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.