



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager's amendments (with no marginal notes), an amendment from the Council (with source shown in the margin), and additional amendments from a Conference Member (with source shown in the margin).

1 The Administrative Procedure Act (APA) exempts policy statements and interpretive¹
2 rules from its requirements for the issuance of legislative rules, including notice and comment.²
3 The *Attorney General's Manual on the Administrative Procedure Act* defines “statements of
4 policy” as agency statements of general applicability “issued . . . to advise the public
5 prospectively of the manner in which the agency proposes to exercise a discretionary power.”³
6 The *Manual* similarly defines “interpretive rules” as “rules or statements issued by an agency to
7 advise the public of the agency’s construction of the statutes and rules which it administers.”⁴
8 Because of the commonalities between policy statements and interpretive rules, including their
9 advisory function, many scholars and government agencies have more recently adopted the
10 umbrella term “guidance” to refer to both interpretive rules and policy statements.⁵

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

² 5 U.S.C. § 553(b)(A).

³ ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

⁴ *Id.*

⁵ See, e.g., Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-final-report>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

11 The Administrative Conference has issued several recommendations on policy
12 statements.⁶ The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*
13 *Statements*, offers best practices to agencies regarding policy statements. The Recommendation
14 advises agencies not to treat policy statements as binding on the public and to take steps to make
15 clear to the public that policy statements are nonbinding. It also suggests measures agencies
16 could take to allow the public to propose alternative approaches to those contained in a policy
17 statement and offers suggestions on how agencies can involve the public in adopting and
18 modifying policy statements.⁷

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

23 This project takes up that charge. Policy statements and interpretive rules are similar in
24 that they lack the force of law⁸ and are often issued without notice-and-comment proceedings, as
25 the APA permits. This similarity suggests that, as a matter of best practice, when interested
26 persons disagree with the views expressed in an interpretive rule, the agency should allow them a
27 fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the
28 practice that Recommendation 2017-5 already prescribes in the case of policy statements.⁹ The
29 benefits to the public of according such treatment, as well as the potential costs to agencies of

⁶ See, e.g., Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 1992-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 1976-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

⁷ See Recommendation 2017-5, *supra* note 6, ¶ 9.

⁸ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1208 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citing the ATTORNEY GENERAL'S MANUAL, *supra* note 3, at 30 n.3)).

⁹ Recommendation 2017-5, *supra* note 6, ¶ 2; see also Recommendation 1992-2, *supra* note 6, ¶ II.B.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

30 according it, are largely the same regardless of whether a given guidance document is concerned
31 with law, policy, or a combination of both.¹⁰

32 Recommendation 2017-5 provided that “[a]n agency should not use a policy statement to
33 create a standard binding on the public, that is, as a standard with which noncompliance may
34 form an independent basis for action in matters that determine the rights and obligations of any
35 member of the public.”¹¹ Although the same basic idea should apply to interpretive rules, the
36 concept of “binding” effect can give rise to misunderstanding in the context of those rules, for
37 several reasons.

38 First, interpretive rules often use mandatory language when the agency is using that
39 language to describe an existing statutory or regulatory requirement. Recommendation 2017-
40 5 itself recognized the legitimacy of such phrasing.¹² For this reason, administrative lawyers
41 sometimes describe such rules as “binding.” That common usage of words, however, can lead to
42 confusion: it can impede efforts to make clear that interpretive rules should remain nonbinding in
43 a different sense, i.e., that members of the public should be accorded a fair opportunity to request
44 that such rules be modified, rescinded, or waived.

45 Second, discussions of the circumstances in which interpretive rules may or may not be
46 “binding” bring to mind assumptions that stem from the case law construing the rulemaking
47 exemption in the APA.¹³ Courts and commentators have disagreed about whether, under that
48 case law, interpretive rules may be binding on the agency that issues them.¹⁴ Despite this
49 diversity of views, officials interviewed for this project did not express the view that they would

¹⁰ See Blake Emerson and Ronald M. Levin, Agency Guidance Through Interpretive Rules: Research and Analysis 33–34 (May 28, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-through-interpretive-rules-final-report>.

¹¹ Recommendation 2017-5, *supra* note 6, ¶ 1.

¹² *Id.* ¶ 5; accord Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,440 (Jan. 25, 2007).

¹³ See 5 U.S.C. § 553(b)(A).

¹⁴ Emerson & Levin, *supra* note 9, at 20–23; Parrillo, *supra* note 5, at 23–25; see also Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

50 categorically deny private parties the opportunity to seek modification, rescission, or waiver of
51 an interpretive rule. In this Recommendation, the Administrative Conference addresses only best
52 practices and expresses no opinions about how the APA rulemaking exemption should be
53 construed. Nevertheless, assumptions derived from the APA background can divert attention
54 from **issuesconsideration** of what sound principles of administration require, which this
55 Recommendation does address.

