



Recommendation 92-2

Agency Policy Statements

(Adopted June 18, 1992)

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 guidance, 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.¹ 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

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



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law. Courts have frequently 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 section 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 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 the policy is given deference by the courts. The practical consequence is this process may be costly and protracted, and 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.² Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests 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.

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."



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Recommendation

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind³ affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure 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 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 it has taken to comply with procedural requirements.

II. Policy Statements

A. *Notice of nonbinding nature.* Policy statements of general applicability should make clear they are not binding. Persons affected by policy statements should be advised 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

³ As the term is used here, an agency rule 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 section 553. A document that was not issued pursuant to section 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."



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they already exist, to allow as an additional subject requests for modification or reconsideration of 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 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.

Citations:

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