AMBIGUITY, AGENCIES, AND THE ADMINISTRATIVE PROCEDURE ACT: ANALYZING THE OSHA RULE REVISION CONCERNING AGENCY ACCESS TO EMPLOYEE MEDICAL RECORDS

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INTRODUCTION

Congress has abdicated federal power to the vast bureaucracy of federal agencies by failing to revisit the Administrative Procedure Act (the "APA") and provide clarification. Agencies have been using the ambiguous language of the APA to classify rules as nonlegislative and avoid the notice and comment process. The Occupational Safety and Health Administration ("OSHA") rule revision is only one example of how agencies hide substantive rules within the APA exemptions to forego notice and comment. This Comment focuses on the provision of the OSHA rule revision referred to as the elimination of the removal requirement. This discussion on the OSHA rule revision serves as a vehicle to exemplify the broader, more critical issue: the need for a precise definition for nonlegislative rules. A definition can shrink the loophole that agencies have been exploiting to reduce the voice of the interested public. Administrative agencies circumvent the APA when they classify rules as nonlegislative and exempt themselves from the notice and comment process even though the rule produces substantive effects. By circumventing the APA, agencies are expanding their power without allowing for public comment on the proposal. It is imperative that the problem is recognized and resolved to ensure that the public is afforded their right to participate in the federal agency rulemaking process.

Courts employ different tests to delineate between legislative and nonlegislative rules, and this inconsistency has resulted in immense litigation seeking a clear precedent or standard. The Supreme Court's refusal to offer a decision on the matter has eroded

the structural integrity of the APA and agency rulemaking.[1] When a federal agency promulgates a rule without using notice and comment procedures, the agency acts unilaterally and does not allow for public participation. Because of this unilateral action, the APA exceptions to the notice and comment requirement were designed to include only internal rules and procedures, policy statements, and interpretations of previously promulgated rules. Congress reasoned that interested parties need not be involved in the process of rulemaking when the rules only affected the agencies. Congress understood that notice and comment produced needless obstacles regarding these unilateral actions; however, Congress did not intend for these exceptions to be abused and misused. Agencies use the ambiguous language in the statute to classify rules that affect interested parties as an exception and avoid the time-consuming and expensive notice and comment process. When agencies promulgate rules in this manner, they hastily implement new rules (or rule changes) and foreclose interested parties from participating in the rulemaking process that affects their interests. This act of expediency enlarges this hole in the APA.

This Comment explores this issue described above and includes the recent OSHA rule revision as one example. Part I discusses the background, which includes a description of the APA, a general overview of OSHA, a brief synopsis of the rule revision, and an application of the APA to the OSHA rule revision. Part II presents the argument that the OSHA rule revision invades individual privacy rights. Part III exemplifies how the ambiguous language of the APA and the variety of rules have led to inconsistent results and unclear distinctions between legislative and nonlegislative rules. Part IV discusses the fate of the OSHA rule revision. Part V provides recommendations and solutions to address the identified issue. The final part concludes and reviews the argument presented in this Comment.

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[1] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (citing Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004)) ("We need not, and do not, wade into that debate here.").

I. BACKGROUND

This Comment presents the idea that federal administrative agency rulemaking is flawed and needs to be revised to accomplish the original statutory intent. The Administrative Procedure Act (the "APA") governs federal agency rulemaking. This Comment focuses on the notice and comment requirement of the APA because this provision is a metaphorical fork-in-the-road that determines the subsequent steps in the rulemaking process. This provision is also the mechanism by which agencies have been able to hide substantive rules and avoid notice and comment. This Part is included to provide proper understanding of the statutory framework and agency rulemaking procedures.

A. Administrative Procedure Act

To improve justice and prescribe fair administrative procedure, Congress passed the Administrative Procedure Act (the "APA"), which established rulemaking procedures for federal agencies.[2] Rulemaking is the "agency process for formulating, amending, or repealing a rule."[3] The APA defines a rule as an agency statement that prescribes or interprets law or describes organization, procedure, or practice of the agency.[4] Section 553 of Title 5 of the United States Code requires that agencies undergo notice and comment procedures before promulgating substantive

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[2] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559); *see also* Standard Oil Co. v. Dep't of Energy, 596 F.2d 1029, 1057-58 (Temp. Emer. Ct. App. 1978) ("The APA's rulemaking procedures 'were designed to assure fairness and mature consideration of rules of general application.'") (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969)); *accord* New Jersey v. Dep't of Health & Hum. Servs., 670 F.2d 1262, 1281 (3d Cir. 1981) ("The APA notice and comment procedures exist . . . to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.").

[3] 5 U.S.C. § 551(5).

[4] 5 U.S.C. § 551(4) ("'[*R*]*ule*' means the whole or a part of 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]") (emphasis added).

rules.[5] Notice and comment is a two-part exercise that requires agencies to allow the interested public to engage in the rulemaking process prior to enacting a rule.[6] The notice element requires that agencies publish a general notice of the proposed rule in the Federal Register.[7] The notice must include "the time, place, and nature of public rule making proceedings; [a] reference to the legal authority under which the rule is proposed; and . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved."[8] The comment element allows for interested parties to engage with the agency and voice their thoughts, opinions, concerns, arguments, etc. pertaining to the proposed rule after the required notice.[9] The agency must then consider all of the relevant presentations and publish a statement of the agency's justification for the new rule.[10] The APA designed the notice and comment process to involve and protect interested parties in the rulemaking process.[11] Furthermore, notice and comment was

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[5] *See* 5 U.S.C. § 553; *see also* Mendoza v. Perez, 754 F.3d 1002, 1020 (D.C. Cir. 2014) ("An agency is generally required by the APA to publish notice of proposed rulemaking in the Federal Register and to accept and consider public comments on its proposal."); Am. Standard, Inc. v. United States, 602 F.2d 256, 267 (Ct. Cl. 1979) ("A substantive rule is invalid if it is not promulgated in accordance with the notice requirements of the APA.") (citing Chrysler Corp. v. Brown, 441 U.S. 281, 312-316 (1979)).

[6] *See generally Standard Oil Co.*, 596 F.2d at 1057-58 ("The prior publication and opportunity for comment requirements enable 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated'.") (quoting Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969)).

[7] 5 U.S.C. § 553(b).

[8] *Id.*; *see* Forester v. Consumer Prod. Safety Comm'n, 559 F.2d 774, 787 (D.C. Cir. 1977) ("Section 553(b) does *not* require that interested parties be provided *precise notice of each aspect* of the regulations eventually adopted. Rather, notice is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process.") (emphasis added).

[9] 5 U.S.C. § 553(c) ("[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . .").

[10] *Id.* ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."); *see also* Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 814 (D.C. Cir. 1975) ("The APA requires an agency to provide the public with notice of proposed rules, an opportunity to comment upon them, and 'a concise general statement of their basis and purpose' that justifies the rules in light of the comments received.").

[11] *See* 5 U.S.C. § 553; *see also* Dow Chem., USA v. Consumer Prod. Safety Comm'n, 459 F. Supp. 378, 391 (W.D. La. 1978) ("It is also an efficient channel through which experts in the field and those affected by the proposed rules can provide information

designed for due deliberation by the agency prior to promulgating the final rule.[12]

The notice and comment process requirement 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.[13]

These exemptions were designed to offer the agency flexibility "where substantive rights are not at stake."[14] This Comment will focus on the exemptions for interpretative rules,[15] general policy statements,[16] and rules of agency organization, procedure, or practice,[17] all of which are not precisely defined within the APA.

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which may have been overlooked by the agency, can point out the abstruse effects of the proposed rules, and can suggest alternatives.") (citation omitted).

[12] Smiley v. Citibank (S.D.), N.A, 517 U.S. 735, 741 (1996) ("[T]he notice-and-comment procedures of the Administrative Procedure Act [were] designed to assure *due deliberation* . . . .") (emphasis added).

[13] 5 U.S.C. § 553(b); *see* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 21-22 (1994) ("When the document does interpret, it is an interpretive rule exempt from APA notice-and-comment requirements. When it does not interpret and has not been made binding, it is a policy statement exempt from APA notice-and-comment requirements. But where the document does not interpret and nevertheless has been made binding (albeit only as a practical matter), it is a spurious rule that should have been promulgated legislatively.").

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

[15] *See generally* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015) ("[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'") (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

[16] *See generally* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. . . . A general statement of policy . . . does not establish a 'binding norm.'").

[17] *See generally* Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980) ("A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.").

B. Occupational Safety and Health Administration

Many federal agencies misuse the APA exemptions to forego notice and comment.[18] The 2020 OSHA rule revision is included as a recent example. This background section provides context as to what and how OSHA regulates. Moreover, it details a full description of the 2020 rule revision. This contextualization will allow for an illustration of nonlegislative and legislative rules as well as exemplify the broad problem that this Comment identifies.

