



## **Statement # 9**

### **Guidelines for Choosing the Appropriate Level of Agency Policy Articulation**

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(Adopted June 10, 1983)

The Administrative Conference continues to support the general principle, stated in Recommendation 71-3, that "agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible." Without endorsing every particular conclusion expressed therein, the Conference believes that the appended statement of its Committee on Judicial Review and the supporting report of its consultant suggesting considerations and guidelines for choosing the appropriate level of agency policy articulation will assist agencies in achieving these ends.

#### **Appendix—Guidelines**

Administrative agencies frequently must make decisions about how extensively and how clearly to articulate their policies. To assist agencies in making these difficult decisions, the Committee on Judicial Review of the Administrative Conference has identified and analyzed many of the considerations involved and offers the following guiding principles and conclusions.

In previous recommendations, the Conference has staunchly advocated the proposition that agencies should better articulate their policies. Recommendation 71-3 broadly proclaimed that "agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible." Several more narrowly focused recommendations echo this sentiment. Recommendation 70-2 declared that the Securities and Exchange Commission should "to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards [applied] in determining registration obligations in the no-action process." Similar recommendations have been directed to the Immigration and Naturalization Service in change-of-status cases (No. 71-5), to the United States Parole Commission (No. 72-3), to the Labor Department in alien labor certification decisions (No. 73-2), and to federal banking agencies (No. 75-1).

These recommendations reflect the Conference's general position favoring precision in administrative rulemaking—agencies should articulate their policies in a form that evokes a uniform interpretation in the minds of the affected parties. Such precision provides greater



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guidance to members of the public in planning their conduct, enables agency officials to control the quality and consistency of agency decisionmaking, reduces the costs of resolving disputes, provides persons threatened with adverse outcomes a more meaningful opportunity to participate in the decisionmaking process, facilitates judicial review of agency action, and facilitates political review of agency policy.

Despite these benefits, subsequent study of the above-mentioned programs, along with other case studies, suggests that there remains an ingrained resistance among some agency administrators to extensive policy articulation. In some instances, this may be due to inertia or mere neglect. But in other programs, our study suggests that the precision with which agencies articulate policies reflects conscious choice based upon a belief that specificity comes at too high a cost in regulatory complexity or inflexibility.

More specifically, an agency's choice whether to adopt a specific or vague verbal formulation can have an impact in four general areas:

—*Noncompliance costs*: the impact of the rule on the rate of compliance by the regulated population. This will be influenced by the ease with which a rule's addressee can determine how the rule will apply to his intended conduct and the likelihood, as perceived by the addressee, that the rule will be enforced in his case.

—*Misapplication costs*: the social costs resulting from overinclusiveness—application of a rule to circumstances where it is not appropriate—or underinclusiveness—failure to apply the rule to circumstances where it is appropriate. A clear rule will produce such errors if it is inaccurately drafted, including within its reach either more or fewer situations than necessary to achieve the policymaker's goals. On the other hand, a more accurate rule, if vague, may be erroneously applied in practice because it is more susceptible to misinterpretation.

—*Rulemaking costs*: the costs of obtaining and evaluating the information necessary to develop a rule or policy. Writing a precise rule usually requires considerable initial rulemaking costs. A vaguer policy may produce greater rulemaking costs later, including the need to explain decisions in individual cases and to maintain quality control mechanisms, and possibly the cost of subsequent legislative rulemaking to clarify the policy.

—*Rule application costs*: the transaction costs of enforcing the rule, which will be affected by the size of the regulatory program, the rate of compliance, the number of disputed issues, and the formality of the applicable procedures. This category also includes the resources



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expended by the regulated population in determining whether and how a rule will apply to their activities and planning for compliance.

Once it is acknowledged that the drive for increased regulatory specificity is subject to some limit, then advice-giving becomes more difficult. In the hope of assisting administrative agency policymakers to achieve the elusive optimum level of policy articulation, this statement discusses particular examples of agency policies demonstrating varying levels of precision and identifies conclusions about regulatory specificity that can be drawn from these examples.

