

Course No:
Prof. Sally Katzen

Section 1
Fall 2006

Regulatory Perspectives

Syllabus

You will be required to buy one book, A Guide to Federal Agency Rulemaking, 3rd ed., Jeffrey S. Lubbers, published in 1998 by the American Bar Association (“Guide”) and one set of copied materials (those items marked “Reading Materials” (“RM”) in the syllabus. I recommend another paperback, Rulemaking: How Government Agencies Write Laws and Make Policy (“Rulemaking”), 3rd ed., Cornelius M. Kerwin, CQ Press, 2003, which provides more general information (at an advanced level) of the subject. In addition, I recommend another book published by the American Bar Association, which is a compilation of important primary documents (statutes, executive orders, etc); it is entitled Federal Administrative Procedure Sourcebook (“Sourcebook”), and edited by Funk, Lubbers and Pou.

Class participation is important and will count for 15% of your grade; unexcused absences are unacceptable. There will be a research paper that counts for 85% of your grade.

Introduction:[Week 1]

- **What is a Regulation?** -- How does a Regulation differ from an Order? from an Act? What is the difference between rulemaking and adjudication? -- Reading: Administrative Procedure Act ("APA") ("Guide, pp. 374-76); Guide, pp. 93-107. Recommended Reading: Attorney General's Manual (Sourcebook, pp. 41-48); Rulemaking, Chap.1, esp. pp. 2-7, 22-28, and 50-51
- **What is the administrative state?** Where did it come from? Reading: "Federal Regulation: An Introduction" (to The Federal Regulatory Directory, 10th ed.) (RM) ("Intro") pp. 2-7 (until The Reagan & First Bush Administrations) and pp. 12 (Regulatory Tools) to 15 (until Implementation Techniques).
- **Who are the Players in Rulemaking?** -- What happened to separation of powers? – Reading: Guide at pp. 7-19. Recommended Reading: Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," 84 Colum. L. Rev. 573 (1984) ("Strauss") (RM) at pp.4-12, 23-24.

I. Congress (Part 1) [Week 2]

- **Enabling Legislation** -- National Traffic & Motor Safety Act of 1966, 15 U.S.C. Sec. 1392 (49 U.S. 30111) (RM); Clean Air Act, Sec. 7409 (b) (at p. 11 of the majority opinion in Whitman, infra.)

- **Why delegate?** -- Kagan, "Presidential Administration," 114 Harv L Rev 2245 (2001) ("Kagan"), pp. 7-9 (Congressional Control) (RM)
- **How much to delegate?** -- American Trucking Associations, Inc. et al. v. Environmental Protection Agency, 175 F.3d 1027 (DC Cir. 1999) Part I of the Per Curiam opinion and Tatel dissent; 195 F.3d 4 (DC Cir. 1999) Part I and Silberman separate opinion on denial of rehearing en banc; Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001), Section III and Thomas and Stevens concurring opinions.
- **Congressional Oversight (Part 1)** -- "Intro," pp. 25-27 (Congressional Oversight)

II. Agencies [Week 3]

A. General -- What is the difference between independent regulatory agencies and Executive Branch agencies? What does it matter? -- Review (or read) "Strauss," pp. 8-12; "Upward Trend in Regulation Continues: An Analysis of the U.S Budget for Fiscal Years 2005 and 2006 at <http://www.Mercatus.org> -- especially Tables 1 and 2.

B. Who does the work? (political appointees & civil service) -- "Kagan," pp. 9-11 (B. Self Control); "Intro," pp. 21-23 (Regulatory Personnel); "In The Loop," 6/15/01; Faler, "For Bush Choices, Wait Grows," 7/25/02; Milbank, "Bush Seeks to Rule the Bureaucracy," 11/22/04; "Four Presidents Sought Changes," Federal Page, 09/05/05; and "Trust in Government," Federal Page, 05/02/06, Washington Post (RM); Association of National Advertisers v. FTC, 627 F.2d 1151 (DC Cir. 1979), Sections I, III A, B & C, IV B and V, Leventhal at A, and MacKinnon at VI.

