

Excerpt from: Another Reason to Reform the Federal Regulatory System: Agencies' Treating
Nonlegislative Rules as Binding Law

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I. THE ADMINISTRATIVE PROCEDURE ACT

In 1789, the first Congress of the United States enacted statutes creating the nation's original administrative agencies, such as the Post Office and the Treasury. n9 Subsequently, Congress has created innumerable agencies and granted them several powers, including the [*156] authority to make law. n10 Congress creates federal agencies through legislative acts, commonly known as "organic" or "enabling" statutes. n11 Through an organic statute, Congress grants an agency several powers, such as the authority to conduct adjudications, to investigate private entities, to initiate enforcement actions and to create legislative rules. n12 Each organic statute is unique, and over a century and a half, the heterogeneity between the various agencies led to inconsistency and confusion. n13 Furthermore, many members of the public lamented that it was undemocratic for administrative agencies to function without regard for public opinion. n14

In 1946, Congress passed the Administrative Procedure Act ("APA") to promote uniformity, fairness and public participation in how agencies operate. n15 For all intents and purposes, the APA is the bible of administrative law. n16 An agency must abide by both its organic statute and the APA. n17 When a court reviews an agency's actions, the [*157] court looks first to the agency's organic statute and second to the APA as the default statute. n18 When Congress drafts organic statutes, it often instructs agencies to follow certain provisions of the APA. n19 For instance, many organic statutes defer to the APA's standardized rules for rulemaking. n20

The APA describes the procedure by which agencies may create legislative rules. n21 According to the APA, to produce a legislative rule, an agency must follow a procedure incorporating public input. n22 Because they require agencies to consider public commentary, rulemaking procedures impose burdens on administrative agencies. n23 To allow flexibility, the APA provides exceptions that release agencies from following any rulemaking procedure. n24 One exception, the focal point of this Note, is for nonlegislative rules under § 553(b)(A) of the APA. n25 [*158] The following sections explain in more detail the procedures for rulemaking, and how agencies may avoid those procedures through the § 553(b)(A) exception.

A. The Rulemaking Process

Congress has three choices when establishing how agencies produce legislative rules: n26 (1) employ the "informal rulemaking" process of § 553 of the APA; (2) to use the "formal

rulemaking" process of sections 553, 556 and 557 of the APA; or (3) to employ unique rulemaking procedures described in the organic statute itself. n27 The majority of the time, Congress instructs the agency to employ the informal rulemaking process. n28

The key elements of informal rulemaking--also known as "notice-and-comment"--are that before issuing a legislative rule, an agency must notify the public of the proposed rule, accept commentary on the proposal and respond to that commentary. n29 Because of [*159] the provisions for public participation, informal rulemaking generally is time-consuming and arduous for agencies. n30

Even more extensive and elaborate than informal rulemaking is formal rulemaking which, resembling a trial, includes live testimony and cross-examination. n31 Unique rulemaking procedures vary, but tend to be less formal than formal rulemakings and more formal than informal rulemakings. n32 If Congress adopts a statute creating an agency but does not specify whether the agency has the authority to create rules, the presumption is that the agency has the authority to promulgate rules and that it may do so through the informal § 553 process. n33 If an organic statute empowers an agency to promulgate rules, but does not clearly describe through which process, the default presumption is to employ the § 553 informal process. n34 Whether an organic statute prescribes informal, formal or unique rulemaking procedures, the APA provides for an exception from such procedures. n35

n9 See, e.g., 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 7 (3d ed. 1994); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 4 (4th ed. 1998); J. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-89, at 187-92 (1935).

n10 See *United States v. Grimaud*, 220 U.S. 506, 517 (1910) (noting that Congress may delegate rulemaking authority to agencies); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 678 (D.C. Cir. 1973) (upholding FTC's authority to create legislative-type rules); DAVIS & PIERCE, supra note 9, at 6 (size and scope of agency activity has increased during every period of U.S. history); MASHAW ET AL., supra note 9, at 4-6, 15 (noting that Congress has created many agencies and delegated to them rulemaking authority and other powers).

