

Sample Final Exam Essay Question – Answer Key

Two levels to answering this question: your ability to challenge the rule in court, and – once in court – what standard of review would apply.

I. Getting Into Court and Review of Agency Action

- a. Proposed rule – no final agency action; only proposed. But if no final rule planned, the guidance may serve as a rule-making in actuality.
- b. Standing – did your client submit comments on the proposed rule?
- c. Enforcement discretion – *Heckler v. Chaney*
- d. Does the memorandum fall within the interpretative rule exemption under APA? Or statement of general policy?
- e. If final agency action, subject to arbitrary and capricious review under 706(2)(A).

II. Standard of review

- a. *Mead* test –
 - i. interpretive memorandum satisfy the threshold test?
 - ii. multiple agencies have authority to speak – *Gonzalez v. Oregon*
 - iii. U.S. Department of Agriculture – expertise in genetic research?
- b. *Chevron* step one – does the statute speak to this direct issue unambiguously?
- c. *Chevron* step two – was the agency's interpretation reasonable?
- d. *Auer* deference – to extent that memorandum interprets agency's own regulations. But note the *Auer* deference under severe criticism by several Justices.
- e. Overall agency action – arbitrary and capricious under APA 706(2)(A)?

III. Remedy – remand for either withdrawal of guidance memorandum or re-publication as a notice-and-comment rulemaking.