1. General Overview of OSHA

In an attempt to combat workplace-related injuries and illnesses, Congress passed the Occupational Safety and Health Act of 1970 ("the OSH Act" or "the Act") and created the Occupational Safety and Health Administration ("OSHA").[19] OSHA sets standards and adopts regulations to ensure and improve the safety and health of working conditions.[20] OSHA workplace safety regulations apply to most private sector employees[21] (through federal OSHA or an OSHA-approved state program[22]), federal agencies,[23] and state and local government agencies in states that have adopted OSHA-approved state plans.[24] OSHA does not cover

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[18] *See, e.g.*, Azar v. Allina Health Servs., 139 S. Ct. 1804, 1808 (2019) (U.S. Department of Health and Human Services); City of Idaho Falls v. Fed. Energy Regul. Comm'n, 629 F.3d 222, 227-30 (D.C. Cir. 2011) (Federal Energy Regulatory Commission); *Batterton*, 648 F.2d at 705-08 (U.S. Department of Labor).

[19] Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678).

[20] *See* 29 U.S.C. § 655. *See generally* Directorate of Standards & Guidance, *The OSHA Rulemaking Process*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf [https://perma.cc/25U3-DD2E] (Oct. 15, 2012) (describing agency rulemaking procedures).

[21] OSHA regulations apply to any employer employing one or more employees in the United States, D.C., or a U.S. territory. 29 C.F.R. § 1975.4 (2022); *see also* 29 U.S.C. § 668. The term "employer" under the Act refers to any person "engaged in a business affecting commerce who has employees." 29 C.F.R. § 1975.4(a) (2022).

[22] 29 C.F.R. § 1975.5 (2022); *see also* OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., 3021-06R, WORKERS' RIGHTS 5 (2017). To determine if a state has adopted an OSHA-approved state plan, see *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/stateplans/ [https://perma.cc/9XCD-QZP9] (last visited Dec. 19, 2022).

[23] 29 U.S.C. § 668.

[24] OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 22, at 5.

self-employed workers,[25] immediate family members of farm workers,[26] and workplace hazards regulated by another federal agency.[27]

The overarching general duty of an employer is to provide a safe and healthful work environment that is free from any recognized hazards and to comply with any regulations promulgated under the Act.[28] To ensure that employers are complying with the standards, OSHA has an enforcement process that includes inspections, citations, and penalties.[29] There are seven potential reasons for an OSHA inspection: (1) imminent danger situations; (2) worker fatalities; (3) hospitalizations, amputations, or losses of an eye; (4) worker complaints; (5) referrals; (6) targeted inspections of "high hazard" industries; and (7) follow-up inspections.[30] "OSHA's inspections are intended to result in the abatement of violations . . . ."[31] OSHA inspections must be conducted "in a reasonable manner" and for a reasonable duration.[32] An inspection may include an investigation of "all pertinent conditions, structures, machines, apparatus, devices, equipment and materials" as well as the reviewing of records.[33] Specifically, during compliance inspections, OSHA may review worker medical records to determine if the employer is in compliance with applicable standards and regulations.[34] OSHA

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[25] *Id.* at 6.

[26] 29 C.F.R. § 1975.4(b)(2) (2022); *see also* OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 22, at 6.

[27] 29 C.F.R. § 1975.3(c) (2022). "A two-step analysis is used to determine whether OSHA jurisdiction has been preempted: (1) whether a regulation has been promulgated by a state or federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific 'working conditions' at issue." Bush & Burchett, Inc. v. Reich, 117 F.3d 932, 936 (6th Cir. 1997) (citing Pa. Elec. Co. v. Fed. Mine Safety & Health Rev. Comm'n, 969 F.2d 1501, 1504 (3d Cir. 1992)).

[28] 29 U.S.C. § 654(a); 29 C.F.R. § 1903.1 (2022).

[29] 29 U.S.C. § 657; 29 C.F.R. § 1903.1 (2022).

[30] U.S. Dep't of Lab., *The OSHA Inspection Process*, YOUTUBE (Oct. 17, 2019), https://www.youtube.com/watch?v=HA6bixDzeLY [Perma.cc link unavailable].

[31] 29 C.F.R. § 1903.19 (2022). "Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection." 29 C.F.R. § 1903.19(b)(1).

[32] 29 C.F.R. § 1903.3(a) (2022).

[33] *Id.*

[34] *See* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. 45,780, 45,781 (July 30, 2020) (codified at 29 C.F.R. § 1913.10); *see also id.* at 45,782 ("Section 8(a) of

may also review worker medical records to gather information when revising standards and regulations during agency rulemaking.[35]

2. 2020 Rule Revision: Summary of Changes

On July 29, 2020, OSHA announced that the agency had revised the Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, amending 29 C.F.R. § 1913.10 without using notice and comment procedures, and that the changes would be effective the following day (July 30, 2020).[36] OSHA revised the rule to clarify the rule and "enhance employee privacy."[37] The rule revision also described internal procedures for obtaining and using personally identifiable employee medical information, according to the agency.[38] The announcement identified three outcomes of the rule revision: (1) transfer of approval authority from the Assistant Secretary to the Medical Records Officer (the "MRO"); (2) clarify that a written access order is now referred to as a medical access order ("MAO") and "does not constitute an administrative subpoena"; and (3) establish new procedures for "access[ing] and safeguarding of personally identifiable employee medical information maintained in electronic form."[39] OSHA explained that the rule revision was also implemented to adjust for modern data-keeping policies associated with electronic records.[40]

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the OSH Act authorizes OSHA to enter, inspect, and investigate places of employment, and section 8(b) permits OSHA to subpoena both witnesses and evidence when conducting inspections and investigations.") (citing 29 U.S.C. § 657(a)-(b)).

[35] *See id.* at 45,781.

[36] Trade Release, Occupational Safety & Health Admin., U.S. Department of Labor Issues Revised Rule Concerning OSHA Access to Employee Medical Records (July 29, 2020), https://www.osha.gov/news/newsreleases/trade/07292020 [https://perma.cc/6YZA-5GSD].

[37] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782 ("In order to enhance employee privacy, and clarify certain provisions, OSHA has determined that it is necessary to revise its regulation at § 1913.10.").

[38] *Id.*

[39] Trade Release, Occupational Safety & Health Admin., *supra* note 36.

[40] *See id.* The undertones of the announcement seem to reflect how the COVID-19 pandemic influenced the elimination of the removal requirement. *See* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782.

With the rule revision, OSHA revised some of the language of the previous regulation to adjust for changes in administrative responsibilities and to update record accessibility and safeguarding procedures.[41] OSHA performs inspections as part of its statutory purpose to ensure workers have a "safe and healthful" work environment.[42] With that responsibility, OSHA reviews employee medical information.[43] The means of access and type of information obtained are regulated by the rule revision.[44] The OSHA rule revision made five distinct changes:

(1) replaced the term "written access order" with "MAO";[45]

(2) transferred authority from the Assistant Secretary for Occupational Safety and Health (the "Assistant Secretary") to the MRO to administer and implement all § 1913.10 procedures;[46]

(3) clarified that an MAO is not an administrative subpoena;[47]

(4) eliminated the requirement that direct personal identifiers be removed from records when OSHA examines such records

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[41] *See generally* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. 45,780. For a short summary of the OSHA rule revision, see Caroline Heavey, *OSHA Revises Rule Concerning Employee Medical Records*, NAT'L SEA GRANT L. CTR.: BLOG (Aug. 11, 2020), http://nsglc.olemiss.edu/blog/2020/aug/11/index.html [https://perma.cc/84LQ-PD54].

[42] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782 (quoting 29 U.S.C. § 651).

[43] *Id.*

[44] *See generally id.*

[45] *Id.* at 45,782. An MAO is required to access personally identifiable medical information. *Id.* at 45,783.

[46] *Id.* at 45,782. The MRO is trained in "evaluation, use, and privacy protection of" employee medical information and reports directly to the Assistant Secretary. *Id.* at 45,783-84. Administering and implementing all § 1913.10 procedures include the following responsibilities: determining agency access to personally identifiable information pursuant to an MAO, inter-agency transfer of such information, and public disclosure of such information in the agency's possession, as well as authorizing agency review of certain limited information without an MAO. *Id.* at 45,783.

[47] *Id.* at 45,782. An administrative subpoena can compel the production of documents and is enforced by a U.S. District Court, whereas an MAO is for internal use and cannot be enforced in a U.S. District Court. *Id.* at 45,786.

> away from the workplace (the "elimination of the removal requirement");[48] and
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> (5) established procedures for safe access and storage of electronic records.[49]

OSHA publications related to the rule revision focus on the transfer of responsibility from the Assistant Secretary to the MRO and the procedures implemented for electronic records; however, the title appended to all the related agency documents focuses on and includes the language, "Access to Employee Medical Records."[50] Despite efforts by OSHA to redirect the focus, the major change included in the rule revision is "the elimination of the requirement that 'direct personal identifiers' be removed for OSHA's review of medical information away from a worksite."[51] The elimination of the removal requirement appears to be a substantive change to the rule, whereas the other four changes appear to be straightforward, internal procedure. This Comment focuses on the elimination of the removal requirement.

