



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Distinguishing Between Legislative Rules and Non-Legislative Rules

What is the difference between a legislative rule and a non-legislative rule?

Legislative rules are substantive regulations that agencies issue to implement their statutory authorities. Subject to some exceptions, agencies must conduct notice-and-comment rulemaking before adopting legislative rules ([IIB-014](#)). Non-legislative rules include interpretive rules and policy statements, which are often called guidance documents ([IIB-023](#)). Interpretive rules explain how the agency construes the laws and regulations it administers. Policy statements advise how the agency may exercise its discretion in the future.

How do agencies decide whether to issue legislative or non-legislative rules?

Agencies use legislative rules when they want to announce binding standards that have the force and effect of law. Agencies use non-legislative rules to explain what they think the statute means or how they may enforce it, without necessarily binding the agency or the public.

What are some benefits and drawbacks of legislative and non-legislative rules?

Legislative rulemaking allows agencies to consider public comments before finalizing rules, but that process can be lengthy and resource intensive. Non-legislative rulemaking generally provides a faster way for agencies to explain or announce their policies, but sometimes at the expense of public engagement. ACUS recommends that agencies consider soliciting public input on non-legislative rules in some cases, even if it is not legally required (Recommendations [2017-5](#) and [2019-1](#)).

How do courts distinguish between legislative and non-legislative rules?

Distinguishing between legislative and non-legislative rules is one of the most challenging topics in administrative law. See *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975) (noting that the distinction is “enshrouded in considerable smog”). Cases commonly arise where an agency issues what it considers to be a valid non-legislative rule exempt from notice-and-comment requirements, but a party argues that the exemption does not apply and that the rule is therefore procedurally invalid. Neither the Supreme Court nor the lower federal courts have developed a definitive test for making this distinction, see *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015), but the material below outlines two key questions that courts often consider.

Does the rule have binding effect?

Deciding whether a rule has binding effect is a key consideration in distinguishing policy statements from legislative rules. Because a valid policy statement must by definition leave the agency free to exercise discretion in the future, a policy statement is invalid if it compels the agency or a party to follow a particular standard not already prescribed by law. To determine whether a policy statement has this kind of binding effect, courts consider factors such as whether the document contains mandatory language or what the legal consequences of not following the guidance may be. Courts may also examine how the agency is applying the guidance in practice, such as whether the agency is applying it inflexibly even if the document is facially non-binding. See generally *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).

Does the rule create new law?

A guidance document cannot be a valid interpretive rule unless it sets forth a genuine interpretation of existing statutes or regulations, such as by explaining the meaning of existing law or reminding parties of their legal duties. A valid interpretive rule cannot adopt a wholly new position or effect a substantive change in existing regulations. In deciding whether a guidance document creates new law, courts will also sometimes frame the issue in terms of whether there would be an adequate basis for enforcement in absence of the guidance; if an existing statute or regulation addresses the topic with sufficient specificity, then this may indicate that the related guidance on the topic is a valid interpretive rule. Whether guidance creates new law is a key aspect of distinguishing interpretive rules from legislative rules, but it may be difficult to discern in practice. See *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165 (7th Cir. 1996); *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

Additional Resources

ACUS Rec. [2019-1](#), Agency Guidance Through Interpretive Rules
ACUS Rec. [2017-5](#), Agency Guidance Through Policy Statements
ACUS Rec. [2014-3](#), Guidance in the Rulemaking Process
ACUS Rec. [92-2](#), Agency Policy Statements
ACUS Rec. [76-5](#), Interpretive Rules of General Applicability and Statements of General Policy
Kate R. Bowers, Cong. Rsch. Serv., [Agency Use of Guidance Documents](#) (2021)