### **Examples of Differing Levels of Agency Policy Articulation**

#### *A. The Federal Aviation Administration's Age-60 Pilot Retirement Rule*

The Federal Aviation Administration's (FAA) rule providing that no individual 60 years of age or over shall pilot any commercial flight, adopted pursuant to its statutory authority to promote flight safety, is a model of precise policy articulation. The rule is extremely clear and simple.

Since the rule was first adopted, the FAA has withstood considerable pressure to amend it. The rule has been upheld on court appeal as has the agency's absolute refusal to grant exemptions or waivers. The agency itself has frequently promoted research to determine whether a more individualized standard could be developed. However, none of these efforts have come to fruition. The most recent study concluded that there is still no better alternative than the age-60 rule.

The age-60 rule applies to a relatively small group of people whose activity is very visible, and the airlines help the FAA to enforce the rule. Thus a precise rule is not really necessary to promote compliance. It does, however, produce a considerable savings in dispute resolution costs. A discretionary retirement standard would require an elaborate procedure for determining individual cases, including expensive hearings and appeals for resolving disputes. On the other hand, the clear rule has hidden rulemaking costs—the expense of the frequent attacks on the rule and requests for waiver.

The age-60 rule carries an obvious risk of overinclusiveness, prohibiting many pilots in their 60's, who may still be fit, from flying. The FAA acknowledged this problem in adopting the rule, but noted that there is a general correlation between advancing age and deteriorating capacity to fly, and that sophisticated testing methods that would permit more individualized measurement of ability did not exist. The FAA apparently determined that the social cost of



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overinclusiveness in this case (the harm to older pilots and the cost of training replacements) is low compared with that of an underinclusive rule (the risk of airline accidents). Salary and benefit packages that take the age-60 retirement rule into account have reduced the cost of overinclusiveness.

### *B. "Safe Harbor" Rules for Resale of Unregistered Securities*

The Securities Act of 1933 prohibits the public sale of securities for which no registration statement has been filed with the Securities and Exchange Commission (SEC), but permits private offerings of unregistered securities. The resale of these unregistered securities is illegal if the seller is an "underwriter," someone who has purchased "with a view to . . . the distribution" of the security.

In implementing the "underwriter" provision, the SEC has moved from unarticulated standards to very specific ones. Formerly, the agency issued "no-action" letters, promising no enforcement action with respect to particular transactions, based on review of the individual facts. Facing increasing pressures to clarify its policy, the SEC adopted the "safe harbor" rules, under which transactions meeting five highly objective criteria are exempt from the registration requirement. Proponents of exemption for transactions not meeting the criteria must bear a substantial burden of proof. Since the SEC will no longer issue no-action letters on this subject, the safe harbor rules provide the only opportunity to resell unregistered securities without substantial risk. The rules have been revised frequently, and seem to be evolving toward a simpler test based on one of the five criteria, length of ownership.

The safe harbor rules were designed to reduce enforcement transaction costs by eliminating the need for no-action letters. Since the no-action process was efficient and simple, however, the savings for the agency may not be significant. On the other hand, the savings in legal fees to private parties hoping to resell their unregistered securities have probably been more substantial. The total savings in transaction costs have been offset somewhat by the costs of the frequent rule revisions; however, the net effect has probably been favorable.

Since the no-action process was highly centralized, the adoption of precise rules probably has not produced substantial quality control improvements. Moreover, precision is not really necessary to promote compliance. Lawyers and brokers involved in these transactions are generally "repeaters" with substantial reputational interests to protect.



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In adopting the safe harbor rules the SEC hoped to protect innocent purchasers by reducing the underinclusiveness of the existing no-action system. The original version of the rules, however, was so restrictive as to discourage capital formation and so complex as to nullify some of the intended reductions in transaction costs. With its subsequent amendments to the rules, the SEC is moving toward a better balance of precision, accuracy, and complexity.

