The APA's informal rulemaking process is simple and flexible, consisting of only three procedural requirements, although additional procedural and analytical requirements imposed by Presidents, Congress, and courts have made the process more complex. Under the APA, first, the agency must give prior *notice,* which is usually accomplished by publication of an item in the Federal Register. The notice must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved," as well as a reference to the legal authority for issuing the rule and information about the opportunities for public participation. 5 U.S.C. § 553(b). After publication of the notice of rulemaking, the agency must "give interested persons an opportunity to participate" through *submission of written comments* containing data, views, or arguments. 5 U.S.C. § 553(c). The agency is not required to hold any oral hearings under this section; it has discretion to decide whether interested persons will be allowed to submit testimony or to present oral argument to the decisionmakers. Finally, after the agency has considered the public comments, it must issue with its final rules "a concise general *statement of . . . basis and purpose.*" Id. This statement is often referred to as the "preamble." Reviewing courts expect the agency to spell out in detail its reasons for issuing a rule and also to "consider and respond to significant comments received during the period for public comment." Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015). Thus, statements of basis and purpose have become increasingly lengthy in modern practice. See Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (statement must be complete enough to enable the reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did").

Advances in electronic technology have turned the process into what is called e-rulemaking, with virtually all agencies incorporating use of the Internet into their notice-and-comment process. At most agency websites, members of the public can find notices of pending rulemaking proceedings, access background materials, submit on-line comments, and read and respond to comments filed by others. Congress encouraged this sort of "electronic docketing" in § 206 of the E-Government Act of 2002, Pub. L. No. 107–347, 44 U.S.C. § 3501 note. The culmination of these efforts has been the creation of a single portal for comments in pending rulemakings to all the major regulatory agencies at www.regulations.gov. Major benefits of this process include the ease of commenting for interested persons all over the world, and the accessibility of comments already submitted. But with this increased accessibility comes certain challenges as well. Paper comments must be scanned and uploaded, comments containing copyrighted material, confidential business information, and personal private information must be handled more carefully.

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Whether conducted on-line or off-line, the notice-and-comment rulemaking procedures spelled out in the APA provide an efficient means by which administrators can acquire information and reach a prompt decision. From the point of view of a party who opposes a particular rule, however, the procedures may seem much less fair than trial-type hearings, where parties enjoy extensive rights to know and challenge opposing evidence. The APA informal rulemaking provisions do not expressly require the agency to expose its factual, legal, and policy support to public criticism. Unless a challenging party is able to obtain

internal agency documents under the Freedom of Information Act, see pp. 155–164 supra, she may not be able to discover the agency's supporting evidence and analysis until the rule has been issued and an action has been brought in court to challenge its validity. Consequently, informal rulemaking may produce inaccurate or misguided decisions if the agency is not sufficiently rigorous or self-disciplined in gathering and analyzing information. For these reasons, regulated industries and other constituency groups have often sought additional procedural safeguards in administrative rulemaking. One strategy they have used is to attempt to invoke the APA's formal rulemaking procedures.

c. The Logical Outgrowth Test. Naturally agencies' final rules may differ from their proposed rules, given the purpose of notice and comment. If, however, the final rule differs significantly and "the interested parties could not reasonably have anticipated the final rulemaking from the draft [rule]," this creates a 326

fair notice problem. American Water Works Ass'n v. EPA, 40 F.3d 1266, 1275 (D.C. Cir. 1994). The courts have fashioned a test to address such challenges: whether the final rule is a "logical outgrowth" of the proposed rule on which it solicited comments. In Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985), the USDA proposed changes in a food donation program to eliminate certain foods with high sugar content. The notice mentioned fruit juice as one such food. After receiving some comments suggesting the additional elimination of flavored milk, USDA added that change to the final rule. The Chocolate Manufactures Association protested that it had not been given any notice that such an idea was being considered and that it was not a logical outgrowth of what USDA had proposed. The court agreed and remanded the rule. The Supreme Court adopted the logical outgrowth test in Long Island Care at Home, Ltd. v.

Coke, 551 U.S. 158 (2007), but it did so in a rather undemanding way—finding that the Labor Department did not violate the APA when it proposed a rule extending overtime protection to certain employees, and then changed the final rule to exclude those employees. Nevertheless, an agency still risks reversal when it adopts a final rule that is the exact opposite of the rule it originally proposed. See, e.g., Allina Health Services v. Sebelius, 746 F.3d 1102 (D.C. Cir. 2014).

d.Formal Rulemaking. Section 553(c) of the APA contains an exception to the general principle that administrative rulemaking requires, at most, a notice-and-comment process. It states that "[w]hen rules are required by statute to be made on the record 327

after opportunity for an agency hearing," the agency must follow sections 556 and 557 of the APA—that is, it must afford most of the procedures required in formal adjudication. Thus, when some other statute (usually the one that delegates rulemaking authority) directs the agency to do so, it must conduct a trial-type hearing and provide interested persons with an opportunity to testify and cross-examine adverse witnesses before issuing a rule. (See chart on p. 249.) This process is traditionally called "rulemaking on a record" or "formal rulemaking." (It should be noted that as informal (notice-and-comment) rulemaking has become more complex, many popular accounts in the media refer to it, confusingly, as "formal rulemaking," usually in contradistinction to non-binding guidance.)

