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## INTERPRETIVE RULES, POLICY STATEMENTS, GUIDANCES, MANUALS, AND THE LIKE—SHOULD FEDERAL AGENCIES USE THEM TO BIND THE PUBLIC?

ROBERT A. ANTHONY\*

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\* B.A. 1953, Yale University; B.A. Juris. 1955, M.A., Oxford University; J.D. 1957, Stanford University. Professor of Law, George Mason University. Chairman of the Administrative Conference of the United States 1974-1979.

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#### INTRODUCTION AND SUMMARY

With one exception, the answer to the question in the title is “no.” To use such nonlegislative documents to bind the public violates the Administrative Procedure Act (APA) and dishonors our system of limited government. This is true whether the agency attempts to bind the public as a legal matter or as a practical matter.<sup>1</sup> An agency may not make binding law except in accordance with the authorities and procedures established by Congress. To make binding law through actions in the nature of rulemaking, the agency must use legislative rules, which ordinarily must be made in accordance with the notice-and-comment procedures specified by section 553 of the APA.<sup>2</sup>

1. An agency rule is “binding” when the agency treats it as dispositive of the issue it addresses. A document that was not issued legislatively, and which therefore cannot be binding *legally*, is nevertheless binding *as a practical matter* if the agency treats it as dispositive of the issue it addresses. *See infra* notes 79-94 and accompanying text.

2. 5 U.S.C. § 553 (1988); *see* *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979); *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980) (“Advance notice and public participation are required for those actions that carry the force of law.”). An agency may make law through adjudication, as contrasted with rulemaking, without complying with § 553 procedures or otherwise

The sole category of exceptions—where an agency may permissibly attempt to make a substantive nonlegislative rulemaking document binding on private parties—is for interpretive rules.<sup>3</sup> These are rules that interpret statutory language which has some tangible meaning, rather than empty or vague language like “fair and equitable” or “in the public interest.”<sup>4</sup> An agency may nonlegislatively announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own.<sup>5</sup> Because Congress has already acted legislatively, the agency need not exercise its own delegated legislative authority. Its attempts to enforce an interpretation can be viewed as simply implementing existing positive law previously laid down by Congress. As a

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observing the requirements for making legislative rules. *See infra* text accompanying notes 33-36 and 41-48. This Article is not concerned with the law made by adjudication. That the two styles of lawmaking are governed by widely different procedural requirements (strict for rules but loose for adjudications) is an anomaly created by Congress when it enacted § 553 and confirmed by the Supreme Court in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

3. Legislative rules made pursuant to specific exemptions in § 553, *see infra* text accompanying notes 51-54, do not supply additional exceptions to the statements in the text about *nonlegislative* documents. The exemptions in § 553 relieve the agency of having to follow that section's notice-and-comment procedures, but they do not relieve the agency of the need, if its rule is to be binding, to satisfy other requirements of legislative rulemaking. *See infra* text accompanying notes 41-48. Even on a subject as to which its *legislative* rules would come within § 553's exemption from notice-and-comment procedure, the agency may not use a *nonlegislative* document to bind the public, unless that document is an interpretive rule.

4. *See infra* text accompanying notes 56-68.

5. *See American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045-46 (D.C. Cir. 1987) (differentiating “cases in which an agency is merely explicating Congress' desires from those cases in which the agency is adding substantive content of its own,” and speaking of a “classic example of an agency rule held not to be interpretative—thus requiring notice and comment as a prerequisite to validity”) and authorities cited therein. “The function of § 553's first exception, that for ‘interpretive rules,’ is to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.” *Id.* at 1045; *see also Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991) (“[A]s a general rule, an agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment.”); *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987) (“[T]hese cases show that what distinguishes interpretative from legislative rules is the legal base upon which the rule rests. If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.”); *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 559-60 (D.C. Cir. 1983) (“As an interpretative rule, the new annuity computation formula is exempt from the rulemaking requirements of the APA, and OPM therefore did not act unlawfully in promulgating it without notice and comment proceedings.”), *cert. denied*, 465 U.S. 1100 (1984); *see also cases cited infra* note 366.

It is cliché to observe that these distinctions are sometimes difficult to draw. That makes them none the less indispensable to the analysis needed to identify unauthorized attempts to fasten binding norms upon the public.

practical matter, the agency in this way gives the interpretation a binding effect.<sup>6</sup> The same is true where the agency interprets its own previously promulgated legislative rules.

By contrast, when it does not merely interpret, but sets forth onto new substantive ground through rules that it will make binding, the agency must observe the legislative processes laid down by Congress.<sup>7</sup> That is, *when an agency uses rules to set forth new policies that will bind the public, it must promulgate them in the form of legislative rules.* The statutory procedures for developing legislative rules serve values that have deep importance for a fair and effective administrative process and indeed for the maintenance of a democratic system of limited government.<sup>8</sup>

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6. By declaring that the given interpretation is the one it will apply, or by basing enforcement action upon it, or by routinely applying it to pass upon applications, the agency binds the affected private parties *as a practical matter*, see *infra* text accompanying notes 79-89 and 366-68, at least until a court disapproves the interpretation. The agency treats the interpretation as dispositive of the question involved, and private parties can ignore it only at their peril. The private parties are thus bound *practically* even though the nonlegislatively promulgated interpretation does not *legally* bind them: An agency interpretation does not bind the courts and does not of its own force bind the public unless it has been embodied in a legislative rule or other action carrying the force of law, as a court is free to arrive at a different interpretation. See *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235-36 (1991); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Metropolitan School Dist. of Wayne Township v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 n.6, 39 (1990); *infra* note 366.

7. Administrative Procedure Act, § 4, 5 U.S.C. § 553 (1988); *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *American Hosp. Ass'n*, 834 F.2d at 1044-46. In addition to those of the APA, other statutory requirements may specify the legislative rulemaking procedures in particular areas. *E.g.*, 15 U.S.C. § 57a (1988) (Federal Trade Commission); 20 U.S.C. § 1232 (1988) (Department of Education).

The APA § 553 requirements, often called "notice-and-comment" procedures, call for publication of notice of the proposed rulemaking (including notice of any public proceedings, of the legal authority under which the rules are proposed, and of the terms of the proposal or the subjects and issues involved); opportunity for all interested persons to comment through submission of written views, with or without opportunity for oral presentation; consideration of the matter presented; and publication of the rules, including a concise statement of their basis and purpose, in the *Federal Register*. 5 U.S.C. § 553(a)(1).

Section 553 provides exemptions from these requirements for "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice," *id.* § 553(b)(A), and when the agency "for good cause" finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," *id.* § 553(b)(B). The exemptions for interpretive rules and policy statements are central topics of this Article.

In their adjudicatory opinions, agencies often announce the propositions of law or policy that formed the basis of their decisions. These propositions are not treated as rules by the APA, and are not governed by the statement in the text. See *infra* text accompanying notes 31-36. Nor are non-substantive rules of agency organization, procedure, or practice governed by the statement in the text. See *infra* text accompanying notes 53-54.

8. See *infra* text accompanying notes 356-58.

Except to the extent that they interpret specific statutory or regulatory language, then, *nonlegislative rules like policy statements, guidances, manuals and memoranda should not be used to bind the public.*<sup>9</sup> While these nonlegislative rules by definition cannot *legally* bind, agencies often inappropriately issue them with the intent or effect of imposing a *practical* binding norm upon the regulated or benefited public. Such use of nonlegislative policy documents is the capital problem addressed by this Article.

Thus, under the taxonomy of the APA,<sup>10</sup> a rulemaking action that the agency wishes to make binding upon affected persons must be either a legislative rule (which binds legally) or an interpretive rule (which may bind practically). All other substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins, and the like—are in APA terminology “policy statements,”<sup>11</sup> which the agency is *not* entitled to make binding, either as a legal matter or as a practical matter. These issuances will sometimes be referred to as “non-legislative policy documents” or “policy documents.”

This Article accordingly will advance the general recommendation, based on the APA, that agencies observe legislative rulemaking procedures for any action in the nature of rulemaking that is intended to impose mandatory obligations or standards upon private parties, or that has that effect. To the extent that agency pronouncements interpret specific statutory or regulatory language, this general recommendation does not apply. But the Article will separately recommend that interpretations that substantially enlarge the jurisdiction exercised by the agency, or substantially change the obligations or entitlements of private parties, should nevertheless be promulgated by legislative rulemaking procedures as a matter of sound agency practice.<sup>12</sup>

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9. All documents and actions like these are “rules” within the APA definition, 5 U.S.C. § 551(4) (1988), and also are “policy statements” within the APA’s taxonomy, as explicated below, *infra* text accompanying notes 65-70. “[R]ule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .” 5 U.S.C. § 551(4). The definition thus includes documents and actions that do not have the force of law (nonlegislative rules) as well as those that do (legislative rules). The “agency process for formulating, amending, or repealing a rule” is defined as “rule making” by the APA. *Id.* § 551(5).

10. See *infra* Part I.

11. See *supra* note 9; *infra* text accompanying notes 65-70.

12. See *infra* text accompanying notes 370-73.

The implementation of these recommendations will doubtless in some circumstances prove inconvenient or costly to the agency. See *infra* text accompanying notes 380-81. In especially difficult circumstances, the agency may rely upon the exemption from rulemaking requirements that applies “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary,

The use of legislative rulemaking procedures is not the only cure to be prescribed for the misuse of nonlegislative documents described herein. An agency has the option of issuing its policies in the form of policy statements that are genuinely nonbinding, thereby bringing them within the "policy statement" exemption from the APA's rulemaking requirements.<sup>13</sup> When it chooses this course of action the agency should observe an alternate process, by which it can assure that its documents are not binding and therefore will not be invalidated on the ground that they were not promulgated by the use of legislative rulemaking procedures. To achieve these outcomes, the agency should stand ready to entertain challenges to the policy in particular proceedings to which the document may apply, and should observe a disciplined system for maintaining an "open mind" when passing upon such challenges.<sup>14</sup>

Finally, the Article recommends procedures through which an agency, whenever it intends a rule to be legislative, should announce that intention and inform the public about the statutory authorities and procedures by which it has acted.

Although the subject is complex and evidence is laborious to assemble, it is manifest that nonobservance of APA rulemaking requirements is widespread. Several agencies rely in major part upon nonlegislative issuances to propagate new and changed elements in their regulatory or benefit programs.<sup>15</sup> This Article examines a number of agency attempts to make nonlegislative policy documents bind the public.<sup>16</sup> Frequently such rules are not challenged in court, because the affected private parties cannot afford the cost or the delay of litigation, or because for other practical

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or contrary to the public interest." 5 U.S.C. § 553(b)(B). Also available is the exception from publication requirements "as otherwise provided by the agency for good cause found and published with the rule." *Id.* § 553(d)(3). These "good cause" exceptions supply an adequate safety valve, and unless the agency can invoke them it should follow the recommendations herein. See Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 588-608 (1970).

13. See 5 U.S.C. § 553(b)(A) (1988); *infra* note 66; see also *infra* Part V.

14. See *infra* text accompanying notes 359-63; see also *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) ("[A]n agency's open-mindedness in individual proceedings can substitute for a general rulemaking . . ."); *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) ("When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy.").

15. Examples are the Health Care Financing Administration with respect to Medicare and Medicaid, the Department of Education with respect to guaranteed student loans, the Federal Energy Regulatory Commission with respect to regulation of pipelines, and the Nuclear Regulatory Commission with respect to reactor safety.

16. See *infra* Parts III and V.

reasons they must accept a needed agency approval or benefit on whatever terms the agency sets.<sup>17</sup>

The use of nonlegislative policy documents generally serves the important function of informing staff and the public about agency positions, and in the great majority of instances is proper and indeed very valuable. But the misuse of such documents—to bind, where legislative rules should have been used—carries great costs. Affected members of the public are likely to be confused or misled about the reach and legal quality of the standards the agency has imposed. One consequence of this uncertainty can be that affected persons are unaware that the agency intends to give its nonlegislative issuance binding effect. Probably more often, though, the private parties realize all too clearly that the agency will insist upon strict compliance, but conclude that there is little they can do to resist. In either case, the uncertainty can breed costly waste of effort among private parties trying to puzzle out how far they are bound or otherwise affected by the informal agency document.<sup>18</sup>

Doubtless more costly yet is the tendency to overregulate that is nurtured when the practice of making binding law by guidances, manuals, and memoranda is tolerated. If such nonlegislative actions can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency heads (or, more frequently, subordinate officials) will be enticed into using them. Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it eases its work greatly in several undesirable ways. It escapes the delay and the challenge of allowing public participation in the development of its rule.<sup>19</sup> It probably escapes the toil and the discipline of building a strong rulemaking record.<sup>20</sup> It escapes the discipline of preparing a statement of the basis and purpose justifying the rule.<sup>21</sup> It may also escape APA publication requirements<sup>22</sup> and Office of Management

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17. In at least one case, Congress has expressly precluded judicial review of failure to observe § 553's rulemaking requirements. 42 U.S.C. § 1395ff(b)(3)(B) (1988) (national coverage Medicare determinations by Health and Human Services). *But see* Administrative Conference of the United States, Recommendation No. 87-8, National Coverage Determinations Under the Medicare Program, 1 C.F.R. § 305.87-8(4)(b) (1992) (recommending that Congress consider repealing § 1395ff(b)(3)(B)).

18. In some instances, agencies misstate the nature of their rules. *See, e.g.,* Chamber of Commerce v. OSHA, 636 F.2d 464 (D.C. Cir. 1980); Cerro Metal Prod. v. Marshall, 620 F.2d 964, 975-78, 981 (3d Cir. 1980).

19. *See* 5 U.S.C. § 553(c) (1988).

20. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

21. *See* 5 U.S.C. § 553(c); *State Farm*, 463 U.S. at 42-43, 57.

22. 5 U.S.C. §§ 552(a)(1)(D), 553(b), (c). The requirement to publish in the *Federal Register* "statements of general policy or interpretations of general applicability formulated and adopted by the agency," *id.* § 552(a)(1)(D), is honored far more frequently in the breach than in the observance.

and Budget regulatory review.<sup>23</sup> And if the agency can show that its informal document is not final or ripe, it will escape immediate judicial review.<sup>24</sup> Indeed, for practical reasons it may escape judicial review altogether.<sup>25</sup>

One can readily understand how a governmental instrument so quick, cheap, largely unchecked and low in risk, and yet so effectual, may tempt some agencies to slight the APA's mandates.

A particularly perverse phenomenon arises from some courts' emphasis upon the discretion retained by the agency as an indicator of the nonbinding character of its issuance.<sup>26</sup> Under this approach, the more discretion the agency reserves in a document, the better are its chances that a court will hold that legislative rulemaking procedures were not required, even though the public was plainly meant to be bound.<sup>27</sup> The theory is that the agency, by reserving discretion, has not bound itself. But the incentives work the wrong way here. The prospect of avoiding legislative procedures encourages the agency to be cagey rather than candid, and to state its rules loosely rather than precisely. A preferable test would consider whether the constraints on private persons amount to a binding of *those persons*. Otherwise, it is perfectly easy for a document to reserve plenty of discretion for the agency to act variantly, even where it makes clear that private parties will be held to strict conformity.<sup>28</sup> Any tactical advantage the agency may gain will come at the expense of clarity and fairness to affected private persons.

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23. See Exec. Order No. 12,291, 3 C.F.R. 127 (Comp. 1981), reprinted in 5 U.S.C. § 601 note (1988). But see Memorandum from the Vice President to the Heads of Executive Departments and Agencies on the Regulatory Review Process 1 (March 22, 1991): "The Administration has consistently interpreted the Executive Order to include all policy guidance that affects the public. Such policy guidance includes not only regulations that are published for notice and comment, but also strategy statements, guidelines, policy manuals, grant and loan procedures, Advance Notices of Proposed Rule Making, press releases and other documents announcing or implementing regulatory policy that affects the public."

24. See RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 180-206 (1985).

25. See National Solid Waste Management Ass'n v. EPA, 27 Env't Rep. Cas. (BNA) 1566 (D.C. Cir. Oct. 27, 1987). The court denied a petition for review under RCRA of an EPA document because it lacked jurisdiction. The court stated that it has jurisdiction under § 7006 of RCRA only where the document is a "regulation, or requirement." *Id.* at 1567 (citing 42 U.S.C. § 6976(a)(1) (1982)). The court noted further that whether a document is a regulation or requirement depends on several factors including the agency's own characterization of the document. *Id.* at 1566. Where there was no regulation or requirement satisfying this test, there could be no judicial review of an agency action. *Id.* at 1567.

26. See *infra* Part V.

27. See *infra* text accompanying notes 305-08.

28. Consider, for example, the new 1991 EPA disclaimer form, *infra* text accompanying note 307.

To countenance nonlegislative documents that bind is inevitably to expand the agency's discretion in a most undesirable way. Although the public is bound the agency is not bound, as it would be had it used legislative rules.<sup>29</sup> It is easier for the agency to deviate from or change positions taken in policy statements, memoranda and the like than it is to deviate from or change those adopted through legislative processes.<sup>30</sup> Additionally, it may be observed generally that nonlegislative documents often are less clear and definite than legislative rules, and may enable the agency to operate at a lower level of visibility, with greater discretion and with fewer checks from the public and the courts.

Observance of legislative rulemaking requirements may appear burdensome to some agencies. One can realistically confront and assess the practical difficulties, however, only after pursuing the greatest possible clarity with regard to the concepts and requirements that these things entail. That pursuit must be the first objective of this Article.

## I. A SHORT TAXONOMICAL GUIDE TO AGENCY RULEMAKING

To subdue this problem, strong analytical tools are needed. The courts lamentably have muddled critical concepts as to which clarity and precision are essential for solution of the problem at hand. First, we must be able to distinguish legislative from nonlegislative rules. Second, we must be able to distinguish policy statements from interpretive rules. Third, we must be able to identify the circumstances in which agencies should use legislatively promulgated rules instead of nonlegislative rules (which are either interpretive rules or policy statements).

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29. See *Service v. Dulles*, 354 U.S. 363, 372 (1957) (sustaining the argument that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen"); *Boske v. Comingore*, 177 U.S. 459, 467-70 (1900); see also *United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1990) ("To prevail on his claim that the agency impermissibly departed from its own policy in seizing his property, Glenn must establish that the policy in question had the force and effect of law"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (stating that an agency "need not adhere to mere 'general statement[s] of policy'"); *Doe v. Hampton*, 566 F.2d 265, 278-82 (D.C. Cir. 1977).

30. It is not clear whether the judicially established requirement of a reasoned explanation for a change in policy, see *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983), applies to nonlegislative documents as well as to legislative rules or policies adopted in formal adjudications. Compare *One 1985 Mercedes*, 917 F.2d at 423 ("[I]nterpretive rules, general statements of policy or rules of agency organization, procedure or practice" do not have "the force and effect of law.") with *Telecommunications Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms."). As a practical matter, because nonlegislative documents are not easily challenged when they may be deemed unripe or not final, judicial discipline over policy changes is minimized. See *Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 772 (D.C. Cir. 1984), cert. dismissed sub nom. *City of New Orleans v. Middle South Energy, Inc.*, 473 U.S. 930 (1985).

All of these distinctions arise under section 553 of the APA, whose taxonomy I shall now briefly describe. This description will supply the means to draw the first two of the distinctions just cited. The third is the chief subject of this study, and will be treated at greater length.

### A. *Rules and Rulemaking*

This Article is concerned only with agency actions that fall within the APA's definition of "rule" by constituting "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency . . . ."<sup>31</sup> Issuances encompassed by this definition come in a myriad of formats and bear a myriad of labels: legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others.<sup>32</sup>

The agency process for formulating, amending, or repealing any such "rule" is defined as "rulemaking" by the APA.<sup>33</sup> Final agency dispositions in matters that are not rulemakings are "adjudications,"<sup>34</sup> which typically determine the entitlements, liabilities, or status of individually named or identifiable parties. Agencies are entitled, without observing the statutory rulemaking procedure, to set forth in their adjudicatory opinions the general propositions of law or policy that formed the basis for the adjudicatory decisions.<sup>35</sup> Though such statements may create new agency law, they are not "rules," and are not addressed in this Article.<sup>36</sup>

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31. 5 U.S.C. § 551(4) (1988).

32. See *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971).

33. 5 U.S.C. § 551(5).

34. *Id.* § 551(6), (7).

35. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

36. The author has previously addressed the problems of fairness and effectiveness that agencies engender when they rely for making their law upon a process of case-by-case adjudication instead of rulemaking. Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 *STAN. L. REV.* 1, 51-55 (1971); see also *infra* note 272. But nothing in the present Article is intended to suggest that it is improper for an agency to lay down, as the basis of its adjudicatory decisions, general principles to which it expects the public to conform.

## B. Legislative and Nonlegislative Rules

Rules are broadly classified as “legislative” and “nonlegislative.”<sup>37</sup> This classification is vital for the present analysis. The United States Court of Appeals for the District of Columbia Circuit has stated: “The distinction between legislative rules and interpretative rules or policy statements [i.e., the main categories of nonlegislative rules] has been described at various times as ‘tenuous,’ ‘fuzzy,’ ‘blurred,’ and, perhaps most picturesquely, ‘enshrouded in considerable smog.’ As Professor Davis puts it, ‘the problem is baffling.’”<sup>38</sup>

With respect, the distinction is very clear.<sup>39</sup> Legislative rules *can* readily be differentiated from those that are nonlegislative. The

37. The courts, unfortunately, sometimes confusingly use the term “substantive rule” to mean “legislative rule.” Compare *United Technologies Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987) (“distinguish[] interpretive from legislative rules”) and *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (“whether a given agency action is interpretive or legislative”) with *id.* at 1045 (“the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum”) and *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1980) (“distinguishing between substantive and interpretative rules”); see also *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980) (equating “‘legislative’ or ‘substantive’ rules”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979). Reasons for the preferred usage, observed in this Article, were well expressed in *Metropolitan School Dist. of Wayne Township v. Davila*, 969 F.2d 485, 488 (7th Cir. 1992): “We find the use of the term ‘substantive’ in this context misleading; an interpretation which explains the meaning of the statute can be just as ‘substantive’ as a legislative rule. We prefer the interpretive/legislative terminology because it avoids any potential confusion.”