n11 See MASHAW ET AL., supra note 9, at 56 (stating: "virtually all agency action begins with a statute"); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 35, 220 (1985) (noting that enabling statutes, also referred to as "organic," convey powers to agencies); Stephen F. Williams, The Era of "Risk-Risk" and the Problem of Keeping the APA up to Date, 63 U. CHI. L. REV. 1375, 1384 (1996). Statutes, however, are not the only means by which an agency comes into being. See MASHAW ET AL., supra note 9, at 12. Presidential executive orders have created many federal agencies, such as the Environmental Protection Agency and the Army Corps of Engineers. See *id.*

n12 See Administrative Procedure Act, 5 U.S.C. §§ 551, 553-557 (1994); MASHAW ET AL., supra note 9, at 13-15.

n13 See JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 150-51 (1977) (noting the growth of administrative state fostered fragmentation of policy making).

n14 See *id.*; MASHAW ET AL., supra note 9, at 9.

n15 See 5 U.S.C. §§ 553-557 (codifying method for rulemaking and for judicial review of agency action); *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993) (noting that the APA invests unrepresentative agencies with public participation and fairness); MASHAW ET AL., supra note 9, at 148 (noting that the APA systematized agency procedures); U.S. DEP'T OF JUSTICE, supra note 3, at 9 (noting that the purposes of APA are to provide for public participation, public awareness, uniformity and judicial review of agency actions). For a history of the APA, see generally Peter L. Strauss, Changing Times: the APA at Fifty, 63 U. CHI. L. REV. 1389 (1996).

n16 See 5 U.S.C. §§ 551, 553-596, 701-706; MASHAW ET AL., supra note 9, at 148; U.S. DEP'T OF JUSTICE, supra note 3, at 9-10.

n17 See MASHAW ET AL., supra note 9, at 148; U.S. DEP'T OF JUSTICE, supra note 3, at

9-10.

n18 See MASHAW ET AL., supra note 9, at 459; PIERCE ET AL., supra note 11, at 37; U.S. DEP'T OF JUSTICE, supra note 3, at 9-10.

n19 See MASHAW ET AL., supra note 9, at 459.

n20 See id.

n21 See 5 U.S.C. § 553. Courts tend to treat interpretative rules, policy statements, guidelines and their ilk as virtually the same. See *Community Nutrition Inst. v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987) [hereinafter "CNI"]; see also *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 93-94 (D.C. Cir. 1997) (stating that "further confusing the matter is the tendency of courts and litigants to lump interpretative rules and policy statements together in contrast to substantive rules, a tendency to which we have ourselves succumbed on occasion."). In the last few years, the District of Columbia Circuit Court of Appeals has stressed the differences between interpretative rules and policy statements. See *Hudson v. Federal Aviation Admin.*, 192 F.3d 1031, 1036 (D.C. Cir. 1999); *Syncor*, 127 F.3d at 94. Some legal scholars have analyzed all nonlegislative rules as being similar, while others have found interpretative rules and policy statements to be quite distinct. Compare Robert A. Anthony, Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?, 41 *DUKE L.J.* 1311, 1323-27 (1992) [hereinafter Interpretative Rules] (analyzing interpretative rules and policy statements as completely different legal instruments), with Ronald M. Levin, Nonlegislative Rules and the Administrative Open Mind, 41 *DUKE L.J.* 1497, 1499 (1992) (stating: "the proper distinction to be drawn here is between legislative rules . . . and nonlegislative rules . . ."). This Note will not explore extensively all of the nuances between the two types of nonlegislative rules.

n22 See, e.g., 5 U.S.C. §§ 553, 556-557; *White*, 7 F.3d at 303.

n23 See Anthony, Interpretative Rules, supra note 21, at 1319; Richard M. Thomas, Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance, 44 *ADMIN. L. REV.* 131, 134 (1992).

n24 See 5 U.S.C. § 553(a), (b)(A), (b)(B).

n25 This Note will refer to the statutory provision as "5 U.S.C. § 553(b)(A)." Because the statute's format is ambiguous, however, many courts and scholars refer to the exception as "5 U.S.C. § 553(b)(3)(A)." See, e.g., *CNI*, 818 F.2d at 945; Elizabeth Williams, What Constitutes "Interpretative Rule" of Agency so as to Exempt Such Action From Notice Requirement of Administrative Procedure Act (5 U.S.C.A. § 553(B)(3)(A)), 126 *A.L.R. FED.* 347, 347 (1995). Most authorities, however, refer to the exception as falling within 5 U.S.C. § 553(b)(A). See, e.g., *Thomas v. New York*, 802 F.2d 1443, 1447 (D.C. Cir. 1986); Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 *DUKE L.J.* 381, 381 n.5 (1985); Daniel A. Kracov & Robert P. Brady, Food and Drug Administration Advisory Opinions and Guidance Documents After *Community Nutrition Institute v. Young*, 48 *FOOD & DRUG L.J.*

47, 47 n.1 (1993).

