

The Informal Rulemaking Process

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What is Rulemaking?

- The “agency process for formulating, amending, or repealing...
- an agency statement of general or particular applicability and future effect
- designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....”

What is a rule?

Legislative/Substantive

Imposes a binding requirement on those to whom it applies; it has the force of law

Interpretative Rule

Interprets existing statutes or rules; it tells the public what the agency thinks a statute or rule means

Policy Statement

Tells the public how the agency intends to exercise a discretionary power

Management or Procedural Rule

Two categories

- **Management or Personnel:** Involves running or supervising agency's business; concerns agency and does not affect the public
- **Organization, Procedure, or Practice:** Describes the agency's structure and functions and the way in which its determinations are made

Why is a Rule Issued?

Identification of Need for a Rule

- Statutory Mandate/Authority
 - General
 - Specific
 - Conflicting
 - Vague or problematic
- Agency identification of a problem
 - Inspector reports/agency oversight
 - Accidents, environmental problems, or other problems
 - Enforcement issues/problems
 - Requests for interpretation/exemption
 - Etc.
- Petitions from the public
- Changes in state of the art
- Policy initiatives
- NTSB or similar recommendations
- Etc.
- Role of risk assessments

What are the APA Requirements for Informal Rulemaking?

Basic Requirements for Informal Rulemaking

Simple process

- NPRM
- Public comments
- Final rule
- Exceptions

Notice of Proposed Rulemaking

- Contents:
 - Preamble
 - Rule text optional
- Comment period

Exceptions from APA Informal Rulemaking Requirements

- Military or foreign affairs functions
- Agency management or personnel, or public property, loans, grants, benefits or contracts

Exceptions from Notice and Comment Requirements

Unless otherwise required by statute, these exceptions are available:

- Good cause (“impracticable, unnecessary, or contrary to the public interest”)
- Interpretations and policy statements
- Rules of agency organization, procedure, or practice

Preamble

- Explains need and authority for rule
- Explains rule text or subjects and issues involved
- May ask questions
- Generally summarizes or provides various analyses

Logical Outgrowth Test/Scope of Notice

- NPRM must “fairly apprise interested persons” of the issues involved
- Changes may be made based on the comments received, if the public is adequately apprised of their possibility
- Logical outgrowth/reasonably anticipated

Comment period

- APA - no minimum
- But (with exceptions)
 - E.O. 12866 - 60 days
 - NAFTA implementation: proposed technical regulation - 75 days
- Can extend or reopen
- Can provide reply period

Docket

- Public Access
 - Rulemaking and supporting documents
 - Public comments
 - Ex Parte communications
 - Late comments
- Internet-access – Regulations.gov
 - All agencies
- Expanding use of electronic technology
 - Searching and sorting
 - Reply comments
 - Standard forms
 - Blogs
 - Etc.

Final Rule

- Preamble
 - Responses to public comment
 - Statement of basis and purpose
- Rule Text

Response to Public Comment

- Comments can be very helpful
- Problems
 - Assertions without data
 - Conflicting data
 - “Cross-town hypocrisy”
 - May ignore each other
- May get 10s, 100s, 1000s . . .
- May be very detailed or postcards
- Not a vote

Effective Date

- Substantive rules: not less than 30 days after publication
- Exceptions
 - Granting exemption or relieving restriction
 - Interpretative rules and policy statements
 - Good cause
- Also:
 - Implementation date
 - Compliance date
- Notice and comment needed for subsequent delay

Publication Requirements

- Legislative rules

Must be published in *Federal Register* or personally served to have effect

- Interpretative rules, policy statements and staff manuals

If not published or actual and timely notice is not provided, must be electronically available before the agency can rely on them, use them, or cite them as precedent

Exemptions from Rules

For unique circumstances not considered during rulemaking

Ex Parte Rules

- APA has no requirements for informal rulemaking
- DOT discourages ex parte communications after NPRM
- If they occur, a summary must be placed in the docket