As used in this Article, the term “substantive rule” contrasts with “procedural rule,” and has a meaning parallel to the concept of “substantive law”—that is, a rule that creates or affects private rights, duties or obligations. See *BLACK’S LAW DICTIONARY* 1429 (6th ed. 1990). This is correct usage under the APA. See 5 U.S.C. § 553(d) (1988). The term “substantive rule,” therefore, embraces legislative rules, interpretive rules, and policy statements other than those concerned with procedure, practice, or agency organization. See *id.* §§ 553(b)(A), 553(d); see also *Joseph v. United States Civil Serv. Comm’n*, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977) (“Interpretative rules may be substantive in the sense of addressing a substantive rather than a procedural issue of law . . .”).

This Article also follows the widespread modern usage of substituting the word “interpretive” for the statutory term “interpretative.” See 5 U.S.C. § 553(b)(A), (d)(2). For brevity, the term “policy statements” is used in place of the statute’s “general statements of policy.” *Id.*

38. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted).

39. Professor Koch had it right when, speaking of the distinction between interpretive rules and legislative rules, he wrote: “The distinction is not ‘fuzzy’ but clear: a legislative rule must be promulgated pursuant to a legislative grant of authority. The distinction is troublesome not because it is unclear, but because it is not always easy to determine . . .” Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 *GEO. L.J.* 1047, 1049 n.11 (1976); see *infra* text accompanying notes 105-10.

Despite their language, the courts just quoted and the authorities they cited were *not* addressing the distinction between legislative and nonlegislative rules (interpretive rules and policy statements). Rather, they were grappling with the question of whether a rule that *plainly was nonlegislative* should be invalidated or remanded because the agency *should have* promulgated it through legislative rulemaking procedures—that is, whether it *should have been a legislative rule*. That inquiry is a central focus of the present study.

fundamental idea is that a "legislative rule is the product of an exercise of delegated legislative power to make law through rules."<sup>40</sup>

More particularly, a rule qualifies as legislative if all of the following requirements are met: 1) The agency must possess delegated statutory authority to act with respect to the subject matter of the rule.<sup>41</sup> 2) Promulgation of the rule must be an intentional exercise of that delegated authority.<sup>42</sup> 3) The agency must also possess delegated statutory authority to make rules with the force of law.<sup>43</sup> 4) Promulgation of the rule must be an intentional exercise of the authority to make rules with the force of law.<sup>44</sup> 5) Promulgation of the rule must be an effective exercise of that authority.<sup>45</sup> 6) The promulgation must observe procedures mandated by the agency's organic statute and by the APA.<sup>46</sup> Particularly, unless it falls within an exemption in the organic legislation or in the APA, the rule must be developed through public notice-and-comment procedures<sup>47</sup> and be published in the *Federal Register*.<sup>48</sup> For purposes of this Article, the most important of the requirements is the sixth.

40. 2 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:8 (2d ed. 1979); *see also* Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977):

The relevant distinction between legislative and interpretative or any other nonlegislative rules is not the nature of the questions they address but the authority and intent with which they are issued and the resulting effect on the power of a court to depart from the decision embodied in the rule.

41. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979). In the case of interpretation of a statute that the agency has the primary responsibility to administer, such a delegation as to subject matter may be implied from the silence or ambiguity of the statute on the points in question. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *see* Anthony, *supra* note 6, at 31-35. One may speculate that the Supreme Court, when presented with a proper case, is likely to establish a similar presumption for rules that do not involve interpretations.

42. *See* DAVIS, *supra* note 40, §§ 7:10-7:11.

43. *Chrysler Corp.*, 441 U.S. at 302; *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980). A general statutory grant of rulemaking power will ordinarily be sufficient to authorize the agency to issue rules having legislative force. *See, e.g.*, *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975).

44. The agency may possess such authority, but intend to produce only a policy statement, which of course is not legislative. *See Batterton*, 648 F.2d at 702; DAVIS, *supra* note 40, §§ 7:10-7:11.

45. The issuance cannot be a legislative one if it is set forth in some format as to which the agency lacks statutory authority to act with the force of law. *See* Anthony, *supra* note 6, at 36-40. Also, if the agency retains a great deal of discretion to act at variance with the statement it has issued, the issuance might not represent an effective exercise of the rulemaking authority. *See* *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667-68 (D.C. Cir. 1978). However, if the agency intends that private parties are to be bound, the fact that discretion is retained should not relieve the agency from observing the procedural and other requirements for promulgation of a legislative rule. *See infra* Part V.

46. *Chrysler Corp.*, 441 U.S. at 302-03, 315.

47. 5 U.S.C. § 553 (1988).

48. *Id.* §§ 552(a)(1), 553(b), (d).

An agency's issuance is a valid legislative rule if and only if it meets all six of these requirements. *All substantive rules that do not fit this template are nonlegislative. They are either interpretive rules (if they interpret specific statutory or regulatory language) or policy statements (if they do not).*

The APA requires the use of legislative rulemaking procedures for every rule unless the rule falls within one of the statutory exceptions.<sup>49</sup> The courts have repeatedly declared that the exceptions are to be narrowly construed and reluctantly recognized, so as not to defeat the salutary purposes behind the notice-and-comment provisions of section 553.<sup>50</sup> For present purposes we must lay to the side the exceptions pertaining to the subject matter of rules<sup>51</sup> and to the existence of good cause to dispense with the statutory procedures.<sup>52</sup> These exceptions do not relate to the rules' legal quality. And the exception for rules of agency organization, procedure or practice is also set to the side. It bears only peripherally on the present study,<sup>53</sup> which is concerned with agency control or guidance of private conduct—that is, with substantive rather than procedural rules.<sup>54</sup> The exceptions that are of concern here are those for interpretive rules and policy statements.<sup>55</sup>

### C. *Interpretive Rules and Policy Statements*

Our focus, then, is upon substantive rules, which under the APA may be 1) legislative rules, 2) interpretive rules, or 3) policy statements.<sup>56</sup> This is the entire universe of substantive rules.

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49. *Id.* § 553; see, e.g., *W.C. v. Bowen*, 807 F.2d 1502, 1504 (9th Cir. 1987); *Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Batterton v. Marshall*, 648 F.2d 694, 700-01, 710 (D.C. Cir. 1980); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 742-43, 745 (3d Cir. 1969).

50. See *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) and cases cited therein. On the benefits and costs of notice-and-comment procedures, see Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402-09.

51. 5 U.S.C. § 553(a)(1) (involving military or foreign affairs functions); *id.* § 553(a)(2) (involving agency management, personnel, public property, loans, grants, benefits, or contracts).

52. *Id.* § 553(b)(B).

53. The question of when legislative rulemaking should be used for rules that arguably are procedural was presented in *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369 (D.C. Cir. 1990), *judgment vacated as moot*, 111 S. Ct. 944 (1991), and is the subject of Administrative Conference of the United States, Recommendation No. 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements (to be codified at 1 C.F.R. § 305.92-1)*.

54. See *supra* note 37.

55. 5 U.S.C. § 553(b)(A).

56. See *supra* note 37. The label placed upon the rule by the agency, "while relevant, is not dispositive." *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985).

At this point, it is useful to envision a simple grid. Norms that interpret can be issued either legislatively or nonlegislatively. Norms that do not interpret can also be issued either legislatively or nonlegislatively. All issued legislatively under the tests stated above<sup>57</sup> are legislative rules, whether they interpret or not. Those that are not legislative are either interpretive rules or policy statements, depending upon whether they interpret or not.

Because they are both nonlegislative, interpretive rules and policy statements are often usefully discussed together,<sup>58</sup> as in the subheading just above. But they are critically different for present purposes. The critical difference is that the courts do not treat interpretations as making new law, on the theory that they merely restate or explain the preexisting legislative acts and intentions of Congress.<sup>59</sup> By contrast policy statements, although within the agency's authority, do not rest upon existing positive legislation that has tangible meaning.<sup>60</sup> Neither Congress nor the agency, acting legislatively, has already made the law that the policy statements express. Thus these documents are looked upon as creating new policy, albeit not legally binding policy as the documents were not promulgated legislatively.<sup>61</sup>

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57. See *supra* text accompanying notes 39-48.

58. *E.g.*, *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) (treating both interpretive and policy expressions together under the term "non-binding action"); PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 157-58 (1989) (analyzing the impact of "interpretive rules and other like formulations"); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 523 (1977) (contrasting "nonlegislative rules"—both interpretive rules and policy statements—with "legislative rules"); Koch, *supra* note 39, at 1049-53.

59. *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("agency is merely explicating Congress' desires"); *General Motors*, 742 F.2d at 1565; *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979); *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 763 n.12 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); *American President Lines, Ltd. v. FMC*, 316 F.2d 419, 421-22 (D.C. Cir. 1963); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

60. See *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987). The court used the term "legislative rules" to refer to nonlegislatively promulgated rules of the sort herein defined as "policy statements." See *infra* notes 65-69 and accompanying text.

61. "A binding policy is an oxymoron." *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988); see Anthony, *supra* note 6, at 2-6, 55-58.

An interpretive rule is an agency statement that was not issued legislatively and that interprets language of a statute<sup>62</sup> (or of an existing legislative rule)<sup>63</sup> that has some tangible meaning.<sup>64</sup>

A policy statement is an agency statement of substantive law or policy, of general or particular applicability and future effect,<sup>65</sup> that was not issued legislatively and is not an interpretive rule.<sup>66</sup>

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62. “ ‘An interpretive rule is one which does not have the full force and effect of a substantive [legislative] rule but which is in the form of an explanation of particular terms in an Act.’ ” *Gibson Wine*, 194 F.2d at 331 (quoting David Reich, *Rulemaking Under the Administrative Procedure Act*, 7 N.Y.U. SCH. L. INST. PROC. 492, 516 (1947)), quoted in *American Hosp. Ass’n*, 834 F.2d at 1045, in *Batterton*, 648 F.2d at 705, and numerous other cases. “If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency’s interpretation of those provisions, it is an interpretive rule.” *United Technologies*, 821 F.2d at 719-20.

A rule that purported to interpret a vacuous statutory term like “just and reasonable” or “public interest, convenience and necessity” would not be interpretive; if it were issued by legislative rulemaking it would be a legislative rule, but if not, such a rule would be a policy statement. See *infra* notes 63-64 and accompanying text. But see *Friedrich v. Secretary of Health & Human Servs.*, 894 F.2d 829, 837 (6th Cir.) (articulation of what is “reasonable and necessary” in particular circumstances held to be interpretive), *cert. denied*, 111 S. Ct. 59 (1990).

63. E.g., *Indiana Dep’t of Public Welfare v. Sullivan*, 934 F.2d 853, 856 (7th Cir. 1991); *Nason v. Kennebec County CETA*, 646 F.2d 10, 18 (1st Cir. 1981); *National Ass’n of Ins. Agents, Inc. v. Board of Governors, Fed. Reserve Sys.*, 489 F.2d 1268, 1270 (D.C. Cir. 1974).

64. A rule that interprets statutory or regulatory language having specific meaning can be either legislative or interpretive. The fact that it interprets a statute does not reduce a legislative rule to the status of an interpretive rule. A classic case of statutory interpretation by means of a legislative rule is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I would hazard the guess that a majority of legislative rules involve interpretation of statutes.

Loose language in many of the cases, however, can be misunderstood to suggest that any rule announcing an interpretation must always be a mere nonlegislative rule, even if the rule had been promulgated legislatively. E.g., *Gibson Wine*, 194 F.2d at 329-31 (“[I]nterpretive rules are statements as to what the administrative officer thinks the statute or regulation means.”), quoted in *American Hosp. Ass’n*, 834 F.2d at 1045. The original culprit in this respect may have been the “working definition” offered by the Justice Department: “*Interpretative Rules*—rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].

65. See the APA definition of “rule,” *supra* text accompanying note 31.

66. It is said that policy statements are “designed to inform rather than to control.” *American Trucking Ass’ns v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981), *cert. denied*, 460 U.S. 1022 (1983). And while policy statements often “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,” ATTORNEY GENERAL’S MANUAL, *supra* note 64, at 30 n.3, and perhaps always *should* do so, it is obvious that the category cannot be confined to statements of these sorts. For example, a nonlegislative document declaring a policy that purports to control or guide private parties’ conduct is a policy statement. Whether it *should* have been issued as a legislative rule instead of as a policy statement is a separate question. A document’s classification as a policy statement does not *ipso facto* qualify it for the policy statement exemption from § 553’s legislative rulemaking requirements. To be exempt, the statement must be tentative and not intended to be binding. See *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-21, 1323 (D.C. Cir. 1988); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 945-47, 949 (D.C. Cir. 1987); *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 37-39 (D.C. Cir. 1974); cases cited *infra* notes 274-303; *infra* Part V.

If the document goes beyond a fair interpretation of existing legislation,<sup>67</sup> it is not an interpretive rule.<sup>68</sup> Because it was not promulgated legislatively, it cannot be a legislative rule; it therefore is a policy statement. This is not merely the logical classification, but the proper one, as the agency is making policy in an area not specifically governed by the existing law.<sup>69</sup>

*All substantive nonlegislative issuances that are not interpretive rules are policy statements—whether they are captioned or issued as policy statements or manuals or guidances or memoranda or circulars or press releases or even as interpretations.*

The cases are replete with statements to the effect that policy statements are “designed to inform rather than to control.”<sup>70</sup> But many policy statements—and manuals, guidances, memoranda and the like that fall within the category of policy statements—manifestly are “designed to control.” These are the principal concern of this Article.

I have said that a substantive nonlegislative rule must be either an interpretive rule or a policy statement. Rather surprisingly, this perhaps self-evident proposition has eluded most courts and commentators, at least in the terminology they have chosen.

On the distinctions between interpretive rules and policy statements, and between those forms of nonlegislative rules and legislative rules, see generally 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE §§ 3.23-3.26 (1985); Asimow, *supra* note 50, at 383-401; Arthur E. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 108-17 (1971).

67. See *supra* text accompanying notes 3-6. In a leading case, Chief Judge Patricia Wald summarized the D.C. Circuit cases as having “generally sought to distinguish cases in which an agency is merely explicating Congress’ desires from those cases in which the agency is adding substantive content of its own.” *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

68. See *United Technologies Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987) (“[R]ules in which the agency sought to fill gaps and inconsistencies left by the statutory scheme . . . picked up where the statute left off; ‘by no stretch of the imagination could [they] have been derived by mere ‘interpretation’ of the instructions of Congress.’”) (quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 879 (D.C. Cir. 1979)); *Cabais v. Egger*, 690 F.2d 234, 239 (D.C. Cir. 1982) (“These rules . . . impose an obligation on the states not found in the statute itself. It cannot reasonably be argued that these rules are merely interpretative.”); see also *First Bancorporation v. Board of Governors, Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (“[T]he Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order. Implicit in our holding is a rejection of the Board’s contention that this is an interpretative rule . . .”) (citations omitted).

69. Consider, for example, what was said about the documents involved in *Jerri’s Ceramic Arts, Inc. v. Consumer Prod. Safety Comm’n*, 874 F.2d 205, 207-08 (4th Cir. 1989) (“more is involved than mere ‘interpretation’”); *Cabais*, 690 F.2d at 239 (rules and formulae “impose an obligation on the states not found in the statute itself”); *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 468-69 (D.C. Cir. 1980) (nonlegislatively issued “regulation does not merely explain the statute”); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 878-79 (D.C. Cir. 1979) (rules “founded on no explicit provisions passed by Congress”).

70. *American Trucking*, 659 F.2d at 462.

Although documents were plainly nonlegislative (because they were not promulgated by notice-and-comment procedures), courts nevertheless in many cases have regularly asked whether such documents “are” legislative rules<sup>71</sup> rather than interpretive rules<sup>72</sup> or policy statements.<sup>73</sup> This method of framing the issue begs the real question and seems to me to have bred unending confusion. For precision’s sake, we must insist that these documents cannot “be” legislative rules, as they were not issued legislatively. What the courts in these cases plainly were looking for was whether the agency was *trying* to issue a rule that was legislative in nature. Did the agency, for example, attempt to “implement a general statutory mandate”<sup>74</sup> or “intend[] to create new law, rights or duties”<sup>75</sup> or “impose an obligation . . . not found in the statute itself”<sup>76</sup> or “attempt[] . . . to supplement the Act, not simply to construe it”<sup>77</sup> or “conclusively determine[] the . . . trigger [for] the . . . program allocations”<sup>78</sup> In short, did the agency’s nonlegislative action bind or attempt to bind the affected public?

Thus, the proper question in these cases is not whether the policy document *is* a legislative rule. Rather, the proper question is whether the nonlegislative document *should have been* issued as a legislative rule in the circumstances. The key to that question is, I believe, quite clear, based on analysis of the APA and of the many decided cases: *Did the agency intend the document to bind? Has the agency given it binding effect?* If the answer to either of these questions is “yes,” the document should have been issued as a legislative rule.

## II. NONLEGISLATIVE RULES WITH BINDING EFFECT

Legislative rules<sup>79</sup> have the force of law and are legally binding upon the courts, the agency, and the public.<sup>80</sup> Nonlegislative rules

71. Sometimes called a “substantive rule,” *see supra* note 37.

72. *E.g.*, *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (citing *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985)); *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045-46 (D.C. Cir. 1987); *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987).

73. *E.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-22 (D.C. Cir. 1988); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) and cases cited therein; *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 37-38 (D.C. Cir. 1974).

74. *United Technologies*, 821 F.2d at 720.

75. *Fertilizer Inst.*, 935 F.2d at 1307-08 (quoting *General Motors*, 742 F.2d at 1565).

76. *Cabais v. Egger*, 690 F.2d 234, 239 (D.C. Cir. 1982).

77. *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980).

78. *Batterton v. Marshall*, 648 F.2d 694, 706 (D.C. Cir. 1980).

79. *See supra* text accompanying notes 41-48.

80. *See Anthony, supra* note 6, at 3 n.6, 39. More precisely, rules are binding and have the force of law when a court may not review them freely, but must accept them unless they are contrary to statute or unreasonable. *Id.*

(interpretive rules and policy statements), by definition, are not *legally* binding on the courts, the agency, or the public.

This Article deals with nonlegislative rules that have the purpose or effect of binding the public *as a practical matter*. These are nonlegislative documents that are intended to impose mandatory standards or obligations, or that as a practical matter are given that effect.<sup>81</sup>

In general, a nonlegislative document is binding as a practical matter if the agency treats it the same way it treats a legislative rule—that is, as dispositive of the issues that it addresses—or leads the affected public to believe it will treat the document that way. Certain indicia that nonlegislative documents are binding in this practical sense are clearly identifiable.

Obviously, agency *enforcement action* based upon nonobservance of the nonlegislative document, or the threat of such action, bespeaks a clear intent to bind and indeed puts it into execution.<sup>82</sup> Here the eating is the proof of the pudding.

Similarly, in the setting of agency actions that pass upon applications for approvals, permits, benefits, and the like, *regular application of the standards* set forth in the document evidences both the intent to bind and a practical binding effect.<sup>83</sup>

A document will have practical binding effect before it is actually applied if the affected private parties are reasonably *led to believe* that failure to conform will bring adverse consequences, such as an enforcement action<sup>84</sup> or denial of an application.<sup>85</sup> If the document is couched

81. This understanding, that the binding effects are practical ones and not legal ones, clarifies one of the many terminological inexactitudes that plague this field, the so-called "legal effect" test. Professor Asimow has summarized the usage of some courts and commentators: "The prevailing standard for distinguishing legislative and interpretive rules can be described as the 'legal effect' test. If a rule explaining the meaning of language actually makes 'new law,' as opposed to merely interpreting 'existing law,' it is legislative." Asimow, *supra* note 50, at 394. I suggest that greatly improved clarity will be achieved if it is realized that under this "test" the court is actually looking for *practical* binding effects, *not legally* binding ones. (And of course the rule is not legislative when it was not promulgated legislatively.)

82. *E.g.*, *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989) (conviction based on violation of nonlegislative Park Service document reversed). Other examples of these categories of practical bindingness are set forth in Part III.

83. *E.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) ("later conduct applying it confirms [the] binding character" of the model, also evidenced by mandatory language).

84. *E.g.*, *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 208 (4th Cir. 1989) ("[T]he proposed statement has the clear intent of . . . providing the Commission with power to enforce violations of a new rule.").

85. *E.g.*, *Linoz v. Heckler*, 800 F.2d 871 (9th Cir. 1986) (denial of Medicare coverage based on manual).

in mandatory language,<sup>86</sup> or in terms indicating that it will be regularly applied,<sup>87</sup> a binding intent is strongly evidenced.<sup>88</sup> In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.<sup>89</sup>

It is possible that an agency will use mandatory or rigid language even though it does not intend the document to be regularly applied without further consideration. There is nevertheless a practical binding effect if private parties suffer or reasonably believe they will suffer by noncompliance. This phenomenon can occur especially where the document is issued at headquarters but administered in the field.<sup>90</sup> Mandatory language in the document may combine with the routinized behavior of the field staff to produce a practical binding effect upon affected private parties. Although the document may not have been intended to be “finally determinative of the issues or rights to which it is addressed,”<sup>91</sup> its practical effect is to bind, and affected persons may not be able to risk noncompliance to test it. Similarly, a document that initially was intended to be nonbinding, or one as to which the intent was unclear, may harden into a fixed rule, with binding effect, by repeated application.<sup>92</sup>

A further emblem of practical binding effect is the absence of an opportunity for affected private parties to be heard on proposed policy

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86. *E.g.*, *Community Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987) (“mandatory, definitive language is a powerful, even potentially dispositive, factor” suggesting that the nonlegislative rules were “presently binding norms”).

87. *E.g.*, *American Bus Ass’n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) (“in reality a flat rule of eligibility”) (quoting *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 984 (E.D. Pa. 1977)).

88. Closely parallel is the concept of expected conformity, which is important in determining whether agency action is final, *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), or ripe for judicial review, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). “Characteristics indicating finality include providing a ‘definitive’ statement of the agency’s position, having a ‘direct and immediate’ effect on the day-to-day business of the complaining parties, having the ‘status of law,’ and carrying the expectation of ‘immediate compliance with [its] terms.’” *Southern Cal. Aerial Advertisers’ Ass’n v. FAA*, 881 F.2d 672, 675 (9th Cir. 1989).

