



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Todd

Thanks for the word version. I have made some edits in red line on it. Here are a few overall thoughts.

1. Suppose an agency goes through notice and comment rulemaking that satisfies section 553 and what arrives is a rule that interprets a term in the statute, such as employee. In some sense, it is plainly an interpretive rule, but it is also a substantive rule that creates rights etc. I suggest a footnote that excludes from this recommendation rules that follow 553 and interpret the words in a statute or regulation.
2. Recommendations 12-15 discuss a subject that is not mentioned in the preamble, yet seems to be broad enough to warrant a separate section within this overall recommendation. In addition, I notice that it addresses topics in the prior recommendations and often in greater detail. The more that I thought about these, the less sure I was that a "rule" that suggests a number of options is what I would think of as a rule, even an interpretive rule, but more closely resembles a policy statement. My reaction is the preamble should describe this form of guidance (see 12, as amended) and then say that even if called interpretive rules, they should be seen as policy statements and handled accordingly. In this connection, I found much of the extra discussion in 13-15 to be unnecessary (too detailed), but if it is necessary, then it is not clear why it does not belong in the earlier recommendations that relate to the same topics..

Hope these are helpful. I am around for another hour and then for much of tomorrow if anyone wants to discuss. I am sending this only to you, but this should go to the committee etc and of course are public.

Alan



## Agency Guidance Through Interpretive Rules

### Committee on Judicial Review

Proposed Recommendation for Committee | April 18, 2019

#### MORRISON SUGGESTIONS

1 The Administrative Procedure Act (APA) exempts policy statements and interpretive<sup>1</sup>  
 2 rules from its requirements for the issuance of legislative rules, including notice and comment.<sup>2</sup>  
 3 The Attorney General’s Manual on the Administrative Procedure Act defines interpretive rules  
 4 as “rules or statements issued by an agency to advise the public of the agency’s construction of  
 5 the statutes and rules which it administers.”<sup>3</sup> Because of the commonalities between policy  
 6 statements and interpretive rules ~~these two kinds of documents~~, including their advisory function,  
 7 more recently many scholars and government agencies have adopted the umbrella term  
 8 “guidance” to refer to both interpretive rules and policy statements.<sup>4</sup>

9 The Administrative Conference has issued several recommendations on policy  
 10 statements.<sup>5</sup> The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*

Commented [ABM1]: Deleted phrase too indefinite because of intervening sentence.

<sup>1</sup> In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

<sup>2</sup> 5 U.S.C. § 553(b)(A).

<sup>3</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). The Manual defines “statements of policy” as agency statements of general applicability “issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”

<sup>4</sup> See, e.g., Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>.

<sup>5</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).



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11 *Statements*, offers best practices to agencies regarding policy statements. The Recommendation  
12 advises agencies not to treat policy statements as binding on the public and to take steps to make  
13 clear to the public that policy statements are non-binding. It also suggests measures agencies  
14 could take to allow the public to propose alternative approaches to those contained in a policy  
15 statement and offers suggestions on how agencies can involve the public in adopting and  
16 modifying policy statements.

17 During the discussion of Recommendation 2017-5, the Assembly considered whether to  
18 extend the recommendations therein to interpretive rules. The Assembly decided against doing  
19 so, but it expressed its views that a follow-on study addressing interpretive rules would be  
20 valuable.

21 This project takes up that charge. Policy statements and interpretive rules are similar in  
22 that they lack the force of law<sup>6</sup> and are often issued without notice-and-comment proceedings, as  
23 the APA permits. This similarity suggests that, as a matter of best practice, when interested  
24 persons disagree with the views expressed in an interpretive rule, the agency should allow them a  
25 fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the  
26 practice that Recommendation 2017-5 already prescribes in the case of policy statements.<sup>7</sup> The  
27 benefits to the public of according such treatment, as well as the potential costs to agencies of  
28 according it, are largely the same regardless of whether a given guidance document is concerned  
29 with law, policy, or a combination of both.<sup>8</sup>

30 Recommendation 2017-5 provided that “[a]n agency should not use a policy statement to  
31 create a standard binding on the public, that is, as a standard with which noncompliance may  
32 form an independent basis for action in matters that determine the rights and obligations of any

<sup>6</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979), and referencing the Attorney General’s Manual on the Administrative Procedure Act, at 30 n.3).

