virtually any significant rule can have a substantial impact. Friedrich v. Secretary of HHS, 894 F.2d 829 (6th Cir. 1990). Even in today's more restrained legal environment, however, the exemptions for guidance documents continue to generate confusion and extensive litigation.

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A *general statement of policy* states how the agency intends to use its lawmaking power in the future but does not attempt to bind anyone immediately. The APA exempts these pronouncements from public procedure because they do not, in themselves, alter anyone's legal rights. In a subsequent proceeding, the agency cannot cite the policy statement as settling any issues; opposing parties have a right to be heard as though the statement had never been issued. The court found this exemption applicable in Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974), in which the Commission had tentatively endorsed a particular set of priorities for allocating natural gas in the event of a shortage, but had indicated that in later proceedings it would give further consideration to its suggested approach, in light of any counterarguments presented by companies that favored alternative approaches. Thus, the exemption applies to a pronouncement that merely provides a starting point for the exercise of discretion. Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18, 58–60 (D.C. Cir. 2002); American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987).

However, courts do not always take an agency's representations as to its intentions at face value. If the language of the statement, or the way in which the agency implements it, suggests that the agency will not give opposing parties a genuine opportunity to reopen the issues, the court may conclude that the agency

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is trying to give the statement the force of law, making notice and comment essential. Courts often ask whether the document is being used in a manner that makes it binding "as a practical matter." 314

General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002). That showing can be made by pointing to mandatory language in the statement, CropLife America v. EPA, 329 F.3d 876 (D.C. Cir. 2003), or to the agency's actual course of conduct in implementing the statement. United Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994); McLouth v. Steel Prods. Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988). Although these cases, which apply the policy statement exemption narrowly, serve a useful purpose insofar as they promote public input in agency decisionmaking, they also have a worrisome side. The public has a vital interest in knowing what an agency's discretionary policies are. If statements disclosing those policies are too readily held to trigger notice-and-comment obligations, agencies may simply decide to issue fewer advisory statements.

In a related line of cases, courts have found that a document fell outside the policy statement exemption because of its binding effect on *agency personnel*. A well-known example was a Department of Homeland Security memorandum that set forth a program under which certain undocumented immigrants could receive a temporary reprieve from the threat of deportation. The Fifth Circuit upheld a preliminary injunction against the program on the basis that it should have been issued after notice and comment. The court rejected the defense that the memo was a mere policy statement. Although the memo on its face provided for department staff to implement the program using case-by-case discretion, the court believed that, in practice, the staff would allow relief routinely. Texas v. United States, 809 F.3d 134 (5th 315

Cir. 2015), aff'd by equally divided Court, 136 S. Ct. 2271 (2016); see also Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987). Such holdings have been criticized on the basis that they may impair the ability of agency heads to insure that staff members will implement their policies in a consistent, orderly manner. As an earlier decision by the same court asked, "what purpose would an agency's statement of policy serve if agency employees could not refer to it for guidance?" Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592 (5th Cir. 1995).

An *interpretive rule* differs from a legislative rule in that it is not intended to alter legal rights, but to state the agency's view of what existing law already requires. In some situations, the exemption for interpretive rules is relatively easy to apply. For example, if an agency has no delegated lawmaking authority, its rules are necessarily interpretive. See General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (discussing EEOC guidelines). On the other hand, where a statute is drafted in such a way that it cannot come into play until the administering agency issues implementing rules, those rules cannot be interpretive and must be issued through APA procedure. American Mining Cong. v. MSHA, 995 F.2d 1106 (D.C. Cir. 1993).

Many cases applying the interpretive rules exemption, however, cannot be resolved on so categorical a basis. They plunge the courts into difficult case-by-case judgments. Sometimes those judgments turn on the extent to which the agency 316

intends to apply the statement in a binding fashion, or actually does so. New York City Employees' Retirement Sys. v. SEC, 45 F.3d 7 (2d Cir. 1995) (SEC no-action letters were nonbinding and thus interpretive); Alaska v. U.S. Dep't of Transp., 868 F.2d 441 (D.C. Cir. 1989) (regulation was evidently intended to have binding effect and thus was not an interpretive rule). In