89. *See, e.g.*, *Alaska v. Department of Transp.*, 868 F.2d 441 (D.C. Cir. 1989); *Community Nutrition*, 818 F.2d at 943; *see also Public Citizen, Inc. v. NRC*, 940 F.2d 679 (D.C. Cir. 1991).

90. *See infra* Part VI.

91. *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

92. “Where the language and context of a statement are inconclusive, we have turned to the agency’s actual applications.” *Public Citizen*, 940 F.2d at 682 (Williams, J.) (citing *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)); *Community Nutrition*, 818 F.2d at 943; *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980); *American Bus Ass’n v. United States*, 627 F.2d 525 (D.C. Cir. 1980); *see also American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1056-57 (D.C. Cir. 1987) (“[W]here the agency’s characterization of its action would fit them cleanly into a § 553 exemption, we think it the most prudent course to await the sharpened facts that come from the actual workings of the regulation . . . .”); *infra* notes 314-15 and accompanying text.

alternatives, before the policy set forth in the document is concretely applied to them, and to have their proposals considered with an open mind by the agency's policymakers. If the document is to be applied rigidly to private persons without first affording them a realistic chance to challenge its policy, its binding effect is evident. By the same token, if the agency affords such an opportunity and genuinely is open to reconsideration of the policy, the document shows neither the intent to bind nor such an effect.<sup>93</sup>

All of these practical binding effects will be more severe where the affected private parties, for practical reasons, cannot invoke the aid of the courts to challenge the documents. For example, regulations may require the exhaustion of lengthy intra-agency appeals before the challenged permit can be used, even on the agency's terms.<sup>94</sup>

Applying the above guides to determine when a document has practical binding force may not always be easy. As Chief Judge Patricia Wald has well observed with respect to one aspect of the problem, "[d]etermining whether a given agency action is interpretive or legislative<sup>95</sup> is an extraordinarily case-specific endeavor."<sup>96</sup> Similarly, Judge Kenneth Starr, having stated that a "legislative rule is recognizable by virtue of its binding effect,"<sup>97</sup> declared that "[t]his definitional principle, however, is hardly self-executing,"<sup>98</sup> and cited a number of "factors" to be examined.<sup>99</sup> That standards have a mathematical or mechanical quality is not determinative of the agency's intent or use of them to

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93. The courts often say that a document is not "legislative" (or not "substantive")—meaning that it need not have been issued legislatively—if the agency has reserved discretion to act at variance with it. This notion, which I believe is flawed, is discussed below. See *infra* Part V.

94. See, e.g., 40 C.F.R. § 124.15, .19 (1991) (EPA).

95. Under the analysis and terminology set forth above, this effort is to distinguish an interpretive rule (as to which legislative rulemaking is not required despite the agency's efforts to bind) from a document that goes beyond interpretation and sets forth new law which the agency intends to be binding. The latter document is not a legislative rule, since it was not promulgated legislatively. It is a policy statement that *should have been* issued as a legislative rule. Thus, properly understood, the distinction is between an interpretive rule and a rule that should have been legislative.

96. *American Hosp.*, 834 F.2d at 1045.

97. *Alaska v. Department of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989).

98. *Id.* at 446.

99. The factors in the *Alaska* case, and in *Community Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987), that reinforced the conclusion that the agency intended the action to have binding effect were: mandatory language, prior grant of "exemptions," publication in the Code of Federal Regulations, limitation upon the agency's discretion, and whether the agency could successfully prosecute persons who had complied with the document. *Alaska*, 868 F.2d at 446-47.

bind.<sup>100</sup> The availability of procedures for waiver of the rule should not change a rule from being one that binds to one that does not.<sup>101</sup>

If a rule is conclusive on one factor but reserves discretion on the second, it is not “any less of a rule . . . even though it does not purport to answer the second question.”<sup>102</sup> Indeed, a single nonlegislative document can imaginably be a layer-cake of elements: restatement of statutory language, interpretation of statute, interpretation of legislative regulations, policy statement declaring policy that is not intended to bind,<sup>103</sup> and policy statement declaring policy that is intended to bind.<sup>104</sup> The last of these must always be carefully distinguished from the other elements, to consider whether legislative rulemaking requirements should have been observed.

A proper focus upon practical binding effects may enable us to understand why the courts have found the “distinction between legislative rules and interpretative rules or policy statements” to be “enshrouded in considerable smog” and “baffling.”<sup>105</sup> I believe there are two principal reasons for the courts’ perplexity.

The first is that, properly understood, the distinction calls for a largely factual judgment—to pass upon the agency’s intent to bind (or its practice of doing so)—without benefit of the sorts of evidence upon which factual findings are ordinarily based.<sup>106</sup> One needs only to sample the opinions that parse the considerations bearing upon these distinctions<sup>107</sup> to see that the evidence and inferences that can be drawn from the administrative record are limited, making the court’s task difficult, though by no means impossible. It would seem quite wrong under the

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100. Compare *Texaco, Inc. v. Federal Power Comm’n*, 412 F.2d 740, 744-45 (3d Cir. 1969) (holding that document imposing obligation to pay compound interest on refunds was *not* an exempt policy statement where agency would not reconsider the basic policy, even though it would entertain waiver petitions) with *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 40 (D.C. Cir. 1974) (holding that document establishing a schedule of priorities for curtailing deliveries of gas was an exempt policy statement where agency afforded opportunity to challenge the basic policy).

101. “In general, a discretionary waiver provision is not sufficient to qualify an otherwise nondiscretionary regulation as a ‘general statement of policy’ . . . .” *Guardian Fed. Sav. & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 n.33 (D.C. Cir. 1978). “In filing a waiver application, an operator is entitled to be confronted only with rules adopted in the procedural manner prescribed by Congress.” *Texaco*, 412 F.2d at 746.

102. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988).

103. See *Panhandle Producers & Royalty Owners Ass’n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1110-11 (D.C. Cir. 1987).

104. See *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

105. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted). The full quotation appears in the text accompanying note 38 *supra*.

106. Chief Judge Wald has said that cases passing upon whether a rule is interpretive “turn on their precise facts.” *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

107. E.g., *Alaska v. Department of Transp.*, 868 F.2d 441, 445-47 (D.C. Cir. 1989); *American Hosp.*, 834 F.2d at 1045-47.

*Morgan IV* doctrine<sup>108</sup> to countenance discovery proceedings or evidentiary hearings in which officials could be interrogated about their motives or their deliberative practices. It is significant that the cases have not in any way suggested that such procedures should be allowed.<sup>109</sup> The necessary determinations can be facilitated by a clear recognition of the issues that bear upon the inquiry into the practical binding purposes or effects of an agency issuance.<sup>110</sup>

The second reason the courts have found the distinction troubling, I would suggest, is one which has already been described: the reigning confusion in the use of terms and their accompanying concepts. It must be firmly grasped that rules that declare new policy can be either legislative rules or nonlegislative rules, depending upon whether they were promulgated legislatively; that those not issued legislatively cannot ever "be" legislative rules, even if they should have been; and that nonlegislative rules that do not interpret (or that "go beyond the statute" in an attempt at interpretation) are policy statements within the APA's taxonomy and must be so treated when determining whether they should have been issued legislatively.

### III. EXAMPLES OF AGENCY USE OF NONLEGISLATIVE RULES TO BIND THE PUBLIC

Our focus now narrows to the category of nonlegislative documents that go beyond a fair interpretation of existing legislation and that the agency makes binding upon the public. Again, these documents are "policy statements" within the APA, rather than interpretive rules.<sup>111</sup> An agency may use interpretive rules in a manner that makes them

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108. The *Morgan IV* doctrine holds that it ordinarily is improper to subject a decisional official to questioning on his or her decision processes, just as a judge may not be subjected to such scrutiny. *United States v. Morgan*, 313 U.S. 409, 422 (1941).

109. See *Public Citizen, Inc. v. NRC*, 940 F.2d 679, 682 (D.C. Cir. 1991). Rather than suggesting discovery proceedings, the court said with regard to how it proceeds in these cases: "Where the language and context of a statement are inconclusive, we have turned to the agency's actual application."

110. The courts have suggested that the burden is on the agency to show that its act is within an exemption to § 553. "The issue here is whether the agency has demonstrated that this case is governed by the exceptions to section 553." *Gnardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 663 (D.C. Cir. 1978). "The exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'" *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984), quoted in *American Hosp.*, 834 F.2d at 1045, and numerous other cases.

111. See *supra* text accompanying notes 65-70.

binding as a practical matter,<sup>112</sup> but it may not so use policy documents.<sup>113</sup> The examples that follow illustrate agency use of nonlegislative policy documents to bind the public.

Although it is not necessary to do so, the examples are grouped for convenience into the categories of enforcement cases, application-and-approval cases, and benefit and reimbursement cases, with separate attention to cases involving administration by the states. The phenomenon of the regular application of nonlegislative policy documents by field offices of the federal agency and by the states will be discussed at a later point,<sup>114</sup> apart from presentation of these examples.

The majority of the examples are drawn from adjudicated cases.<sup>115</sup> Because the courts have documented and organized the facts, these examples have been relatively easy to gather and can be summarized in a relatively simple fashion. Other examples, collected from non-case sources, have generally required more extensive presentation and documentation.

#### A. *Use of Nonlegislative Policy Documents in Direct Enforcement*

Occasionally agencies rely upon guidances or other nonlegislative policy documents as the law under which to bring or to threaten direct enforcement actions in court or within the agency.

A-1. A demonstrator at Lafayette Park in front of the White House was prosecuted for violating "conditions," issued but not made part of its regulations by the United States Park Service, that restricted the storage of property in the Park.<sup>116</sup>

A-2. The government sought an injunction and civil penalties in district court for violation of the terms of a memorandum sent by the Environmental Protection Agency's Director of Control Programs to the EPA regional office air program chiefs, imposing stricter requirements

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112. *See supra* text accompanying notes 3-6.

113. *See supra* text accompanying notes 7-11; *infra* Part IV.

114. *See infra* Part VI.

115. In the examples drawn from decided cases, unless otherwise stated, the agency's use of the nonlegislative document was in each instance disapproved by the court because the agency had failed to observe legislative rulemaking procedures. "Normally, a judicial determination of procedural defect requires invalidation of the challenged rule." *Batterton v. Marshall*, 648 F.2d 694, 711 (D.C. Cir. 1980). This disposition will therefore not be recited in the individual examples. And rather than appending a footnote to every declarative sentence, this section uses a single citation for each case example in its entirety, unless reason exists to do otherwise.

116. *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989) (holding document "null and void"; reversing conviction).

(through a new method of computing) than those in the duly-promulgated state implementation plan in question.<sup>117</sup>

A-3. One alleged violation remained after the Food and Drug Administration (FDA) had inspected the plant of a manufacturer of medical apparatus, and the government pressed suit to enjoin it. The company had fallen short of a sterility standard that had been set forth in draft "inspectional guidelines" circulated by FDA's compliance office to its inspectors.<sup>118</sup>

A-4. The Administrator of the Occupational Safety and Health Administration (OSHA) spoke at a labor union convention and followed up with a document captioned "interpretive rule and general statement of policy," to the effect that employers would be charged with discrimination unless they paid wages to union representatives who accompanied OSHA personnel conducting inspections of the employers' premises, despite the absence of any such provision in the Occupational Safety and Health Act.<sup>119</sup>

A-5. The Consumer Products Safety Commission, through a "statement of interpretation," eliminated an exclusion to its Small Parts Rule, violation of which could invoke a range of civil and criminal penalties provided by statute. The court found that the statement did not interpret, but amounted to an attempt to impose new duties having the force of law.<sup>120</sup>

A-6. Through an "order," which it argued was a policy statement within the APA exemption, the Federal Power Commission for the first time directed operators to pay interest on refunds it had ordered.<sup>121</sup>

A-7. Acting under statutory provisions outlawing discrimination against the handicapped by institutions receiving federal assistance,<sup>122</sup> the Secretary of Health and Human Services (HHS) without notice and

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117. *United States v. Zimmer Paper Prods., Inc.*, 20 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,556 (S.D. Ind. 1989) (holding memorandum to be of no effect).

118. *United States v. Bioclinical Sys., Inc.*, 666 F. Supp. 82, 84 (D. Md. 1987) (denying injunction; "At bottom, what the Government is asserting here is that . . . the SAL [sterility assurance level] should be what the Office of Compliance dictates it to be.").

119. *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980) (vacating rule; "[M]ost important of all, high-handed agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action."); *see also id.* at 472 (Bazelon, J., concurring) ("[A]dvance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era.").

120. *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989) (setting aside document).

121. *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740 (3d Cir. 1969) (setting aside order).

122. *Rehabilitation Act of 1973*, § 504, 29 U.S.C. § 794 (1988).

comment issued an immediately effective “interim final regulation” requiring hospitals to post notices that discriminatory denial of food and customary medical care to a handicapped infant is unlawful.<sup>123</sup> Because the regulation was “intended, among other things, to change the course of medical decisionmaking,”<sup>124</sup> it affected substantive rights and was not an interpretation, and therefore was “declared invalid due to the Secretary’s failure to follow procedural requirements in its promulgation.”<sup>125</sup>

A-8. The FDA’s regulations requiring tamper-resistant packaging for certain over-the-counter drug products<sup>126</sup> were augmented by a 1988 Compliance Policy Guide (CPG),<sup>127</sup> stating the agency’s conclusion that certain packaging technologies (tinted wrappers, and cellophane with overlapping end flaps) were “no longer acceptable.”<sup>128</sup> A CPG such as this one may be an example of an advisory opinion which the FDA states “may be used in administrative or court proceedings to illustrate acceptable and unacceptable procedures or standards, but not as a legal requirement.”<sup>129</sup> However, if a drug company were wilfully to use tinted wrappers or cellophane in violation of the CPG, it could hardly be doubted that the FDA would initiate some sort of enforcement action.<sup>130</sup>

A-9. Under the amended Motor Vehicle Cost Savings and Information Act, manufacturers were required to meet average fuel economy standards.<sup>131</sup> EPA’s responsibilities under the Act included establishing, “by rule,” test and calculation procedures,<sup>132</sup> and conducting the tests and calculating manufacturers’ corporate average fuel economy (CAFE) ratings.<sup>133</sup> A manufacturer that failed to meet its CAFE standard by as little as 1/10 of a mile per gallon could incur millions of dollars in civil penalties.<sup>134</sup> EPA was criticized by the Comptroller General for its use

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123. 48 Fed. Reg. 9630 (1983) (the “Baby Doe regulation”).

124. *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395, 401 (D.D.C. 1983).

125. *Id.* at 400.

126. 21 C.F.R. § 211.132 (1991).

127. Food and Drug Administration, Compliance Policy Guide No. 7132a.17 (Mar. 1, 1988) reprinted as enclosure to THE PROPRIETARY ASSOCIATION, ACTIVE MEMBER REPORT NO. 32-88.

128. *Id.* at 2.

129. 21 C.F.R. § 10.85(j) (1991).

130. Though one would not expect any regulated company to flout the agency’s policy in this particular, this fact does not change the binding effect created by the evident agency intent to require affected parties to obey the CPG’s prohibitions. Potential penalties include injunction, 21 U.S.C. § 332 (1988), seizure, *id.* § 334, and criminal prosecution, *id.* § 333.

131. 15 U.S.C. §§ 2001-2012 (1982).

132. *Id.* § 2003(d)(1).

133. *Id.* §§ 2002, 2003.

134. Op. Comptroller Gen. No. B-217744, at 2 (Letter from Milton J. Socolar, for the Comptroller General, to Representative John D. Dingell, Chairman, Subcomm. on Oversight and Investigations, House Comm. on Energy and Commerce (June 3, 1985)).

of advisory circulars to make changes in the tests instead of performing legislative rulemaking.<sup>135</sup>

A-10. Nonlegislative provisions in United States Department of Agriculture (USDA) manuals are legion, and they are enforced. A large number were cited to the author by USDA senior attorneys.<sup>136</sup> Here are some examples from the manuals of the Animal and Plant Health Inspection Service: a) A Veterinary Services memorandum went beyond the requirements of statute and regulations<sup>137</sup> to add a requirement that all containers used for exportation of animal embryos or semen (except to Canada) must be marked with a legend stating that they must be cleaned and disinfected before return to the United States.<sup>138</sup> A person contemplating export could fairly expect that, if the legend were not included, the inspector would forbid the export, or would cite a violation if export were attempted.<sup>139</sup> b) The gypsy moth regulations specify a list of "regulated articles" subject to quarantine restrictions upon interstate movement.<sup>140</sup> Under the rubric "[i]f the article is one of the following, then it's regulated," the manual adds a substantial and entirely new category, "timber and timber products."<sup>141</sup> c) Certain garbage deriving from food is regulated to avert disease; the regulations provide that "regulated garbage" shall be moved and unloaded under the direction of a USDA inspector,<sup>142</sup> but the manual requires that regulated garbage may be transported only by an approved vessel.<sup>143</sup> d) The same regulations call for sterilization of regulated garbage by cooking and burial of the residue in a landfill, except that burial is not required for materials extracted from the residue in certain cases.<sup>144</sup> The manual calls for burial

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135. "[C]hanges should have been made formally [by legislative rulemaking], unless one of the specific limited exceptions applied to a particular change." *Id.* at 1; *see also id.* at 8.

136. Group interview with John Golden, Associate General Counsel, USDA; Ronald Cipolla, Assistant General Counsel, USDA; William Jenson, Senior Counsel, USDA; Thomas Walsh, Assistant General Counsel, USDA; Robert Paul, Deputy Assistant General Counsel, USDA; and Harold Reuben, Deputy Assistant General Counsel, USDA, in Washington, D.C. (July 9, 1991).

137. 9 C.F.R. pt. 98 (1991) (regulations covering "Importation of Certain Animal Embryos and Animal Semen").

138. Animal and Plant Health Inspection Service, USDA, Veterinary Services Memorandum No. 592.111 (Feb. 6, 1991).

139. Interviews with William Jenson, Senior Counsel, USDA, in Washington, D.C. (July 7, 1991 and Sept. 5, 1991).

140. 7 C.F.R. § 301.45-1(x) (1991).

141. ANIMAL AND PLANT HEALTH INSPECTION SERVICE, USDA, GYPSY MOTH PROGRAM MANUAL 9.3 (Oct. 9, 1990).

142. 9 C.F.R. § 94.5(f)(1) (1991).

143. ANIMAL AND PLANT HEALTH INSPECTION SERVICE, USDA, AIRPORT AND MARITIME OPERATIONS MANUAL 3.40a (PDC 11/90-09).

144. 9 C.F.R. § 94.5(h)(2) (1991) (burial not necessary where residue is unsuitable for use as a food or soil additive).

of all sterilized garbage.<sup>145</sup> e) Regulations require that pet birds of U.S. origin that have been outside the United States for more than sixty days must be confined by the owner at the place where the birds are available for inspection for a minimum of thirty days.<sup>146</sup> The manual requires quarantine at the owner's residence.<sup>147</sup>

A-11. The Department of Transportation as successor to the Civil Aeronautics Board issued, without recourse to notice-and-comment rulemaking procedures, an "Order Granting Exemption," followed by an "Order Amending Exemption" and an "Order Clarifying Amendment to Exemption."<sup>148</sup> Their upshot was that air travel advertisements may state certain taxes and surcharges separately from the basic fares, without being regarded as "unfair or deceptive practices or unfair methods of competition" within the meaning of the Federal Aviation Act's analog<sup>149</sup> to section 5 of the Federal Trade Commission Act.<sup>150</sup> After several states, at the recommendation of the National Association of Attorneys General, adopted statutes that conflicted with the Federal Aviation Administration (FAA) position, the federal agency responded that "the Federal government has preempted this aspect of state advertising regulation."<sup>151</sup> Twenty-seven states successfully sued to have the actions set aside.<sup>152</sup>

As the examples below illustrate, the private party can be placed in a particularly difficult position when the agency can take enforcement action without prior recourse to the courts or even to agency hearing procedures.

A-12. An inmate working in the Federal Prison Industries Program refused to comply with a "program statement" that called for remittance of half of his prison earnings to pay off certain obligations, preferring to send the money to his wife. He was accordingly fired from his prison job. Thus the document was made binding by the sanction of dismissal. Although the program statement was couched in less-than-

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145. AIRPORT AND MARITIME OPERATIONS MANUAL, *supra* note 143, at 3.40a.

146. 9 C.F.R. § 92.101(c)(2)(ii)(B)(1) (1991).

147. AIRPORT AND MARITIME OPERATIONS MANUAL, *supra* note 143, at 3.30.

148. *Alaska v. Department of Transp.*, 868 F.2d 441, 442 (D.C. Cir. 1989).

149. 49 U.S.C. § 1381(a) (1988).

150. 15 U.S.C. § 45(a)(1) (1988).

151. *Alaska*, 868 F.2d at 442-43.

152. *Id.* at 445 ("DOT's actions are strikingly similar to (and in all principled respects, the same as) that deemed to constitute a legislative rule in *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987)]; we therefore conclude that the 1988 Orders are invalid by virtue of the Department's failure to employ notice-and-comment procedures.").

mandatory terms and was argued by the government to be an interpretive rule, it was applied in an absolute manner.<sup>153</sup>

A-13. An assistant regional manager of the FAA sent a letter to Los Angeles area pilots and operators of banner-towing airplanes, declaring that they no longer could fly through a corridor in the Los Angeles terminal control area. Since the directive would be implemented by the FAA's air traffic controllers denying clearances to transit the corridor, the pilots would be put out of business without any judicial action by the FAA. The court held the letter to be a "rule" within the APA and reviewable as final agency action.<sup>154</sup>

A-14. In a similar pattern, the FAA sent a letter to aerial sports parachuting operators, stating that parachuting would no longer be permitted in a previously designated jump zone adjacent to and within the San Diego terminal control area. The court again held the letter to be a "rule" and reviewable final action.<sup>155</sup>

A-15. An FDA "import alert" required FDA agents at U.S. ports of entry to detain reimported American-made pharmaceuticals unless the importer could document their full chain of custody while abroad. Under this document, FDA ordered an importer's goods to be reexported or destroyed within ninety days, but agreed to a stay during which the importer was able to obtain judicial relief.<sup>156</sup>

A-16. USDA meat inspectors base their evaluations on inspection manuals and bulletins to the field, only relatively minor parts of which are promulgated through legislative rulemaking procedures. The inspectors have the power to close down a packing line temporarily for serious violations, until the plant comes into compliance. The immediate economics of the situation tend to compel the packers to comply with the rules thus enforced rather than to endure a shutdown and await relief in court.<sup>157</sup>

Statements of enforcement policy are ordinarily issued nonlegislatively. These statements typically set forth the criteria by which the agency will select cases for prosecution or other enforcement action.