<sup>7</sup> Recommendation 2017-5, *supra* note 5, ¶ 2; *see also* Recommendation 92-2, *supra* note 5, ¶ II.B.

<sup>8</sup> *See* Blake Emerson and Ronald M. Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis 31–32* (Mar. 8, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-guidance-through-interpretive-rules>.



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33 member of the public.”<sup>9</sup> Although the same basic idea should apply to interpretive rules, the  
34 concept of “binding” effect can give rise to misunderstanding in the context of those rules, for  
35 several reasons.

36 [First, interpretive rules often use mandatory language when the agency is using that  
37 language to describe an existing statutory or regulatory requirement. Recommendation 2017-5  
38 itself recognized the legitimacy of such phrasing.<sup>10</sup> Although the presence of such mandatory  
39 language does not negate the benefits of allowing interested persons a fair opportunity to seek  
40 reconsideration or revision of the particular interpretation the agency chose, it can, as a practical  
41 matter, complicate admonitions that an agency should refrain from characterizing the rule as  
42 “binding.”]

43 Second, discussions of the circumstances in which guidance may or may not be “binding”  
44 bring to mind assumptions that stem from the case law construing the rulemaking exemptions in  
45 the APA. Under that case law, it is universally understood that policy statements may not be  
46 legally binding, but courts and commentators have disagreed about whether the same is true of  
47 interpretive rules.<sup>11</sup> Because of this ambiguity, agency counsel sometimes assume that an  
48 interpretive rule can be binding (although research for this project and for Recommendation  
49 2017-5 disclosed little evidence that many of them act upon that belief<sup>12</sup>). In this  
50 Recommendation the Administrative Conference addresses only best practices and expresses no  
51 opinions about how the APA rulemaking exemption should be construed. Nevertheless,  
52 assumptions derived from the APA background can ~~divert~~ ~~distract~~ attention from issues of what  
53 sound principles of administration require, which this Recommendation does address.

**Commented [TR2]:** We would like to hear the Committee’s thoughts on whether this paragraph should remain.

**Commented [ABM3R2]:** I would leave it in as useful background info.

**Commented [ABM4]:** People can be distracted, attention can be diverted.

<sup>9</sup> Recommendation 2017-5, *supra* note 5, ¶ 1.

<sup>10</sup> Recommendation 2017-5, *supra* note 5, ¶ 5; *accord*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, 72 Fed. Reg. 3,436, 3,440 (Jan. 25, 2007).

<sup>11</sup> Emerson & Levin, *supra* note 8, at 19–21; Parrillo, *supra* note 4, at 23–25; *see generally* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).

<sup>12</sup> Emerson & Levin, *supra* note 8, at 15–17; Parrillo, *supra* note 4, at 23–24n.36.



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54 Third, administrative lawyers currently differ on the question of whether interpretive  
55 rules are effectively rendered “binding” when they are reviewed in court under the *Auer v.*  
56 *Robbins*<sup>13</sup> standard of review, which provides that an agency’s interpretation of its own  
57 regulation becomes of “controlling weight” if it is not “plainly erroneous or inconsistent with the  
58 regulation.”<sup>14</sup> The question of whether interested persons should be able to ask an agency to  
59 reconsider or revise an interpretive rule does not intrinsically have to turn on what level of  
60 deference the courts would later accord to the agency’s interpretation in the event of judicial  
61 review. Indeed, the possibility of judicial deference at the appellate level (under *Auer* or any  
62 other standard of review) may augment the challenger’s interest in raising this substantive issue  
63 at the agency level.<sup>15</sup> Even so, the doctrinal debate over whether an interpretive rule is or is not  
64 “binding” under *Auer* can have the effect of directing the focus of attention away from these  
65 practical considerations.

Commented [ABM5]: Given this context, “substantive” is more likely to be confusing than helpful.

