthew Bender), ch 10A, Preventing Disclosure of Information: The “Reverse-FOIA” Case § 10A.03.

3 Administrative Law (Matthew Bender), ch 12, The Privacy Act of 1974 §§ 12.05, 12.07, 12.12.

3 Administrative Law (Matthew Bender), ch 13, Authority to Make Rules; Rulemaking Under the APA §§ 13.01, 13.02.

3 Administrative Law (Matthew Bender), ch 14, Rulemaking Versus Adjudication § 14.04.

3 Administrative Law (Matthew Bender), ch 15, Informal Rulemaking §§ 15.01–15.09.

3 Administrative Law (Matthew Bender), ch 16, Rulemaking and the Right to a Hearing §§ 16.01, 16.03.

3 Administrative Law (Matthew Bender), ch 17, Judicial Imposition of Rulemaking Procedures §§ 17.01, 17.02.

4 Administrative Law (Matthew Bender), ch 23, Discovery and Production of Evidence § 23.02.

4 Administrative Law (Matthew Bender), ch 24, Burden of Proof and Presumptions § 24.02.

4 Administrative Law (Matthew Bender), ch 27, Witnesses § 27.02.

4 Administrative Law (Matthew Bender), ch 31, The Right to a Hearing § 31.01.

4 Administrative Law (Matthew Bender), ch 32, What Kind of Hearing? § 32.01.

4 Administrative Law (Matthew Bender), ch 34, APA Hearing Procedures § 34.01.

4 Administrative Law (Matthew Bender), ch 36, Agency Orders § 36.01.

5 Administrative Law (Matthew Bender), ch 39, Decisions Under the Administrative Procedure Act § 39.05.

5 Administrative Law (Matthew Bender), ch 41, Licenses § 41.07.

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5 Administrative Law (Matthew Bender), ch 43, Introduction to Judicial Review § 43.01.

5 Administrative Law (Matthew Bender), ch 45, Jurisdiction § 45.04.

5 Administrative Law (Matthew Bender), ch 48, Ripeness and Finality § 48.04.

6 Administrative Law (Matthew Bender), ch 51, Judicial Review of Questions of Law and Facts §§ 51.02, 51.03.

6 Administrative Law (Matthew Bender), ch 52, The Record for Purposes of Review §§ 52.02, 52.03.

Intellectual Property:

4 *Chisum on Patents (Matthew Bender), ch 11*, Patent and Trademark Office Procedures § 11.03.

Immigration:

1 [Immigration Law and Procedure \(rev. ed.\), ch 3](#), Agencies, Records and Information, Fees and Forms § 3.24.

Corporate and Business Law:

4 [Antitrust Counseling and Litigation Techniques \(Matthew Bender\), ch 51](#), The FTC As a Federal Court Litigant § 51.03.

6 Kintner, Federal Antitrust Law (Matthew Bender), ch 43, Introduction to the Federal Trade Commission Act § 43.24.

6 Kintner, Federal Antitrust Law (Matthew Bender), ch 46, The Federal Trade Commission Non-Adjudicative Regulatory Activities §§ 46.11, 46.16–46.18, 46.22.

Labor and Employment:

6 Larson on Employment Discrimination, ch 116, Federal Government Contracts § 116.03.

Federal Taxation:

5 [Rabkin & Johnson, Federal, Income, Gift and Estate Taxation \(Matthew Bender\), ch 77](#), Practice Before the IRS, Guidance and Settlements § 77.02.

1 Tax Controversies: Audits, Investigations, Trials (Matthew Bender), ch 15, Civil Penalties § 15.03.

Forms:

1 Bender's Federal Practice Forms, Forms 8(l):102, 8(l):103, Federal Rules of Civil Procedure.

5 Bender's Federal Practice Forms, Form 24:80, Federal Rules of Civil Procedure.

11 Bender's Federal Practice Forms, Form 65:4, Federal Rules of Civil Procedure.

3 [Rabkin & Johnson, Current Legal Forms, § 3A.19](#), Business Franchises.

Annotations:

Comment Note.—Right to assistance by counsel in administrative proceedings. [33 ALR3d 229](#).

Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA), [5 U.S.C.A. § 553\(b\)\(B\)](#) [[5 USCS § 553\(b\)\(B\)](#)]. [26 ALR Fed 2d 97](#).

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Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA), [42 U.S.C.A. §§ 16901](#) et seq. [[42 USCS §§ 16901](#) et seq.], its Enforcement Provision, [18 U.S.C.A. § 2250](#) [[18 USCS § 2250](#)], and Associated Regulations. [30 ALR Fed 2d 213](#).

Validity, Construction, and Application of Magnuson Fishery Conservation and Management Act Provision Mandating Actions by the Secretary of Commerce in Connection with Fishery Regulations ([16 U.S.C.A. §§ 1854, 1855\(a\)](#) to (d) [[16 USCS §§ 1854, 1855\(a\)](#)–(d)]). [36 ALR Fed 2d 31](#).