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153. *Prows v. Department of Justice*, 704 F. Supp. 272, 274-76 (D.D.C. 1988) (holding program statement null and void), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991).

154. *Southern Cal. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672, 673-74 (9th Cir. 1989) (holding letter invalid).

155. *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 967-68 (9th Cir. 1989) (holding letter invalid).

156. *Bellarno Int'l Ltd. v. FDA*, 678 F. Supp. 410, 411-12 (E.D.N.Y. 1988) (holding import alert unlawful).

157. Interview with John Golden, Associate General Counsel, USDA, in Washington, D.C. (Apr. 9, 1991).

Often they are lengthy and detailed, articulating quite specific standards.<sup>158</sup> To the extent they interpret statutory language that has some tangible meaning, these documents pose little problem, as the agency may lawfully attempt to make them bind.<sup>159</sup> Similarly, where the statement provides for the future exercise of discretion in its application, notice and comment are not required.<sup>160</sup>

But what of statements setting enforcement policy under broad language like “just and reasonable” or “unfair”? These in themselves constitute vast subjects, lying beyond the scope of this study. But some elements should be touched upon. First is the question whether a given statement interprets sufficiently concrete statutory language to qualify as interpretive.<sup>161</sup> If it is concluded that the statement is not interpretive, there remain questions of what it intends substantively and whether it is meant to be binding. Those questions can be hard to answer.<sup>162</sup> There appear to be at least three possibilities: 1) Sometimes the agency is stating a safe-harbor policy, such that private persons may know that if they observe the policy they will not be deemed in violation and will not be prosecuted. But they will not necessarily be deemed in violation, or be prosecuted, if they do not observe the policy. Such a document can create binding norms.<sup>163</sup> 2) The agency may intend that the document, for

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158. See, e.g., the Guides and Practice Rules of the Federal Trade Commission, 16 C.F.R. pts. 17-24, 228-59 (1992).

159. But see the recommendations, *infra* text accompanying notes 364-73. Enforcement policies that set priorities primarily in terms of resource allocation rather than in substantive terms ordinarily will not pose difficulties for present purposes.

160. See *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012-15 (9th Cir. 1987); *infra* Part V.

161. To the extent the Guides and Practice Rules of the Federal Trade Commission, *supra* note 158, set forth detailed forms of misrepresentation or deception in industry-specific terms, they arguably are interpretive of the statutory term “unfair or deceptive acts or practices.” Federal Trade Commission Act, 15 U.S.C. § 45 (1988). These statutory words are broad but nevertheless have some tangible meaning when applied in a “negative” way—that is, to condemn acts which by common usage or general acceptance are “unfair or fraudulent or tricky.” *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). But where the rules use the statutory words in a “positive” way—not merely to require refraining from unfair or deceptive acts but to require affected parties to perform affirmative acts to be safe from prosecution—it would seem hard to say they draw any tangible meaning from the statutory language. To that extent these rules are policy statements, as they are not interpretive. See *supra* text accompanying notes 59-69. It is worth noting that analogous documents issued by the Department of Transportation under its statutory authority over “unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof,” 49 U.S.C. app. § 1381 (1988), were held *not* to be interpretive. *Alaska v. Department of Transp.*, 868 F.2d 441, 445-47 (D.C. Cir. 1989).

162. See *Public Citizen, Inc. v. NRC*, 940 F.2d 679, 680 (D.C. Cir. 1991) (holding that “policy statement” identifying practices that expose the public to radiation in such minute amounts as to be “below regulatory concern” was *unripe* for review).

163. E.g., *Community Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987). The FDA’s policy statement set forth “action levels,” informing food producers of the allowable levels of unavoidable contaminants. These were safe-harbor rules in the style of definition (1) in the text above.

the purposes of administration and enforcement, will authoritatively define the offense. Then, any nonobservance is subject to enforcement action, while observance comes within a safe harbor. This approach creates norms that have a practical binding effect. 3) The agency may try to have it both ways—that is, to hold affected parties to the standards set in the enforcement policy, but deny the document a role as a safe harbor, thereby reserving the freedom to proceed against persons who conform to it but for other reasons are deemed in violation of the statute. This again can create a practical binding effect.

Affected persons may flout these rules only at their peril. The agencies rarely will declare which of the three approaches they are taking. The usual disclaimers are consistent with all three,<sup>164</sup> leaving affected private parties uncertain as to which approach is intended and as to its practical binding force.<sup>165</sup>

#### B. *Use of Nonlegislative Policy Documents to Pass upon Applications*

Nonlegislative policy documents are often the vehicles by which the agencies establish standards for approving or granting applications submitted by private parties. If the standards are intended to be routinely applied, or if they *are* regularly applied, they of course have a practical binding effect, even though they are not legally binding. This is true whether the applicant is able to challenge the document in court or not.

Frequently the applicant is under some sort of practical compulsion to seek the agency's approval. Guidances or manuals or other nonlegislative documents that set standards for an approval that the applicant must have as a business necessity, for example, or as the means of sustaining livelihood, acquire a particularly potent mandatory force. Where denial would place the applicant in a position of noncompliance with the risk of penalties, or would deprive him of essential sustenance, the standards as a practical matter amount to immediately enforceable regulatory norms—indeed, self-executing ones, because applicants in these circumstances have little choice but to accept the agency's terms. And because these applicants are typically unable to tolerate the delay or cost that a contest would entail, the documents and the norms they establish will often elude judicial scrutiny.

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The combination of "mandatory, definitive language," *id.* at 947, with the agency's "own course of conduct," *id.* at 949, gave the documents a "present, binding effect," *id.*, and led the court to hold the action levels "to be invalid in that they were issued without the requisite notice-and-comment procedures." *Id.* at 950; *see also* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535-37 (D.C. Cir. 1986).

164. *See, e.g.*, 16 C.F.R. pt. 17 (1991).

165. An example of this problem is the Fish and Wildlife Service's announcement on the northern spotted owl, discussed *infra* Part VI(B).

B-1. The Interstate Commerce Commission (ICC) adopted a “policy statement,” concerning applications for operating authority to and from Canada, which had the effect of releasing shippers from legally enforceable duties and constraints.<sup>166</sup> The court found it to be a “‘flat rule of eligibility’”<sup>167</sup> that “purports on its face to notify applicants for certificates precisely what showings the Commission will or will not require of them.”<sup>168</sup>

B-2. An ICC “Restriction Removal Statement” contained “guidelines” that were prefaced by a declaration that they were not intended to prejudice any individual application. But the court found that “there are sinews of command beneath the velvet words of the subsequent sections of the guidelines,” and that the guidelines as a whole were “decorated with words that appear to be carefully chosen to avert classification as rules.”<sup>169</sup> The court remarked further that the “manner of dealing with applicants who do not follow what is declared to be the ‘normal’ course demonstrates graphically that the carrier who does not conform will incur both delay and potentially vast litigation expense.”<sup>170</sup> This practical binding effect reinforced the conclusion that “these are not guidelines but normative rules.”<sup>171</sup>

B-3. In another ICC case, the agency published an announcement in the *Federal Register* that it was cancelling all existing “special permission authorities” and that these authorities would no longer be issued.<sup>172</sup>

B-4. The Department of Labor’s program handbook for employment of workers holding H-2A visas changed the definition of “prevailing practices,” thereby (as charged by the plaintiff farmworkers’ advocacy group) relaxing farmworker protection standards to which employers must adhere. The document as amended was published in the

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166. *American Bus Ass’n v. United States*, 627 F.2d 525, 533 (D.C. Cir. 1980) (holding statement unlawful).

167. *Id.* at 532 (quoting *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 984 (E.D. Pa. 1977)).

168. *Id.*

169. *American Trucking Ass’ns v. ICC*, 659 F.2d 452, 463 (5th Cir. 1981) (holding guidelines invalid), *cert. denied*, 460 U.S. 1022 (1983).

170. *Id.* at 463-64.

171. *Id.* at 464. The court quoted *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) (“An announcement stating a change in the method by which an agency will grant substantive rights is not a ‘general statement of policy.’”). Of course, this document *was* a general statement of policy as defined by the analysis in this Article, *supra* text accompanying notes 65-69, but the court was saying that it *should have been* promulgated as a legislative rule.

172. *American Trucking Ass’n v. United States*, 688 F.2d 1337, 1348 (11th Cir. 1982) (holding document invalid; “[T]he fact that the prospective announcement affects a discretionary function does not deprive it of its rulemaking quality.”), *rev’d in part*, 467 U.S. 354 (1984). “Special permission authorities” are findings by the ICC that cause exists to allow trucking rate changes to take effect before the running of the 30-day period required by statute. *Id.* at 1347.

*Federal Register* as an "informational notice" but no comment was sought. Government counsel conceded that the handbook was "mandatory" and "binding."<sup>173</sup>

B-5. The Chief of the Guaranteed Student Loan Branch of the Department of Education replied by an individual letter<sup>174</sup> to an inquiry from the New York State Higher Education Services Corporation, concerning the eligibility for a new loan of a borrower whose prior loan had been discharged as a result of his total and permanent disability.<sup>175</sup> The letter specified that an otherwise eligible applicant is ineligible for a further loan unless he reaffirms the previously discharged loan and meets certain other conditions, and that a loan made without observing these requirements would not be covered by federal reinsurance.<sup>176</sup> Although the author of the letter spoke of it as an "interpretation," it would seem difficult to point to specific language in the statute<sup>177</sup> that could yield so detailed an interpretation. The threatened sanction compelled compliance by the lending institution and the state-based guarantor organization, although legislative rulemaking was not used.<sup>178</sup> The author of the letter requested that it be circulated to guarantor organizations nationwide through their trade association,<sup>179</sup> thus making its requirements known to those other than its addressee who might be affected.

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173. *Comite de Apoyo para los Trabajadores Agricolas v. Dole*, 731 F. Supp. 541, 548 (D.D.C. 1990) (directing agency to engage in informal notice-and-comment rulemaking with respect to the definition of "prevailing practice").

174. Letter from Saul Moskowitz, Chief, Guaranteed Student Loan Branch, Division of Policy and Development, U.S. Department of Education, to Milton Wright, Vice President, Division of Guaranteed Loan Programs, New York State Higher Education Services Corp. (Sept. 1, 1989) [hereinafter Letter from Moskowitz].

175. The Higher Education Act of 1965 requires the Secretary of Education to discharge liability on the loan of a student borrower who dies or becomes permanently and totally disabled. 20 U.S.C. § 1087(a) (1988).

176. Letter from Moskowitz, *supra* note 174, at 1.

177. 20 U.S.C. § 1087.

178. The letter stated: "We intend to include our policy in this area in an upcoming notice of proposed rulemaking." Letter from Moskowitz, *supra* note 174, at 2. Such provisions were included in the Notice of Proposed Rulemaking, Guaranteed Student Loans, 55 Fed. Reg. 48,324, 48,342, 48,359 (1990) (to be codified at 34 C.F.R. pt. 682) (proposed Nov 20, 1990). These proposed rules have not yet been adopted.

179. Letter from Moskowitz, *supra* note 174, at 2 ("[P]lease understand that the Department's interpretation of an applicable statute or regulation need not be codified in regulation or memorialized in a Dear Colleague letter to be considered an official Department position. The expression of that view by an authorized Department representative is sufficient. Nevertheless, we agree that this Departmental interpretation is of sufficient general interest and importance that all guarantee agencies should be made aware of it. To that end, we are providing a copy of this letter to the National Council of Higher Education Loan Programs, which we have asked to distribute this guidance to its members.")

It should be noted that by statute "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the [Department of Education]," 20 U.S.C.

B-6. In 1988 the Assistant Secretary of Labor for Mine Safety and Health established a "Directives System" and manual<sup>180</sup> to provide guidance on how the Mine Safety and Health Administration (MSHA) applies the Federal Mine Safety and Health Act of 1977<sup>181</sup> and the corresponding regulations.<sup>182</sup> The system is updated by nonlegislatively issued<sup>183</sup> program policy letters (PPLs), which in many cases establish new requirements going beyond the regulations or impose new penalties or penalty schedules.<sup>184</sup> An example is PPL P89-11-8, which sets forth specific criteria to be met for approval of electrical equipment that incorporates methane monitors.<sup>185</sup> The pertinent regulation governing electrical equipment<sup>186</sup> speaks of rugged construction, sound engineering, and safety for the intended use, but does not specify engineering criteria for particular types of electrical mining equipment. The quite specific requirements of the electrical equipment PPL, which are stated in mandatory terms, arguably amount to an interpretation of the regulation, although the PPL recites that the pertinent part of the regulations "presently does not contain requirements relative to the use of methane monitors on permissible equipment."<sup>187</sup> A manufacturer who does not meet the standards will be denied the certificate of approval needed to market the equipment, and operators using unapproved equipment face citation and enforcement action.

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§ 1232(a)(1) (1988), must comply with the rulemaking procedures of 5 U.S.C. § 553 and certain additional special requirements. 20 U.S.C. § 1232 (b)-(g).

180. 2 MSHA ADMINISTRATIVE POLICY AND PROCEDURES MANUAL, ch. 100 (Release II-4, July 17, 1990).

181. 30 U.S.C. §§ 801-962 (1988).

182. 30 C.F.R. pts. 5-104 (1991).

183. *But see* 30 U.S.C. § 811(a) (1988) ("The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of title 5, (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.").

184. A 1990 PPL established higher penalties for mine operators or contractors with an "excessive history of violations" (defined for the first time in the PPL). Increased Assessments for Mines with Excessive History of Violations, PPL No. P90-III-4 (effective May 29, 1990). An MSHA administrative law judge held that "notice and comment under the Administrative Procedure Act are necessary before the program policy letter can be effective." Drummond Co., No. SE 90-126, A.C. No. 01-00323-03638, slip op. at 16 (Mar. 6, 1991).

185. Approval of Methane Monitors Incorporated in the Design of Electric Equipment, PPL No. P89-11-8 (effective Aug. 29, 1989).

186. 30 C.F.R. § 18.20 (1991).

187. PPL No. P89-11-8, *supra* note 185, at 1 (The regulations contain requirements for the use of methane monitors generally, but these requirements "cannot be evaluated as a part of the approval" of equipment.).

B-7. The EPA used a nonlegislatively announced "model" to predict, based on "reasonable worst case assumptions,"<sup>188</sup> the "leachate levels" of wastes that applicants petitioned to have removed from the list of hazardous wastes subject to regulation under the Resource Conservation and Recovery Act.<sup>189</sup> EPA argued that the model as a policy statement was exempt from notice-and-comment requirements. In an incisive and highly significant opinion, Judge Stephen Williams observed that the document's mandatory language "suggests the rigor of a rule, not the phiancy of a policy,"<sup>190</sup> and that the agency's "later conduct applying it confirms its binding character."<sup>191</sup> "The agency treated the model as conclusively disposing of certain issues . . . . On those issues, EPA was simply unready to hear new argument. The model thus created a norm with 'present-day binding effect' on the rights of delisting petitioners."<sup>192</sup>

B-8. A landowner sought to fill portions of its property for building development.<sup>193</sup> The Clean Water Act prohibits the discharge of any "pollutant" (including dredged or fill material) into "navigable waters" except in compliance with a permit issued by the Department of the Army under the Act.<sup>194</sup> The term "navigable waters" is defined to include "the waters of the United States."<sup>195</sup> The Army Corps of Engineers' regulations claim that jurisdiction over "waters of the United States" includes "[a]ll other waters . . . which could affect interstate or foreign commerce."<sup>196</sup>

The Corps' Deputy Director for Public Works issued a memorandum to all district Corps offices listing seven categories having a sufficient connection with interstate commerce to warrant the exercise of jurisdiction over isolated waters, including "[w]aters which are used or could be used as habitat by . . . migratory birds which cross state lines."<sup>197</sup> This memorandum potentially swept into the regulatory regime millions of acres of land for which a permit would be required to fill. The Corps

188. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1319 (D.C. Cir. 1988) (quoting 50 Fed. Reg. 7882, 7883 (1985) (to be codified at 40 C.F.R. § 261) (proposed Feb. 26, 1985)).

189. *Id.* at 1319.

190. *Id.* at 1320-21.

191. *Id.* at 1321.

192. *Id.*

193. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd without op.*, 885 F.2d 866 (4th Cir. 1989).

194. 33 U.S.C. §§ 1311(a), 1344(a), 1362(6), (12) (1988).

195. *Id.* § 1362(7).

196. 33 C.F.R. § 328.3(a)(3) (1991). Congress intended to confer a broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the Commerce Clause. See *Leslie Salt Co. v. Froehlike*, 578 F.2d 742, 754-55 (9th Cir. 1978); *California v. EPA*, 511 F.2d 963, 964 n.1 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976).

197. Memorandum of Brigadier General Patrick J. Kelly, Deputy Director for Civil Works, U.S. Army Corps of Engineers (Nov. 8, 1985), *quoted in Tabb Lakes*, 715 F. Supp. at 728.

asserted jurisdiction over the land involved in the present case on the ground that the portions of it that were wetlands (though not water) could be used as habitat by “not ducks or geese, but woodpeckers, songbirds, etc.”<sup>198</sup> The court held that “the Corps intended the November 8, 1985 Kelly Memorandum [to be] binding and intended that it take effect immediately,”<sup>199</sup> and set it aside for failure to observe APA notice-and-comment requirements.<sup>200</sup>

B-9. Although the court held the document involved to be a proper policy statement, the well-known *Pacific Gas & Electric* case<sup>201</sup> nevertheless offers a useful illustration. In view of the diversity of curtailment plans submitted by pipeline companies in response to a gas shortage, the Federal Power Commission promulgated a “Statement of Policy” which “set forth the Commission’s view of a proper priority schedule” and “further state[d] the Commission’s intent to follow this priority schedule unless a particular pipeline company demonstrates that a different curtailment plan is more in the public interest.”<sup>202</sup> The provisions of the statement were clear and definite, and were couched largely in mandatory terms, but also stated that “[w]hen applied in specific

198. *Tabb Lakes*, 715 F. Supp. at 728.

199. *Id.* at 729.

200. *Id.* The Kelly Memorandum was arguably an interpretation of the regulation 33 C.F.R. § 328.3(a)(3) (1991). A later similar statement contained in *Federal Register* preambular comments upon the regulation, 51 Fed. Reg. 41,206, 41,217 (1986), was apparently assumed to be interpretive in *Leslie Salt Co. v. United States*, 896 F.2d 354, 359-60 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991). On this view, it would not be improper under the APA for the Corps to employ a memorandum rather than a legislative rule to announce a position it intended to make binding. See *supra* notes 3-6 and accompanying text. The huge and debatable extension of jurisdiction it asserted, however, illustrates the good sense of using notice-and-comment rulemaking procedures for the promulgation of interpretations that substantially enlarge the agency’s claim of jurisdiction, as recommended in this Article. See *infra* text accompanying notes 371-73.

The entire field of wetlands regulation has been the focus of enormous ongoing controversy. See, e.g., Senator Johnston’s proposed amendment to the Clean Water Act that would deny the use of funds to identify or delineate wetlands under any “manual [that was] not adopted in accordance with the requirements for notice and public comment of the rule-making process of the Administrative Procedure Act.” 137 CONG. REC. S9342 (daily ed. July 9, 1991); see also Michael Weisskopf, *Wetlands Protection and the Struggle over Environmental Policy*, WASH. POST, Aug. 8, 1991, at A17; *How Wet is a Wetland?*, WASH. POST, Aug. 7, 1991, at A14; *Bush’s Swamp Thing*, WALL ST. J., July 25, 1991, at A8. On August 14, 1991, the EPA, Corps of Engineers, Soil Conservation Service, and Fish and Wildlife Service jointly published in the *Federal Register* a proposed revision of the controversial wetlands manual. 56 Fed. Reg. 40,446 (1991). The prefatory material stated:

[T]he proposed Manual on which we are soliciting public comment is a technical guidance document and provides internal procedures for agency field staff for identifying and delineating wetlands. Both versions of the document serve to advise the public prospectively of the manner in which agency personnel will apply the definition of wetlands to particular sites on a case-by-case basis.

*Id.*

201. *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974).

202. *Id.* at 36.

cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation."<sup>203</sup> Largely on the basis of interpreting this and related language favorably to the Commission, the court upheld the document. However, one may suspect that, despite the language declaring its tentative effect, the document would lead affected parties to believe it would be rigorously applied and therefore would bind as a practical matter. Perhaps the court had similar doubts in mind when it cautioned: "We expect the Commission . . . to refrain from treating Order No. 467 as anything more than a general statement of policy."<sup>204</sup>

Although regarded by some as a champion in the game of "rule by memorandum," EPA has recently shown signs of recognizing its obligation to promulgate legislative rules when it intends to bind the public. Twice in the last year or so it has backed away from actions that manifestly were based upon the premise that nonlegislative policy documents may be enforced or applied in the same binding way as legislative rules are.

B-10. In the preamble to a final rule approving revisions in Kentucky's state implementation plan (SIP) under the Clean Air Act,<sup>205</sup> EPA had stated that, in view of the complexity of the subject matter:

It would be administratively impracticable . . . to amend the regulations and SIPs every time EPA . . . issues guidance regarding the proper implementation of the NSR [new source review] program. . . . Rather, action by EPA to approve [revisions to a SIP] has the effect of requiring the State to follow EPA's current and future interpretations of the Act's provisions and regulations, as well as EPA's operating policies and guidance . . . .<sup>206</sup>

This is a rather explicit declaration by EPA of its intent to bind through nonlegislative issuances. Obviously, if EPA interpretations and guidances are binding on the states in their implementation of the clean air laws, they are binding upon private parties who must gain the states' approval of their permit applications. EPA stated further that it may deem inadequate a state-issued permit not reflecting these positions, and "may consider enforcement action . . . to address the permit deficiency."<sup>207</sup>

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203. *Id.* at 50.

204. *Id.* at 43.

205. Notification of Clarification, 54 Fed. Reg. 36,307 (1989).

206. *Id.* at 36,307-08.