Extras

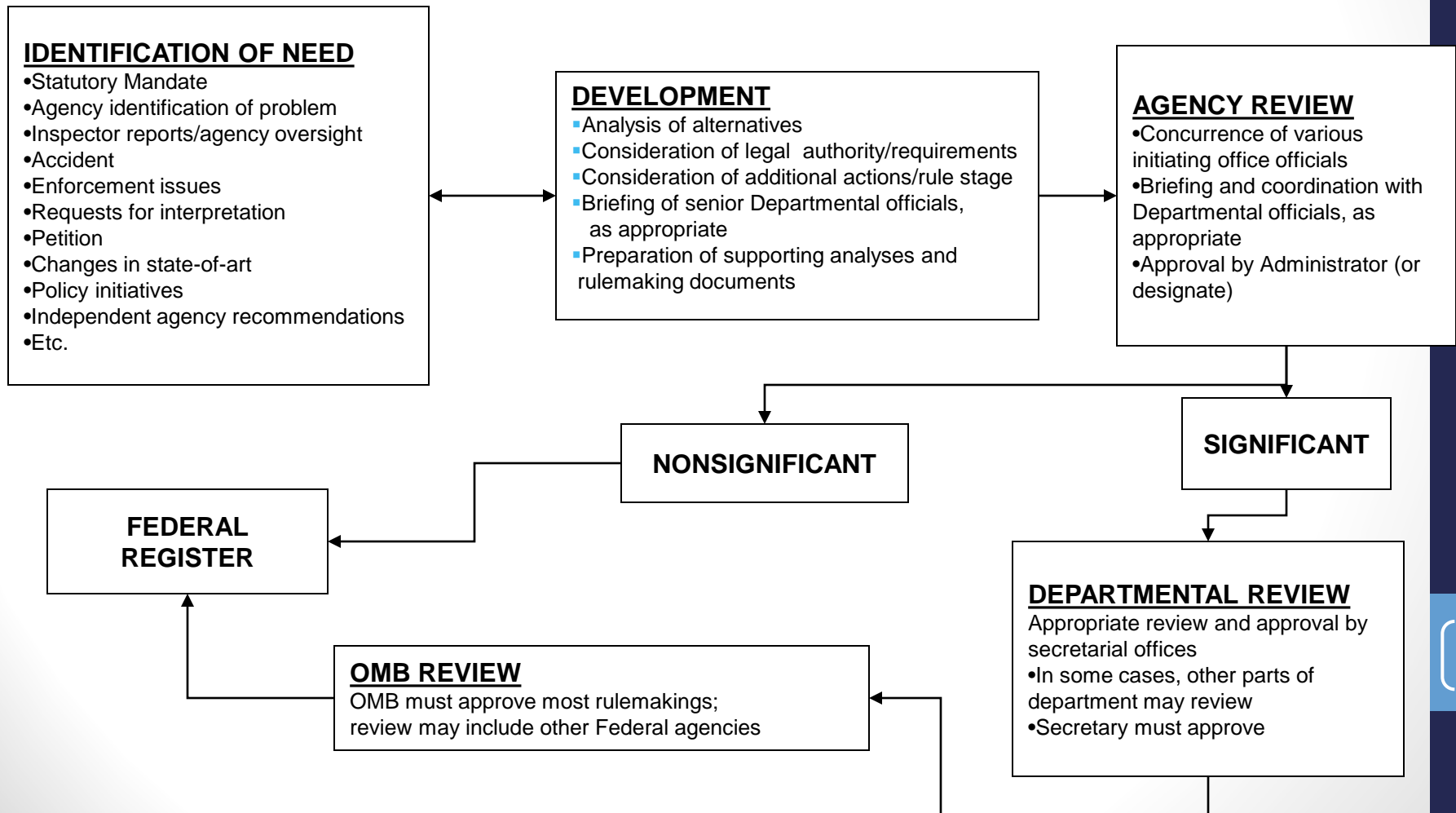
- ANPRM
- SNPRM
- IFR
- Request for comments
- Hearings
- Reply comments
- Collaborative techniques
 - Negotiated rulemaking
 - Advisory committees
 - Facilitated public meetings
 - Blogs
 - Etc.
- Also: Direct Final Rule