### *C. Disability Determinations in Social Security Cases*

The size and impact of the Social Security disability rules are much greater than those of the previous examples; in 1980, 1.2 million people applied for benefits. The system for determining eligibility for disability benefits is very decentralized, including initial determinations made by state agencies and several levels of administrative and court review.

Since the program began in 1956, the definition of disability has grown increasingly precise. The Social Security Administration's (SSA) first definition of disability was short and general, enumerating some factors to be considered in making the determination and listing nine vaguely described impairments that would ordinarily be considered disabling.

A rule revision in response to a 1967 statutory amendment added a more detailed and objective "medical appendix" that defined threshold impairment levels for presumptive disability. While subsequent amendments continued this trend toward greater precision, the relationship between medical impairments and the ability to perform "substantial gainful activity" (the test of whether a claimant's disability prevents him from working) remained obscure. SSA strove to remedy this in 1978, with a five-step series of questions designed to resolve easy cases on the basis of single factors and ending with a medical-vocational grid defining relationships among four variables (exertional capability, education, age, and work experience) to predict outcomes for the most difficult cases.

Two factors have led to this trend—the high costs of processing claims in a large and growing program with a multi-level appeals process, and the difficulty of controlling subordinate decisionmakers in a highly decentralized system. The price paid for greater clarity, in rulemaking costs, misapplication costs, and complexity, has not been high. Since claimants are entitled to a clear explanation for individual decisions, SSA's initial rulemaking expenditures have saved potentially far higher costs later in the process. Although application of the rules results in some erroneous outcomes, this cost is acceptable because the misclassifications occur near the border between the disabled and the not disabled. And in this instance, the complexity of the rules does not significantly drive up rule application costs, since most



individual cases involve only a few contested issues. Thus the choice of greater precision appears sound.

#### *D. Labor Certification of Immigrant Aliens*

Under U.S. immigration law, aliens may not enter the country in order to work unless the Secretary of Labor has certified that qualified domestic labor is not available and that the employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. The Secretary initially promulgated rules containing two lists—one of undersupplied jobs for which certification would be automatic, and another of oversupplied jobs for which certification was precluded. These categories provided great clarity in the easy cases. Decisions on the "availability" of workers in unlisted occupations were based on regional office guidelines specifying the use of general labor market data for the local area.

After the labor market data approach was rejected by some reviewing courts, an overhaul of the rules in 1977 established a new availability test based on individual recruitment efforts by the prospective employer. The rules described the necessary efforts in great detail. Despite their detail, the 1977 rules raised many new questions of interpretation and were criticized by employers as too rigid and costly. The result of these complaints was another revision in 1980.

These efforts have had mixed success in reducing the program's high transaction costs. The volume of cases is quite large. While the number of applications fell after adoption of the 1977 rules and the rate of certification rose, the time spent on each case also rose, in part because of the substantive change in the availability test and in part because of the rules' increased complexity. The rules were somewhat more successful in promoting consistency in a highly decentralized system, and the 1980 amendments continued this trend.

The potential for compliance problems in this type of program is high—both workers and employers may have strong incentives to violate the law, and the regulated activity is dispersed and inconspicuous. This is an additional reason to provide clear standards.

The resulting misapplication problems have been held in check. Concern about overinclusiveness prompted some easing of the employer recruitment requirements in 1980. Although the rules have not been wholly successful at discouraging employers from making only superficial recruitment efforts, the oversupply schedule protects the most common jobs and the certification process effectively protects domestic wage rates.



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### *E. Parole Release Guidelines*

As it existed in the late 1960's, the federal parole release process was very close to a pure example of official discretion. On the basis of an interview with the prisoner, Parole Board members would decide whether to release the prisoner, offering no reasons for their decision. Implementing an extremely vague statutory standard, Board rules listed 33 very general factors to be considered in making decisions.