OSHA tried to argue that the change benefited employers and workers because it reduced the amount of time and space the agency needed on-site during an investigation.[52] OSHA explained

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[48] *Id.* at 45,782. OSHA claims that eliminating the removal requirement will reduce the time and physical space necessary to complete on-site inspections, thus, improving agency efficiency. *Id.*

[49] *Id.* at 45,788. Such procedures include password protections, firewalls, and encryptions. *Id.*

[50] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. 45,780; *see also* Trade Release, Occupational Safety & Health Admin., *supra* note 36; *OSHA Revises Rules on Its Access to Employee Medical Records, Adds New Section on Electronic Records*, SAFETY+HEALTH MAG. (Aug. 4, 2020), https://www.safetyandhealthmagazine.com/articles/20154-osha-revises-rules-on-its-access-to-employee-medical-records-adds-new-section-on-electronic-records [https://perma.cc/B7H7-HTK7].

[51] Katie Clarey, *OSHA Medical Records Rule a 'Mixed Bag' for Employers, Source Says*, HR DIVE (Aug. 3, 2020), https://www.hrdive.com/news/osha-medical-records-rule-a-mixed-bag-for-employers-source-says/582783/ [https://perma.cc/5U4M-LYN5].

[52] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782 ("First, since the process for determining whether there is a need for OSHA to review employee medical information will be more efficient, employers will know sooner if such a review is authorized at their worksite. Second, the elimination of the outdated requirement to remove direct personal identifiers before taking medical information off-

that the elimination of the removal requirement is "offset by new provisions designed to strengthen employee privacy."[53] Also, OSHA asserted that the procedures within the rule change were necessary safeguards because of the sensitivity of the privacy rights involved.[54] OSHA cautioned that the agency intended to limit external agency transfers and public disclosure of personally identifiable information; however, it noted that a public health purpose is a sufficient circumstance necessitating both.[55] The rule revision was implemented because the agency felt that the old rule had become "outdated."[56]

C. APA Applied to OSHA Rule Revision: OSHA's Point of View

The APA applies to federal agencies, including OSHA.[57] "The notice and comment rulemaking procedures of 5 U.S.C. [§] 553 of

site for review will reduce the amount of an employer's time and physical space needed by OSHA personnel when they visit a specific workplace. Third, the revisions will benefit employees because the procedures in § 1913.10 to protect the security and privacy of employee medical records will be strengthened, especially with regard to medical information in electronic form. Fourth, the elimination of the requirement to remove direct personal identifiers before taking medical information off-site will enhance employee privacy because the removal process always carries with it the possibility that medical information will be misidentified or mislabeled, which could result in unauthorized staff mistakenly reviewing that information. Finally, deletion of the time-consuming de-identification procedures will mean that authorized OSHA personnel can conduct follow-up consultations with employees about their health more quickly.").

[53] *Id.*

[54] *Id.* ("The procedural regulations in 29 [C.F.R. §] 1913.10 are necessary to enable the use of employee medical records by OSHA consistent with the employee's right of privacy."). Some examples of safeguards include relevance of information requested, limited access within the agency unless otherwise necessary, and electronic security measures such as passwords, firewalls, and encryptions. *Id.* at 45,787 ("OSHA believes the safeguards for electronic medical records established by this final rule, which are based on existing OSHA practices and policy, enhance privacy protection and reduces [sic] the need to remove direct personal identifiers when OSHA personnel take personally identifiable employee medical information off-site.").

[55] *Id.* at 45,785 ("For example, in order to resolve a public health problem, OSHA may need to transfer employee medical information to another federal or state agency.").

[56] *Id.* at 45,787.

[57] *See* 5 U.S.C. § 553; *cf.* Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 1466 (D.C. Cir. 1995) ("The Secretary of Labor, acting through the Occupational Safety and Health Administration ('OSHA'), has authority under the OSH Act to issue health and safety 'standards' and 'regulations' through rulemaking pursuant to the Administrative Procedure Act ('APA')."). *See generally* 29 U.S.C. § 655(b)(2) ("The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health *standard* in the Federal Register and shall afford

the Administrative Procedure Act (APA) do not apply to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'"[58] OSHA asserts that the rule revision "is a rule of agency procedure [and] practice . . . and therefore, is exempt from . . . the notice and comment rulemaking procedures of the APA . . . ."[59] OSHA claims the rule revision to be "procedural rather than substantive" and that there is "good cause" for the immediate effective date, arguing that the rule revision imposes obligations only on the agency and does "not affect employer compliance with OSHA requirements."[60] Additionally, OSHA argued that it did not impose new obligations on employers, so there was no need for notice.[61] Furthermore, OSHA relied on the response to the initial rule promulgation in 1980 to justify the revision: "[M]any participants in the rulemaking endorsed OSHA access to employee medical records without the consent of the employee for occupational safety and health purposes."[62]

II. IMPACT OF THE OSHA RULE REVISION: DIMINISHING WORKER PRIVACY RIGHTS

Congress often prefers to leave statutes open to interpretation as to be inclusive when circumstances change and innovation produces new developments, but in the case of the APA, Congress's preference for inclusivity has hindered the public's right to participate in agency rulemaking. Notice and comment procedures

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interested persons a period of thirty days after publication to submit written data or comments.") (emphasis added); 29 U.S.C. § 657(g)(2) ("The Secretary . . . shall each prescribe such *rules and regulations* as he may deem necessary to carry out their responsibilities under this Act . . . .") (emphasis added).

[58] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782 (quoting 5 U.S.C. § 553(b)(A)).

[59] *Id.* at 45,791.

[60] *Id.* at 45,782 ("The procedures set forth in § 1913.10 are internal agency procedures and do not affect employer compliance with OSHA requirements.").

[61] *Id.* ("[B]ecause it imposes no obligations on parties outside the federal government and therefore no advance notice is required to enable employers or other private parties to come into compliance.").

[62] *Id.* at 45,781 (citing Access to Employee Exposure and Medical Records, 45 Fed. Reg. 35,212, 35,218 (May 23, 1980)).

were incorporated into the APA to be a safeguard for that right.[63] As it stands now, the APA fails to achieve the intended result because of the broad applicability and interpretation of the exemptions that has created a loophole. This OSHA rule revision is only one example of the broader problem plaguing administrative law and agency rulemaking.

A. Privacy of Medical Records as a Substantive Right

The provision of the OSHA rule revision that is the focus of this Comment eliminates the requirement that OSHA personnel remove personal identifiers from employee medical records prior to taking the records off-site. The elimination of the removal requirement concerns workers' privacy rights. Within the explanation for the rule change, OSHA conceded that "substantial personal privacy interests" are involved with agency access to personally identifiable medical information.[64] Before this revision, the rule concerning agency access to employee medical records called for OSHA personnel to remove all personally identifiable information before taking employee medical records off-site.[65] The rule revision bypasses this safeguard in an effort to speed up the record review process, but it does so at the expense of employee privacy rights.

Various aspects of American jurisprudence demonstrate a universal understanding that medical records contain "intimate facts of a personal nature" and demand some specter of privacy protection.[66] For example, the Federal Rules of Civil Procedure make it more difficult to discover health reports than for discovery generally.[67] The Freedom of Information Act includes a specific exemption for medical files.[68] In *Doe v. Delie*, the Third Circuit held

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[63] Batterton v. Marshall, 648 F.2d 694, 703 n.47 (D.C. Cir. 1980) ("The legislative history of the APA *explicitly states* that due to the unrepresentative nature of an administrative agency, 'public participation . . . in the rulemaking process is *essential* in order to permit administrative agencies to inform themselves, and to afford safeguards to private interests.'") (emphasis added).

[64] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,781.

[65] *See id.* at 45,787.

[66] United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980).

[67] *Id*; *see also* FED. R. CIV. P. 26(b), 35.

[68] *Westinghouse*, 638 F.2d at 577; *see also* 5 U.S.C. § 552(b)(6).

that "the Fourteenth Amendment protects an inmate's right to medical privacy, subject to legitimate penological interests."[69] The Privacy Act of 1974 was established to protect individuals' privacy rights, particularly by limiting federal agency access to individuals' records.[70] The Health Insurance Portability and Accountability Act of 1996, or more commonly known as "HIPAA," restricts access to medical information by preventing the unauthorized disclosure of any "individually identifiable health information."[71] Privacy of personal medical records is a long-established right across various aspects of the law; thus, OSHA must recognize privacy of medical records as a substantive right and reverse the rule revision provision eliminating the removal requirement.