C. Substantive Due Process [Weeks 4 and 5]

- Overview – "Intro," pp.18-21
- Role of **Science** -- Understanding Risk, pp. 11, 14-18, 24-26; Ropeik & Gray, Risk: A Practical Guide for Deciding What's Really Safe . . ., pp. 8-18 & App. 1; Pianin, "Moving Target on Policy Battlefield," 5/2/02, and Weiss, "Bush Misuses Science, Report Says," 8/8/03, Washington Post; Vargano, "Bush's Changes to Advisory Process Draw Scientists' Ire," USA Today, 2/19/04 (RM); Harlan Land Co. v. US Department of Agriculture, 186 F.Supp.2d 1076 (E.D.CA 2001), Sections I, III B, V and VI
- Role of **Economics** – Office of Management and Budget Circular No. A-4, "New Guidelines of the Conduct of Regulatory Analysis, 3/2/04, Intro., pp. 118-20; C. Alternative Regulatory Approaches, pp. 124-26; D. Analytical Approaches, pp. 126-29; E. Identify and Measure Benefits and Costs, pp. 132-37, bottom of 143-48, and 154-59; Viscusi and Aldy, "The Value of a Statistical Life," Joint Center (AEI & Brookings), Jan. 2003, Table 12, "Values of Statistical Life Used by U.S. Regulatory Agencies 1985-2000"; "Dividing the Compensation," Washington Post, 11/18/04; Reilly, "The EPA's Cost Underruns" and "New Predator in Yellowstone Reshapes Park's Entire Ecosystem," Washington Post (1/26/04) (RM); Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001), Section II and Breyer concurring opinion.
- **Role of Policy Preferences** -- all of the above

- Statutory and Other Requirements --
 - Executive Order 12866, Sections 1 (a) and (b) (Guide, pp 405-07 or Sourcebook pp. 220-23)
 - Paperwork Reduction Act, Section 3506(c)(1) (Sourcebook pp. 767-68)
 - Regulatory Flexibility Act, Sections 603-05 (Guide, pp. 392-93 or Sourcebook pp. 973-75)
 - Unfunded Mandates Reform Act, Sections 1532, 1535 (Guide, pp. 369 or Sourcebook pp. 991-93, 994)
 - National Environmental Policy Act, Section 4332 (Sourcebook, pp. 591-92)