207. *Id.* at 36,308.

After protest and commencement of litigation,<sup>208</sup> EPA issued a "Notice of Clarification"<sup>209</sup> in which it stated that interpretations and guidances do not have "independent status . . . such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Clean Air Act. . . . [I]n defending against such an enforcement action [i.e., one based on such interpretations or guidances], a party is free to assert that EPA has not reasonably interpreted the underlying statutory and regulatory provisions."<sup>210</sup> The agency properly receded from the assertion that its informal documents are in themselves binding, and recognized that they are subject to challenge.<sup>211</sup>

B-11. In a second example, EPA agreed to use legislative rulemaking to promulgate a policy it had for several years enforced through informal documents. The Clean Air Act<sup>212</sup> establishes requirements to "prevent significant deterioration" of air quality in "attainment" areas—that is, those regions where national air quality standards are currently satisfied with respect to given pollutants.<sup>213</sup> Those seeking to construct a new major emitting facility or a major modification to an existing facility must obtain a permit from the permitting authority (EPA, or the state acting under a delegation or other arrangement with EPA).<sup>214</sup> The permit must include, among other things, emission limitations based on the "best available control technology" (BACT).<sup>215</sup> The BACT for any facility is "an emission limitation based on the maximum degree of reduction of each pollutant . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility . . . ."<sup>216</sup> New source performance standards (NSPS) and national emission standards for hazardous air pollutants (NESHAP) promulgated by EPA generally serve as the baseline for BACT determinations.<sup>217</sup>

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208. *Westvaco v. EPA*, No. 89-3975 (6th Cir. filed Oct. 31, 1989).

209. Notice of Clarification, 55 Fed. Reg. 23,547 (1990).

210. *Id.* at 23,548.

211. To the extent interpretations are involved, those issued nonlegislatively cannot bind the courts and should be reviewed independently (subject only to the court's respectful consideration of the agency's views), rather than by a reasonableness test as suggested by EPA's language. See Anthony, *supra* note 6, at 36-42, 55-60.

212. 42 U.S.C. §§ 7470-7479 (1988).

213. *Id.* § 7470.

214. *Id.* §§ 7475(a)(1), 7479(1); 40 C.F.R. §§ 52.21(i)(1), 52.21(b)(2) (1991).

215. 42 U.S.C. §§ 7475(a)(4), 7479(3).

216. *Id.* § 7479(3). The definition in EPA's regulations is very similar. See 40 C.F.R. § 52.21(b)(12) (1991).

217. 42 U.S.C. § 7479(3).

For a number of years, BACT was determined on a "bottom-up" basis, roughly as follows: Starting with the baseline NSPS and any applicable NESHAP, the permitting authority weighed the statutory considerations to determine whether any higher level of control was "available" and "achievable" in the particular circumstances of the case.<sup>218</sup> Beginning in 1986 and 1987, units within EPA adopted and imposed on the states a "top-down" approach in place of the bottom-up method. Briefly, in place of case-by-case weighing of factors, "top-down" requires use of the most stringent control technology unless the applicant can show that it is technologically or economically "infeasible." The first comprehensive announcement of the new policy came in a 1987 memorandum from the Assistant Administrator for Air and Radiation to EPA's Regional Administrators.<sup>219</sup> The Assistant Administrator stated that he had "determined that [the top-down approach] should be adopted across the board," and that a state-issued permit that "fails to reflect adequate consideration of the factors that would have been relevant using a 'top-down' type of analysis shall be considered deficient by EPA."<sup>220</sup> There followed in July 1988 a communication (captioned "Memorandum," but introduced by the words "this guidance") from the Associate Enforcement Counsel for Air and the Director of the Stationary Source Compliance Monitoring Division to various subordinate regional and headquarters officials.<sup>221</sup> This document stated that "any one of the following factors will normally be sufficient for EPA to find a [state-granted] permit 'deficient' and consider enforcement action: 1. BACT determination not using the 'top-down' approach."<sup>222</sup> Other documents were issued, stating in various terms the mandatory nature of the top-down requirements, which were applied consistently after 1988.<sup>223</sup> But these requirements

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218. See U.S. ENVIRONMENTAL PROTECTION AGENCY, PREVENTION OF SIGNIFICANT DETE-RIORATION—WORKSHOP MANUAL, at II-B-1 to B-5 (Oct. 1980).

219. Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation, to Regional Administrators, Regions I-X (Dec. 1, 1987).

220. *Id.* at 4.

221. Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air, Office of Enforcement and Compliance Monitoring, and John S. Seitz, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, to various addressees (July 15, 1988).

222. *Id.* at 2.

223. On March 15, 1990, the Source Review Section, Noncriteria Pollutants Program Branch, Air Quality Management Division, Office of Air Quality Planning and Standards of EPA issued a document of some 76 pages plus appendices, captioned "'Top-Down' Best Available Control Technology Guidance Document." The cover and every page were prominently marked "draft." In October 1990, EPA's Office of Air Quality Planning and Standards issued a draft New Source Review Workshop Manual, containing a 75-page chapter, the bulk of which was devoted to a detailed explanation of how the top-down process should be applied. Again, every page was marked "draft." These informal guidance documents were never put into a final form, let alone made the subject of rulemaking.

were never made the subject of rulemaking procedures, or of any sort of public notice, opportunity for public comment or any other form of public participation in their development.

Litigation ensued, challenging EPA's promulgation of this mandatory policy without the use of legislative rulemaking.<sup>224</sup> In July 1991, EPA entered into a settlement agreement with the plaintiffs.<sup>225</sup> Although it conceded no admissions on any issue of law, fact, or liability,<sup>226</sup> EPA agreed to publish in the *Federal Register* "a proposed rule proposing to revise or clarify the regulations defining BACT . . . , and proposing to revise or clarify how BACT determinations should be made," and "to take final action on the proposed rule as expeditiously as practicable."<sup>227</sup> The settlement further recited: "Any EPA BACT policy statement or interpretation is intended only to guide the implementation of BACT under approved state new source review programs and is not intended to create binding legal rights or obligations and does not have the force and effect of law."<sup>228</sup>

These actions in the Kentucky SIP matter and the top-down case bespeak some degree of recognition by EPA of an obligation to rely upon legislative rules, rather than informal documents, to establish binding standards and requirements. Interestingly, in the top-down situation EPA might have been able to avoid obligatory rulemaking, even though it intended its top-down precepts to bind private parties, by framing them as interpretive rules. The key elements of the top-down policy arguably can be linked to the language of the statutory definition of BACT.<sup>229</sup> As noted above, an agency is not obliged by the APA to use legislative rulemaking for promulgating documents that interpret specifically worded statutory language, even if it intends to apply the interpretations rigorously to private parties affected by them.<sup>230</sup> On the other hand, I believe the top-down documents are more properly viewed as policy

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224. The principal case based on failure to use legislative rulemaking procedures is *American Paper Inst. v. Reilly*, No. 89-2030 (D.D.C. filed July 18, 1989). Related cases are *American Paper Inst. v. Reilly*, No. 89-1428 (D.D.C. filed July 10, 1989); *Alabama Power Co. v. Reilly*, No. 89-1429 (D.D.C. filed July 11, 1991); *American Paper Inst. v. Reilly*, No. 90-1364 (D.D.C. filed July 13, 1990).

225. Settlement Agreement entered with the plaintiffs in the cases cited *supra* note 224 (July 9 and 10, 1991).

226. *Id.* at 5.

227. *Id.* at 2.

228. *Id.* The quoted passage was immediately followed by a citation to the "clarification," *supra* text accompanying notes 209-11, of the language in the preamble to the rule approving Kentucky's revised SIP, *supra* text accompanying notes 205-07.

229. See *supra* text accompanying note 50.

230. See *supra* text and authorities accompanying notes 3-6. Portions of the top-down process might be regarded as rules of procedure or practice, exempt from notice-and-comment rulemaking requirements under 5 U.S.C. § 553(b)(A) (1988).

statements, which may not be used in place of legislative rules when the agency intends them to bind. In its own brief in the litigation challenging EPA's failure to promulgate the top-down policy by legislative rulemaking, the government repeatedly characterized the top-down policies and actions as statements of policy (or administrative adjudications), rather than as interpretive rules.<sup>231</sup> On this view, of course, legislative rulemaking would be required to the extent the documents were intended to bind private parties.<sup>232</sup>

If not a separate category, rules governing ratemaking should at least be recognized as a distinct subset of the applications-and-approvals category.

B-12. A Federal Communications Commission (FCC) issuance offers an intricate example-in-point. The Commission in 1985 opened an investigation of rates charged by local telephone companies (LECs) for special access services including high-capacity communications (HiCap) services.<sup>233</sup> The special access services rate category primarily embraces large-scale private-line services offered by LECs to major interstate carriers such as AT&T and MCI and to large business users. Separately established rules required LECs to refund charges if their rate of return for any segment of their operations (such as special access) exceeded the allowable overall rate of return, even if the latter were within permissible limits.<sup>234</sup> Those rules were struck down by the D.C. Circuit in early 1988.<sup>235</sup> In December 1988, the Commission announced in the special access proceeding a set of specific new "guidelines" for evaluating the lawfulness of HiCap rates.<sup>236</sup> Although some comments were received, somewhat in the fashion of FCC ratemakings, section 553 rulemaking procedures were not employed.<sup>237</sup> These guidelines established issues that differed significantly from the issues and factors announced at the

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231. Defendants' Memorandum in Support of Motion to Dismiss, at 12, 33, 35, 36, *American Paper Inst. v. Reilly*, No. 89-2030 (D.D.C. filed July 18, 1989).

232. On the fashion in which federal nonlegislative documents may bind or otherwise affect state and local permitting agencies, and through them private parties, see *infra* Part VI.

233. Order Designating Investigation of Special Access Tariffs of Local Exchange Carriers, CC No. 85-166 (released May 24, 1985) [hereinafter Designation Order].

234. Authorized Rates of Return for Interstate Services of AT&T and Exchange Telephone Carriers, 50 Fed. Reg. 41,350 (1985).

235. *American Tel. & Tel. Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988).

236. *In re Investigation of Special Access Tariffs of Local Exchange Carriers*, 4 F.C.C.R. 4797 (1988).

237. The Commission characterized the proceedings as "Rule Makings of particular applicability." *In re Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 F.C.C.R. 4861, 4861 ¶ 7 (1990) (denying reconsideration).

outset of the proceeding.<sup>238</sup> Among them was one (Guideline No. 1) that largely resuscitated, for HiCap special access rates, the refund rules struck down earlier that year.<sup>239</sup>

The accompanying order directed the affected companies to file supplemental cases to justify their rates under the guidelines.<sup>240</sup> In a January 1990 action,<sup>241</sup> the Commission applied the guidelines, found (with one exception) that the companies' HiCap rates in effect at the time satisfied the new guidelines, and therefore ordered no change in those existing rates.<sup>242</sup> The Commission also applied the guidelines to HiCap rates during the 1985-1986 and 1987-1988 review periods. On the basis of Guideline No. 1, it ordered twelve companies to refund tens of millions of dollars.<sup>243</sup>

The companies did not seek judicial review of the failure to use legislative rulemaking to adopt the guidelines, as they were generally content with the way the guidelines were applied to uphold existing rates, which would continue into the future.<sup>244</sup> They have, however, challenged the refund orders on grounds of impermissible retroactivity.<sup>245</sup>

### C. Use of Nonlegislative Policy Documents in Benefit Cases

Nonlegislative policy issuances have been used to deny benefits in federal programs.

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238. See *MCI Telecommunications Corp. v. New York Tel. Co.*, 5 F.C.C.R. 707, 708 ¶ 10 (1990) ("The Commission . . . decided not to evaluate the specific . . . rates under investigation using the approach [announced at the outset of the proceeding] but instead established a set of guidelines.").

239. In re *Investigation*, 4 F.C.C.R. at 4803 ¶ 58.

240. *Id.* at 4805 ¶ 78.

241. In re *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 F.C.C.R. 412 (1990) (the "refund order").

242. *Id.* at 416 ¶ 32.

243. *Id.* at 412-13 ¶¶ 6-12, 416 ¶¶ 34-37.

244. Interview with Alfred Winchell Whittaker, counsel for the Ameritech telephone companies, in Washington, D.C. (Aug. 7, 1991).

245. *Ohio Bell Tel. Co. v. FCC*, No. 90-3146 (6th Cir. filed Feb. 21, 1990).

Even if one took the view that (despite the Commission's own characterization, *see supra* note 237) the proceeding was partly an adjudication because it included an investigation of past rates, the method of promulgating the guidelines probably would remain improper. The 1988 document did not merely address the past, but spoke without limitation to all LECs, for all the future: "[W]e will require that all LECs provide a *de novo* justification of their strategically-priced special access rates in each annual access tariff filing. The justification should consist of a demonstration that the rates proposed will meet the standards [guidelines] set forth herein." In re *Investigation*, 4 F.C.C.R. at 4803 ¶ 57. This is the language of rulemaking. That the guidelines were applied in a partly adjudicatory 1990 decision would not legitimate the failure to use rulemaking in 1988 (though their application in 1990 might be sustainable procedurally on the theory that the guidelines were freshly generated for purposes of the adjudication, *see NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969)). Whether application of the guidelines could be sustained over the further objection that it was impermissibly retroactive is, of course, an entirely separate matter.

C-1. The Bureau of Indian Affairs (BIA) denied general assistance benefits to full-blooded unassimilated Indians who lived near but not on their reservation.<sup>246</sup> The Bureau had issued its restrictive eligibility policy only through a BIA manual, not a legislative rule.<sup>247</sup>

C-2. The Department of Housing and Urban Development's *HUD Property Disposition Handbook, One to Four Units* governed the disposition of family residences foreclosed and transferred to HUD under its mortgage insurance programs. Homeless persons and organizations aiding the homeless attacked the document in several particulars, and challenged its validity on the ground that it had not been issued through legislative rulemaking procedures. Language in the document directed HUD's property disposition directors in the field to follow the policies and procedures therein set forth.<sup>248</sup>

C-3. Plaintiff claimants were denied Medicare Part B reimbursement for certain services on the basis of provisions in the Carrier's Manual, a nonlegislative document "made binding in Part B benefit determinations" by regulations issued by the Secretary of HHS.<sup>249</sup>

C-4. The Social Security Administration's Appeals Council, relying on a Social Security Ruling that implemented a statutory amendment directing the Secretary of HHS to formulate new policy in the disability benefits program, reversed an administrative law judge's award of benefits.<sup>250</sup>

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246. *Morton v. Ruiz*, 415 U.S. 199 (1974).

247. *Id.* The Supreme Court found the Indians eligible under the statute, but assumed that in view of reduced appropriations the agency could rationally limit eligibility to those actually living on the reservation. However, the Court said that the "conscious choice of the Secretary not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, render[ed] it ineffective." *Id.* at 236. "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Id.* at 232.

248. *Lee v. Kemp*, 731 F. Supp. 1101 (D.D.C. 1989) (remanding for violation of notice-and-comment rulemaking requirements). Although the subject matter was exempt from APA rulemaking requirements as relating to "public property," 5 U.S.C. § 553(a)(2) (1988), HUD had voluntarily subjected itself to substantially the same requirements. 731 F. Supp. at 1112-13. Such a voluntary waiver of the exemption is binding on the agency. *Rodway v. USDA*, 514 F.2d 809 (D.C. Cir. 1975).

249. *Linoz v. Heckler*, 800 F.2d 871, 874 (9th Cir. 1986) (holding document invalid). Although the subject matter was exempt from APA rulemaking requirements as relating to "benefits," 5 U.S.C. § 553(a)(2), HHS in 1971 had waived the exception. 800 F.2d at 877 n.7. In contrast, *Friedrich v. Secretary of Health and Human Servs.*, 894 F.2d 829 (6th Cir.), *cert. denied*, 111 S. Ct. 59 (1990), held that a "national coverage determination," on the basis of which a Part B Medicare reimbursement claim was denied, was an interpretive rule because it interpreted the statutory term "reasonable and necessary." *Id.* at 837.

250. *W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987) (holding ruling void; reinstating ALJ award of benefits).

C-5. HHS's Medicare Provider Reimbursement Manual and a clarifying memorandum called for paying cost-control bonuses to hospitals at the final settlement stage rather than at the interim payment or tentative settlement stage.<sup>251</sup>

D. *Nonlegislative Policy Documents Affecting Programs Administered by the States*

Standards in nonlegislative federal issuances often control the disbursement of federally reimbursed moneys to or by the states, or the conduct of programs administered by the states. "The manner in which the Secretary regulates the states controls the manner in which the states regulate the facilities and that, in turn, controls the treatment of the residents."<sup>252</sup>

D-1. The Department of Labor issued an Unemployment Insurance Program Letter, establishing detailed rules with mathematical formulas for determining individual contributions to pension funds, for the states to include when exercising authority under the Federal Unemployment Tax Act to provide in their respective laws for taking account of pension contributions in computing benefits.<sup>253</sup>

D-2. Class action plaintiffs were threatened with reduction in food stamps under USDA interim rules, issued without notice or opportunity for comment, that implemented a statutory change in the definition of "household."<sup>254</sup>

D-3. The Department of Labor, by notification to regional offices, established a new method of calculating the unemployment statistics by which were triggered the emergency job program allocations to the states under the Comprehensive Employment and Training Act.<sup>255</sup>

D-4. An amended HHS regulation promulgated without notice and comment was used to deny Ohio's proposed amendment to its Medicaid State Plan, with respect to the ceiling on allocations for the

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251. *Mount Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951 (9th Cir. 1988) (holding manual provision and memorandum invalid; policy that provides that bonuses are to be paid at tentative settlement is a change that must be promulgated according to APA § 553).

252. *Estate of Smith v. Bowen*, 675 F. Supp. 586, 589 (D. Colo. 1987).

253. *Cabais v. Egger*, 690 F.2d 234, 239 (D.C. Cir. 1982) (holding that document can be enjoined; "These rules . . . impose an obligation on the states not found in the statute itself. It cannot reasonably be argued that these rules are merely interpretative.").

254. *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983) (holding interim rule invalid, though later regulations legislatively promulgated were valid).

255. *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) (holding Maryland's claims justiciable only in regard to changes in future methodology; further holding that those changes must be promulgated by APA legislative rulemaking procedures).

maintenance and support of noninstitutionalized spouses of institutionalized Medicaid recipients.<sup>256</sup>

D-5. Certain forms, standards, methods, and procedures were required to be used by state survey agencies in Medicaid facility certifications. They were required despite the fact that, though they had been set forth for comment as appendices to proposed regulations, they were never included in final regulations.<sup>257</sup>

D-6. To implement a 1981 amendment to the Trade Act of 1974, the Department of Labor issued a series of interpretive letters directing the states to calculate workers' eligibility for trade adjustment allowances in a certain fashion, and threatened to impose penalties on a state that refused to follow them.<sup>258</sup>

D-7. The Department of Education employs Dear Colleague letters to direct compliance by state-based guarantor organizations<sup>259</sup> and lenders with the Department's policies for the Guaranteed Student Loan Program. The Dear Colleague letters sometimes purport to interpret statutory or regulatory language, but often add wholly new requirements. The Department can withhold the reimbursement of funds to lending institutions and to guarantor organizations that do not exert the efforts to collect defaulted loans stipulated in the letters.<sup>260</sup>

One such document outlined the conditions under which the agency will reinstate reinsurance coverage after a lending institution has violated the federal due diligence or timely filing regulations.<sup>261</sup> These conditions include requirements that go beyond the statutory and regulatory language.<sup>262</sup> For example, the bulletin's entirely new section on "Cures for

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256. *Ohio Dep't of Human Servs. v. Department of Health & Human Servs.*, 862 F.2d 1228 (6th Cir. 1988) (holding rule invalid because of failure to comply with APA rulemaking requirements).

257. *Estate of Smith v. Bowen*, 675 F. Supp. 586 (D. Colo. 1987) (holding HHS Secretary in contempt of prior district court and court of appeals orders to promulgate regulations on the subject).

258. *Tyler v. Department of Labor*, 752 F. Supp. 32 (D. Me. 1990) (holding eligibility policy invalid).

259. State-based guarantor organizations may be agencies of the state, public nonprofit corporations, or private nonprofit corporations. These organizations are ordinarily referred to as "guaranty agencies." The term "agency" is not so used here, to avoid confusion with the federal agency.

260. 34 C.F.R. § 682.406(a)(1), (a)(3); 34 C.F.R. § 682.411 (1991).

261. Letter from C. Ronald Kimberling, Assistant Secretary for Postsecondary Education, and Dewey L. Newman, Deputy Assistant Secretary for Student Financial Assistance, to state guarantor organization directors (Mar. 11, 1988) [hereinafter *Cure Bulletin*].

262. The letter cites 34 C.F.R. § 682.406(a)(3), (a)(5), and 34 C.F.R. § 682.423(b)(1) (1988) as the foundation for requiring the lender to comply with the minimum due diligence procedures and with the timely filing deadlines in order for the guarantor organization to receive reinsurance on the loan. But it is the March 11, 1988 Bulletin that delineates the actual situations that can jeopardize the institutions' right to receive or retain interest benefits and special allowance payments on a loan. See *Cure Bulletin*, *supra* note 261.

Timely Filing Violations and Certain Due Diligence Violations”<sup>263</sup> adds four additional steps and fifty-five days to the due diligence procedures outlined in the regulations. The bulletin then specifies penalties for non-compliance with the due diligence requirements, including the loss of “reinsurance payments on a loan on which the lender has violated the Federal due diligence or timely filing requirements, even if the lender has followed a cure procedure established by the [guarantor] agency.”<sup>264</sup> Although the regulations do not provide that the Department may withhold payment of accrued interest as a penalty for a lender’s violation,<sup>265</sup> the bulletin adds this penalty for due diligence violations occurring on or after May 1, 1988.<sup>266</sup> Additionally, the regulation relevant to skip tracing<sup>267</sup> has been expanded in the bulletin to require location of the borrower and performance of an additional due diligence stream before a claim is filed.<sup>268</sup>

#### IV. THE KEY TESTS: INTENT TO BIND OR BINDING EFFECT

Although they do not express it in just the same language, the illustrative judicial decisions cited in the last section support this simple proposition: *If a document expresses a change in substantive law or policy*<sup>269</sup> (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA’s legislative rulemaking procedures.<sup>270</sup> The legislative rulemaking process must be utilized if the document is to have the binding effect the agency has in view.