With regard to OSHA's access to medical records, the courts have recognized the agency's legitimate interest in the records and the employee's privacy rights; therefore, the courts have provided guidance on measures to afford the employee notice of such disclosure and time for the employee to object and protect their privacy interests.[72] There is precedent calling for the disclosure of medical records to government agencies "pursuant to a written request by, or with the prior written consent of, the individual" when there is a need to perform the agency's duties.[73] The significance of the rule revision is the elimination of the requirement of the removal of personal identifiers prior to taking employee medical records away from a workplace. The precedent calling for compliant disclosure of employee records to federal

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[69] 257 F.3d 309, 323 (3d Cir. 2001).

[70] Privacy Act of 1974, Pub. L. No. 93-579, sec. 2(a)(1), 88 Stat. 1896, 1896 ("[T]he privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies.").

[71] 42 U.S.C. § 1320d-6(a)(3); *see also* 42 U.S.C. § 1320d(6). *See generally* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

[72] *See Westinghouse*, 638 F.2d at 578. Factors to consider when determining "whether an intrusion into an individual's privacy is justified" include: (a) "the type of record requested"; (b) "the information it does or might contain"; (c) "the potential for harm in any subsequent nonconsensual disclosure"; (d) "the injury from disclosure to the relationship in which the record was generated"; (e) "the adequacy of safeguards to prevent unauthorized disclosure"; (f) "the degree of need for access"; and (g) "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Id.*

[73] Maydak v. United States, 363 F.3d 512, 520-21 (D.C. Cir. 2004) (quoting 5 U.S.C. § 552a(b)).

agencies applied to disclosure without the personally identifiable information, which is a more limited scope of information to be provided. It is evident from the rule change that OSHA is relying on this same precedent to access employee medical records off-site despite the expanded scope of information to be included. Nevertheless, with the rule revision, the expanded scope of information available to the agency off-site drastically diminishes employee privacy rights.

1. Personal Identifiers

Even when individual privacy interests are superseded by other outside interests, almost always, personally identifiable information remains protected.[74] When records contain personal identifiers, the recipient of those records will be able to connect the information received to a specific individual. Personal identifiers necessitate greater privacy coverage because they can be used to readily identify an individual.[75] Because of the readily identifiable nature of such disclosure, the OSHA rule revision diminishes employees' substantive right to privacy as it relates to their medical records. Personally identifiable information demands privacy protections that the OSHA rule revision ignores in the agency's attempt to streamline and condense its review procedures.[76]

III. AMBIGUITY, AGENCIES, AND THE APA

The OSHA rule revision disguises substantive changes beneath a cloak of internal procedures and personnel changes. It is true that some of the changes in the rule revision affect only OSHA agency personnel; however, the key alteration is agency access to personally identifiable employee information and medical records away from the worksite. If this was not the essence of the revision, then the agency would not have appended the language concerning access to employee medical records to nearly all the documents

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[74] *See, e.g.*, 18 U.S.C. § 2710(b)(1) (preventing video tape service providers from disclosing "personally identifiable information concerning any consumer of such provider").

[75] *See* Eichenberger v. ESPN, Inc., 876 F.3d 979, 984 (9th Cir. 2017).

[76] *See generally* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. 45,780 (July 30, 2020) (codified at 29 C.F.R. § 1913.10).

related to the rule revision.[77] OSHA abused the APA procedural rule exemption when the agency forewent the notice and comment process in revising this rule. The OSHA rule revision crossed the line of policy and procedure and entered the realm of substantive law. This substantive impact of the OSHA rule revision indicates that OSHA should have used notice and comment prior to implementing the rule revision. Nevertheless, OSHA did not act any differently than how any other federal agency would under the current APA procedures.

The ambiguity in the language of the APA has left the precise definitions of the notice and comment exemptions unknown. This lack of clarity has been a point of weakness in the statute, and agencies have been exploiting it. When agencies forego notice and comment procedures in rulemaking, the promulgated rule must meet one of the APA exemptions.[78] The OSHA rule revision is one example of how agencies use the broad language of the APA to avoid the time and expense of notice and comment.[79] This Part highlights how the ambiguity in the statute has resulted in multiple and various interpretations of legislative and nonlegislative rules. Furthermore, it identifies how this inconsistency proves to be a major issue within a more complex and dynamic problem.

A. Legislative v. Nonlegislative Rules

The OSHA rule revision exemplifies a larger problem within administrative law. The statutory language of the APA is ambiguous as to what qualifies as an exemption to notice and comment.[80] Nonlegislative rules are often distinguished from

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[77] *See supra* note 50 and accompanying text.

[78] *See* 5 U.S.C. § 553(b).

[79] Notice and comment also demands rational responses to the public's comments. This proves to be a critical step because if an agency cannot respond, the stage is set for a substantive attack on the new regulation as arbitrary and capricious. *See* 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."); *see also* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Such legislative regulations are given controlling weight unless they are *arbitrary, capricious, or manifestly contrary to the statute*.") (emphasis added).

[80] *See generally* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044-48 (D.C. Cir. 1987).

legislative, or "law- or policymaking" rules,[81] which "have the same effects as statutes."[82] In 1947, the Department of Justice issued a manual (the "Manual") that provided guidance as to the definitional deficiencies left in the statute and was influential with courts; however, this articulation still lacks insight as to the terms' actual meanings.[83] Courts and scholars alike have been wrestling with a consistent, workable definition or test.[84] The Supreme Court has refused to resolve the issue even though it acknowledged that it "is the source of much . . . debate."[85] As such, the precise distinction between nonlegislative and legislative rules has been unclear.[86]

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[81] Manning, *supra* note 1, at 931.

[82] Pierce, *supra* note 1, at 549.

[83] Nadav D. Ben Zur, Note, *Differentiating Legislative from Nonlegislative Rules: An Empirical and Qualitative Analysis*, 87 FORDHAM L. REV. 2125, 2130 (2019). "The Manual defines legislative rules as rules 'other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute' and 'have the force and effect of law.' The Manual defines interpretive rules as rules 'issued . . . to advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* (quoting U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)) (alterations in original).

[84] *See* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317-53 (2018); *see also* Matthew D. Goldstein, Comment, *HUD's 2016 Legal Guidance: An Administrative Dilemma*, 69 ADMIN. L. REV. 951, 968 (2017) ("Because there is no uniform test to distinguish between legislative and nonlegislative rules, there is no sure way to anticipate how a reviewing court would rule . . . ."). This debate has been paramount particularly in the IRS and in the tax law context. *Cf.* Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 265, 281-85 (2016); Rimma Tsvasman, Note, *No More Excuses: A Case for the IRS's Full Compliance with the Administrative Procedure Act*, 76 BROOK. L. REV. 837 (2011).

[85] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (citing Pierce, *supra* note 1; Manning, *supra* note 1) ("We need not, and do not, wade into that debate here.").

[86] *See* Hickman & Thomson, *supra* note 84, at 265 ("The APA does not define when a rule is interpretative as opposed to legislative, or what it means for a rule to be 'impracticable, unnecessary, or contrary to the public interest.'"); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) ("The distinction between legislative rules and interpretative rules or policy statements has been described at various times as 'tenuous,' 'fuzzy,' 'blurred,' and, perhaps most picturesquely, 'enshrouded in considerable smog.'") (citations omitted) (first quoting Chisholm v. FCC, 538 F.2d 349, 393 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976); then quoting Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974); then quoting Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 Duke L.J. 346, 352; and then quoting Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1975)); *accord* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987) ("The perimeters of the exemption for general statements of policy, like those for interpretive pronouncements, are fuzzy.").

Courts have had to review and develop their own tests to discern whether a rule is legislative (also referred to as substantive) and should have undergone notice and comment or whether a rule is nonlegislative (also referred to as procedural and interpretative) and exempt from notice and comment.[87] The following six factors are those that courts use most often to distinguish legislative rules from nonlegislative rules:

> (1) the "agency label" test, which relies on the agency's own characterization of the rule—as legislative or nonlegislative—as a guide to the rule's proper classification;
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> (2) the "clarification" test, which asks whether a rule merely provides greater clarity to an existing regulation;
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> (3) the "acting pursuant to statutory delegation" test, which assesses whether the agency has the required authority from Congress to implement legislative rules;
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> (4) the "agency binding" test, under which a rule is more likely to be deemed legislative if it has effectively limited an agency administrator's discretion;
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> (5) the "create new rights or duties" test, which assesses whether an agency has shifted the regulatory landscape by creating new rights or duties for the affected public; and
>
> (6) the "substantial impact" test, under which a rule with a significant impact on the regulated public will more readily be found to require notice-and-comment procedures.[88]

This list represents some of the common factors that courts use to make the determination as to whether a rule is legislative or nonlegislative. The agency label, clarification, acting pursuant to statutory delegation, and agency binding tests focus on the agency action, whereas the create new rights or duties and substantial impact tests focus on the rule's effect on the public.[89] The variety of factors used to decipher the definition of a nonlegislative rule

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[87] This Comment will use the term "legislative" to classify the rules that undergo notice and comment and the term "nonlegislative" to classify those that do not.