Other Statutes and Executive Orders

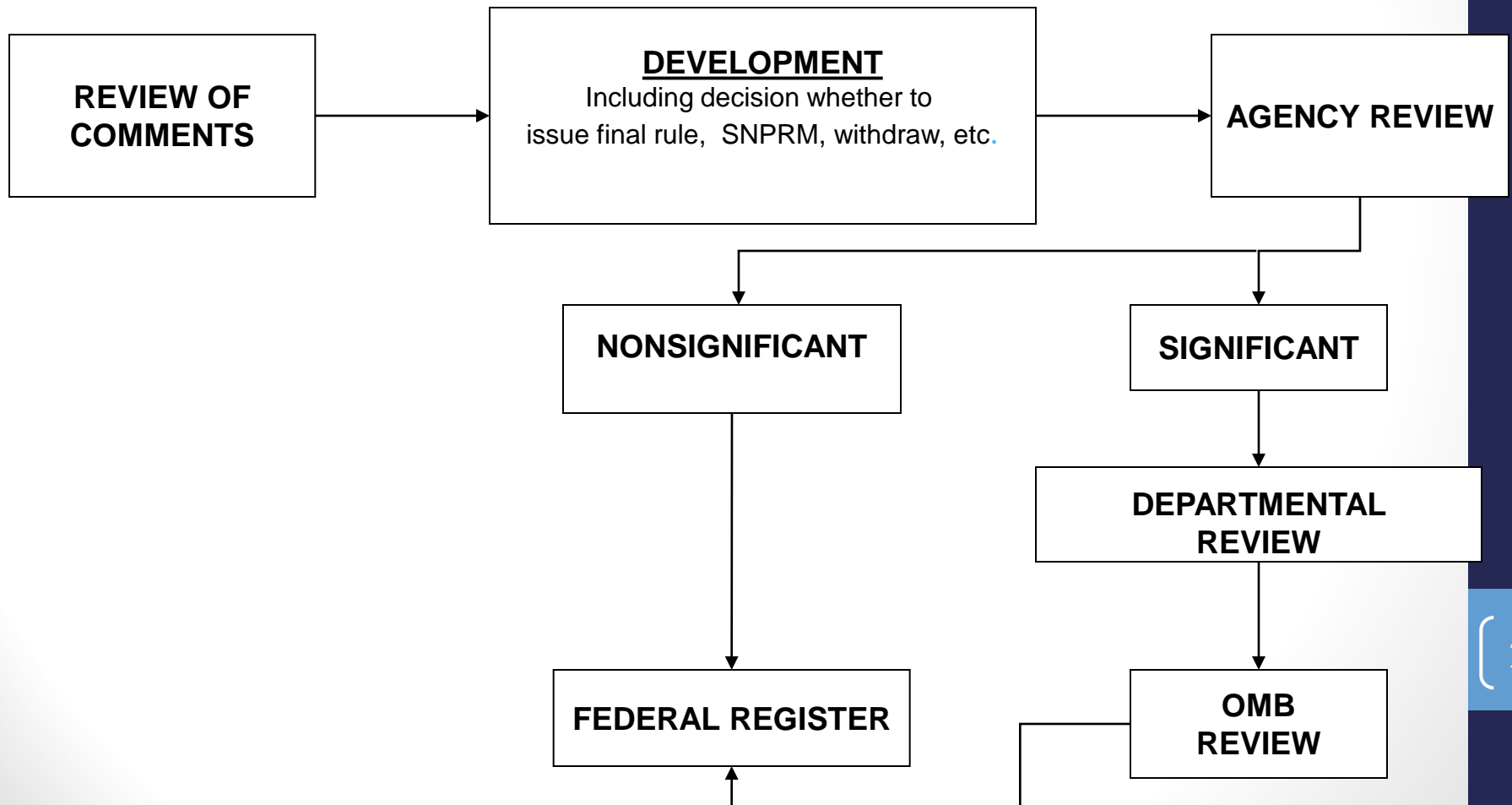
- Require agencies to consider or assess impacts on –
 - Economy
 - Paperwork burdens
 - Privacy
 - Small entities
 - State, local, and tribal governments
 - Environment
 - Trade
 - Energy
 - International obligations
 - Etc.
- Require review by OMB and others

How does the Process Work?

Rulemaking Process - Proposed Rule



Rulemaking Process - Final Rule



What Is the Role of OMB/White House?

- Significant rule review
- Submission of rulemaking document/supporting analyses
- Other agencies
- Time factors
- The issues
 - Economic analyses
 - Alternatives
 - Etc.

What Is the Role of Congress?

- Hearings
- Reports to Congress
- Meetings
- Requirements in reports and appropriations acts
- Substantive legislation
- Congressional review provisions in SBREFA

What is the Role of the Courts?

- Various statutes impose different standards, but under APA can challenge a rule because:
 - Arbitrary, capricious, abuse of discretion, or illegal
 - Unconstitutional
 - In excess of statutory authority
 - Failed to follow legal procedure
- Can also “compel action unlawfully withheld or unreasonably delayed”

For more information, see...

- [Regs.dot.gov](https://www.regulations.gov)

Conclusion