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this respect, their approach is similar to the test for general statements of policy. In addition, however, courts often examine the substance of an agency's interpretation in relation to the provision that it purports to interpret (which may be a statute or a prior legislative rule). In general, statements that largely track the language of the underlying provision, or appear to be "fairly encompassed" within that language, stand a good chance of being found to satisfy the exemption. Air Transport Ass'n of Am., Inc. v. FAA, 291 F.3d 49 (D.C. Cir. 2002). Conversely, if the statement expresses a position that does not seem to follow directly from the language or purposes of the provision, a court is more likely to infer that the agency is trying to establish a new legal obligation, making compliance with APA procedure essential. Sprint Corp. v. FCC, 315 F.3d 369 (D.C. Cir. 2003); Hoctor v. USDA, 82 F.3d 165 (7th Cir. 1996). However, not all courts apply the reasoning of *Sprint* and *Hoctor* with much vigor, if at all; in some cases, agency statements that extrapolate from highly ambiguous or open-ended language in a statute or regulation have been found to fall within the interpretive rules exemption. Shalala v. Guernsey Memorial Hosp., 514 U.S. 87 (1995); *American* 317

Mining, supra. At present, none of these varying approaches predominates, and the case law remains in disarray, in no small part because the Supreme Court has not opined on the issue.

Changes over time in an agency's interpretation can also be important in applying the exemption. The Supreme Court noted in *Guernsey* that a statement would lose its exemptive status if it were inconsistent with an existing legislative rule. In other words, a pronouncement that effectively amends a legislative rule must itself be legislative. See, e.g., Hemp Industries Ass'n v. DEA, 333 F.3d 1082 (9th Cir. 2003); National Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992). The logic behind

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these cases is straightforward. Because the prior legislative rule has the force of law, it is binding on the agency until the agency revokes or revises it, a task that of course requires rulemaking procedure. For a time the D.C. Circuit, joined by a few other circuits, extended the principle of these cases by holding that an agency is required to use notice and comment if it wishes to adopt an interpretation that is inconsistent with a prior *interpretation of a legislative rule*. See Alaska Prof. Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999). However, in Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015), the Supreme Court arrested that trend, by holding that this additional procedural requirement for some interpretive rules is unauthorized by the APA.

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2. C. RULEMAKING PROCEDURES

Agency rulemaking proceedings can take on three different procedural forms under the APA: they may be formal, informal, or exempted completely from the Act's procedural requirements. In addition, the basic APA procedural models have sometimes been supplemented or modified by Congress in particular grants of rulemaking authority, and reviewing courts have, at least in the past, occasionally required agencies to use procedures other than those specified in the APA. Before discussing these latter "hybrid" rulemaking approaches, however, it is necessary to examine the three kinds of rulemaking proceedings contemplated by the APA.

1.THE APA PROCEDURAL MODELS

a.Exempted Rulemaking. The general rulemaking provision of the APA, § 553, contains several exemptions that authorize agencies to issue final rules without

any public participation. The exemptions for interpretive rules and policy statements have just been discussed. In addition, § 553(a) completely exempts from public notice and opportunity to comment all rulemaking proceedings relating to "a military or foreign affairs function" or "agency management or personnel or to public property, loans, grants, benefits, or contracts." Commentators have strongly criticized these sweeping exemptions, and the Administrative Conference has recommended that they be repealed or narrowed. ACUS Recommendation No. 73–5, 39 Fed. Reg. 4847 (1974) (military or foreign affairs); 319

ACUS Recommendation No. 69–8, 38 Fed. Reg. 19,782 (1973) (grants or benefits). The exemption for proprietary matters, such as grants and benefits, seems particularly difficult to justify. When it was originally enacted, there was a general assumption that private parties had few procedural rights when the government action affected a "privilege" or a "mere gratuity" rather than private property. That distinction has now been rejected as unsound and unworkable in contemporary due process analysis; see pp. 204–207 supra. The government uses the spending power to pursue a wide variety of social objectives, and the effect of the § 553 exemption is to immunize many important policy decisions from public participation—although some agencies have softened this impact by passing regulations that waive any reliance on the exemption, and Congress has required compliance with notice-and-comment requirements in some specific agency rulemaking statutes governing these matters. See e.g., 38 U.S.C. § 501 (veterans benefits rules).

The APA also permits agencies to issue *procedural rules* without prior notice.