[88] Ben Zur, *supra* note 83, at 2136.

[89] *Id.* at 2144.

demonstrates the lack of clarity as to what qualifies. Moreover, it demonstrates how courts have developed skepticism about how federal agencies handle rulemaking.

1. Agency Label

There is a "presumption of procedural validity" when an agency promulgates a rule.[90] However, courts and judges differ in regard to the weight they grant to that presumption.[91] The agency label factor defers to the agency's classification of the rule, but it also creates "a rebuttable presumption that a rule is nonlegislative if an agency describes it as such . . . ."[92] The level of deference afforded differs among the circuit courts as well.[93] Another formulation of the agency label test is to look to whether the agency published the rule in the Code of Federal Regulations, which is required for legislative rules during the notice and comment process.[94] This understanding of the test still presents flaws and fails to clearly distinguish between the types of rules.[95]

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[90] *Id.* at 2137 (quoting Levin, *supra* note 84, at 290). *But see* Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988) ("The label an agency gives to a particular statement of policy is *not dispositive*.") (emphasis added) (citing Anderson v. Butz, 550 F.2d 459, 463 (9th Cir. 1977)).

[91] Ben Zur, *supra* note 83, at 2137-38.

[92] *Id.* at 2137.

[93] *Id.* ("[C]ourts across the circuits often defer to the label an agency casts on its disputed rule and afford it significant weight . . . . Other courts, however, afford little or no weight to the agency's label."). The Second Circuit views the agency label as a "starting point." *Id.* (quoting Mejia-Ruiz v. Immigr. & Naturalization Serv., 51 F.3d 358, 365 (2d Cir. 1995)). The Seventh Circuit gives "great weight" to the agency label. *Id.* (quoting First Nat'l Bank of Chi. v. Standard Bank & Tr., 172 F.3d 472, 478 (7th Cir. 1999)). The Sixth Circuit has noted that the agency label is the "most persuasive factor" in determining the type of rule. *Id.* (citing Dyer v. Sec'y of Health & Hum. Servs., 889 F.2d 682, 685 (6th Cir. 1989)). The Fifth Circuit is cautious of the agency label test: "[C]ourts should be 'mindful but suspicious of the agency's own characterization' of a promulgated rule." *Id.* (quoting Texas v. United States, 809 F.3d 134, 171 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016)).

[94] *Id.* at 2138 ("'[T]he real dividing line' between legislative and nonlegislative rules is whether the agency published the rule in the CFR.") (quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1056 (D.C. Cir. 1987)); *see also* 5 U.S.C. § 553(b) ("General notice of proposed rule making shall be published in the Federal Register . . . . [T]his subsection does not apply—to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .").

[95] Ben Zur, *supra* note 83, at 2138 ("Obviously, an agency that contends its rule is not substantive is unlikely to publish that rule in the CFR. . . . If the agency's action is

2. Clarification

The clarification factor asserts that nonlegislative rules seek to clarify statutes and rules and do not change policy or law.[96] Clarification can take the form of reminding parties of their rights and duties, providing an explanation of the law, or including policy implications.[97] The key to the clarification test is determining whether the proposed rule makes a "substantive modification."[98] A rule revision does more than clarify existing policy when it significantly alters an established practice; therefore, such a rule must be submitted for notice and comment.[99]

3. Acting Pursuant to Statutory Delegation

Acting pursuant to statutory delegation is often a threshold factor to determine "whether Congress has delegated agencies the power to issue legislative rules and, if so, whether [they] relied on that delegation."[100] Pursuant to statutory delegation means that

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in reality a substantive rule, it is no less so for remaining unpublished.") (quoting *Bowen*, 834 F.2d at 1060 (Mikva, J., concurring in part and dissenting in part)).

[96] *Id.* (citing Brasch v. United States, 41 F. App'x 574, 576 (3d Cir. 2002); Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 664-65 (D.C. Cir. 1978); Allen v. Bergland, 661 F.2d 1001, 1007 (4th Cir. 1981)); *see also* Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988) ("Rules, or policies, that 'merely clarify or explain existing law or regulations' are exempt from section 553 requirements. . . . Rules that 'effect a change in existing law or policy,' are subject to the notice and comment rulemaking requirements of section 553.") (emphasis omitted) (quoting Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986)).

[97] Ben Zur, *supra* note 83, at 2138.

[98] Cont'l Oil Co. v. Burns, 317 F. Supp. 194, 197 (D. Del. 1970) (distinguishing legislative rules as those that create "a substantive modification in or adoption of new regulations"); *see also* Cabais v. Egger, 527 F. Supp. 498, 504 (D.D.C. 1981), *rev'd*, 684 F.2d 1031 (D.C. Cir. 1982), *aff'd in part and rev'd in part*, 690 F.2d 234 (D.C. Cir. 1982) ("Only rules without a substantial impact on the operation of the statute, i.e., statements of 'clarification or explanation of an existing statute,' are exempt from APA notice and comment procedures."); *Guardian Fed. Sav. & Loan Ass'n*, 589 F.2d at 664.

[99] Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001) ("If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.").

[100] Ben Zur, *supra* note 83, at 2139 (citing Child.'s Hosp. of the King's Daughters, Inc. v. Azar, 896 F.3d 615, 622 (4th Cir. 2018)); *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

Congress enabled and authorized the agency to set standards rather than retaining the legislative authority itself.[101] Therefore, agencies without delegated authority can issue only nonlegislative rules.[102] This test fails to provide clarity as to the distinction between legislative and nonlegislative rules because it fails to consider the implications and impact of the promulgated rule, which is at the very heart of the need for the distinction.[103] If an agency does not have authority to issue legislative rules, that restriction does not prevent the agency from doing so while classifying the rule as nonlegislative.[104]

4. Agency Binding

The agency binding factor examines the flexibility the rule affords the agency to make individual determinations.[105] The agency binding factor defines legislative rules as those that limit administrative discretion or establish a binding norm.[106] Some courts have criticized this approach and called for courts to examine

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[101] Mission Grp. Kan., Inc. v. Riley, 146 F.3d 775, 784 (10th Cir. 1998) ("[W]hen Congress authorizes an agency to create standards, it is delegating legislative authority . . . . Put differently, when a statute does not impose a duty on the persons subject to it but instead authorizes (or requires—it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency.") (quoting Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 169-70 (7th Cir. 1996). *See generally* Anthony, *supra* note 13.

[102] Ben Zur, *supra* note 83, at 2139; *see also Riley*, 146 F.3d at 784 ("Provided that a rule promulgated pursuant to such a delegation is intended to bind, and not merely to be a tentative statement of the agency's view, which would make it just a policy statement, and not a rule at all, the rule would be the clearest possible example of a legislative rule, as to which the notice and comment procedure not followed here is mandatory, as distinct from an interpretive rule . . . .") (quoting *Hoctor*, 82 F.3d at 169-70).

[103] *See* Ben Zur, *supra* note 83, at 2139; *see also* S. Cal. Edison Co. v. Fed. Energy Regul. Comm'n, 770 F.2d 779, 783 (9th Cir. 1985) ("For purposes of the APA, substantive rules are rules that create law . . . pursuant to authority properly delegated by Congress.") (citing Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984)).

[104] *Cf.* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1060 (D.C. Cir. 1987) (Mikva, J., concurring in part and dissenting in part) ("Obviously, an agency that contends its rule is not substantive is unlikely to publish that rule in the CFR. . . . If the agency's action is in reality a substantive rule, it is no less so for remaining unpublished.").

[105] Ben Zur, *supra* note 83, at 2140; *see also* Sacora v. Thomas, 628 F.3d 1059, 1069 (9th Cir. 2010).

[106] Ben Zur, *supra* note 83, at 2140.

whether the limitation "adversely affects individual rights and obligations."[107]

5. Creates New Rights or Duties

Because legislative rules are said to have the effect of law, the create new rights or duties test classifies legislative rules as those that "grant rights, impose obligations, or produce other significant effects on private interests."[108] The creates new rights or duties factor requires the court to note the status quo before the rule and measure the change after its implementation.[109] Scholars have noted that it is "increasingly difficult to ascertain whether an interpretive rule that altered rights and duties crosses the line into the territory of a legislative rule."[110]

6. Substantial Impact

The substantial impact factor inquires as to the extent of the impact of the agency action on the regulated parties.[111] A substantial impact on the public relegates a rule to the notice and comment procedure.[112] If an action "did not have a considerable

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[107] *Id.* at 2141 (citing Animal Legal Def. Fund v. Quigg, 932 F.2d 920, 929 (Fed. Cir. 1991)).