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263. Cure Bulletin, *supra* note 261, at 9-10.

264. *Id.* at 2.

265. See 34 C.F.R. § 682.413 (1991).

266. Cure Bulletin, *supra* note 261, at 8.

267. 34 C.F.R. § 682.411(g) (1991).

268. Cure Bulletin, *supra* note 261, at 9-10.

269. Numerous cases identify the class of changes that are subject to legislative rulemaking requirements in terms such as “impose[s] rights and obligations,” *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting *American Bus Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)); “modifies existing rights, law, or policy,” *W.C. v. Bowen*, 807 F.2d 1502, 1504 (9th Cir. 1987); “effect a change in existing law or policy,” *Mount Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988) (quoting *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986)); “substantially alter the rights or interests of regulated parties,” *Air Transp. Ass’n of Am. v. Department of Transp.*, 900 F.2d 369, 376 (D.C. Cir. 1990) (quoting *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1041 (D.C. Cir. 1987)), *judgment vacated as moot*, 111 S. Ct. 944 (1991); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (A “substantive rule” or “legislative-type rule” is one “affecting individual rights and obligations.”).

270. This proposition does not apply to documents that interpret concrete statutory or regulatory language. See *supra* notes 3-6. The theory is that the agency is not making new law or changing the law but is merely clarifying or explaining preexisting law in the statutes or regulations. See *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045-46 (D.C. Cir. 1987).

These cases reflect a realization that the agency should not be able to fasten its will upon the affected public through any means it pleases. It may not tell people what they can and cannot do except through procedures that Congress by delegation has empowered them to use for making law.<sup>271</sup> It may not enforce or apply a nonlegislative policy document in just the same way it may enforce or apply a legislative rule.<sup>272</sup> Especially in view of the important values served by legislative rulemaking—enrichment of the agency's information and enhancement of the rule's acceptability, flowing from the public's opportunity to present facts and views—can it credibly be argued that unilaterally issued guidances or memoranda can possess the same force? Congress in the APA has provided that they cannot.<sup>273</sup> In one way or another, almost all of the exemplar cases cited above mention an agency's intent to bind affected parties, or a binding effect as administered, as a ground for disapproving the nonlegislative policy document.

Here are samples from the decisions citing agency *intent to bind*: "We find this evidence persuasive that the Park Service intended the Lafayette Park storage rule as an independent substantive rule."<sup>274</sup> "EPA is attempting to impose the Rhoads memo upon Zimmer as a presently binding rule."<sup>275</sup> "The fundamental question . . . is whether or not the Compliance Office of the Division of Compliance Programs of the FDA may properly insist upon manufacturers of plated culture media meeting an SAL [sterility assurance level, established by draft inspectional guidelines] of 0.1%. It may not do so."<sup>276</sup> "Because [OSHA] possesses legislatively delegated power to make legislative rules and because it is apparent to us that [OSHA] must have intended this regulation to be an exercise of that power, we hold that the workaround pay regulation is a legislative rule."<sup>277</sup> "Moreover, the effect of the new regulation exposes the Administration's true intent. . . . Courts often infer the intent behind an action from the action's foreseeable effects."<sup>278</sup> "Here, the language of the statement and related comments establishes that more is involved

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271. See Anthony, *supra* note 6, at 34-40.

272. Even principles announced through adjudication, which may have the force of law at least as to the parties, see Anthony, *supra* note 6, at 47-52, should not be treated "precisely as if they were rules." Resolution of American Bar Ass'n House of Delegates (adopted Feb. 1985), reprinted in Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 177 (1986).

273. 5 U.S.C. § 553 (1988).

274. United States v. Picciotto, 875 F.2d 345, 348 (D.C. Cir. 1989).

275. United States v. Zimmer Paper Prods., Inc. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,556, 20,558 (S.D. Ind. Dec. 5, 1989).

276. United States v. Bioclinical Sys., Inc., 666 F. Supp. 82, 83 (D. Md. 1987).

277. Chamber of Commerce of the United States v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980).

278. *Id.* at 469 & n.7.

than mere 'interpretation,' because the proposed statement has the clear intent of eliminating a former exemption and of providing the Commission with power to enforce violations of a new rule."<sup>279</sup> "[O]rder No. 362 adopts a substantive rule imposing such rights and obligations."<sup>280</sup> "The agency's own words strongly suggest that action levels are not musings about what the FDA might do in the future but rather that they set a precise level of aflatoxin contamination that FDA has presently deemed permissible. Action levels inform food producers what this level is; indeed, that is their very purpose."<sup>281</sup> An agency contention that its guidelines "are not intended to prejudice any individual application" was rejected with the observation that "there are sinews of command beneath the velvet words of the subsequent sections of the guidelines."<sup>282</sup> "In short, the essential inquiry is what the agency intends to do, for if it chooses to exercise its legislative rulemaking power, then that is what it has done."<sup>283</sup> "[I]n this case it is clear that Brigadier General Kelly's Memorandum affected a change in Corps policy intended to have the full force and effect of a substantive rule, and that the Corps relied on the memorandum in reaching its jurisdiction determination."<sup>284</sup> "When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy."<sup>285</sup> "The district court found that [the Bellmon Amendment review program] was designed to alter ALJ decisions."<sup>286</sup> "[S]ubstantial impact does not make a rule legislative, but whether a rule has a substantial impact may be relevant in construing the intent of the agency in issuing the rule. In this case, there is a great deal of evidence . . . to suggest that the Secretary fully intended this rule to have legislative effect."<sup>287</sup> "This legislative and regulatory framework heavily supports the conclusion that the Secretary intended the new regulations to have the force of legislative rules."<sup>288</sup> "[T]he legislative and regulatory framework suggests that the Secretary, at the time of their

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279. *Jerri's Ceramic Arts v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 208 (4th Cir. 1989).

280. *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969).

281. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

282. *Americau Trucking Ass'ns v. ICC*, 659 F.2d 452, 463 (5th Cir. 1981), *cert. denied*, 460 U.S. 1022 (1983).

283. *American Trucking Ass'n v. United States*, 688 F.2d 1337, 1344 (11th Cir. 1982), *rev'd*, 467 U.S. 354 (1984).

284. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd without op.*, 885 F.2d 866 (4th Cir. 1989).

285. *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974).

286. *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir. 1987).

287. *Levesque v. Block*, 723 F.2d 175, 182-83 (1st Cir. 1983).

288. *Id.* at 183.

promulgation, intended the regulations to have legislative effect.”<sup>289</sup> “The perceived need for ‘exemptions’ reinforced our understanding that the FDA had intended the action levels to have a binding effect.”<sup>290</sup>

Numerous other opinions, beyond those in cases cited as illustrations above, show the centrality of the agency’s intent to bind. Here are a few: “[S]tatements whose language, context and application suggest an intent to bind agency discretion and private party conduct—the sort of statements requiring compliance with § 553—will have that effect if valid; interpretive rules or policy statements will not, *regardless* of their validity. A binding policy is an oxymoron.”<sup>291</sup> “When it added the District to its exemption regulation the Commission clearly intended to exercise that authority and promulgate a rule with the full force of law.”<sup>292</sup> “[T]o determine the effect of a *Manual* provision, a court must determine the Commission’s intent in authoring it.”<sup>293</sup> “[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.”<sup>294</sup>

In the following cases, drawn from those cited as illustrations above, the court’s opinion identified the nonlegislative policy document’s *binding effect* as an indicium that legislative rulemaking should have been used: “Our limited holding is that the current action levels are treated as substantive rules by FDA and, as such, can only be permitted if notice-and-comment procedures are employed.”<sup>295</sup> “Notwithstanding FDA’s unsupported protestations to the contrary, it is apparent that Import Alert #66-14 binds not only the agency, but the importers as well.”<sup>296</sup> “More critically than EPA’s language adopting the model, its later conduct applying it confirms its binding character. . . . The agency treated the model as disposing conclusively of certain issues.”<sup>297</sup> “The rule imposed a ceiling *ex proprio vigore*. The rule was mandatory, not advisory, and the mandate was a new one.”<sup>298</sup> “Although the Program Statement provides that inmates ‘will be expected’ to allot 50% of their earnings to

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289. *Tyler v. Department of Labor*, 752 F. Supp. 32, 38 (D. Me. 1990) (citing *Levesque*, 723 F.2d at 182 (1st Cir. 1983)).

290. *Alaska v. Department of Transp.*, 868 F.2d 441, 446 (D.C. Cir. 1989) (citing *Community Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987)).

291. *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

292. *Joseph v. Civil Serv. Comm’n*, 554 F.2d 1140, 1153 (D.C. Cir. 1977).

293. *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977).

294. *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985).

295. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987).

296. *Bellarno Int’l Ltd. v. FDA*, 678 F. Supp. 410, 414 (E.D.N.Y. 1988).

297. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

298. *Ohio Dep’t of Human Servs. v. Department of Health & Human Servs.*, 862 F.2d 1228, 1234 (6th Cir. 1988).

the payment process, this 'expectation' has been given the force of law. . . . [P]rogram Statement 5380.1 has been itself interpreted by the defendants as an absolute rule."<sup>299</sup> "These rules limit state discretion in this area and impose an obligation on the states not found in the statute itself."<sup>300</sup> "[A]t oral argument, agency counsel stated categorically that the handbook definition is mandatory, binding Department policy, not simply a factor to guide the discretion of regional administrators."<sup>301</sup> "The critical question is whether the agency action jeopardizes the rights and interest of the parties, for if it does, it must be subject to public comment prior to taking effect."<sup>302</sup> "[A] legislative rule is recognizable by virtue of its binding effect."<sup>303</sup>

In their words, and yet even more in their holdings, the cases exhibit a virtual unanimity in condemning the use of nonlegislative documents (other than interpretations) that are intended to bind or that do bind in practical terms.<sup>304</sup>

## V. THE ROLE OF AGENCY DISCRETION

As a gauge of whether an agency should have issued a policy document legislatively, the courts have made much of the discretion reserved by the agency. Certainly there is a major role for this element of the analysis. In many cases, however, it should not be determinative.

In his important *McLouth Steel* opinion, Judge Stephen Williams succinctly stated the test that he distilled from numerous D.C. Circuit opinions: "The question for purposes of § 553 is whether a statement is a rule of present binding effect; the answer depends on whether the statement constrains the agency's discretion."<sup>305</sup> The point of this approach

299. *Prows v. Department of Justice*, 704 F. Supp. 272, 276 (D.D.C. 1988), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991).

300. *Cabais v. Egger*, 690 F.2d 234, 239 (D.C. Cir. 1982).

301. *Comite de Apoyo para los Trabajadores Agricolas v. Dole*, 731 F. Supp. 541, 545 (D.D.C. 1990).

302. *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980) (footnote omitted).

303. *Alaska v. Department of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989). Despite its language rejecting the argument that an agency's action is legislative whenever it has the effect of creating new duties, *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991) is not contrary to the above cases, since the rule in question there was interpretive.

304. A possible exception is *Friedrich v. Secretary of Health & Human Servs.*, 894 F.2d 829 (6th Cir.), *cert. denied*, 111 S. Ct. 59 (1990). The court recognized the binding character of the Medicare national coverage determination ("The Secretary has chosen to seek uniformity by requiring Part B carriers to abide by all regulations in the Manual." *Id.* at 837), but treated the Secretary's determination as an interpretation of the statutory language "reasonable and necessary," which therefore "creates no new law." *Id.* Certainly, the classification as interpretive is fairly arguable either way.

305. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). The discretion considered here appears to be discretion to act at variance with positions set forth in the document at issue. Perhaps distinct is the discretion as to substance connoted when the Eleventh Circuit

is that, if the agency has acted *tentatively*, and reserves discretion to reconsider and to revise or vary or rescind the policy before concretely applying it, then neither the agency nor an affected private party is bound, either as a legal matter or in a practical sense. On this basis, an agency would not err in announcing its policy through a nonlegislative document.

These conclusions must rest, however, on the assumption that, *before applying the policy concretely to a private party*, the agency either will promulgate it as a legislative rule or will hold its mind open to reconsider the policy and to accord the affected party an opportunity to challenge its wisdom.<sup>306</sup>

One difficulty is that this assumption is not made explicit in the cases. At bottom, however, the problem is that the assumption will be faulty in particular cases. As in many of the illustrative cases mentioned above, the agency may well have settled firmly upon its policies, with every intent of exacting conformity from those affected. The fact that the policy is announced in a nonlegislative document—and speaks of reserved discretion to act at variance with it—does not change that intent. But under the D.C. Circuit's test, this tactic furnishes the agency with a convenient chance to have things both ways: to impose a practical binding effect upon private parties, but also plausibly to argue to the courts that the informal issuance and reserved discretion prove there was no obligation to proceed legislatively. This strategy may through bureaucratic habit be pursued in the best of faith. But in reviewing the cases one cannot avoid suspecting that the agencies consider it easy to fool the courts on these points, or at least think it is worth arguing, in the face of manifest reality, that their reservation of discretion means that they have not bound the complaining members of the public.

In fact, despite any professed reservation of discretion, a nonlegislative document as a practical matter can quite readily impose binding standards or obligations upon private parties. Their discretion is constrained even if the agency's is not. A test more consistent with the spirit of the APA than one looking to the constraints on an agency's discretion

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remarked that "the fact that the prospective announcement affects a discretionary function does not deprive it of its rulemaking quality." *American Trucking Ass'n v. United States*, 688 F.2d 1337, 1348 (11th Cir. 1982), *rev'd*, 467 U.S. 354 (1984).

306. "[A]n agency's open-mindedness in individual proceedings can substitute for a general rulemaking . . ." *McLouth*, 838 F.2d at 1325. The agency may say what it is *thinking* of doing. That is a policy statement. But when it *knows* what it is going to do, it must use legislative rulemaking.

Citing *McLouth*, the same Circuit in a related context spoke of a "presumption of closed-mindedness." *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 380 (D.C. Cir. 1990), *judgment vacated as moot*, 111 S. Ct. 944 (1991).

would be one that considered whether the intended or actual constraints on the *private persons' discretion* (that is, upon their freedom of action) amount to binding them in a practical sense. If so, the recitation that discretion is reserved should be of no moment, and the agency's circumvention of legislative rulemaking procedures should be redressed.

These points may be illustrated by the following form of disclaimer, which the EPA prepared in the summer of 1991 for inclusion in guidances and other nonlegislative issuances:

NOTICE: The policies set out in this [document] are not final agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this [document] or to act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.<sup>307</sup>

It scarcely needs to be observed that this provision is wholly one-sided. The substantive elements in EPA guidance documents are often couched in specific and facially mandatory terms, by which affected private parties may reasonably believe themselves to be bound in one of the practical senses described above.<sup>308</sup> The quoted EPA statement preserves great discretion for the agency. But it yields no flexibility to affected persons, nor does it afford any assurance that they will have a realistic chance to challenge the substantive policy positions set forth in the document.

The literal application of the D.C. Circuit's discretion test would sanction the use of nonlegislative procedures for a document endorsed with this disclaimer. And yet if the document is binding as a practical matter—because it is framed in mandatory terms or is regularly applied or is so structured that in context affected persons cannot disregard it—it would be quite wrong to hold that such a disclaimer excuses the failure to observe notice-and-comment requirements.

To do so in such a case would leave the private party in the worst of possible worlds: The private party is bound but the agency retains full freedom to act at variance with its stated position. The reservation of discretion affords the agency scope for unpredictable behavior, without diminishing the prospective compliance burden on the private party. Alternatively, there is little to deter the agency, despite its reservation of discretion to decide variantly, from relentlessly applying the stated positions as though they had the full force of law.

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307. Interview with E. Donald Elliott, General Counsel, and Charles L. Elkins, Associate General Counsel, EPA, in Washington, D.C. (July 10, 1991).

308. See *supra* Part II.

Under the corollary to the D.C. Circuit's position—that the more discretion the agency reserves the less likely it is that the rule will be treated as legislative—the agency is rewarded for stating its rules with less precision and authority than might otherwise be required of it. Yet as a practical matter it still may be able to apply or threaten to apply the rule in a binding way. It is simply bad government to tolerate the notion that the more discretion an agency reserves for itself the more readily it can escape the obligation to promulgate its rules in the manner instructed by Congress.

Only if the agency makes it clear that it retains an open mind on the final terms of the policy should the fact that it retains discretion validate its use of nonlegislative guidance documents. If the agency mind is open, the affected party's opportunity at a later proceeding to contend for an alternative or modified policy, or for abandonment of the tentatively adopted one, is the functional equivalent of the opportunity to comment in a legislative rulemaking proceeding.

Thus, an agency may issue a statement of policy setting forth the standards it expects to apply in granting certain approvals. If the agency genuinely maintains an open mind, so that an applicant has a realistic chance to persuade it to adopt a different position when the applicant's particular case is passed upon, the original policy statement had neither the intent nor the effect of imposing mandatory constraints on the applicant. The agency therefore was not obliged to use legislative rulemaking procedures to issue it.<sup>309</sup>

Similarly, if an agency administering a vague statute sets forth a guidance as to the kinds of behavior it will take enforcement action against, but persons guilty of that behavior have a real opportunity when proceeded against to persuade the agency that that behavior should not be deemed culpable, then the guidance may be issued without observing legislative rulemaking procedure, as it has neither the intent nor the effect of foreclosing the private party.

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309. "When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order [which in FPC parlance can be a rule] as a general statement of policy [within the exemption of APA § 553(b)(A)]." *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974).

To be treated as having an open mind, it should not be enough that the agency permits affected persons to seek waivers or exceptions from the stated position. In *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740 (3d Cir. 1969), the Commission "elected to proceed in this case by making a general rule," *id.* at 745 (footnote omitted). The court held that Texaco was "harmed by being faced with such a general rule which it must overcome in any ad hoc waiver proceeding . . . . In filing a waiver application, an operator is entitled to be confronted only with rules adopted in the procedural manner prescribed by Congress." *Id.* at 746 (footnote omitted).

But if the outcome of the later proceeding is a foregone conclusion because the earlier policy statement or guidance was to be mechanically applied, there clearly has been an intent or an effect making it binding on the private parties as a practical matter, and legislative rulemaking should have been used.<sup>310</sup>

The announced position might be mechanically applied because the agency decisionmakers intended all along to apply it that way. But it also might be mechanically applied because staff or administrative law judges or cooperating state officials felt obliged to follow strictly the document that came from headquarters, even if the agency heads had not intended that those officials be obliged to follow it. Thus the agency would be well advised to establish a system to prevent the inadvertent closing of minds it intends be kept open. Elements of such a system for assuring that policies are tentative are proposed in Part VII of this Article.

If the agency genuinely has put its document forth on a tentative basis and with an open mind, it should willingly implement the disciplinary measures needed to assure that its intent is effectuated. But when an agency in practice does not provide realistic opportunities to challenge its purportedly tentative policies, or conceals the availability of such opportunities, or issues documents in a way that leaves ambivalence or confusion about their legal effect, its claim to exemption from the APA's rulemaking requirements is to that extent vitiated. An agency should not be suffered to come into court and plead, as agencies so often have done, that the uncertainties with which it has surrounded the document establish its tentative effect and thereby excuse the failure to obey the rulemaking commands of the APA.

## VI. ADMINISTRATION OF POLICIES BY AGENCY STAFF AND BY THE STATES

Two further circumstances must be taken into account where agencies have issued nonlegislative policy documents.

### A. *Administration of Nonlegislative Policy Documents by Agency Staff*

General knowledge of normal bureaucratic behavior permits us to postulate a basic general proposition about how nonlegislative guidance documents are administered by the agencies' own staffs, especially in the

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310. "Had petitioner seriously attacked the reasoning of the Policy Statement, and had ERA responded merely by saying, in effect, 'That is no longer open to discussion. We resolved it in the Policy Statement,' then the agency's conduct would belie its characterization of the Policy Statement." *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987).

field: Staff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them. Staffers generally will not feel free to question the stated policies, and will not in practice do so.

Staff members, including the most conscientious, have every incentive to act in this fashion. To accept the agency guidance as conclusive is the quick and simple thing to do, and leaves staff members relatively invulnerable to criticism. By contrast, to treat the document as tentative, and therefore as subject to reconsideration upon the request of affected parties, would demand more time and effort, and would expose staff members to disapproval for departing from established positions. And treating the matter as a settled part of the operational routine is more comfortable for staff members than having to consider the policy anew each time it is to be applied.

Circumstances of course vary in our complicated government. Some nonlegislative policy documents may be framed in general language that is not capable of regularized application, and some may make it clear that the guidance is tentative only. But otherwise, I suspect that the above observations hold true in the great majority of cases. And I suspect that they hold true whether or not the agency<sup>311</sup> intended its document to bind the staff.<sup>312</sup> Indeed, although the agency may protest otherwise, it can often be quite clear that its nonlegislative document was intended to control the staff's basis for decision.<sup>313</sup> But even if the document was intended merely to guide, the tendencies mentioned are likely

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311. Although judicial opinions customarily observe the polite fiction of dealing with a rule as though it had been issued by "the Secretary" or "the Administrator" or "the Commission," in reality (as shown by numerous examples in Part III above) nonlegislative documents often—and I would think usually—emanate from officials below the level of the agency heads. To announce policies nonlegislatively, those officials do not ordinarily need a delegation of authority from the agency heads, as they would if the policies were to be issued legislatively. But there is no reason to think that nonlegislative statements issued by lesser officials are applied by subordinates any less regularly than are nonlegislative issuances from the top.

312. The Administrative Conference's rulemaking manual distinguishes among documents that (by intent or effect) bind 1) lower-level staff, 2) members of the public, and 3) the agency itself, and accurately adds: "Any form of binding effect will take an agency pronouncement out of the policy statement exemption because policy statements are to have prospective and not immediate effect." OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 65 (2d ed. 1991).

313. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 233-35 (1974) (BIA); *Lee v. Kemp*, 731 F. Supp. 1101, 1113-14 (D.D.C. 1989) (HUD); *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728-29 (E.D. Va. 1988) (U.S. Army Corps of Engineers), *aff'd without op.*, 885 F.2d 866 (4th Cir. 1989); *United States v. Bioclinical Sys., Inc.*, 666 F. Supp. 82, 83-84 (D. Md. 1987) (FDA); *Fugere v. Derwinski*, 119 Daily Wash. L. Rep. 289, 294 (U.S. Ct. Veterans App. Dec. 27, 1990) (rejecting agency argument that the provision's placement in a "procedural manual for the use of field personnel" prevented it from being a "substantive rule"); Example A-10, *supra* text accompanying notes

to harden it into a rigidly applied rule, with the effect of binding private parties.<sup>314</sup>

### B. *Administration of Nonlegislative Policy Documents by the States*

The ways federal and state administrative actions interplay are many, and the span of fields that their interplay touches is broad. It reaches housing, social security, education, environmental protection, conservation, medicare, transfer programs like food stamps and unemployment compensation, and a myriad of others. The role played by federal guidance documents in so cluttered an arena cannot be comprehensively dealt with here.<sup>315</sup>

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136-47 (USDA inspection manuals); Example B-6, *supra* text accompanying notes 180-87 (MSHA inspection manuals).

314. The spokesman to whom I was directed by EPA stated that there are a number of circumstances in which EPA's staff permit writers may depart from guidance documents. The permit writers may not disregard the guidance, but may deem an exception appropriate where the guidance makes no sense in a given application, where its applicability is doubtful, or where the guidance is cast in flexible terms such that the permit writer must decide what a concept (like "best available control technology") means in a given application. But the permit writer cannot change basic policy, for example, by allowing use of a lesser technology in place of the "best" on a nontechnical ground such as saving jobs. Nor can the permit writer ignore a methodology mandated by a guidance, such as use of the "top-down" method for determining best available control technology. *See supra* notes 212-16 and accompanying text. Where the guidance is cast in directive language, the staff will follow it faithfully. There is, however, some flexibility in most EPA guidances. The spokesman noted that many EPA draft permits are subject to public comment, which supplies an opportunity for challenge to relevant guidances and affords a procedure functionally similar to the notice-and-comment procedure of APA § 553. Telephone interview with Walter Mugdan, Deputy Regional Counsel, Region II, EPA (Aug. 14, 1991). Nothing in the EPA manuals for permit writers requires them to treat guidance documents as tentative or to maintain a willingness to reconsider the policies if challenged. Telephone interview with Charles L. Elkins, Associate General Counsel, EPA (Nov. 25, 1991).

The EPA's Judicial Officer, who hears appeals in the Administrator's stead, has occasionally rejected or departed from the agency's guidances. *Id.* An example is *In re Hoechst Celanese Corp.*, RCRA Appeal No. 87-13 (1989). The Judicial Officer held that the guidance documents were not mandatory and that the EPA regional office must justify its action on its own merits.

315. The most significant pattern of interaction involves federal agency insistence upon observance of the nonlegislative document as a condition of channelling money to the states, or through the states to private parties. *See, e.g.,* Ohio Dep't of Human Servs. v. Department of Health & Human Servs., 862 F.2d 1228 (6th Cir. 1988); *Cabais v. Egger*, 690 F.2d 234, 235-36 (D.C. Cir. 1982) ("Unemployment insurance in this nation is a joint federal-state responsibility. . . . The Department of Labor informs state agencies of the minimum federal requirements they must meet to remain certified primarily by issuing Unemployment Insurance Program Letters."); *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980); Food Stamp Program Policy Memo 90-6, *HUD Payments*, issued by Thomas O'Connor, Director, Program Development Division (Feb. 9, 1990); Example D-7, *supra* text accompanying notes 259-68 (guaranteed student loan program); *see also* *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983); *Tyler v. Department of Labor*, 752 F. Supp. 32 (D. Me. 1990); *infra* note 366.

*Fletcher v. Housing Auth. of Louisville*, 491 F.2d 793 (6th Cir.), *vacated sub nom.* *Department of Hous. & Urban Dev. v. Fletcher*, 419 U.S. 812 (1974), offers a sample of this interaction:

But a brief look at one document strikingly illustrates the way in which nonlegislative federal guidelines can be translated into commands to the states and then into commands by the states to private parties.

That document is a typewritten set of guidelines issued by a regional office of the Fish and Wildlife Service (FWS), which administers the Endangered Species Act.<sup>316</sup> The guidelines<sup>317</sup> aim at protecting the northern spotted owl by restricting the cutting of timber in the vicinity of its habitat.<sup>318</sup> This species of owl, which is found only in Washington, Oregon, and California, was listed as a "threatened species" effective July 23, 1990,<sup>319</sup> and the Guidelines were announced that month by FWS's regional office in Portland, Oregon.

Under the Act, a species is "endangered" when it is "in danger of extinction throughout all or a significant portion of its range,"<sup>320</sup> and is "threatened" when it is "likely to become an endangered species within the foreseeable future."<sup>321</sup> It is unlawful to "take" any creature listed as

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HUD argues that its Circular merely suggested that local housing agencies consider implementing a rent range scheme. For us to accept this argument as a reason for not reviewing HAL's [Housing Authority of Louisville's] rent range formula would be to blind ourselves to the realities of cooperative federalism in this case. The record is clear that the sole reason for HAL's implementation of HUD Circular No. 7465.12 was the desire to conform to HUD's wishes. HUD's desire may not have taken the form of a formal requirement . . . . But it took the form of a demand through HUD's controls over HAL's federal funding. . . .

. . . .

. . . [I]t is clear that HUD's actions made Circular No. 7465.12 a matter of federal policy, not federal suggestion.

*Id.* at 799.

Other significant categories of federal-state interaction in which federal nonlegislative documents play a role include those where financial conditions are not central to the issue arising under the state's administration of the federal statutory program, e.g., Example B-10, *supra* text accompanying notes 205-11 (Kentucky state implementation plan under Clean Air Act), Example B-11, *supra* text accompanying notes 212-28 (state-granted permits to be invalidated by EPA if state fails to use "top-down" method of determining best available control technology); those in which federal liabilities are placed upon the state as an actor or upon the relevant state officials in their personal capacities, *see* discussion of the restrictions on harvesting of timber near habitats of northern spotted owls, *infra* text accompanying notes 316-47; and those in which the states adopt the federal guidance into their own law, *see infra* text accompanying notes 316-47.

316. Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1544 (1988).

317. U.S. Fish and Wildlife Service, Region 1, Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl (July 1990) [hereinafter Guidelines].

318. The statute provides specifically that "section 553 of title 5 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this [Act]," with two exceptions requiring *more* elaborate notice-and-comment procedures for certain actions, including the listing of a species as endangered or threatened. 16 U.S.C. § 1533(b)(4)-(6) (1988). The Guidelines were issued without observing these procedures.

319. 50 C.F.R. § 17.11 (1991).

320. 16 U.S.C. § 1532(6).

321. *Id.* § 1532(20).

an endangered species.<sup>322</sup> In a bold application of the authorizing statute,<sup>323</sup> the Department of the Interior has provided by regulation that all prohibitions pertaining to endangered species shall apply to all threatened species.<sup>324</sup> Thus, "taking" a threatened species like the spotted owl is subject to the same sanctions as is taking an endangered species. These include civil penalties, criminal fines and imprisonment, and federal and citizen suits for injunctive relief.<sup>325</sup> The listing of the northern spotted owl as a threatened species immediately placed logging companies, acting in the normal course of their business on private lands, at risk of prosecution for injury to an owl or to its habitat.

The extent to which unintentional injury to a bird or disturbance of habitat amounts to a "taking" is highly unclear.<sup>326</sup> The term "take" includes "harm,"<sup>327</sup> which is defined by regulation to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."<sup>328</sup> In the absence of designation of a "critical habitat" pursuant to an elaborate statutory procedure,<sup>329</sup> no other statutory or regulatory provision expressly prohibits habitat modification. Modification that results in impairment of essential behavior

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322. *Id.* § 1538(a)(1)(B).

323. "The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife . . ." *Id.* § 1533(d).

324. 50 C.F.R. § 17.31 (1991). There are some exceptions which are not pertinent here. *See id.* § 17.21(c)(5).

325. 16 U.S.C. § 1540(a), (b), (e)(6), (g).

326. The Guidelines use the term "incidental take," which they describe as a "'take' (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young." Guidelines, *supra* note 317, at 2. This should be read with the regulatory definition that "[i]ncidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 50 C.F.R. § 17.3 (1991). Although the statute provides for a permit to exempt taking that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U.S.C. § 1539(a)(1)(B), that procedure is slow and cumbersome, entailing submission of a large-area conservation plan; as a result, few such permits have been sought or granted. Here, timber operators were confronted with immediate jeopardy from the moment the spotted owl was designated as threatened. Where there is no permit, the Guidelines treat any incidental take of the owl as prohibited activity unless the restrictions on cutting within the stated areas around owl nests and activity centers have been observed. Guidelines, *supra* note 317, at 9-11. The document states that specific information about well-studied individual owls could be used to justify an exception to the guidelines, but provides no procedure for doing so. *Id.* at 10.

327. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

328. 50 C.F.R. § 17.3.

329. 16 U.S.C. § 1533(a)(3)(A). Such a designation for the northern spotted owl, which would not cover any private lands, is in the proposal stage. *See generally* U.S. Fish & Wildlife Service, Region I, News Release, *Revised Northern Spotted Owl Critical Habitat Proposal of 8.2 Million Acres Announced by Fish and Wildlife Service* (Aug. 5, 1991) [hereinafter News Release].

patterns that could lead to extinction may be treated as "harm," even if the extinction might not occur for several decades.<sup>330</sup> Beyond that, one cannot confidently state the extent to which the prohibition of "take" may require maintenance of habitat necessary for essential behavioral patterns. The owl Guidelines bear upon this uncertain area.

The Guidelines were intended, at least in part, to advise timber operators about what they could safely do.<sup>331</sup> The document can be viewed in this aspect as a safe harbor rule.<sup>332</sup> But it also discloses an intent to bind affected parties by authoritatively defining the offense<sup>333</sup>—that is, not only to set safe harbor limits but to treat persons as in violation of the Endangered Species Act if they go beyond those limits.<sup>334</sup> Thus, to be safe from prosecution, operators must refrain from cutting timber, around each owl nest site or activity center, in an area which may be as large as 3,960 acres.<sup>335</sup>

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330. *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

331. Telephone Interview with Russell D. Peterson, Field Supervisor, Fish and Wildlife Service Enhancement Field Office, Portland, Oregon (Aug. 8, 1991). The Guidelines state: "If a person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines." Guidelines, *supra* note 317, at 9.

332. See *supra* text accompanying note 163 (discussing possibility of employing a safe-harbor policy).

333. See *supra* text accompanying notes 161-63 (discussing possibility that the agency intends authoritatively to define the offense).

334. "The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act) will be subject to investigation by the Service pursuant to Section 9 of the Act." Guidelines, *supra* note 317, at 9.

The Guidelines at several points use language suggesting that they are tentative (e.g., "these interim guidelines," *id.*) or constitute merely guidance rather than strict rules (e.g., "The Service offers the following general guidance to address 'incidental' take of northern spotted owls that may occur incidentally to timber harvest or related activities," *id.*). Whether intended to be binding or not, the Guidelines nevertheless have had binding practical effect, in that the affected states and private operators have had to act upon the reasonable belief that the Guideline rules must be observed. See *supra* text accompanying notes 79-88; see also *infra* notes 337-46 and accompanying text (describing the practical binding nature of a Fish and Wildlife Service August 1991 news release). The Guidelines' mention that individual situations will be considered relates, not to changing their policy, but to justifying "an exception to these Guidelines." Guidelines, *supra* note 317, at 9.

335. Guidelines, *supra* note 317, at 10-11. Specifically, the rules call for 1) conducting owl surveys in accordance with FWS protocols; 2) avoiding harvest that results in less than 70 acres of "the best available suitable owl habitat" encompassing the nest site and/or activity center of a pair of spotted owls; 3) avoiding harvest that results in less than 500 acres of "suitable habitat" within a 0.7 mile radius (1,000 acres) of a nest site and/or activity center; and 4) avoiding harvest that results in less than a 40% coverage by "suitable owl habitat" within a circle centered on the nest or activity center, having a radius appropriate for its geographical "province." In Washington, the radius for the Olympic Peninsula is 2.2 miles, which amounts to 9,900 acres, 40% of which is 3,960 acres; for the Cascades, the radius is 1.8 miles, amounting to 6,600 acres, 40% of which is 2,640 acres. For

These rules have excited great controversy and bitter outcry about the loss of jobs and productive opportunities. Part of this has resulted from application of the Guidelines to logging on federal lands.<sup>336</sup> But complaint has focused as well upon the limits the Guidelines have placed upon logging on private lands, *particularly through administration of the Guidelines limits by the states.*

The State of Washington has adopted the Guidelines standards, substantially whole, into the administration of its state forest practices laws.<sup>337</sup> This has resulted in a state requirement that the Guidelines limits be adhered to as a condition of receiving a state permit to cut timber, even on one's own land.<sup>338</sup> Washington has enforced the Guidelines

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provinces in Oregon and California, the 40% areas protected against logging are either 1,000 or 1,360 acres in extent. *Id.*

336. With regard to the closely related action of proposing designation of a critical habitat for the spotted owl, mostly on federal lands:

[T]imber industry and labor officials immediately accused the agency of being too generous to the owl at the expense of loggers. American Forest Resources Alliance director Mark Rey said more than 130,000 workers would lose their jobs because of the government's action, which he described as a "land lockup equivalent [to the size] of Massachusetts, Vermont and Connecticut combined."

Margaret E. Kriz, *Owls I, Timber O*, NAT'L J., May 4, 1991, at 1056, 1059 (alteration in original); see also Margaret E. Kriz, *Jobs v. Owls*, NAT'L J., Nov. 30, 1991, at 2913.

337. See Forest Practices Act, WASH. REV. CODE ANN. §§ 76.09-76.09.935 (West Supp. 1992). Harvesting on lands known to contain a pair or the nest or breeding grounds of any threatened or endangered species is classified as a "Class IV - special" forest practice, for which special application and permit requirements must be observed. WASH. ADMIN. CODE § 222-16-050(1)(b)(i) (1989).

The examples herein will be confined to Washington, but the situation is similar in California. Oregon requires no permit for the harvesting of timber as such. The requirements of the federal Guidelines, of course, apply directly to timber operators there, as they do in Washington and California where, additionally, compliance with the Guidelines' requirements is a condition of receiving state forest practices permits for harvesting timber. See CAL. PENAL CODE § 653p (West 1988) ("The violation of any federal regulations adopted pursuant to the [Endangered Species Act] shall also be deemed a violation of this section and shall be prosecuted by the appropriate state or local officials.").

338. "Based on listing of the northern spotted owl as a federal threatened species and the [Owl Guidelines] provided by the USF&WS, the DNR [Department of Natural Resources] has determined that the following actions and conditioning criteria on forest practices are necessary to prevent material damage to this public resource." Memorandum from Arden Olson, Division Manager, Forest Regulation and Assistance Division, Washington State Department of Natural Resources, to Regional Managers, *Owl Memo #2—Interim Operating Procedures for FPA Conditioning to Protect Northern Spotted Owls* 1 (Aug. 27, 1990) (on file with author). For passing upon proposed forest practice activities (such as cutting trees), the document provided criteria that are very similar to, and in important respects substantially identical to, those of the Guidelines. For example:

NO HARVEST WILL BE ALLOWED WITHIN THIS CIRCLE [having a radius of 2.2 or 1.8 miles, as prescribed by the Guidelines] THAT RESULTS IN LESS THAN 40% COVERAGE BY SUITABLE OWL HABITAT: 3972 ACRES ON THE OLYMPIC PENINSULA, 2523 ACRES IN THE CASCADES. If the amount of suitable habitat within this circle is less than the indicated minimum acreage, no harvest of suitable habitat will be permitted.

*Id.* at 4-5. Similar provision is made for protection of 70 acres of the best habitat, and of 500 acres within a radius of 0.7 miles. *Id.* at 5.

limits by means of stop-work orders and permit denials. The following are two examples.

In December, 1990, the Department of Natural Resources ordered Wind River Logging to "STOP ALL WORK" connected with the violation described in the order, and more specifically ordered:

EFFECTIVE IMMEDIATELY CEASE ALL TIMBER FALLING ON THOSE PORTIONS OF THE APPLICATION WITHIN OWL HABITAT, AS INDICATED ON THE ATTACHED MAP. NO FUTURE TIMBER FALLING WILL BE ALLOWED UNTIL APPROPRIATE SPOTTED OWL SURVEY INFORMATION IS ANALYZED AND ACCEPTED BY THE WASHINGTON DEPARTMENT OF WILDLIFE AS PROOF OF THE ABSENCE OF NORHTHERN [sic] SPOTTED OWLS IN THIS LOCATION.<sup>339</sup>

The explanation, after paraphrasing federal definitions of "take" and "harm," stated, in terms reflecting the Guidelines: "THIS OPERATION IS WITHIN (1.8) MILES OF A KNOWN SPOTTED OWL NEST OR BREEDING PAIR AND WILL REDUCE AVAILABLE SUITABLE HABITAT BELOW THE LEVEL NECESSARY FOR THE SURVIVAL OF THE PAIR."<sup>340</sup>

A permit denial involved Betty F. Orem, whose timberland abutting the Olympic National Forest had been classified as a tree farm.

In May and June of 1989, while carrying out clearcutting operations in the neighboring National Forest, the Forest Service burned and otherwise damaged a number of Mrs. Orem's trees. In considering her subsequent compensation claim, the Forest Service advised Mrs. Orem that she had a duty to mitigate the damage by harvesting and selling the damaged trees for their salvage value. When she sought approval to conduct salvage operations and otherwise to maintain the value of her timber stand by routine thinning, however, Mrs. Orem's application was delayed and then substantially denied due to the presence of a

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In some contrast to Owl Memo #2, a successor document, Memorandum from Art Stearns, Supervisor, Washington State Department of Natural Resources, to Regional Managers, *Owl Memo #3—Interim Policy and Procedures for Protecting the Northern Spotted Owl* (Mar. 5, 1991), contains passages that stress the independent regulatory role of the state, *id.* at 1 ("Additional spotted owl protection requirements may be established or imposed as a matter of federal law, over which the DNR has no regulatory authority."), and the flexible nature of the revised rules, *id.* ("These are guidelines only and may be adjusted on a case-by-case basis based on site-specific information and consultation . . ."). In some respects, it has recast the rules in less severely mandatory terms; for example, the provision corresponding to that quoted in the last paragraph now reads: "HARVEST WITHIN THIS CIRCLE RESULTING IN LESS THAN 40 PERCENT COVERAGE BY SUITABLE OWL HABITAT (3,972 ACRES ON THE OLYMPIC PENINSULA AND 2,523 ACRES ELSEWHERE), MAY HAVE A PROBABLE SIGNIFICANT ADVERSE IMPACT TO THE OWLS." *Id.* at 3. But it has retained the basic structure from the Guidelines. *See id.* at 3-4.

339. Forest Practices Order/Notice from the Washington State Department of Natural Resources to Wind River Logging Company (Dec. 14, 1990) (on file with author).

340. *Id.*

spotted owl in the Olympic National Forest, about half a mile from her property.<sup>341</sup>

The FWS in August 1991 “praised the incorporation into state forest practices review processes of Federal guidelines on avoidance of ‘incidental taking’ of spotted owls on private lands by California and Washington.”<sup>342</sup> But this action by the states can hardly be viewed as voluntary. They and their relevant employees were placed under a plain threat by the federal agency. States and their officers, employees, agents, departments and instrumentalities are “persons” within the Endangered Species Act’s definition,<sup>343</sup> and therefore fall within the Act’s prohibition of “take” by “any person.”<sup>344</sup> Their approval of timber harvesting activities that resulted in “take” under the Guidelines could render them liable on a complicity theory:

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be *party to take* on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of the ESA.<sup>345</sup>

To avoid liability, the states have had to assure that their review and permitting processes do not allow activities that would violate the Guidelines. In this way, the federal agency has in practical effect bound the states to follow the Guidelines. Further, it has conscripted the states as its regulatory agents, to force the nonlegislatively promulgated Guidelines upon private parties.<sup>346</sup>

In October 1991 the Fish and Wildlife Service rescinded the Guidelines, and stated that it “will investigate the need for a regulation.”<sup>347</sup>

341. Complaint at 6, *Sweet Home Chapter of Communities for a Great Oregon v. Turner*, No. 91-2218 (D.D.C. filed Aug. 30, 1991).

342. News Release, *supra* note 329, at 2.

343. 16 U.S.C. § 1532(13) (1988).

344. *Id.* § 1538(a)(1).

345. Guidelines, *supra* note 317, at 13 (emphasis added).

346. As was contemporaneously reported:

Agency officials said the guidelines were always meant to be strictly voluntary, but Brian Boyle, Washington state commissioner of public lands, said Wednesday such a claim was “insane” and officials in all three states had used the guidelines to design their own owl protection plans. . . . Boyle said that even if the guidelines were meant to be voluntary or advisory, Fish and Wildlife Service officials had made it clear his office would be held legally responsible if it didn’t take steps to guard against the incidental “taking” or killing of owls. “Everyone felt they had a gun to their heads,” Boyle said. “Most landowners, including my office, had assumed the guidelines had the effect of law.”

Les Blumenthal, *Agency Rescinds Owl Guidelines*, THE OREGONIAN, Oct. 17, 1991, at B1.

347. Memorandum from H. Dale Hall, Assistant Regional Director, U.S. Fish and Wildlife Service, Region 1, to Field Supervisors (Oct. 2, 1991). The body of this document, in its entirety, reads: “The July 1990 document titled ‘Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl,’ is hereby rescinded. We will investigate the need for a regulation.” *Id.*

## VII. RECOMMENDATIONS

Again, our concern is with substantive agency pronouncements that fit the APA's broad definition of "rule"<sup>348</sup> and that as a practical matter are binding because they either are intended to bind or are given that effect. As demonstrated,<sup>349</sup> any such pronouncement (other than one that interprets specific statutory or regulatory language) must be promulgated in accordance with the procedures required by the APA for legislative rulemaking.<sup>350</sup>

Described above,<sup>351</sup> however, are numerous examples of such policy documents that were not issued legislatively but that should have been so issued because as a practical matter they were binding.<sup>352</sup>

In such cases, affected persons and the public generally will not have been accorded a regularized notice of the agencies' actions or an assured opportunity to participate in their development. Citizens or lawyers in Pocatello, or even in Washington, sometimes do not have ready access to the guidances or manuals that agencies are using to bind them. And when they do, they can be confused about the legal import of documents like these, and frustrated at their inability to escape the practical obligations or standards the documents impose. Often, in order to win a needed approval, they must accept the conditions demanded by the non-legislative rule, and thereby as a practical matter surrender the opportunity to obtain court review of the offending conditions. The agencies, for their part, might not have issued these pronouncements so freely if legislative rulemaking procedures had had to be followed.

