

William Funk

*When is a Rule a Regulation? Marking a Clear Line  
Between Nonlegislative Rules and Legislative Rules*

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Abstract by Dipal Shah

Funk's article defines the difference between legislative and non-legislative rules. Funk maintains that legislative rules have both the force and the effect of law, whereas nonlegislative rules do not. In addition, Funk argues that a logical corollary to this difference is that legislative rules are governed by the *Chevron* deference, whereas nonlegislative rules do not possess this governance.

Funk argues that traditional tests used by legal analysts to distinguish between legislative and nonlegislative rules often fail and lead to confusing results. Funk proposes a notice-and-comment test. Funk contends the notice-and-comment test is more transparent and predictive of the same goals as the traditional tests. If the rule has gone through a notice-and-comment process, Funk argues that the agency has established the facts and rationale for the policy. This analysis should lead to the finding of a legislative rule. Funk claims this notice-and-comment method leads to a clarified understanding of the force and effect of rule-making, both legislative and nonlegislative.