[108] *Id.* (quoting Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980)); *accord* Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985) ("[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule."); *see also* Anthony, *supra* note 13, at 15 ("[I]f the duties or rights in question have not previously been legislated, any agency rulemaking effort to bindingly establish those duties or rights must be done legislatively (normally requiring the use of APA notice-and-comment procedures).").

[109] Ben Zur, *supra* note 83, at 2141; *see also* Anthony, *supra* note 13, at 20 ("[A] rule should be promulgated legislatively if it attempts to impose binding obligations or standards not already established by existing legislation.").

[110] Ben Zur, *supra* note 83, at 2142.

[111] *Id.*; *see also* Neighborhood TV Co. v. FCC, 742 F.2d 629, 637 (D.C. Cir. 1984) ("It still remains, however, to identify the 'substantive rights and interests' that may not be altered without prior opportunity for notice and comment. Certainly not every interest so qualifies, since every change in rules will have some effect on those regulated.") (citing Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)).

[112] Ben Zur, *supra* note 83, at 2142; *see also supra* note 96 and accompanying text; Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979) ("The exemption of section 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that *depart from existing practice* and have a *substantial impact* on those regulated.") (emphasis added).

impact on regulated parties," then it is more proper for an agency to forego the notice and comment process.[113] Some courts have criticized this test as another form of "judicial gloss."[114]

B. APA Factors Applied to the OSHA Rule Revision

This Section applies the aforementioned six factors to the OSHA Rule Revision. As previously noted, this Comment focuses on the elimination of the removal requirement but makes references to the other provisions to develop the argument.

1. Agency Label

Applying the agency label test to the OSHA rule revision does not help to illuminate the true essence of the rule. In the explanatory release accompanying the rule revision, OSHA proclaimed the rule revision to be nonlegislative, arguing that it was procedural in nature rather than substantive.[115] Under the agency label consideration, a court would defer to OSHA's articulation of the quality of the rule; however, the amount of deference the court affords to the agency label is inconsistent among the circuits and judges.[116] Therefore, the court in which the challenge is brought will dictate the amount of deference to be granted.[117]

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[113] Ben Zur, *supra* note 83, at 2142; *see also* McDonnell Douglas Corp. v. Marshall, 465 F. Supp. 22, 26 (E.D. Mo. 1978), *aff'd sub nom.* Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979) ("[N]otice and comment is required if the rule makes a substantive impact on the rights and duties of the person subject to regulation. If the rule does not have such an impact, it is exempt from the notice and comment requirements of the statute.") (quoting Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 669 (4th Cir. 1977)).

[114] Ben Zur, *supra* note 83, at 2144 (quoting Cabais v. Egger, 690 F.2d 234, 237 n.3 (D.C. Cir. 1982)); *see also* Energy Rsrvs. Grp., Inc. v. Dep't of Energy, 589 F.2d 1082, 1094 (Temp. Emer. Ct. App. 1978) ("The words 'substantial impact' do not appear in § 553 of the APA. They constitute an unwarranted judicial gloss on the statute misapplied in the context of these cases.") (footnote omitted).

[115] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. 45,780, 45,782 (July 30, 2020) (codified at 29 C.F.R. § 1913.10) ("The provisions in 29 [C.F.R. §] 1913.10 are rules of agency procedure and practice within the meaning of section 553(b)(A) of the APA.").

[116] Ben Zur, *supra* note 83, at 2137-38; *see also* cases cited *supra* note 93.

[117] For example, the Fifth Circuit is more likely to disagree with the agency's label than the Seventh Circuit. *See* cases cited *supra* note 93.

2. Clarification

The rule revision offers clarity and makes minor adjustments to internal personnel and nomenclature with most of the changes; however, the revision that is the focus of this Comment is beyond a point of clarification.[118] The rule provision that eliminates the removal requirement does not merely clarify the responsibilities of OSHA personnel; it alters them. By eliminating the entire task, the OSHA rule revision makes "a substantive modification" to the prior rule.[119] The prior rule offered privacy protections to personally identifiable employee information; the rule revision strips away privacy protections, substantively modifying the old rule, because it grants the agency access to personally identifiable information off-site. This provision of the rule revision is beyond a point of clarification.

3. Acting Pursuant to Statutory Delegation

Congress delegated OSHA the authority to promulgate regulations and set standards regarding workplace health and safety in Section 655 of Title 29 of the U.S. Code.[120] Therefore, OSHA was acting pursuant to statutory delegation when the agency issued the rule revision because OSHA may implement standards and regulations to further the agency's purpose, including access to information.[121] This application evinces the lack of clarity that can be gleaned by implementing this test. The results here indicate that the agency has authority to issue rules of this nature because Congress has authorized the agency to do so, but it

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[118] *See* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782 ("The final rule clarifies that a MAO does not constitute an administrative subpoena, and eliminates requirements for the removal of direct personal identifiers when OSHA personnel review medical information away from a workplace. . . . Finally, the final rule establishes new internal OSHA requirements, based on existing agency policy, for the access and safeguarding of personally identifiable employee medical information maintained in electronic form.").

[119] *See supra* note 98 and accompanying text.

[120] 29 U.S.C. § 655.

[121] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,782 ("In section 2(b) of the OSH Act, Congress declared the overriding purpose of the Act is 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.'") (quoting 29 U.S.C. § 651).

is unclear whether the reliance on such delegation produced a legislative or nonlegislative rule. Moreover, if OSHA had implemented the rule revision after completing notice and comment procedures, the rule would be within OSHA's statutory delegation.[122] It appears that courts implement this test and conclude that if an agency has not been delegated authority to promulgate legislative rules, that foregoes the possibility of such an agency acting in a legislative manner.[123] It is noted that this test is most often performed as a threshold question, but still, there are limitations with such an inquiry.[124]

4. Agency Binding

The rule revision appears to establish new expectations when gathering records from employers. Because the revision eliminated the removal requirement outright, it is binding on the agency and its personnel. In all record exchanges between OSHA and an employer following the rule revision, the OSHA agent will be able to take the medical records containing personal identifiers off-site.[125] The language of the rule revision indicates that there is a clear change in procedure that is binding on both parties during the exchange. OSHA agents must follow the new protocol to request access, gain access, and retain access to worker medical information with personal identifiers.[126] It is only under certain circumstances that the urgency overcomes the necessity of these procedural requirements.

5. Creates New Rights or Duties

Although difficult to ascertain, the OSHA rule revision appears to have altered rights and duties and crossed into the realm

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[122] *See generally* 29 U.S.C. §§ 651-655.

[123] *See* Child.'s Hosp. of the King's Daughters, Inc. v. Azar, 896 F.3d 615, 622 (4th Cir. 2018) ("When an agency relies on expressly delegated authority to establish policy[,] . . . courts generally treat the agency action as legislative, rather than interpretive, rulemaking.").

[124] *See, e.g.*, Metro. Sch. Dist. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) (finding that the "acting pursuant to statutory delegation" test "returns us to the starting point . . . —what kind of rule does the agency think it has promulgated?").

[125] *See* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,787.

[126] *Id.*

of a legislative rule. The rule revision eliminated the removal requirement, which eliminated the duty of OSHA personnel to remove all personal identifiers prior to taking records away from the workplace.[127] Ergo, the rule revision altered employees' privacy rights.[128] Prior to the rule revision, employees were protected with anonymity when the agency reviewed employee medical records off-site.[129] Now, the rule revision grants the agency access to that private information anywhere and does not provide employees a right to privacy with regard to their medical records.[130] Therefore, instead of creating a new duty for the employers, the rule revision extinguishes the duty of OSHA personnel to remove personal identifiers, which affects the rights of the employees whose records, including the personally identifiable information, are being given to OSHA.

6. Substantial Impact

Those affected by the OSHA rule revision include all workers covered by the OSH Act, which includes most private sector workers and some public sector workers.[131] The rule revision applies to all record exchanges between the agency and employers, so if the agency requests a record exchange with any employer that is regulated by OSHA, the agency's personnel may access employee medical records containing personally identifiable information outside of the employer's workplace.[132] Thus, this rule revision affects approximately 130 million workers.[133] Furthermore,

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[127] *Id.*

[128] *See supra* Section III.A.5.

[129] *See* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,787.

[130] *Id.*

[131] OSHA regulations apply to any employer employing one or more employees in the United States, D.C., or a U.S. territory. 29 C.F.R. § 1975.4.

[132] *See* Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. at 45,787.

[133] *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/data/commonstats#:~:text=Federal%20OSHA%20is%20a%20small,officer%20for%20every%2059%2C000%20workers [https://perma.cc/8TRD-TKV4] (last visited May 18, 2022) ("Federal OSHA is a small agency; with our state partners we have approximately 1,850 inspectors responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation—which translates to about one compliance officer for every 70,000 workers.").

privacy, particularly regarding medical records, is a long-established, protected right in the United States;[134] thus, introducing a rule revision that involves that privacy interest produces a substantial impact.