In 1971, the Board (which became the Parole Commission in 1976) adopted more precise guidelines for parole release. It established two indices measuring the severity of the inmate's offense and the probability of recidivist behavior and identified a range of detention periods appropriate for each combination of characteristics. By specifying a range of detention periods and permitting decisionmakers to deviate from the applicable ranges, the guidelines leave considerable room to individualize parole release decisions. Nevertheless, adoption of the guidelines represented a quantum leap in the precision of the Board's policy. The result has been praised for increasing the fairness of the parole system. The guidelines have undoubtedly improved the quality and consistency of the decisionmaking. They may also have increased the degree to which Board decisions accurately reflect the probability of future antisocial conduct, but this hypothesis cannot easily be tested.

These gains have, of course, been achieved at a price. Rulemaking costs have been high and are continuing because the guidelines have been modified frequently. By comparison, the previous approach involved no significant rulemaking costs. Nor did the guidelines significantly reduce the cost of handling parole applications. Since the cost to prisoners of applying is almost zero and the potential reward is great, almost all prisoners apply for parole, whether or not the guidelines suggest that their efforts will be futile. Moreover, the cost of decisionmaking, very low before adoption of the guidelines, has not been reduced by their adoption.

The guidelines can have little impact on compliance behavior. They do not concern behavior during incarceration, and it is unlikely that the original behavior leading to incarceration would be influenced by parole release guidelines, which are probably unknown to the potential criminal in any event.

Thus, the guidelines provide a modest gain in decisional consistency, an uncertain impact on decisionmaking accuracy, and a modest loss in rulemaking and processing costs. Their main benefit may be that they significantly increase the perception of fairness and justice



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of the parole release system—a value hard to quantify within the context of a cost-benefit study.

### *F. Bank Chartering by the Comptroller of the Currency*

The Office of the Comptroller of the Currency (OCC) grants charters to national banks following the mandate of the National Bank Act of 1864, which contains only the most general substantive standards for granting charters. Over the years, chartering policy has been alternately restrictive and liberal, depending on political and economic conditions. This history has firmly established the principle that the Comptroller retains discretionary control over entry.

Until 1976, Comptrollers made very little effort to articulate precise criteria for chartering decisions, either by rulemaking or in individual decisions. A 1976 policy statement described the Comptroller's goals in bank chartering and identified several relevant factors, but contributed only modestly to regulatory precision. Only a few factors involved anything approaching bright-line tests, and many were subjective or conclusory. Moreover, the Comptroller reserved the right to depart from the policies set forth in the statement. A revised statement issued in 1980 clarified some aspects of the policy, but simultaneously made others more obscure.

Bank chartering is an area where highly specific substantive standards may not be warranted. Accepting that the primary goal of entry restrictions is to maintain public confidence in banking by reducing the risk of failure, it is probable that *per se* rules will produce high misapplication costs, since the likelihood that new entry will cause injury depends on variable market factors and changing economic conditions.

Moreover, since the chartering rules concern themselves with the status and qualifications of applicants rather than the modification of behavior, greater precision would be unlikely to induce compliance. While clearer standards might encourage more applications by reducing the cost of applying, there are more direct ways of achieving this goal when circumstances in the banking industry warrant it.

The number of applications received is small, and the procedure for handling them informal. The courts and Congress have resisted pressures for more expensive and elaborate procedures. Thus the transaction costs of opaque standards are not high. A high degree of centralization also reduces the need for more precise rules to maintain quality control.





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Since the costs of an over- or underinclusive rule would be very high, rulemaking efforts would have to be elaborate and expensive in order to develop more specific rules that were also acceptably accurate. In the context of a system like that of bank chartering, the benefits of greater precision would probably not justify that cost.

### *G. Penalty Standards for Hazardous Materials Transportation Act Violations*

The Hazardous Materials Transportation Act of 1975 authorizes the Secretary of Transportation to designate materials whose transportation may pose safety hazards and to promulgate regulations for the safe transportation of such materials. The Act's chief enforcement provision authorizes the Secretary to impose civil penalties of up to \$10,000 per violation for knowing violations of the Act or regulations, after notice and hearing. The statute identifies factors to be considered in determining the appropriate penalty, such as the nature and seriousness of the violation, prior offenses, and ability to pay. The Secretary has delegated this enforcement authority to the units within the Department of Transportation that regulate the various modes of transportation.