To induce agency observance of proper rulemaking procedures, it is not efficient to rely upon judicial review, which is uncertain and spasmodic and at best a belated curative. It would seem much more productive to set forth for the agencies a clear and comprehensive statement of the precepts they should obey.

Agencies have available to them two courses of procedural action by which to banish the vexing problems described in this Article. They may issue their new policies in binding form through the use of legislative rulemaking procedures (Recommendations A, C and D below). Or they may issue them nonlegislatively, and take care to treat them as nonbinding (Recommendation B below).

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348. For examples, see *supra* text accompanying notes 31-32.

349. See *supra* Parts I, II, and IV.

350. 5 U.S.C. § 553 (1988). Exceptions to the requirements of § 553 are discussed *supra* notes 50-55 and accompanying text.

351. See *supra* Part III.

352. See *supra* Part II. These pronouncements were not *legally* binding, of course, because they had not been issued through the APA's legislative rulemaking procedures.

A. Accordingly, this Article recommends that agencies adhere to section 553's legislative notice-and-comment procedures for any substantive statement of general applicability (other than an interpretive rule) that (a) is intended to establish mandatory standards or to impose obligations upon private parties, or (b) is given that effect by the agency.<sup>353</sup> In the limited circumstances in which such rulemaking may be exempted from notice-and-comment requirements,<sup>354</sup> agencies should nevertheless observe the procedures whenever it is feasible and appropriate to do so.<sup>355</sup>

Values served by the legislative rulemaking procedures are large ones.<sup>356</sup> Fairness is furthered by giving notice to those who are to be bound, both when the proposed rule is about to be considered and when the final rule is definitively published. The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis. The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated and by the public's sense of useful participation in a process that affects them. Its legitimacy rests upon all of these considerations, as well as upon the foundational fact that the agency has observed the procedures laid down by Congress for establishing rules with the

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353. This recommendation does not apply to interpretive rules—that is, statements that interpret language of a statute or of an existing legislative rule that has some tangible content. See *infra* text accompanying notes 364-73.

354. Substantive issuances exempted from the required procedures by 5 U.S.C. § 553(a) (1988) are those involving military or foreign affairs functions, agency management or personnel, public property, loans, benefits or contracts. To the extent agencies have voluntarily waived these exemptions, however, the procedures specified by § 553 apply mandatorily. *Linoz v. Heckler*, 800 F.2d 871, 877 n.7 (9th Cir. 1986) (HHS); *Rodway v. Department of Agric.*, 514 F.2d 809 (D.C. Cir. 1975); *Lee v. Kemp*, 731 F. Supp. 1101, 1112-13 (D.D.C. 1989) (HUD). The rulemaking of particular agencies or programs may be exempted from the APA requirements by the agencies' governing statutes.

355. See Administrative Conference of the United States, Recommendation No. 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1992); Administrative Conference of the United States, Recommendation No. 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73-5 (1992); Bonfield, *supra* note 12; Arthur E. Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 MICH. L. REV. 221 (1972). In all situations, where the use of notice-and-comment procedures would cause extraordinary difficulties for the agency, it may dispense with those procedures under the "good cause" exception. See 5 U.S.C. § 553(b)(B), (c)(3) (1988); *supra* note 12.

356. An excellent summary and discussion of the benefits and costs of notice-and-comment rulemaking procedures is presented in Asimow, *supra* note 50, at 402-09.

binding force of law. The agency's accountability for its rules is deepened by the court-made requirement of a reasoned explanation based upon a substantial rulemaking record.<sup>357</sup>

Beyond all of this, the APA rulemaking requirements impose a salutary discipline. That discipline deters casual and sloppy action, and thereby forestalls the confusion and needless litigation that can result from such action. And that discipline reduces tendencies toward overregulation or bureaucratic overreaching, and discourages low-profile attempts to create practically-binding norms that Congress or the Administration would not have approved.<sup>358</sup>

B. Even where an agency does not plan to observe these APA procedures, but instead contemplates a nonlegislative issuance, there is a way it can preserve its fulfillment of the values just discussed. Indeed, this is the fashion in which an agency must issue any policy statement<sup>359</sup>—that is, any substantive nonlegislative statement that does not interpret specific statutory or regulatory language.<sup>360</sup> The agency must intend that the statement will be genuinely tentative, rather than binding, and assure that it will be so treated.<sup>361</sup>

Accordingly, whenever practicable to do so, agencies should forthrightly declare in their nonlegislative policy documents that the stated policies are tentative, and that before they are applied finally to affected persons those persons will have a chance to challenge the policies (in the manner described below). Additionally, agencies should establish systems to assure that agency staff, counsel, administrative law judges, relevant state officials, and others who may apply policy statements or advise on the basis of such statements, are made aware that the policies set forth in such documents are tentative, and are subject to challenge in the manner described below, before they are applied. The agency similarly should make clear to affected private parties, by specific written advice at the time an application is made or at the commencement of enforcement or other proceedings, that the policies set forth in relevant nonlegislative documents are tentative and are subject to challenge before they are finally applied.<sup>362</sup>

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357. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

358. See *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1309 (7th Cir. 1983).

359. See *supra* Part V.

360. See *supra* Part I(C).

361. "A general statement of policy is . . . neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Batterton v. Marshall*, 648 F.2d 694, 706 (D.C. Cir. 1980) (quoting *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

362. If, as is often said, the purpose of the *Miranda* warning is as much to remind the police officer as it is to advise the suspect, so the agency staff official's duty to advise the private party

Then, before it applies a policy statement as herein defined<sup>363</sup> to a private party in a final action, the agency should afford the affected party a fair opportunity to challenge the legality or wisdom of the statement, or to suggest that a different policy be adopted in its stead, in a forum that assures adequate presentation of the affected person's positions and consideration of those positions by agency officials possessing authority to take or recommend final action upon them. (The opportunity merely to challenge the applicability of the policy, or to request waivers or exceptions from it, would not satisfy this standard.) Those agency officials should reconsider the policy afresh, in the light of the positions so advanced by the private party, with an open mind and without allowing prior publication of the policy statement in any way to foreclose the issue.

C. By contrast, interpretive rules—those that interpret language of a statute or of an existing legislative rule that has some tangible content<sup>364</sup>—are required by law neither to be promulgated by notice-and-comment rulemaking processes (as are binding noninterpretive rules) nor to be issued tentatively while the agency maintains an open mind (as are policy statements).<sup>365</sup> This holds true when the interpretation is issued merely to reduce uncertainty about the meaning of the statute and to afford guidance to staff and to the public. It remains true even when the agency intends, if it can, to make the interpretation bind affected private parties—that is, where the agency intends to act upon the interpretation and relentlessly to compel compliance with it up to the point that a court orders it to do otherwise.<sup>366</sup> The agency has the responsibility to administer and enforce the statute, and in order to get on with that job it must

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would serve as a valuable reminder of his or her own duty to treat the guidance as tentative and subject to policy challenge.

363. See *supra* text accompanying notes 65-69.

364. See *supra* text accompanying notes 58-64.

365. See *supra* note 5. The Department of Agriculture only rarely issues interpretations through notice-and-comment procedures. Interview with John Golden, Associate General Counsel, USDA, in Washington, D.C. (Aug. 9, 1991). Concern about adequate notice to affected parties is met by publication of "notices" without opportunity for comment. *Id.*

366. See, e.g., *Friedrich v. Secretary of Health & Human Servs.*, 894 F.2d 829, 837 (6th Cir.) (interpretive regulation creating no new law, that Secretary required all carriers to abide by, need not be made through § 553 procedures), *cert. denied*, 111 S. Ct. 59 (1990); *American Trucking Ass'n v. United States*, 688 F.2d 1337, 1344 (11th Cir. 1982), *rev'd*, 467 U.S. 354 (1984); see also *Gray Panthers Advocacy Comm. v. Sullivan*, 936 F.2d 1284, 1291-92 (D.C. Cir. 1991).

Though an agency intends to impose the interpretation bindingly rather than tentatively, and may do so without undergoing notice-and-comment procedures, it might not succeed in fulfilling that intention. If the interpretation is not issued legislatively, it is not binding upon courts under the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); the reviewing court must give the agency interpretation respectful attention, but may arrive independently at its own interpretation, even if that of the agency is reasonable. Anthony, *supra* note 6, at 36-40, 55-60. "Such mandatory instructions are not binding on the courts, however, if they merely

be able to take a position as to the meaning of the statute or regulation it is interpreting.<sup>367</sup> By its interpretation, the agency (at least in theory) is simply applying existing law and not creating new law.<sup>368</sup> This contrasts with an agency attempt to establish binding *noninterpretive* norms, which as an act of legislation creating new law can be accomplished only through the APA's legislative rulemaking processes.<sup>369</sup>

It would champion the worthy precepts of the APA, however, if in certain circumstances agencies would voluntarily make use of notice-and-comment rulemaking procedures to develop interpretive rules. Implicit in the doctrine that notice-and-comment procedures are not required for interpretations is a notion that affected parties are in some sense continuously on notice of any imaginable interpretation, and that it is their business (or their counsel's) to anticipate and guard against all possibilities. But when substantial interpretive changes are afoot, the values of fair notice and public participation and agency accountability demand something better.<sup>370</sup>

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interpret and implement the statute and do not create new law." *American Trucking Ass'n*, 688 F.2d at 1344. Thus, despite an agency's intent to bind, interpretive rules do not "foreclose alternate courses of action [by the agency] or conclusively affect rights of private parties." *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980). The staff may unbendingly apply the interpretive document within the agency, but a court may set it aside.

367. See *Chevron*, 467 U.S. at 865.

368. See *supra* cases cited in note 59.

369. 5 U.S.C. § 553 (1988). "Rules that 'effect a change in existing law or policy,' are subject to the notice and comment rulemaking requirements of section 553." *Mount Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988) (quoting *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986)); see also *supra* Part I(B).

370. The Administrative Conference of the United States in 1976 recommended that issuance, repeal or amendment of an interpretive rule "which is likely to have substantial impact on the public" should normally be developed through the procedures of APA § 553; if this is impracticable, unnecessary, or contrary to the public interest, the agency should so state at the time of promulgation and should ordinarily allow a post-promulgation period for public comment and reconsideration. Administrative Conference of the United States, Recommendation No. 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5 (1992). The consultant's report on which this recommendation was based was published as Michael Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977); see also Asimow, *supra* note 50 (generally reaffirming this position). The American Bar Association has adopted a resolution with substantially the same effect. American Bar Association, *Summary of Action of the House of Delegates* 25 (Annual Meeting Aug. 8-9, 1989).

The proposition that interpretive rules having "substantial impact" are required by § 553 to observe notice-and-comment procedures has been repeatedly rejected in recent years. See, e.g., *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1537 (D.C. Cir. 1989); *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Legislation adopted by Florida in 1991 subjects every "rule" (defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy," FLA. STAT. ANN. § 120.52(16) (West Supp. 1992)) to a statutory notice-and-comment rulemaking procedure, FLA. STAT. ANN. § 120.54 (West 1982 & Supp. 1992), with no exemption for interpretive rules or policy statements, FLA. STAT. ANN. § 120.535 (West Supp. 1992).

An agency should endeavor to observe notice-and-comment procedures, I believe, whenever it contemplates the adoption of an interpretation that would 1) extend the scope of the jurisdiction the agency in fact exercises;<sup>371</sup> 2) alter the obligations or liabilities of private parties;<sup>372</sup> or 3) modify the terms on which the agency will grant entitlements.<sup>373</sup> Of course, the rulemaking procedures need not be considered unless the

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The Administrative Conference has adopted a proposal that certain "significant" categories of rules fitting the APA's exemption for "rules of agency . . . procedure[] or practice," 5 U.S.C. § 553(b)(A) (1988), be voluntarily made the subject of notice-and-comment procedures. Administrative Conference of the United States, Recommendation No. 92-1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements (to be codified at 1 C.F.R. § 305.92-1).

371. A proposed interpretation may reach beyond the literal terms of the statute in unexpected ways, while arguably remaining within the perimeter of the agency's statutory authority. A vivid example is offered by the memorandum, described *supra* notes 197-200 and accompanying text, by which an officer of the Corps of Engineers declared jurisdiction over millions of acres newly identified as "waters of the United States" connected to interstate commerce on the basis that they were or could be used as habitat by migratory birds. Although the court in the *Tabb Lakes* case held the memorandum was not interpretive and therefore should be set aside for failure to observe § 553 rulemaking procedures, *see supra* notes 199-200, the memorandum could be regarded as an interpretation of the pertinent regulation, as a similar statement was apparently assumed to be in the *Leslie Salt* case. *See supra* note 200. Notice-and-comment procedures are eminently sensible in such cases.

372. *See, e.g., Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1307-09 (D.C. Cir. 1991) (interpretation declaring that stockpiling of reportable quantities of a hazardous substance is a "release," and setting minimum release levels of radionuclides, was validly issued without notice-and-comment procedures even if it had effect of creating new duties).

To the extent EPA's top-down policy might have been viewed as an interpretation as to which notice-and-comment procedures were not required, *see supra* text accompanying notes 229-32, it strikingly illustrates the sort of imposition of obligations for which the use of notice-and-comment procedures is recommended by this Article.

"[A]lthough [the announcement] serves as an interpretation of existing law, it also effectively enunciates a new requirement heretofore nonexistent for compliance with the law. . . . If left undisturbed by this court, this agency action would wield a significant change in the practices which private employers must follow and in the enforcement steps the agency must take. Under these circumstances, I believe that advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era." *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 471-72 (D.C. Cir. 1980) (Bazelon, J., concurring).

373. *See, e.g., American Postal Workers*, 707 F.2d at 548 (changed interpretation of statutory term reduced retirement annuities of 113,000 prospective retirees).

In 1990 the Department of Agriculture changed its interpretation of an exclusion from the Food Stamp Act's definition of "income," 7 U.S.C. § 2014(d)(11) (1988), to require that certain HUD energy assistance payments to publicly-assisted housing tenants, who pay their utilities separately, be counted as "income." Food Stamp Program Policy Memo 90-6, *supra* note 315. If the HUD payments are made directly to the tenant or to the utility provider, rather than to the landlord, the amounts are included in the tenant's income. *Id.* Because eligibility for food stamps is a function of income, 7 U.S.C. §§ 2014, 2017 (1988), the food stamp allowances of tenants directly receiving the HUD payments are reduced. *See West v. Bowen*, 879 F.2d 1122, 1129-32 (3d Cir. 1989), which rejected a substantially identical earlier position taken by USDA. USDA's Food Stamp Program Policy Memo 90-6, *supra* note 315, stated that its "policy applies in all States except those in the third circuit, i.e. Pennsylvania, Delaware, New Jersey and the Virgin Islands, where there is a court order that HUD utility payments be excluded as energy assistance payments." *Id.* at 1.

change of interpretation is a substantial one, that does not derive in an obvious way from established norms.

D. A final cluster of recommended practices springs from the rather obvious proposition that it should be the agency's responsibility to make the purport of its issuances clear and accessible.<sup>374</sup> If the agency intends an issuance to be legislative and therefore to be legally binding, it should say so,<sup>375</sup> in order that staff and affected persons will be definitively informed of the agency's intentions. It should also explain specifically how its issuance has gained legislative status. Ordinary citizens or even ordinary lawyers should not have to puzzle out the particulars of the agency's authority or its observance of procedural requirements.<sup>376</sup> If the agency expects to apply its document in a binding way, it should be willing to declare that the rule is a legislative one, and to back up that claim with a showing of the specific authority and procedures it has observed.<sup>377</sup> If these simple declarations were required, the public and the courts could know that documents issued without them were nonlegislative, and treat them accordingly.

Thus, this Article recommends that, in issuing any legislative rule, the agency publish as a part of the document promulgating the rule (a) a statement that the agency intends the rule to be a legislative rule, with the force of law; (b) a statement of the way in which specific statutory provisions confer upon the agency the authority to issue this particular rule in legislative form;<sup>378</sup> and (c) a statement of the specific steps the

374. That is the thrust of the APA's publication and public inspection requirements. 5 U.S.C. § 552(a) (1988).

375. Addressing what he termed "interpretative rules with legislative effect," Professor Saunders proposed: "The agency should elect whether it wishes its interpretative rule to enjoy legislative effect. If the agency so chooses, then it must follow the procedures required of legislative rules." Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 373.

376. Assuming the agency has no interest in creating confusion, it can gain nothing by withholding this information, whereas disclosing it can increase the effectiveness of a rule by leading affected persons to realize that the rule has the force of law.

377. As the court observed in *Levesque v. Block*, 723 F.2d 175, 179-80 (1st Cir. 1983) (citations omitted):

Because a rule promulgated pursuant to an agency's legislative authority is entitled to greater deference by the courts than are interpretative rules or policy statements, . . . one runs greater risks in not following legislative rules. It is therefore important to inform the public at the time of promulgation that a rule is legislative . . .

A useful parallel is found in the APA: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the *Federal Register* and not so published." 5 U.S.C. § 552(a)(1) (1988).

378. The APA's only mention of a rule's statutory authority requires "reference to the legal authority under which the rule is proposed" to be included in the notice of *proposed* rulemaking. 5 U.S.C. § 553(b)(2) (1988). Perhaps the requirement in § 553(c), that final rules incorporate "a concise general statement of their basis and purpose," could be read to require mention of statutory

agency has taken to satisfy the elements of rulemaking procedure required by 5 U.S.C. § 553 and by any other applicable statutory provisions.<sup>379</sup>

Agencies will protest that the procedures called for by these recommendations will prove bothersome and will place pressures upon their time and resources. No doubt this is true. Legislative rulemaking procedures can levy upon limited agency funds, people, and other resources.<sup>380</sup> It must be remembered, though, that agencies exist solely to serve the public in accordance with the law. The costs of observing the law and fair procedure are bedrock obligations that cannot legitimately be slighted simply because an agency might lack adequate resources or prefer to direct them elsewhere. At worst, they are a price to be paid for lawfulness and openness and accountability in government. The procedures here recommended are in the greatest part required by the law, which should not be dishonored in the name of a false economy.<sup>381</sup> The balance of the recommendations—in the spirit of the APA—call for the agencies to forswear coyness and advise the public candidly of the actions they are taking. The recommended procedures will avert the imposition of needless cost and confusion upon the public, and will foster a more uniform and punctilious process of administration within the agencies.

In short, if an agency wants to bind the public, it should do it right. It should not try to do it on the cheap or on the sly. It should observe

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authority at that stage. See the rules of the Administrative Committee of the *Federal Register* concerning citations of authority, 1 C.F.R. §§ 21.40-21.53 (1992). Agencies often satisfy these loose requirements by citing the entirety of a statute, or citing a section number followed by “*et seq.*” In no place is the agency called upon to state the *specific* provision that authorizes a rule like the specific rule at hand to be issued legislatively.

379. The following sample statement illustrates the brevity and simplicity with which the recommendations in the text can be implemented: “This rule is published as a legislative rule and has the force of law. It is authorized to be issued in legislative form by 72 U.S.C. § 1234, which provides that ‘the Commission may make such rules and regulations as are necessary to carry out the provisions of this chapter.’ Elements of rulemaking procedure required by statute have been complied with in the following way: Notice of proposed rulemaking for this rule, in compliance with 5 U.S.C. § 553(b)(1)-(3), was published in the *Federal Register* on [hypothetically] July 25, 1993, 58 Fed. Reg. 34,567. The Notice invited all interested persons to submit written data, views, arguments and comments on the proposed rule, on or before November 1, 1993. The public hearing required by the Commission’s enabling statute, 72 U.S.C. § 1235, was held in Hearing Room 2 in the Commission’s offices at 2120 J Street, N.W., Washington, D.C. 20000, on October 1, 1993. The statement of the final rule’s basis and purpose, as required by 5 U.S.C. § 553(c), is published herewith.”

380. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992). The “good cause” exception to notice-and-comment rulemaking procedures is available where the use of those procedures would be “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B), (c)(3) (1988); see *supra* note 12.

381. If the burdens of lawful rulemaking become so severe that the agency cannot act effectively, it can seek legislation empowering it to make legislative rules in a less burdensome manner.

the authorities and procedures laid down by Congress, and it should make use of some simple procedures to tell the public in a helpful way what it is doing.

## APPENDIX A

## RECOMMENDATION 92-2: AGENCY POLICY STATEMENTS\*

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are “rules” within the Administrative Procedure Act’s definition because they constitute “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy,” 5 U.S.C. § 551(4). “Rules” include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553, and (b) nonlegislative rules—that is, interpretive rules and policy statements—which fall within the above definition of “rules” but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.<sup>1</sup> The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently

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\* The Administrative Conference of the United States adopted Recommendation 92-2 on June 18, 1992. This text is reprinted from an advance copy of the recommendation provided to the *Duke Law Journal* by Professor Robert A. Anthony. It will be codified at 1 C.F.R. § 305.92-2. It has been edited only to conform to the *Duke Law Journal*'s citation conventions.

1. There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to decide policy whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in

overruled agency reliance on policy statements as binding on affected persons.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of § 553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.<sup>2</sup> Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

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fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

2. The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is likely to have substantial impact on the public. Agencies were urged to use post-promulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. See Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5.

## RECOMMENDATIONS

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind<sup>3</sup> affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

I. *Legislative Rulemaking for Binding Policies*

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding form as well as the steps that it has taken to comply with procedural requirements.

II. *Policy Statements*

A. *Notice of Nonbinding Nature.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for Challenges to Policy Statements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of

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3. As the term is used here, an agency ruling is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with § 553. A document that was not issued pursuant to § 553, and therefore cannot be binding *legally*, may nevertheless be binding *as a practical matter* if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. See Recommendation 92-1, "The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements" (to be codified at 1 C.F.R. § 305.92-1).

such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

### III. *Instructions to Agency Staff*

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. § 552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.