C. Differences in Rule Articulation

Courts across the country have been articulating different rules to answer the same questions. The lack of consistency is a result of the ambiguity in the APA. There are differences not only across the different circuits, but also within the circuits. This Section provides two examples of rule articulation from the D.C. Circuit. These examples demonstrate how a single circuit has handled issues relating to the ambiguity in the APA notice and comment exemptions and articulated different rules to resolve the issue. The first example is a recent articulation, and the second is an oft-cited articulation. Many OSHA-related cases are brought in the D.C. Circuit,[135] which is why that specific circuit was selected for these case examples. Furthermore, the OSHA rule revision was classified as a rule of agency procedure, so the case examples consider rules of agency procedure as well. The differences in rule articulation within the same circuit have resulted in a lack of clear precedent.[136]

In June 2020, the district court for the D.C. Circuit considered the APA procedural validity of a rule that the agency classified as procedural and, thus, exempt from notice and comment.[137] In making the determination, the court presented two modes of analysis to decipher whether the rule was procedural, as labeled by the agency, or substantive, as asserted by the challenger.[138] The court reasoned notice and comment procedures are to be expected when an agency promulgates a rule[139] and noted that the exceptions

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[134] *See supra* notes 66-71 and accompanying text.

[135] *See, e.g.*, Wayne J. Griffin Elec., Inc. v. Sec'y of Lab., 928 F.3d 105 (D.C. Cir. 2019); Am. Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Nat'l Mar. Safety Ass'n v. Occupational Safety & Health Admin., 649 F.3d 743 (D.C. Cir. 2011).

[136] The differences in rule articulation include an inability to state a consistent test.

[137] *See* AFL-CIO v. NLRB, 466 F. Supp. 3d 68, 73 (D.D.C. 2020).

[138] *Id.* at 88-95.

[139] *Id.* at 88 ("[A]n agency rule is essentially presumed to be substantive for the purpose of the notice-and-comment requirement, and that notice-and-comment

are to be "narrowly construed."[140] The first inquiry asks whether the rule is "directed at the agency's internal processes despite the incidental effect on the parties."[141] The second inquiry asks whether the rule is "not substantive," which reflects the presumption of procedural validity.[142] This second question turns on historical articulations of *substantive* rules from the D.C. Circuit, such as whether the rule grants rights, imposes obligations, significantly affects private interests, limits agency discretion or binds the agency, changes substantive standards, or has the effect of law.[143] The two-part inquiry examines the challenged rule from two points of view, which provides a broader understanding of the realistic implications of the rule. This analytical framework combines previous lines of inquiry to consolidate the inconsistent precedent and to streamline APA rule classification determinations. The two questions, however, overlap, and the analysis can be much of the same under either mode of inquiry.[144]

In August 1980, the D.C. Circuit considered "the difficult but familiar problem of whether a particular agency action requires notice by publication and opportunity for comment by interested parties."[145] The challenger asserted that the Department of Labor ("DOL") violated procedural requirements when promulgating the

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rulemaking is thus generally required unless a rule satisfies one of the listed exceptions.") (emphasis omitted).

[140] *Id.* at 89 (quoting N.J., Dep't of Env't Prot. v. U.S. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

[141] *Id.* at 90. "Incidental effect on the parties" refers to rules that "occasionally create expectations for regulated entities with respect to the timeframe, means, and methods by which those entities assert their substantive rights vis-à-vis the agency." *Id; see, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014); Pub. Citizen v. Dep't of State, 276 F.3d 634, 640-41 (D.C. Cir. 2002); James V. Hurson Assocs., Inc. v. Glickman, 229 F.3d 277, 282 (D.C. Cir. 2000); JEM Broad. Co. v. FCC, 22 F.3d 320, 327-28 (D.C. Cir. 1994); Neighborhood TV Co. v. FCC, 742 F.2d 629, 637-38 (D.C. Cir. 1984); Lamoille Valley R.R. Co. v. Interstate Com. Comm'n, 711 F.2d 295, 328 (D.C. Cir. 1983); Ranger v. FCC, 294 F.2d 240, 244 (D.C. Cir. 1961).

[142] *AFL-CIO*, 466 F. Supp. 3d at 92-93 ("[T]his Court considers whether the challenged parts of the 2019 Election Rule are, or are not, substantive rules as the D.C. Circuit has defined them.").

[143] *Id.* at 92-93; *see, e.g.*, *Glickman*, 229 F.3d at 280-81; Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 174 F.3d 206, 212 (D.C. Cir. 1999); Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980).

[144] *See, e.g.*, *AFL-CIO*, 466 F. Supp. at 93 ("[I]t mirrors much of what has already been said . . . .").

[145] *Batterton*, 648 F.2d at 696.

rule because the DOL did not follow notice and comment procedures prior to final promulgation.[146] The court quoted the Third Circuit and emphasized the importance of requiring notice and comment procedures.[147] Because the DOL did not use notice and comment procedures, the court considered whether the rule fit any of the three exceptions: rules of interpretation, general policy statements, or rules of agency organization, procedure, or practice.[148] With regard to rules of agency procedure, the court focused on whether the rule substantially impacted the rights of interested parties.[149] The court recognized that many internal practices often affect outside parties "in significant ways;"[150] nevertheless, the court stated that the notice and comment exemption is inapplicable when the rule encroaches upon substantial privacy rights and interests.[151] The court gleaned one central conclusion in its final determination: "The critical question is whether the agency action jeopardizes the rights and interest of parties, for if it does, it must be subject to public comment prior to taking effect."[152] With regard to general policy statements, the court concluded that those reflect the agency's future intentions and do not create rules or precedent.[153] To determine if the rule fell within the interpretative

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[146] *Id.* at 699.

[147] *Id.* at 703-04 ("As the Third Circuit articulated, 'Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.' . . . [Section 553] carves out only limited exceptions.") (quoting Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969)).

[148] *Id.* at 705-08.

[149] *Id.* at 707 ("A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.").

[150] *Id.* ("The problem with applying the exception is that many merely internal agency practices affect parties outside the agency—often in significant ways.").

[151] *Id.* at 708 ("The exemption cannot apply, however, where the agency action trenches on substantial private rights and interests.").

[152] *Id.* (footnote omitted).

[153] *Id.* at 706 ("A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in

rule exception, the court considered statutory delegation and the purpose the rule served.[154] The court stated that interpretative rules provide guidance as to the meaning of a particular aspect of a rule.[155] The court also noted that a rule that is not authorized by statutory delegation can only be an interpretative rule.[156] The *Batterton* court applied a different question (i.e., test) for each of the notice and comment exemptions. This conceptualization of the issue is like a process of elimination, presuming that an exemption applied because the rule was promulgated without notice and comment. The court focused on their idea of the primary characterization of each exemption rather than grouping all three exemptions together.

IV. FATE OF THE OSHA RULE REVISION

Agency action may undergo judicial review,[157] during which the reviewing court shall set aside unlawful agency actions.[158] Unlawful actions include those that did not follow proper procedure.[159] OSHA provisions must be challenged within sixty days of the date of promulgation to be submitted for judicial

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future adjudications.") (quoting Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974)).

[154] *Id.* at 705-06.

[155] *Id.* at 705 ("An interpretative rule serves an advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers.").

[156] *Id.* ("Where the rule at issue is not authorized by a relevant statutory delegation, it can only be considered an interpretative rule regardless of its form or scope."). This is because general policy statements are not "rules," and rules of agency organization, practice, and procedure must be provided for with statutory delegation.

[157] 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

[158] 5 U.S.C. § 706(2) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions . . . .").

[159] 5 U.S.C. § 706(2)(D) (including actions taken "without observance of procedure required by law"); *see, e.g.*, Iowa League of Cities v. EPA, 711 F.3d 844, 876 (8th Cir. 2013), *reh'g denied*, No. 11-3412, 2013 U.S. App. LEXIS 14034 (8th Cir. July 10, 2013) (vacating a "legislative rule" implemented by the EPA *without using notice and comment procedures* because it was "without observance of procedure required by law") (quoting 5 U.S.C. § 706(2)(D)).

review.[160] The OSHA rule revision was promulgated on July 30, 2020.[161] More than sixty days have passed without a challenge to the rule being raised; therefore, the statutory objection period has lapsed.

Despite the skepticism regarding the procedural validity, the OSHA rule revision is a valid rule because it was not challenged during the statutory period. The OSHA rule revision does not include a severability clause, which would allow a single provision to be severed from the remaining rule.[162] A severability clause sets a presumption of severability.[163] Absent a severability clause, there is a higher burden, and the court must determine whether the drafters would have wanted to severe the specific provision at issue from the remaining rule.[164] Severance is applied only if a court determines that severance would best serve the drafters' intention.[165] Therefore, the entire rule would have faced a challenge as a whole unless a court had determined that severance was preferable. Despite the concerns with the OSHA rule revision, time for judicial review has passed, and the rule remains effective.[166]

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[160] 29 U.S.C. § 655(f) ("Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.").