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§ 553(b)(A). This exemption reflects "the congressional judgment that such rules, because they do not directly guide public conduct, do not merit the administrative burdens of public input proceedings." U.S. Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984). This exemption has generally covered matters such as agency rules of practice governing the conduct of its proceedings and rules delegating authority or duties within an agency. For example the D.C. Circuit held that a USDA rule eliminating expedited "face-to-320

face" meetings to approve commercial food labels was within the exemption because the rule was clearly procedural in nature ("procedural on its face"), even though the elimination might have had a "substantial impact" on commercial food processors. James V. Hurson Assoc. v. Glickman, 229 F.3d 277, 281 (D.C. Cir. 2000).

More recently the D.C. Circuit has counseled that "the distinction between substantive and procedural rules is one of degree depending upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 5–6 (D.C. Cir. 2011). In that case the court found a TSA decision to screen airline passengers using advanced imaging technology rather than magnetometers to be a substantive rule; the technique was a "procedure," but it also impinged on personal privacy. See also Mendoza v. Perez, 754 F.3d 1002 (D.C. Cir 2014)).

Obviously, the courts' tests in this area have not been very easy to apply. Regardless, ACUS has urged agencies to use notice-and-comment procedures voluntarily for rules apparently falling within this exemption "except in situations in which the costs of such procedures will outweigh the benefits of having public input. . . ." ACUS Recommendation 92–1, 57 Fed. Reg. 30,102 (1992).

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The final APA rulemaking exemption applies when "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). The "impracticable" and 321

"contrary to public interest" branches of this exemption apply when the rule is urgent, or a delay in its issuance would frustrate the rule's purpose. See, e.g., Jifry v. FAA, 370 F.3d 1174 (D.C. Cir. 2004) (upholding FAA's summary adoption of post-9/11 rule authorizing immediate revocation of alien pilot's flight privileges if Transportation Security Administration determines that pilot is a security threat). The "unnecessary" branch applies when the subject matter is so routine or trivial that the value of public participation would be negligible. When an agency invokes either branch of this exemption, the APA requires it to make a "good cause" finding and incorporate in the final rule a brief statement of its reasons for avoiding public participation. The finding is subject to judicial review, and frequently encounters a skeptical reception in the courts. See, e.g., Utility Solid Waste Activities Group v. EPA, 236 F.3d 749 (D.C. Cir. 2001) (rejecting EPA's invocation of good cause exemption to correct a purported typographical error in a regulation where, as amended, the rule greatly expanded the regulated community).

While these exemptions from public participation are quite broad, an agency is generally free to give affected persons more opportunities to participate than the Act requires. Thus it can use notice-and-comment procedures, or confer informally with affected interest groups, or hold public hearings on important rules that are technically exempt from the APA. The Administrative Conference recommended that agencies provide such opportunities for public participation when an interpretive rule or general 322

policy statement "is likely to have a substantial impact on the public." ACUS Recommendation No. 76–5, 41 Fed. Reg. 56,769 (1976). ACUS also recommended that agencies should provide an opportunity for post-promulgation comment after they have issued rules as impracticable or contrary to public interest under the "good cause" exception. ACUS Recommendation 95–4, 60 Fed. Reg. 43,108 (1995). Rules issued on this basis are often called *interim final rules*, because they are both interim (they will be reconsidered and perhaps replaced in light of comments received) and final (they go into effect immediately). For rules issued under the "unnecessary" branch of the "good cause" exemption, ACUS recommended that the agency use *direct final rulemaking*. *Id.* This is a technique by which the agency adopts a rule without prior notice and comment but announces that it will withdraw the rule if anyone files an adverse comment within a short stated period thereafter. Such a commitment effectively provides a "reality check" for the agency's assumption that the rule will prove noncontroversial, but the agency remains free to propose it again using the normal notice-and-comment process.

b. Informal Rulemaking. The basic rulemaking procedure prescribed by § 553 of the APA is generally called "informal" or "notice-and-comment" rulemaking. In the absence of directives to the contrary in an agency's enabling legislation, the APA's informal rulemaking procedures will apply whenever the agency issues substantive rules. Thus, if the statute merely authorizes the agency to issue regulations and those regulations affect the legal 323

rights of private parties, the agency will be required to follow the notice-and-comment procedure of § 553.

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