66 For the foregoing reasons, the Administrative Conference has phrased the initial  
67 operative provisions of the Recommendation so that it no longer uses the term “binding on the  
68 public.” Instead it urges that agencies not treat interpretive rules as setting independent standards  
69 for action and that interested persons should have a fair opportunity to seek revision or  
70 reconsideration of an interpretive rule. In substance, this formulation expresses positions that  
71 largely correspond with prescriptions that Recommendation 2017-5 made regarding policy  
72 statements, but it does so without implicating unintended associations that the word “binding”  
73 might otherwise evoke.

<sup>13</sup> 519 U.S. 452 (1997).

<sup>14</sup> *Id.* at 461; compare *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (stating that, because of “judge-made doctrines of deference . . . [a]gencies may now use [interpretive] rules not just to advise the public, but also to bind them”), with *Perez* at 1208 n.4 (opinion of the Court) (“Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.”). The Supreme Court is currently considering whether to overrule *Auer* in *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari). For reasons explained in the text, the present recommendations do not depend on which view of *Auer* one favors, nor on what the Court may decide in *Kisor*.

<sup>15</sup> See Emerson & Levin, *supra* note 8, at 23.



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74 What constitutes a fair opportunity to contest an interpretive rule will depend on the  
75 circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of  
76 factors can deter affected persons from contesting guidance documents with which they disagree;  
77 these factors operate in approximately the same manner regardless of whether a policy statement  
78 or interpretive rule is involved.<sup>16</sup> Agencies that design procedures for requesting reconsideration  
79 or modification of both types of guidance should be attentive to circumstances that affect the  
80 practical ability of members of the public to avail themselves of the opportunity to be heard. At  
81 the same time, agencies should also consider governmental interests such as the agency’s  
82 resource constraints and need for centralization.<sup>17</sup> For example, Recommendation 3 recognizes  
83 that the need for coordination of multiple decisionmakers in a given program may justify  
84 requiring lower level employees to adhere to the agency’s interpretive rules.

**RECOMMENDATION**

**Recommendations Applicable to All Interpretive Rules**

- 85 1. An agency should not use an interpretive rule to create a standard where noncompliance  
86 ~~with which~~ may form an independent basis for action in matters that determine the rights  
87 and obligations of any member of the public.
- 88 2. An agency should afford members of the public a fair opportunity to argue for  
89 modification, rescission, or waiver of an interpretive rule.
- 90 3. It is sometimes appropriate for an agency, as an internal agency management matter, and  
91 particularly when an interpretive rule is used in connection with regulatory enforcement,  
92 to direct some of its employees to act in conformity with an interpretive rule. But the  
93 agency should ensure that this does not interfere with the fair opportunity called for in

**Commented [ABM6]:** I think the phrase should be “rights OR obligations” not AND, but the prior rec uses AND. I will support either outcome.

<sup>16</sup> Parrillo, *supra* note 4, at 25.

<sup>17</sup> See Emerson & Levin, *supra* note 8, at 36–39.



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94 Recommendation 2. For example, an interpretive rule could require officials at one level  
95 of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a  
96 higher level can authorize a modification, rescission, or waiver of that rule. Agency  
97 review should be available in cases in which frontline officials fail to follow such  
98 interpretive rules ~~in conformity with which they are properly directed to act.~~

99 4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that  
100 the rule expresses the agency's current interpretation of the law but that a member of the  
101 public will, upon proper request, be accorded a fair opportunity to seek reconsideration or  
102 revision of the rule.

103 5. An interpretive rule should not include mandatory language unless the agency is using  
104 that language to describe an existing statutory or regulatory requirement, or the language  
105 is addressed to agency employees and will not interfere with the fair opportunity called  
106 for in Recommendation 2.

107 6. An agency should make clear to members of the public which agency officials are  
108 required to follow an interpretive rule and where to go within the agency to seek  
109 modification, rescission, or waiver from the agency.

110 7. An agency should instruct all employees engaged in an activity to which an interpretive  
111 rule pertains that, although the interpretive rule may contain mandatory language, they  
112 should refrain from making any statements suggesting that an interpretive rule may not  
113 be contested within the agency to the extent provided in Recommendation 2. Insofar as  
114 any employee is directed, as an internal agency management matter, to act in conformity  
115 with an interpretive rule, that employee should be instructed as to the expectations set  
116 forth in Recommendations 2 and 3.