D. Procedural Due Process [Weeks 6, 7 and 8]

- General -- APA Section 553 (Guide, pp. 374-75); Recommended Reading: Rulemaking, pp. Chap. 2, pp. 43-45, 46-50, 73-84
- **Notice** -- A.G. Manual (Sourcebook, pp. 60-63); Guide, pp. 186-93. Recommended Reading: Rulemaking, Chap. 2, pp. 52-54 and 62-64. Reading: Notice of Proposed Rulemaking of NHTSA, 42 Fed. Reg. 15935-37 (3/24/77); Notice of Proposed Rulemaking of NHTSA, 62 Fed. Reg. 807-31 (1/6/97); Skrzycki, "Project Aims for One-Stop Online Shopping for Federal Rules," Washington Post, 3/30/04 (RM)
- **Comment** -- Guide 195-200, 214-16. Recommended Reading: Rulemaking, pp. 64-67, 111-13.
 - **Ex Parte Contacts** -- Sangamon Valley Television Corp v United States, 269 F.2d 221 (DC Cir.1959); Home Box Office, Inc. v FCC, 567 F.2d 9, 51-59 (DC Cir.1977); Sierra Club v Costle, 657 F.2d 298, 311-16, 386-91, 392-404, 408-10 (DC Cir. 1981); Guide, pp. 229-30, 231-33, 238-44.
 - **Special Interests** -- "Kagan," pp. 11-12; "From Viewpoint to Policy," Washington Post, 10/21/02 and "Paying To Make A Point," 8/19/02, The Federal Page, Washington Post, 8/19/02 (RM)
- **Reason and Basis** -- Guide, pp. 261-68; Final Rule of NHTSA, 42 Fed. Reg. 34289-98 (7/5/77); Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Insurance Co., 463 U. S. 29, 32-41, 46-59 (1983); Cook, "The Case for (Some) Regulation, Part 2," The Washington Monthly (March 1995)(RM); Final Rule of NHTSA, 62 Fed. Reg. 12960-75 (3/19/97) ; Skrzycki, "Automakers, Feds Diverge on Air-Bag Test Dummies," Washington Post, 04/20/04 (RM)
- Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519 (1978), Sections I A, B, D (1st para) and II B (RM)
- Statutory and Other Requirements --
 - Paperwork Reduction Act, Sections 3501-03, 3504 (c), 3506 (a), (c), 3507 (Sourcebook pp. 757-61, 762, 766-69, 771-75)
 - Regulatory Flexibility Act, Sections 601-04, 609 (Sourcebook pp. 971-75, 976-78 or Guide, pp. 390-93, 394-95)
 - Unfunded Mandates Reform Act, Sections 1501-03, 1532-34 (Sourcebook pp. 987-91, 991-94 or Guide, pp. 366-69)
 - National Environmental Policy Act, Section 4332 (Sourcebook, pp. 591-92)
 - Executive Order 12866, Section 6(a) (Sourcebook pp.228-30 or Guide, pp. 411-13)

Recommended Reading: Rulemaking, pp. 59-61

III. Presidential Oversight [Weeks 9, 10 and 11]

- Background -- "Intro," pp. 23-25; "Strauss," pp. 41-43; "Kagan," pp. 14-16, 17-20, 22-32.
- **OMB Review**
 - Overview -- Guide, pp. 19-29, 247-49; "Kagan," pp. 16-17, 20-22
 - Executive Order 12291, 46 Fed. Reg. 13193 (2/17/81)
 - Executive Order 12866, 58 Fed. Reg. (9/30/93) (Guide pp. 405-16)
 - Executive Order 13258, 67 Fed. Reg. 9385 (2/26/02)
 - Sierra Club v Costle, *supra*, at 404-08
 - OMB Press Release attaching Memorandum from John Graham 9/20/01, with attachment; Nakashima, "Rule-Making Process to be Tightened," Washington Post, 9/26/01 (RM)
 - Memorandum from John Graham re: Review Time Limits, 10/25/10 (RM)
 - Return Letters -- [www.whitehouse.gov/omb/inforeg/ ... regulatory matters . . . regulatory review ...return letters -- see especially Letter to DOT re Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquid, 8/8/01, and Letter to DOT's NHTSA re: Tire Pressure Monitoring Systems, 2/12/02; Public Citizen, Inc. v. Mineta, 340 F.3d 39 (2003) at 42-52, skim 53-end
 - Prompt Letters -- [www.whitehouse.gov/omb/inforeg/ ... regulatory matters ... regulatory review ... prompt letters]
 - Openness – [www.whitehouse.gov/omb/inforeg . . . regulatory matters . . . meetings and outside communications]
 - General Accounting Office, "Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules," 9/22/03, pp. 38-51 and "Tiny OIRA Still Exercises Its Real Influence," Washington Post, 11/11/03 (RM)
 - OMB's 2004 Report to Congress: "Progress in Regulatory Reform," Table 4; OMB's 2005 Report to Congress: "Validating Regulatory Analysis," Tables 1-4 and 1-5; Skrzycki, "Writing Rules and Pricing Rights at the OMB," 9/30/03, and Vedantam, "New EPA Mercury Rule Omits Conflicting Data," 3/22/05, Washington Post (RM)
 - Skrzycki, "Small-Business Advocate Plays Big Role in Rulemaking," 01/11/03 and "Chemical Date Plan Catalyzes Opposition," 01/03/06, Washington Post; Grunwald, "Business Lobbyists Asked to Discuss Onerous Rules," Washington Post, 12/04/01; OMB Press Release: "Public Nominates 267 Regulations for Reform . . .", 12/19/02; Skrzycki, "Business Groups Jump at Chance to Scratch Regulatory Itches," 6/15/04, "Charting Progress of Rules Proves Difficult," 12/07/04, and "OMB To Reconsider Some Rules, 03/22/05, Washington Post ; Eilperin, "EPA Wording Found To Mirror Industry's," 9/22/04, and Kaufman, "Lobbyists' Role in Food Rules Questioned," 9/30/04, Washington Post (RM)