Validity, Construction, and Application of Nuclear Waste Policy Act of 1982, [Pub. L. 97-425](#) (codified at [42 U.S.C.A. §§ 10101](#) to [10270](#) [[42 USCS §§ 10101–10270](#)]) (NWPA). [41 ALR Fed 2d 81](#).

Construction and Application of Clean Water Act's Total Maximum Daily Loads (TMDLs) Requirement for Waters Failing to Achieve Water Quality Standards Under [33 U.S.C.A. § 1313\(d\)](#) [[33 USCS § 1313\(d\)](#)]. [53 ALR Fed 2d 1](#).

Validity, Construction, and Application of National Security Entry-Exit Registration System (NSEERS). [55 ALR Fed 2d 551](#).

Comment Note.—Hearsay evidence in proceedings before federal administrative agencies. [6 ALR Fed 76](#).

Procedural requirements for judicial enforcement of subpoenas issued by Federal Trade Commission under § 9 of Federal Trade Commission Act ([15 USCS § 49](#)). [7 ALR Fed 347](#).

Construction and application of §§ 101–105 of National Environmental Policy Act of 1969 ([42 USCS §§ 4331–4335](#)) requiring all federal agencies to consider environmental factors in their planning and decision making. [17 ALR Fed 33](#).

Judicial review of orders under National Traffic and Motor Vehicle Safety Act of 1966 ([15 USCS §§ 1381](#) et seq.). [18 ALR Fed 610](#).

Construction and application of provisions of [28 USCS § 2112\(a\)](#) for transfer, from one United States Court of Appeals to another, of proceedings to review or enforce orders of administrative agencies. [19 ALR Fed 520](#).

What constitutes “substantial evidence” within meaning of § 6(f) of the Occupational Safety and Health Act ([29 USCS § 655\(f\)](#)) providing that the Secretary of Labor's determinations shall be conclusive if supported by substantial evidence in the record considered as a whole. [25 ALR Fed 150](#).

Modern status of applicability of doctrine of estoppel against federal government and its agencies. [27 ALR Fed 702](#).

Doctrine of sovereign immunity as precluding or limiting application of judicial review provisions of Administrative Procedure Act ([5 USCS §§ 701](#) et seq.). [30 ALR Fed 714](#).

Composition of record on review of agency action under [28 USCS § 2112\(b\)](#) and Rule 16(a) of *Federal Rules of Appellate Procedure*. [32 ALR Fed 648](#).

Applicability of Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) to federal prison disciplinary proceedings. [39 ALR Fed 808](#).

Construction and application of [5 USCS § 553\(a\)\(2\)](#), exempting from Administrative Procedure Act's rulemaking requirements matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. [41 ALR Fed 926](#).

Sufficiency of agency's compliance with requirement of Administrative Procedure Act ([5 USCS § 553\(c\)](#)) that agency shall incorporate in rules adopted concise general statement of their basis and purpose. [46 ALR Fed 780](#).

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Compliance with provision of Administrative Procedure Act, [5 USCS § 553\(d\)](#), providing that, with certain exceptions, required publication of a substantive rule must be made at least 30 days before its effective date. [54 ALR Fed 553](#).

What constitutes “good cause” under provision of Administrative Procedure Act ([5 USCS § 553\(d\)\(3\)](#)) allowing agency rule to become effective less than 30 days after publication. [55 ALR Fed 880](#).

Right to statement of reasons, under Administrative Procedure Act ([5 USCS § 555\(e\)](#)), for denial of written application, petition, or other request of interested person made in connection with agency proceeding. [57 ALR Fed 765](#).

Propriety of challenging validity of OSHA standard at time of judicial review of enforcement proceeding under § 11(a) of Occupational Safety and Health Act ([29 USCS § 660\(a\)](#)). [61 ALR Fed 422](#).

Validity under federal law of prison regulations relating to inmates’ hair length and style. [62 ALR Fed 479](#).

Availability of Court of Appeals review, under § 509(b)(1)(E) of Federal Water Pollution Control Act ([33 USCS § 1369\(b\)\(1\)\(E\)](#)), of action by Administrator of Environmental Protection Agency in approving or promulgating effluent and other limitations. [62 ALR Fed 906](#).

Federal administrative orders as subject to judicial review where such orders are “capable of repetition, yet evading review”. [66 ALR Fed 285](#).

Environmental Protection Agency’s classifications of air quality control regions under § 107(d)(2) of Clean Air Act ([42 USCS § 7407\(d\)\(2\)](#)). [75 ALR Fed 328](#).

When petition for review of administrative order under [28 USCS § 2344](#) is timely commenced. [84 ALR Fed 369](#).