[161] Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records, 85 Fed. Reg. 45,780, 45,781 (July 30, 2020) (codified at 29 C.F.R. § 1913.10) ("This final rule is effective on July 30, 2020.").

[162] *See* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2288 (2015) ("'Administrative severability clauses,' as we call them, are provisions of administrative rules that clarify whether an agency intends for a rule to remain in effect if a court were to invalidate a portion of the rule.").

[163] *See id.* at 2297.

[164] *See id.* at 2289 ("In the absence of the severability clause, the severability decision requires a reviewing court to apply a fairly well-established doctrinal framework.").

[165] *See id.* at 2296-97.

[166] The OSHA rule revision was implemented during the COVID-19 pandemic. During this time, workers' rights groups and activists were focused on ensuring that workplaces were providing proper COVID-19 protections. *See, e.g.*, Jonathan M. Crotty, *Labor Groups Petition North Carolina for COVID-19 Workplace Safety Standard*, PARKER POE (Nov. 5, 2020), https://www.parkerpoe.com/news/2020/11/labor-groups-

V. RECOMMENDATIONS AND SOLUTIONS

This Part discusses three recommendations aimed at decreasing the misuse of the APA exemptions. The shortcomings of each of these recommendations are noted and discussed. Although there is no recommendation suggested to entirely resolve the issue, recognizing and taking steps toward mitigating the problem are crucial—that is the goal proposed by the following recommendations. Addressing the fact that the issue exists is the first step toward combating agency misuse and abuse of APA exemptions and protecting the public's rights.

A. Congress Should Revise the APA

The lack of clarity in the statute breeds abuse and misuse of the APA exemptions. Congress must evaluate the impact of such ambiguity and restructure the statute to clarify the language of the exemptions. Notice and comment should be the expected avenue of rulemaking for federal agencies, and agencies should only be exempt under specific and narrow circumstances. Congress should revise the APA to include a definition for each exemption. By clarifying what each exemption is intended to entail, Congress can reduce misuse in the future. Even if Congress revises the APA to include precise definitions of the exemptions, it is likely to use language flexible enough to withstand changing circumstances and new developments. This flexibility poses an opportunity for continued misuse of the exemptions, which is the problem the statutory revision is aimed at resolving.

B. The Supreme Court Should Establish a Test

When presented with a petition for certiorari, the Supreme Court should hear a case challenging the procedural validity of an APA rule and establish a test for deciphering whether a rule is legislative or nonlegislative (and exempt from notice and comment). The courts have justified this refusal to establish a clear test or

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petition-north-carolina-for-covid-19 [https://perma.cc/TD3V-QFYX]. OSHA implemented this rule revision during this time when groups were busy focusing on other issues, and this specific revision at issue slipped by without adequate notice. If the OSHA rule revision was implemented at a different time, then it is not certain that it would have gone unchallenged.

definition by arguing that the determination of whether a rule is legislative or nonlegislative turns on the facts and circumstances of the case.[167] If the Court were to issue useful guidance, in the form of a precise definition or standard test, for distinguishing legislative and nonlegislative rules, there would be more consistency in administrative rulemaking. The test needs to be more restrictive as to require notice and comment more often because public input is crucial to the fair administration of agency rulemaking.[168]

The Supreme Court has conceded that there is inconsistency in explanations and debate over the subject, but the Court has refused to weigh in on the matter.[169] The Court's refusal has left vast differences in approaches and inconsistencies with application. It is understandable that the Supreme Court does not want to trample on the power of agencies with an explicit definition; however, leaving the problem unresolved has resulted in a cascade of litigation without clear precedent to follow. The Supreme Court can simultaneously respect the delegation of power by Congress to agencies and ensure that proper procedures are followed during agency rulemaking. Neither are mutually exclusive, nor does one undermine the other. As a matter of judicial efficiency, this refusal has been an utter downfall as it relates to the conservation of judicial resources. Furthermore, it has been a downfall in terms of establishing a consistent expectation or result. As demonstrated in the analysis above, the different tests can produce different outcomes regarding a classification of a rule. For example, according to the agency label factor, the OSHA rule revision is a nonlegislative rule, but the substantial impact factor indicates that

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[167] Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("[A]nalogizing to prior cases is often of limited utility in light of the exceptional degree to which decisions in this doctrinal area turn on their precise facts.").

[168] *See* Brian Wolfman & Bradley Girard, *Argument Preview: The Administrative Procedure Act, Notice-and-Comment Rule Making, and "Interpretive" Rules*, SCOTUSBLOG (Nov. 26, 2014, 10:13 AM), https://www.scotusblog.com/2014/11/argument-previewthe-administrative-procedure-act-notice-and-comment-rule-making-and-interpretive-rules/#:~:text=The%20APA%20generally%20requires%20that,agency%20responds%20to%20the%20comments [https://perma.cc/7HC9-PZBQ] ("The public-comment process sometimes significantly influences the content of legislative rules.").

[169] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (citing Pierce, *supra* note 1; Manning, *supra* note 1).

the rule revision is actually legislative.[170] A combination of the factors incorporated into different formulations of tests produces even more variety and differences in the case law. Because there is no clear test or definition, this inconsistency has afflicted the American judicial system.

Even if the Supreme Court does establish a clear rule, the issue will not be wholly resolved. There is still the possibility that lower courts will not apply the test correctly and consistently. This recommendation is not a foolproof solution intended to resolve the matter completely. Nevertheless, the Supreme Court could help to clarify the distinction and prevent the misuse of the exemption by establishing a clear precedent for other courts to follow.

The *Batterton* court provides an example of a successful approach to the issue.[171] The *Batterton* court used process of elimination.[172] The court identified the hallmark feature of each notice and comment exemption: rule of interpretation, general policy statement, or rule of agency organization, practice, and procedure.[173] The court then asked whether the rule at issue matched the critical aspect of each.[174] The court then proceeded to identify which specific exemption applied to the rule at issue by using process of elimination.[175] This approach provides clarity as to the important aspect of each exemption. It also defers to the agency by presuming procedural validity. This approach provides a thorough examination of the rule and includes insight into the precise meaning of each exemption.

C. APA Factors as a Tool for Agencies

Until Congress or the Supreme Court abolishes the ambiguity associated with the APA, agencies should use the six factors previously discussed in their determinations of whether a rule should be promulgated using notice and comment (legislative) or be exempt (nonlegislative).[176] If agencies employ the six factors

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[170] *See* discussion *supra* Section III.B.
[171] Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).
[172] *See id.* at 705-08.
[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] *See supra* Section III.A.

identified, the agency can better determine if the rule revision qualifies as legislative or nonlegislative. Furthermore, the analysis can evince and support the agency determination of the rule classification upon challenge. The agency resources that would be necessary to conduct such analysis would be minimal and exceedingly less than the judicial resources necessary to litigate such a question. Even if agencies use the six factors, they are still likely to classify a rule as nonlegislative to avoid the notice and comment process because of the time and money necessary to complete those steps. Agencies might produce analysis of the rule using the six factors, but the likelihood that analysis will decrease the misuse of the exemptions is slim.

CONCLUSION

The shortcoming of the APA identified and discussed in this Comment has provided cover for administrative agencies to forego the notice and comment rulemaking procedures with rule changes that, if provided with a clear definition of nonlegislative rules, might otherwise have been required to do so.[177] As mentioned, the APA was crafted to protect the public from the expanding power of the administrative agencies.[178] The APA rulemaking scheme provides a framework for protection, but as this Comment points out, there are still holes in the foundation. These holes allow agencies to escape from the procedures aimed to safeguard the public and implement rule changes without notice and comment. These holes provide the blanket for agencies to continue to expand the scope of their power and authority.

The OSHA rule revision is one example of how agencies misuse the APA exemptions to avoid notice and comment. The OSHA rule revision disguises substantive changes beneath a cloak of internal procedure, personnel, and nomenclature changes. Agency access to employee medical records, including personal identifiers, outside of the workplace is such a substantive change that the entire rule revision should have been classified as legislative, not

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[177] *Cf.* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 96 (D.C. Cir. 2002) ("[I]f the government could skip those procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally—section 553 obviously would be eviscerated.").

[178] *See supra* note 2 and accompanying text.

nonlegislative and thus exempt. Ergo, OSHA invalidly implemented the rule revision.

The ambiguity and abuse have plagued the APA long enough. It is time that issue be addressed so that agencies can no longer affect the public's substantive rights without proper public engagement. This Comment demonstrates that the abuse of APA exemptions is a recurring problem, and that the OSHA rule revision is only one example of a wide-scale usurpation of power.