- Congressional Research Service Report for Congress: “The Information Quality Act – OMB’s Guidance and Initial Implementation,” 1/12/05; Skrzycki, “Salt Institute’s Case Shakes Up Preliminary Rulemaking,” 2/8/05, and “Data on Fla. Panthers Faulty and Incomplete, Wildlife Agency Says,” 3/22/05, Washington Post (RM) ; Salt Institute v. Leavitt, No 05-1097 (4th Cir. 03/06/06)
- OMB Press Release: “OMB Proposes Draft Peer Review Standards For Regulatory Science,” 8/29/03; “Peer Review Plan Draws Criticism,” Washington Post, 01/15/04; OMB Press Release: “OMB Releases Revised Bulletin on Peer Review-- Seeks Additional Public Comment,” 04/15/04 and “OMB Modifies Peer-Review Proposal,” 04/16/04, Washington Post; OMB Memorandum for Heads of Departments and Agencies re: “Issuance of OMB’s “Final Information Quality Bulletin for Peer Review,” 12/16/04 (RM).
- [Risk Assessment Bulletin]
- OMB’s Proposed Bulletin for Good Guidance Practices, posted on OMB website; Skrzycki, “Finding a Way to Better Guidance,” 12/20/05, Washington Post (RM)
- Southern Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48 (D.D.C. 2002)
- **Federalism [Week 12]** -- Executive Order 12612 (10/26/87) (Reagan); Executive Order 13083 (5/14/98), 63 Fed. Reg. 27651 (5/19/98) (Clinton); Executive Order 13132 (8/4/99), 64 Fed. Reg. 43255 (8/10/99)(Revised Clinton); Gray, “Regulation and Federalism,” 1 Yale J. on Reg. 93 (1983) (RM)

IV. Congress (Part 2) [Week 13]

- Riders/appropriations/statutory deadlines/hammers -- reread "Intro," pp. 25-27 and Guide, pp. 13-19; Morgan, “Riders Offer Election-Year Showcase,” 8/12/02, Skrzycki, “Highway Bill Comes Wrapped in Safety Groups’ To-Do List,” 3/2/04, and Grimaldi, “4 Lawmakers Ask for EPA Inquiry,” 08/13/04, Washington Post (RM)
- **Legislative Veto** -- INS v Chada, 462 U.S. 919 (1983)
- Congressional Review of Agency Rulemaking Act (Guide pp. 398-404)
- Statement of Senator Kennedy re: ergonomics (3/6/01); Skrzycki, “Questioning the Cattle Call,” Washington Post, 3/1/05 (RM)

V. Judicial Review [Week 14]

- Background -- “Kagan,” pp. 13-14 (Judicial Control); "Intro," pp. 27-28 (Judicial Review); reread Guide, pp. 7-13
- **Reviewability** - APA Section 701 (Guide p. 381); Guide, pp. 279-82
- **Standing** – APA Section 702 (Guide p. 382-83); Guide, pp. 282-94
- **Scope of Review** -- APA Section 706 (Guide pp. 382-83); Guide, pp. 317-46; United States v. Meade, 533 U.S. 218 (2001)

