

Jon Siegel
Public Member
March 29, 2019

I regret that I will be unable to attend Monday's committee meeting, as I have to teach class at 11:00 am and at 1:40 pm. I might be able to participate remotely for a short time between my two classes. In the meantime, here is a thought about the proposed recommendation.

First, I thank the consultants and the ACUS staff for the excellent work that went into the Report and the Proposed Recommendation. I have a disagreement with part of the proposal, which I express below, but I have great respect for the consultants (I have admired Prof. Levin's work for many years and I think Prof. Emerson is on his way to doing great things) and I recognize that they and the ACUS staff did a great deal of excellent work to get us to this point in the process.

I find myself with some doubts about proposed Recommendations 1 through 5. Those recommendations are similar to parts of ACUS Recommendation 2017-5, about which I also had some doubts. I should probably have voiced my doubts more strongly when Recommendation 2017-5 was adopted. I will now attempt to make up for that lapse.

Most of what I say below is qualified by the point that I am not entirely certain what Proposed Recommendations 1-5 mean. It seems to me that, as written, they go beyond what is stated at pp. 32-34 of the Report. Those pages of the Report suggest different possible approaches that our Recommendation might take, whereas I think Proposed Recommendations 1-5 take a more particular view about what agencies should do. My discussion below is based on this view.

I agree with some of the sentiments expressed by unnamed agency officials at pp. 15-16 of the Report. As stated there, if a statute administered by an agency says "Regulated parties shall q," and a question arises as to whether the meaning of q is x or y, the agency might issue an interpretive rule stating that "Our view is that q means x." In such a case, the agency might legitimately desire that the interpretive rule definitively resolve the question of the meaning of q for the agency's purposes. The interpretive rule would not "bind" the public, inasmuch as a regulated person or entity subject to the statutory command might challenge the agency's understanding of the command if the matter came to the point of judicial review. But the top-level decisionmakers at the agency might wish to give their front-line staff definitive guidance on what the agency's position is regarding the meaning of q, and an interpretive rule should be one means by which they might do so.

The question of whether such an agency rule should be phrased in "binding" terms turns not, I would say, on whether the rule is interpretive or legislative but on whether the underlying statutory norm that the rule interprets is binding. If the statute says, "Regulated parties shall q," then regulated parties already have a legal obligation to q, and the only question is what q means. If the agency's highest-level decisionmakers have decided that q means x, they should be able to tell the agency's staff and members of the public.

If such an interpretive rule were forbidden, the agency's highest-level decisionmakers might still, in the course of a particular adjudication, reach the conclusion that q means x, and in most cases they could apply that determination to the case at hand, even without prior public notice. *SEC v. Chenery (Chenery II)*, 332 U.S. 194 (1947). In my respectful opinion, if the agency's top-level decisionmakers have determined that q means x, it is better for them to be able to tell the public in advance, by means of an interpretative rule, than to surprise the public by having them announce their interpretation in the course of adjudication, which is what could happen if such an interpretive rule were forbidden.

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I suppose an agency could publish an interpretive rule saying "we think q means x, and we will act in accordance with that view, but we will always entertain arguments to the contrary, even in the course of every individual case, and if you manage to persuade us that q does not mean x we will change our minds." But to require that might in at least some cases merely waste time and accomplish nothing of any real value. If the agency is truly open to argument in each case, then by all means it should say so, but if it isn't, I see little value in recommending that it maintain the pretense that it is. The real protection for members of the regulated community (or others) who are aggrieved by the determination that q means x is, I think, judicial review.

That raises the important question of what impact the agency's interpretive rule should have when judicial review is sought. As I understand things, interpretive rules do not receive *Chevron* deference (or at least are less likely to receive it than legislative rules), and I would apply the same principle that courts have sometimes stated with regard to policy statements, that the agency would have to be able to justify its action with regard to other authorities, as though the interpretive rule did not exist. *Cf. Public Citizen v. NRC*, 901 F.2d 147, 157 (D.C. Cir. 1990) (taking this view as to policy statements). That, I think is the real protection for the public, and is better than requiring the agency to pretend that it has not really decided something if in fact it has.

Now, back to proposed Recommendations 1-5. Proposed Recommendation 1 is perhaps not actually inconsistent with what I have said above, as its prohibition on "binding" standards is limited to standards that "form an independent basis for action." But I find it confusing. If the statute requires q, and the agency issues an interpretive rule saying, definitively for agency purposes, that q means x, has the agency violated Proposed Recommendation 1? If so, I find the proposal troubling.

With regard to #2, again, this could be acceptable depending on what it means. If it means that the agency should always maintain some avenue for challenging interpretive rules (such as being open to a petition for changing them), I think that is acceptable, but if it means that in every individual proceeding where the agency implements its interpretive rule it must provide a fair opportunity for an aggrieved party to argue for modification, rescission, or waiver, that might just waste a lot of time. The agency should always, I would say, permit such arguments to be inserted into the record, so that a party can lay the basis for a judicial challenge, but must the agency really examine, each time, with an open mind, the question of whether q means x? That is a recipe for wasting time. Similar thoughts apply to #3.

On #4, again, this seems like it could be productive of mischief depending on what it means. If it means that an agency must inform the public that its interpretive rule may be challenged on judicial review, fine. But if it means that the agency must create and maintain a pretense that it is open to reconsidering its interpretive rule at the agency level in every case, when perhaps it isn't, then it seems to me that this would just mislead the public and lead to wasteful proceedings.

Similarly, on #5, suppose a regulated party calls up the agency hotline and asks, "I see you have a rule says that you think q means x. But I see that it's only an 'interpretive rule.' Is that binding? Does it have the force of law?" To give the simple answer "no" could give the caller the false sense that the agency is prepared to back down from its position in the course of an individual case. If the true answer is, "that rule is not binding once a proceeding gets to court, but it does mean that the agency will act in accordance with the view that q means x until a court tells us otherwise," then I think that is what the agency should say.

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Perhaps I have misunderstood Proposed Recommendations 1-5; perhaps they are consistent with my view as stated above. But as written they seem to me to recommend that agencies deprive themselves and the public of a useful tool, namely, the ability to tell the public what the agency thinks an ambiguous, mandatory statutory requirement means.

Again, I regret that I will not be able to voice this view personally at Monday's meeting. I hope this message is helpful.

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