Since legislative drafters are often not attuned to the nuances of the APA, the relevant statutes may be ambiguous with respect to whether Congress intended the agency to use formal or informal rulemaking. This was the situation that the Supreme Court encountered in United States v. Florida East Coast Ry., 410 U.S. 224 (1973). The

statute merely provided that the Interstate Commerce Commission "may, after hearing," issue rules establishing incentive per diem charges for the use of freight cars. The protesting railroad argued that this language required the ICC to follow the APA's formal rulemaking procedures, and the legislative history did tend to support this conclusion. But the Supreme Court held that notice-and-comment rulemaking would suffice; although a statute did not have to track verbatim the APA phrase "on the record after 328

opportunity for an agency hearing" in order to trigger the formal rulemaking requirements, a clear expression of congressional intent was necessary. In effect, the *Florida East Coast* decision created a strong presumption in favor of informal rulemaking.

Although the point was not openly discussed in the opinion, the *Florida East Coast* decision may be based upon a belief that trial-type hearings are generally not desirable in rulemaking. Commentators have criticized formal rulemaking as a costly, cumbersome process that contributes little to the quality of decision. The experience of the FDA, which was required to use formal rulemaking in some of its regulatory programs, is often cited as illustrative. In the notorious Peanut Butter rulemaking, for example, the parties consumed weeks of hearing time and thousands of pages of transcript so that experts could be cross-examined on such issues as whether peanut butter should contain 87 or 90 percent peanuts. See Corn Products Co. v. FDA, 427 F.2d 511 (3d Cir. 1970). Another FDA formal rulemaking dealing with vitamin supplements was an even longer exercise in futility. After it had held 18 months of hearings, the agency lost on appeal because it had unduly restricted cross-examination of a government expert. National Nutritional Foods Ass'n v. FDA, 504 F.2d 761 (2d

Cir. 1974). In other agencies, the costs and delays associated with formal rulemaking led to the virtual abandonment of regulatory programs. Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 Cal. L. 329

Rev. 1276 (1972). Against the background of this experience, the Supreme Court's reluctance to conclude that an ambiguous statute required formal rulemaking is understandable. Today, formal rulemaking has been nearly abandoned in federal agency proceedings.

Even when a statute does plainly require formal rulemaking, the APA permits some departures from the procedures used in formal adjudications (described in Chapter 7). The most notable difference is that the strict separation of functions requirements of § 554(d) do not apply. Decisionmakers in a formal rulemaking are free to consult with staff experts throughout the agency, including those who were responsible for presenting the agency's position at the hearing. Unlike adjudications, rulemaking proceedings are generally not accusatory; consequently, there is less need to isolate the decisionmakers from a potentially adversary staff in order to assure fairness to the accused. Also, in formal rulemaking the agency may substitute written submissions for oral direct testimony and may forego the ALJ's initial or recommended decision. Id. §§ 556(d), 557(b). However, the § 557(d) ban on ex parte contacts with outsiders does apply.

2. JUDICIALLY IMPOSED PARTICIPATION RIGHTS

In the late 1960s, as rulemaking became an increasingly important form of administrative decisionmaking, dissatisfaction with the rulemaking 530

procedures provided by the APA began to spread. Informal rulemaking was simple and efficient, but it gave interested persons few rights to know and contest the basis of a proposed rule. Formal rulemaking, on the other hand, provided abundant opportunities to participate and to challenge the agency's proposal, but at the cost of near paralysis. As these shortcomings became more apparent, courts, commentators, and legislators attempted to develop intermediate procedural models that would permit effective public participation in rulemaking while avoiding the excesses of trial procedure. These compromise procedures were generally described as "hybrid rulemaking."

Reviewing courts were among the most active proponents of hybrid rulemaking procedures. Although constitutionally based notions of fundamental fairness seemed to underlie this development, the courts generally did not rest their holdings squarely on the Constitution, doubtless because of the traditional understanding that the due process clause has little application in rulemaking cases. Nevertheless, they readily found a variety of other legal bases for imposing hybrid rulemaking procedures. Inartful or ambiguous legislative drafting sometimes provided an opportunity for creative judicial interpretation. For example, in Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973), the court held that the FPC had to employ hybrid procedures, including evidentiary hearings on some contested issues, in setting rates to be charged by pipelines transporting certain kinds of hydrocarbon products. The holding was based on a 331

statute providing that courts should review these rules using the substantial evidence test (a standard of review normally associated with formal proceedings).

In other instances, the courts reinterpreted the APA provisions governing