

## MEMORANDUM

To: Administrative Law Students  
From: Cary Coglianese  
Re: Rulemaking Memo Assignment  
Date:

---

This assignment is intended to guide your exploration of the fascinating and important world of agency rulemaking as well as to help ground some of the concepts addressed in your readings and our classroom discussion of rulemaking procedures. It also affords an opportunity to hone important professional skills, including research, writing, and working in teams.

Working with the other members of your assigned group, you are to find a final rule that meets the following two conditions:

- (a) a federal agency promulgated the final rule at some point from 2014 to the present, **and**
- (b) prior to promulgation, the final rule document *and* a regulatory impact analysis required under E.O. 12,866 had been reviewed by the Office of Information and Regulatory Affairs (OIRA). (That is, your rule must have been deemed to have met one of the criteria for a “significant” rule in Section 3(f) of the Executive Order.)

You may find Table A-1 of OIRA’s [2017 annual report](#) to Congress (or other similar reports) to be useful in identifying potential rules that might meet the above two criteria.

Once you have identified a rule meeting the above criteria, and still working with your group, draft a memo that answers the questions listed below based on research using any of the following sources: the final rule document, including the preamble; earlier documents related to the rule that the agency published in the *Federal Register*; government databases containing primary sources on Lexis, Westlaw, or HeinOnline; and information available on-line at the agency’s website and other government websites (such as Regulations.Gov, RegInfo.Gov, GPOAccess.gov, USA.gov). You may also find useful some of the electronic resources available through the Penn Program on Regulation, in particular the websites [erulemaking.org](#) and [rulefinder.org](#).

Be sure to reference your sources in your memo and follow proper academic norms with respect to quotations and footnoting. Remember, you must place any language you use from other sources inside quotation marks and indicate with some appropriate notation the source of the quoted material. Bluebook-style footnotes would be appropriate.

Your memo should be no more than seven (7) double-spaced pages. Include each member of your team’s name on your final memos and submit just one memo for your entire group via the appropriate assignment folder that will be set up on the Canvas site. Your memo is due by no later than [ ].

## Rulemaking Memo Questions

Your memo should answer the following sets of questions:

### 1. Agency

- Describe the agency that promulgated the rule. How is the agency structured?
- What statute established the agency?
- Where is the agency situated in the overall government organization chart? Is it an executive or “independent” agency? (And why do you reach that conclusion?)
- Is the agency headed by a single administrator or a multi-member board or commission? What, if any, qualifications must the head(s) of the agency meet to be appointed as its head(s)? On what basis can the head of the agency be removed?

### 2. Statute

- What statute does the agency assert gives it the authority to promulgate the rule? In no more than a few sentences, briefly describe that statute.
- When was that statute adopted?
- What provisions of the statute are most relevant to the rule? Based on your reading of the text of the statute, briefly evaluate the agency’s claim that the statute authorizes the promulgation of the agency rule.

### 3. Process

- Describe the procedural steps that the agency followed in adopting the rule. What was the earliest step you can discern in the agency’s process of creating this rule? Provide a reference as appropriate.
- Is the rule amending a previous agency rule? If so, cite that earlier rule -- but you do not need to trace the procedures used to promulgate that previous rule; instead you should start your review of the agency’s procedure with the earliest documented effort by the agency to commence the making of the rule you selected, the one that is doing the amending.
- When did the agency publish a notice of proposed rulemaking? Did the agency publish an advance notice of proposed rulemaking?
- Did the agency hold a hearing or provide other additional steps beyond those found in the requirements of 5 U.S.C. § 553 (or other relevant parts of the Administrative Procedure Act)?
- Did the statute under which the agency purported to act require the agency to use any procedures different from or in addition to those provided in the Administrative Procedure Act?
- What other sources of rulemaking procedure did the agency report it followed?

#### 4. Review

- On what basis did OIRA review this rule? In other words, what provision of Executive Order 12,866 did the rule apparently trigger?
- Does the preamble summarize the results of the agency's regulatory impact analysis for the rule? Is that regulatory impact analysis contained in a separate document? If so, find it and list the URL or otherwise describe where it can be found.

#### 5. Difference

- Briefly explain the major differences (if any) between the final rule and the last proposed rule.
- Do you think these changes represent a "logical outgrowth" of the proposed rule?

#### 6. Comments

- How many comments did the agency receive on its proposed rulemaking? Be as precise as you can possibly be.
- In general, what kinds of individuals or organizations submitted these comments?
- In brief, what kinds of concerns or issues did the comments raise? You need not (and should not) delve into detail, but you should convey, in overview, the general types of concerns raised in the comments.
- How well do you think the agency did in responding to these concerns in the preamble to its final rule?

#### 7. Comment Example

- Find one *substantial* comment filed on the rulemaking. Summarize it briefly and explain how the agency responded to it.
- Based on the agency's response or its explanation in the *Federal Register* preamble, did the agency reject the comment? Did it change its rule in any way in light of the comment? Why or why not?
- Based on what you can glean from your research, do you think the agency's response to this comment was reasonable?