The substantive regulations adopted to enforce the Act are extremely lengthy and detailed, specifying the exact method of compliance. By contrast, neither the Secretary nor the departmental units implementing the law have made much effort to control agency lawyers' charging and sentencing discretion through explicit instructions. This low level of precision has probably occurred because none of the factors that customarily lead policymakers to adopt precise rules operate with much force here. Transaction costs are low because caseloads are small and the penalties sought are usually low enough to discourage respondents from investing heavily in defensive tactics. Moreover, for four of the five departmental units, the prosecution function is concentrated within a very small group of attorneys located in a central office, and quality control has not been a problem. Reliance on regional staff has meant a larger problem maintaining consistency in Coast Guard proceedings.

Penalty standards might enhance compliance by communicating clearly the consequences of a violation. If the regulated population prefers to avoid risk, however, the uncertainty of the present situation might itself enhance compliance. In any event, since agency officials believe many violations are caused by the carelessness or ignorance of low-level employees, the cost of assuring compliance may exceed the cost of a violation. And because the probability of detection and punishment is small, even a clear penalty standard might not promote compliance significantly.



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Most important, however, the discretionary penalty judgments provide an important counterbalance to the highly objective and inevitably overinclusive substantive regulations, allowing agency prosecutors to tailor the sanction to the precise circumstances of the offense and the offender. Thus the benefits of greater precision in this case would not be adequate to justify the resulting rulemaking costs and misapplication losses.

### *H. Alien Change-of-Status Determinations*

Under the immigration laws, the Attorney General is authorized, in his discretion, to adjust the status of aliens in the United States to permanent resident status. The statute establishes fairly clear threshold criteria for the determination, such as legal admission into the United States and eligibility for an immigrant visa under applicable quotas. But the discretionary element remains vague, and the Immigration and Naturalization Service (INS), which implements the law, has done little to clarify it. While some positive and negative factors can be ascertained from reading INS decisions, there is no clear indication of how these factors will be applied in any particular case.

The generality of the standards applied to these cases has frequently been criticized for encouraging inconsistent results and political intervention. While the courts have generally upheld the broad discretion of the INS, they have done so with some reluctance.

In 1979 the INS proposed rules identifying five positive and five negative factors and some principles for applying them in individual cases. However, the factors remained vague, and the proposal offered no criteria for weighing them. INS withdrew the proposal in 1981 on the grounds that it could not anticipate everything that would be relevant in a particular case.

Although INS officials expressed the fear that rule clarification would increase litigation, the opposite seems more likely. Since applicants have a great interest in the outcome and possess multiple avenues for contesting denials, litigation costs are already high. The costs of initial rulemaking, moreover, would surely be offset by the reduced burden of explaining the reasons for decisions, and clearer standards would facilitate quality control in a decentralized system where decisions are made in regional offices.

Clearer standards might also promote compliance, although this depends on the likelihood that the regulated audience is familiar with the rules. It also depends on the extent to which the standards in question are intended to induce particular behavior. Here the



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discretionary judgment may be designed more to recognize the existence or absence of a condition or status, rather than to influence conduct.

The INS apparently concluded that the statutory scheme requires the exercise of broad discretion in order to avoid the potential costs of over- or underinclusiveness. However, the only apparent objective of the discretionary judgment that does not readily lend itself to expression in a clearer rule is that of limiting status adjustment to persons likely to make a very positive contribution to society. Even this goal could be met within the open texture provided by an unweighted, nonexclusive list of factors like that proposed in 1979. The INS rules probably could be far more precise, thus reducing costs, while still retaining the flexibility necessary to make sensible determinations.