Other rules exempted from § 553 rulemaking requirements include rules relating to the military, foreign affairs, agency management, agency personnel, public property, or when there is good cause for an agency to avoid rulemaking procedures. See 5 U.S.C. § 553(a), (b)(B). This Note will not discuss these other exceptions.

n26 See 5 U.S.C. §§ 553, 556-557; MASHAW ET AL., supra note 9, at 459.

n27 See 5 U.S.C. §§ 553, 556-557; MASHAW ET AL., supra note 9, at 459.

n28 See 5 U.S.C. §§ 553, 556-557; DAVIS & PIERCE, supra note 9, at 288; MASHAW ET AL., supra note 9, at 459; Andrew F. Popper, *Administrative Law in the 21st Century*, 49 *ADMIN. L. REV.* 187, 191 (1997).

n29 See 5 U.S.C. § 553. See generally DAVIS & PIERCE, supra note 9, at 287-375; Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 *TULSA L.J.* 185, 185-201 (1996). To execute informal rulemaking, an agency must undergo numerous actions. See 5 U.S.C. § 553; PIERCE ET AL., supra note 11, at 321. First, the agency must publish a notice of proposed rulemaking in the government's official publication, the Federal Register. See 5 U.S.C. § 553(b); Federal Register Act, 44 U.S.C. §§ 1501-1511 (1994); *DeBraun v. Meissner*, 958 F. Supp. 227, 228 (E.D. Pa. 1997); OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT* 3-4 (Jim Wickliffe & Ernie Sowada eds., rev. 1992). The notice of proposed rulemaking includes the actual terms or the substance of the proposed rule and the legal authority behind it. See 5 U.S.C. § 553(b); DAVIS & PIERCE, supra note 9, at 298-99. Private parties may submit commentary to the agency. See 5 U.S.C. § 553(c); DAVIS & PIERCE, supra note 9, at 299-300. The agency considers the commentary then publishes a final rule in the Federal Register. See Freedom of Information Act of 1966, 5 U.S.C. § 552(a)(1)(D) (1994); 5 U.S.C. § 553(c); OFFICE OF THE FEDERAL REGISTER, supra, at 4; PIERCE ET AL., supra note 11, at 321; see also *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1016, 1019-20 (3d Cir. 1972) (noting that the final rule must resemble the proposed rule enough so that public had opportunity for meaningful comment). When the agency publishes the final rule, the agency must address the significant commentary in a "concise general statement" of the rule's basis and purpose. See 5 U.S.C. § 553(c); *Reyblatt v. United States Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983); *PPG Indus., Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980); see generally DAVIS & PIERCE, supra note 9, at 309-20. The duration between publishing a notice of proposed rulemaking and issuing the final rule ranges, but can last a year or more. See OFFICE OF THE FEDERAL REGISTER, supra, at 7. This procedure exists to ensure the public has an opportunity to participate in agency action. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *Tindal*, 717 F.2d at 885; *American Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980); PIERCE ET AL., supra note 11, at 321; U.S. DEP'T OF JUSTICE, supra note 3, at 9.

n30 See 5 U.S.C. § 553; Anthony, *Interpretative Rules*, supra note 21, at 1319; Thomas, supra note 23, at 134.

n31 See 5 U.S.C. §§ 553, 556-557; MASHAW ET AL., supra note 9, at 459-60.

n32 See MASHAW ET AL., supra note 9, at 459; PIERCE ET AL., supra note 11, at 330-31.

n33 See, e.g., *National Petroleum*, 482 F.2d at 673-98 (presuming agencies have rulemaking authority); MASHAW ET AL., supra note 9, at 459.

n34 See *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 337 (noting that when the organic statute is ambiguous, it is appropriate to presume the agency may employ § 553 informal rulemaking rather than §§ 553, 556-557 formal process); MASHAW ET AL., supra note 9, at 459.

n35 See 5 U.S.C. § 553(b)(A).