117 8. When an agency is contemplating adopting or modifying an interpretive rule, it should  
118 consider whether to solicit public participation, and, if so, what kind, before adopting or  
119 modifying the rule. Options for public participation include stakeholder meetings or

Commented [ABM7]:

Commented [ABM8R7]:

Commented [ABM9]: Omitted words not necessary.

Commented [ABM10]: How does "elsewhere" fit into "the rule"? I think we discussed allowing an agency to have a general statement to this effect for all its interp rules: is that still alive and if so, we should make that clear by a sentence at the end of this Rec.

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120 webinars, advisory committee proceedings, and invitation for written input from the  
121 public with or without a response. In deciding how to proceed, the agency should  
122 consider:

- 123 a. The agency’s own procedures for the adoption of interpretive rules.
- 124 b. The likely increase in useful information available to the agency from broadening  
125 participation, keeping in mind that non-regulated parties (regulatory beneficiaries  
126 and other interested parties) may offer different information than regulated parties  
127 and that non-regulated parties will often have no meaningful opportunity to  
128 provide input regarding interpretive rules other than at the time of adoption.

**Commented [ABM12]:** Parties can be seen as applying to adjudications, but we mean more than that. I would use “persons” here and in the next line also.

- 129 c. The likely increase in rule acceptance from broadening participation, keeping in  
130 mind that non-regulated parties will often have no opportunity to provide input  
131 regarding interpretive rules other than at the time of adoption, and that rule  
132 acceptance may be less likely if the agency is not responsive to stakeholder input.

**Commented [ABM13]:** Highlighted phrase is in b and does not need to be repeated here – this is not a criminal statute where duplication might be needed. It is an ACUS recommendation.

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- 133 d. Whether the agency is likely to learn more useful information by having a specific  
134 agency proposal as a focal point for discussion, or instead having a more free-  
135 ranging and less formal discussion.

- 136 e. The practicability of broader forms of participation, including invitation for  
137 written input from the public, keeping in mind that broader participation may  
138 slow the adoption of interpretive rules and may diminish resources for other  
139 agency tasks, including the provision of interpretive rules on other matters.

**Commented [ABM14]:** Certainly no need for “invitation for”. Indeed, since this is part of 8 which means this & other tools, no need for any of including phrase.

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- 140 9. If an agency does not provide for public participation before adopting or modifying an  
141 interpretive rule, it should consider offering an opportunity for public participation after  
142 adoption or modification of the kinds discussed in ~~As with Recommendation 8, options~~  
143 ~~for public participation include stakeholder meetings or webinars, advisory committee~~  
144 ~~proceedings, and invitation for written input from the public with or without a response.~~

**Commented [ABM15]:**

**Commented [ABM16R15]:**

**Commented [ABM17R15]:**

**Commented [ABM18]:** No need to repeat all of these.





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145 10. An agency may make decisions about the appropriate level of public participation  
146 document **by-document** or by assigning certain procedures for public participation to  
147 general categories of documents. If an agency opts for the latter, it should consider  
148 whether resource limitations may cause some documents, if subject to pre-adoption  
149 procedures for public participation, to remain in draft for substantial periods of time. If  
150 that is the case, agencies should either (a) make clear to stakeholders which draft  
151 interpretive rules, if any, should be understood to reflect current agency thinking; or (b)  
152 provide in each draft interpretive rule that, at a certain time after publication, the  
153 document will automatically either be adopted or withdrawn.

**Commented [ABM19]:** I think you mean rule by rule; there may be several documents that comprise a rule or many rules in a single document. Also other lines below use document.

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154 11. All written interpretive rules affecting the interests of regulated parties, regulatory  
155 beneficiaries, or other interested parties should be promptly made available electronically  
156 and indexed, in a manner in which they may readily be found. **Written** interpretive rules  
157 should also indicate the nature of the reliance that may be placed on them and the  
158 opportunities for reconsideration, modification, or waiver of them.