### *1. Comparative Renewal Broadcast Licensing Standards*

The standards used by the Federal Communications Commission (FCC) to select among competing applicants for a broadcast license have remained obscure despite several major reform efforts. The Federal Communications Act and FCC regulations articulate fairly precise threshold criteria that must be met to qualify for a license. Choices among applicants who meet these criteria, however, are governed by policy statements whose efforts to clarify the applicable standards have been very modest.

These standards are particularly vague when one applicant in a comparative proceeding is an incumbent seeking license renewal. A 1970 policy statement governing these cases identified the incumbent's "past record" as the critical factor, with satisfactory service to the community entitling the incumbent to renewal regardless of the merits of the challenger's proposal.

Acknowledging the vagueness of this standard, the FCC opened an inquiry to determine whether quantitative programming standards (e.g., a certain amount of public affairs or local interest programming) should be used to define "substantial service." In 1977, after the D.C. Circuit had overturned the 1970 policy statement, the FCC closed its inquiry, concluding that quantitative program standards should not be adopted. Since that time, despite repeated criticisms and proposals, the FCC has not adopted any more specific standards for comparative renewal proceedings. Arguably, because of the variety of local needs and interests served by broadcasters, a uniform standard poses a high risk of inaccuracy. It was for this reason that the FCC concluded that quantitative programming standards would not necessarily improve broadcast service. An inaccurate rule that chilled freedom of speech, moreover, would be very



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costly. On the other hand, more precise rules might reduce transaction costs significantly. The present costs of individual hearings are very high because of the great value of a broadcast license and the formality of the procedures involved. Although the volume of hearings is low, the fact that applicants seldom challenge incumbent licensees' renewal applications may be largely a result of the imprecision of the standards and the consequent difficulty of predicting success.

The overriding factor in the FCC example is goal ambiguity. There is no national political consensus as to what constitutes "good" broadcast performance nor as to the role of government in promoting it. The agency cannot really be expected to articulate a more precise policy unless the underlying value conflict can be reduced.

### **Summary and Conclusions**

These case studies demonstrate the wide range that exists in the degree of precision with which agencies articulate their policies. The FAA's pilot retirement rule is a paradigm of clarity. The SEC's safe harbor rules, the Social Security disability definition, and the alien labor certification rules combine very clear criteria with vaguer elements. The parole release guidelines, while including a tight matrix of highly objective factors, leave even more room for the exercise of discretion. At the other end of the spectrum, the bank chartering rules, INS change-of-status policies, hazardous materials penalty standards, and FCC broadcast license renewal criteria provide very little guidance about the substantive decision factors.

The historical evolution of these policies demonstrates the prevalence of pressure to increase clarity; some agencies (INS, FCC) have strongly resisted this pressure, while others (SSA, SEC, Parole Board) have responded to it with policy revisions. On the other hand, the FAA example demonstrates that clear, simple rules can prompt pressure in the other direction, if they are perceived to be very over- or underinclusive.

The case studies demonstrate that agency policymakers should not always strive to achieve the maximum possible precision. Instead, they should decide how precisely to articulate their policies based on the nature of the regulatory program and the implications of their choices for the rate of compliance by the regulated population, the cost of rulemaking (both initially and in response to pressures to amend or waive the rule), the cost of applying the rule and of resolving disputes about its application, and the extent and impact of divergence between the outcomes actually produced by the rule and those intended.



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The examples suggest some circumstances in which a heavy investment in initial rulemaking to increase the precision of a policy is likely to be justified: (a) when potential compliance problems loom especially large; (b) when the costs of applying a rule to specific transactions are likely to be high; (c) when the high cost of initial rulemaking is offset by the reduced cost of subsequent policy explanations; and (d) when the risk of misinterpretation of a vague rule is large relative to the risk that a clear rule will be over- or underinclusive.