Validity, construction, and effect of domestic currency transaction reporting requirement based upon [31 USCS § 5313\(a\)](#). [89 ALR Fed 770](#).

What constitutes adequate notice of federal agency rule as against objection that rule adopted differed in substance from that published as proposed in notice. [96 ALR Fed 411](#).

What constitutes “interpretative rule” of agency so as to exempt such action from notice requirements of Administrative Procedure Act (7 USCS § 553(b)(3)(a)). [126 ALR Fed 347](#).

Construction and application of “Military Function” exception to notice and comment requirements of Administrative Procedure Act ([5 USCS § 553\(a\)\(1\)](#)). [133 ALR Fed 537](#).

Federal requirements for public participation in adoption, submission, and approval of state implementation plans and revisions pursuant to § 110 of Clean Air Act ([42 U.S.C.A. § 7410](#) [[42 USCS § 7410](#)]). [151 ALR Fed 445](#).

Supreme Court’s view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. [39 L Ed 2d 942](#).

What constitutes agency “action,” “order,” “decision,” “final order,” “final decision,” or the like, within meaning of federal statutes authorizing judicial review of administrative action—Supreme Court cases. [47 L Ed 2d 843](#).

Other Treatises:

9 [Banking Law \(Matthew Bender\), ch 170](#), Advertising § 170.03.

1C-V Benedict on Admiralty, Shipping Act of 1984, Adjudications § 36.

5 USCS § 553

10-II Benedict on Admiralty, Cruise Ships, Governmental Regulation § 2.03.

[Cohen's Handbook of Federal Indian Law \(Matthew Bender\), ch 5](#), Tribal/Federal Relationship § 5.05.

1 [Energy Law & Transactions \(Matthew Bender\), ch 21](#), Leasing on Federal Lands: Onshore § 21.06.

1 [Energy Law & Transactions \(Matthew Bender\), ch 22](#), The Outer Continental Shelf (OCS): Bidding, Leasing, and Development § 22.06.

5 [Energy Law & Transactions \(Matthew Bender\), ch 140](#), Discovery § 140.02.

6 [Energy Law & Transactions \(Matthew Bender\), ch 143](#), Judicial Review §§ 143.02, 143.05.

2 [Environmental Law Practice Guide \(Matthew Bender\), ch 11A](#), Practice Before the EPA § 11A.02.

2 [Environmental Law Practice Guide \(Matthew Bender\), ch 11B](#), Environmental Litigation § 11B.03.

2A [Environmental Law Practice Guide \(Matthew Bender\), ch 11C](#), Alternative Dispute Resolution § 11C.03.

3 [Environmental Law Practice Guide \(Matthew Bender\), ch 17](#), Clean Air Act § 17.12.

5A [Environmental Law Practice Guide \(Matthew Bender\), ch 40](#), Radioactive Materials § 40.11.

3 [Frumer & Friedman, Products Liability \(Matthew Bender\), ch 17](#), Discovery in Products Liability Litigation § 17.06.

5 [Frumer & Friedman, Products Liability \(Matthew Bender\), ch 55](#), Toxic Torts § 55.04.

1 Rapp, Education Law (Matthew Bender), ch 3, Governing Agencies, Boards, Officers and Authorities § 3.01.

1 [The Law of Advertising \(Matthew Bender\), ch 13](#), State Remedies Available to Competitors § 13.06.

2 [The Law of Advertising \(Matthew Bender\), ch 18](#), Criteria for Representations, Untruth, Deception and Unfairness § 18.02.

3 [The Law of Advertising \(Matthew Bender\), ch 32](#), Investigations and Rulemaking §§ 32.03–32.05.

1 Treatise on Environmental Law (Matthew Bender), ch 1, Environmental Law, Its Beginnings and Some of Its Recurring Issues § 1.06.

1 Treatise on Environmental Law (Matthew Bender), ch 2, Air Pollution § 2.03.

2 Treatise on Environmental Law (Matthew Bender), ch 3, Water Pollution § 3.03.

3 Treatise on Environmental Law (Matthew Bender), ch 4, Solid Waste § 4.03.

3 Treatise on Environmental Law (Matthew Bender), ch 4B, Toxic Substances § 4B.02.

3 Treatise on Environmental Law (Matthew Bender), ch 4C, Emergency Planning § 4C.03.

5 Treatise on Environmental Law (Matthew Bender), ch 12, Public Lands and Conservation §§ 12.02, 12.04.

Toxic Substances Control Act: Reformed by the Lautenberg Act (Gold & Warshaw), ch. 11, Prioritization, Risk Evaluation, Bans, and Restrictions, § 11.02.

Hierarchy Notes:

5 USCS § 553

[5 USCS, Pt. I](#)

[5 USCS, Pt. I, Ch. 5](#)

[5 USCS, Pt. I, Ch. 5, Subch. II](#)

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