**Commented [ABM20]:** How does this last sentence fit in with Rec 4?

**Recommendations Applicable Only to Those Interpretive Rules Amenable to  
Alternative Approaches SEE EMAIL COMMENT ABOYUT WHETHER ALL  
OF THIS IS NECESSARY OR CORRECT AS APPLIED TO INTERPRETIVE  
RULES.**

159 12. Some (policy statements) Interpretive rules that lend themselves to alternative approaches  
160 include those that lay out several lawful options for the public but do not purport to be  
161 exhaustive, and others those that speak at a general level, leaving space for informal  
162 adjustments and negotiation between the agency and its stakeholders about how the y-rule  
163 should be applied. Recommendations 1-11 above apply with equal force to such rules.  
164 However, with respect to such rules, agencies should take additional steps, beyond those  
165 provided in Recommendations 1-11, to promote flexibility, as discussed below in  
166 Recommendations 13-15.



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- 167 13. Agencies should afford members of the public a fair opportunity to argue for lawful  
168 approaches other than those put forward by an interpretive rule, subject to any binding  
169 requirements imposed upon agency employees as an internal management manner. The  
170 agency should explain that a member of the public may take a lawful approach different  
171 from the one set forth in the interpretive rule or request that the agency take such a lawful  
172 approach. The interpretive rule should also include the identity and contact information  
173 of officials to whom such a request should be made. Additionally, with respect to such  
174 rules, agencies should take further measures to promote such flexibility as provided in  
175 Recommendation 14.
- 176 14. In order to provide a fair opportunity for other lawful approaches, an agency should,  
177 subject to considerations of practicability and resource limitations and the priorities  
178 described in Recommendation 15, consider additional measures, including the following:
- 179 a. Promoting the flexible use of interpretive rules in a manner that still takes due  
180 account of needs for consistency and predictability. In particular, when the agency  
181 accepts a proposal for a lawful approach other than that put forward in an  
182 interpretive rule and the approach seems likely to be applicable to other situations,  
183 the agency should disseminate its decision and the reasons for it to other persons  
184 who might make the argument, to other affected stakeholders, to officials likely to  
185 hear the argument, and to members of the public, subject to existing protections  
186 for confidential business or personal information.
- 187 b. Assigning the task of considering arguments for approaches other than that in an  
188 interpretive rule to a component of the agency that is likely to engage in open and  
189 productive dialogue with persons who make such arguments, such as a program  
190 office that is accustomed to dealing cooperatively with regulated parties and  
191 regulatory beneficiaries.



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- 192 c. In cases where frontline officials are authorized to take an approach different from  
193 that in an interpretive rule but decline to do so, directing appeals of such a refusal  
194 to a higher-level official who is not the direct superior of those frontline officials.
- 195 d. Investing in training and monitoring of frontline personnel to ensure that they (i)  
196 treat parties' ideas for lawful approaches different from those in an interpretive  
197 rule in an open and welcoming manner; and (ii) understand that approaches other  
198 than that in an interpretive rule, if undertaken according to the proper internal  
199 agency procedures for approval and justification, are appropriate and will not  
200 have adverse employment consequences for them.
- 201 e. Facilitating opportunities for members of the public, including through  
202 intermediaries such as ombudspersons or associations, to propose or support  
203 approaches different from those in an interpretive rule and to provide feedback to  
204 the agency on whether its officials are giving reasonable consideration to such  
205 proposals.
- 206 15. Because measures to promote flexibility (including those listed in Recommendation 14)  
207 may take up agency resources, it will be necessary to set priorities for which interpretive  
208 rules are most in need of such measures. In deciding when to take such measures the  
209 agency should consider the following, bearing in mind that these considerations will not  
210 always point in the same direction:
- 211 a. An agency should assign a higher priority to an interpretive rule the greater the  
212 rule's impact is likely to be on the interests of regulated parties, regulatory  
213 beneficiaries, and other interested parties, either because regulated parties have  
214 strong incentives to comply with the rule or because the rule practically reduces  
215 the stringency of the regulatory scheme compared to the status quo.
- 216 b. An agency should assign a lower priority to promoting flexibility in the use of a  
217 rule insofar as the rule's value to the agency and to stakeholders lies primarily in



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the fact that it is helpful to have consistency independent of the rule's substantive content.