*Compliance Problems.* Precise rules promote voluntary compliance because they are easy to understand and to enforce (as long as they are not too complex). Consequently, agencies should consider enhancing rule precision when efforts to increase the compliance rate are likely to be most important or effective. This occurs when the rule regulates conduct, rather than status. Rules that permit a choice of whether to comply or not include those that explicitly forbid or command particular actions as well as definitional rules, like the SEC safe harbor rules, that help to distinguish between permitted and prohibited conduct.

Standards for the grant of a permission or privilege, on the other hand, often fall into the status-evaluating category; examples include the OCC's bank chartering rules and the SSA's disability definition. An exception is standards for renewal of a scarce privilege, which may have significant behavioral objectives. FCC licensees, for example, undoubtedly comply more fully with agency rules because they fear nonrenewal.

Compliance problems are exacerbated if the rule's audience is large and relatively unsophisticated. Similarly, compliance will be a problem when the expected level of evasive behavior by the regulated population is high, because compliance is expensive (as with pilot retirement) or because noncompliance is easy to conceal (as with hiring illegal aliens). In these circumstances, increased clarity will promote voluntary compliance and simplify effective enforcement against violators.

*Rule Application Costs.* Increasing a rule's clarity should reduce the costs of applying it to specific transactions, including both the resources expended by members of the regulated population in planning for compliance with the rule and the resources expended by private interests and the government in the course of enforcing the rule. When these costs are likely to be high, a precise rule will be beneficial. Rules that regulate conduct will generate significant costs of planning for compliance, particularly when they affect a large volume of transactions or transactions with a high individual value. For example, potential resellers of unregistered securities will invest more heavily in rule interpretation than employers seeking labor certification for alien workers because of the greater value of the individual transaction.



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Similarly, the higher the volume and value of regulated transactions, the higher the enforcement costs. The formality of the procedure for contesting an adverse decision will also affect the cost of enforcement. Increased clarity of rules should reduce these costs by simplifying both planning and enforcement.

*Rulemaking Costs.* Sometimes developing precise rules requires a substantial initial investment, both in research to anticipate the rule's impact and in efforts to secure agreement among participants in the rulemaking process. This investment will be offset, however, by the extent to which a precise rule reduces the demand for subsequent policy clarification. When an agency will face frequent pressure—from the regulated population, courts, or its own enforcement staff—for explanations of the applicable policy, these subsequent rulemaking costs will be high. This will occur when dispute resolution procedures are elaborate and formal and the rule is administered in a decentralized manner; the Social Security disability program is a good example.

*Misapplication.* The most powerful argument against adopting specific rules is their unavoidable over- or underinclusiveness. But misapplication costs can result from vague rules as well, when they are erroneously applied to an inappropriate person or transaction. The risk that a rule will produce unintended results exists in either case, and there is no reason to believe that a more precise rule formulation will produce more errors or more costly errors. When the cost of errors caused by misinterpretation outweighs that of errors caused by inaccurately drafted rules, precision will be preferable to ambiguity. Programs administered on a highly decentralized basis, for example, have a high inherent risk of misapplication in practice which may justify clear rules. Centralized review can reduce the errors in such a system, but is itself costly. Similarly, as in the FAA's pilot retirement rule, the risk that a rule will be inaccurate on its face may be worth taking when the cost of misapplication in an individual case (i.e., an airline accident) is especially high.

By contrast, errors resulting from inaccurate drafting are most likely to occur when the scope of the rule is broad and the conduct regulated is heterogeneous or changes rapidly over time. For example, the Comptroller of the Currency has argued that bank chartering policy must be free to adjust to unpredictable changes in the economic climate.

In any event, the mere possibility of inaccuracy should be discounted if the cost of resulting errors is low or if techniques can be devised to confine their impact. Such techniques may include provisions permitting persons subject to a rule to seek a waiver, or a hierarchical system of rules that allows the elimination of extreme cases first, reserving closer cases for



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greater scrutiny. The disability definition and the labor certification rules are examples of such hierarchical systems. Rules that permit a range of outcomes, such as the hazardous materials penalty standards, are also likely to involve less significant costs of this type than those offering only an all-or-nothing choice.

### Citations

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