56 Third, administrative lawyers currently differ on the question of whether interpretive
57 rules are effectively rendered “binding” when they are reviewed in court under the *Auer v.*
58 *Robbins*¹⁵ standard of review, which provides that an agency’s interpretation of its own
59 regulation becomes of “controlling weight” if it is not “plainly erroneous or inconsistent with the
60 regulation.”¹⁶ The question of whether interested persons should be able to ask an agency to
61 modify, rescind, or waive an interpretive rule does not intrinsically have to turn on what level of
62 deference the courts would later accord to the agency’s interpretation. **in the event of judicial**
63 **review** Indeed, the possibility of judicial deference at the appellate level (under *Auer* or any other
64 standard of review) may augment the challenger’s interest in raising this interpretive issue at the
65 agency level.¹⁷ Even so, the doctrinal debate over whether an interpretive rule is or is not
66 “binding” under *Auer* can **have the effect of directing the focus of** attention away from these
67 practical considerations.

68 For **these foregoing** reasons, the Administrative Conference has worded the initial
69 operative provisions of the Recommendation so that it avoids using the phrase “binding on the
70 public.” Instead it urges that agencies not treat interpretive rules as setting independent standards

¹⁵ 519 U.S. 452 (1997).

¹⁶ *Id.* at 461; compare *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (stating that because of “judge-made doctrines of deference . . . [a]gencies may now use [interpretive] rules not just to advise the public, but also to bind them”), with *id.* at 1208 n.4 (opinion of the Court) (“Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.”). The Supreme Court is currently considering whether to overrule *Auer* in *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari). For reasons explained in the text, the present recommendations do not depend on which view of *Auer* one favors, or on what the Court may decide in *Kisor*.

¹⁷ See Emerson & Levin, *supra* note 9, at 25.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

71 for action and that interested persons should have a fair opportunity to seek modification,
72 rescission, or waiver of an interpretive rule. In substance, this formulation expresses positions
73 that largely correspond with prescriptions that Recommendation 2017-5 made regarding policy
74 statements, but it does so without implicating unintended associations that the word “binding”
75 might otherwise evoke.

76 What constitutes a fair opportunity to contest an interpretive rule will depend on the
77 circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of
78 factors can deter affected persons from contesting guidance documents with which they disagree;
79 these factors operate in approximately the same manner regardless of whether a policy statement
80 or interpretive rule is involved.¹⁸ Agencies that design procedures for requesting reconsideration
81 or modification of both types of guidance should be attentive to circumstances that affect the
82 practical ability of members of the public to avail themselves of the opportunity to be heard. The
83 mere existence of an opportunity to contest an interpretive rule through an internal appeal may
84 not be enough to afford a “fair opportunity” because of the very high process costs that pursuing
85 such an appeal could entail.

86 At the same time, agencies should also consider governmental interests such as the
87 agency’s resource constraints and need for centralization.¹⁹ For example, an agency should be
88 able to deal summarily with requests that it finds to be obstructive, dilatory, or otherwise
89 tendered in apparent bad faith. It should not be expected to entertain and respond in detail to
90 repetitive or frivolous challenges to the agency’s position. Additionally, Paragraph 3 recognizes
91 that the need for coordination of multiple decision makers in a given program may justify
92 requiring lower-level employees to adhere to the agency’s interpretive rules.

93 The recommendations below pertaining to public participation in the formulation of
94 interpretive rules closely track the public participation provisions of Recommendation 2017-5.

¹⁸ Parrillo, *supra* note 5, at 25.

¹⁹ See Emerson & Levin, *supra* note 9, at 38–41.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

95 The recommendations here have been modified to reflect differences between interpretive rules
96 and statements of policy.

97 Paragraphs 12 through 15 set forth principles that agencies should consider in
98 determining whether and how to invite members of the public to suggest alternative approaches
99 or analyses to those spelled out in interpretive rules. These paragraphs are largely drawn from
100 corresponding provisions in Recommendation 2017-5. Interpretive rules that lend themselves to
101 alternative approaches include those that lay out several lawful options for the public but do not
102 purport to be exhaustive. They may also include rules that, in spelling out decisional factors that
103 are relevant to the meaning of a statute or regulation, leave open the possibility that other
104 decisional factors might also be relevant. Typically, such rules, and those that speak at a general
105 level, leaving space for informal adjustments and negotiation between the agency and ~~its~~
106 ~~stakeholders~~ interested persons²⁰ about how the rule should be applied. On the other hand, certain
107 kinds of interpretive rules, such as those in which an agency has determined that a statutory term
108 has only one construction (e.g., rules that take the view that certain conduct is categorically
109 required or forbidden), do not lend themselves to such flexible treatment. This category may
110 include rules in which an agency has determined that a statutory term has only one construction,
111 such as where the rule takes the view that certain conduct is categorically required or
112 forbidden.²¹

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan B. Morrison #1

Commented [CMA2]: Proposed Amendment from Senior Fellow Alan B. Morrison #2

Commented [CA3]: Proposed Amendment from Council. This Amendment also includes the addition of a new FN 20. Note: If adopted, staff will ensure, as a Committee on Style matter, proper internal cross-references in all footnotes.

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

- 113 1. An agency should not use an interpretive rule to create a standard independent of the
114 statute or legislative rule it interprets. That is, noncompliance with an interpretive rule

²⁰ This Recommendation uses “interested person” rather than “stakeholder,” which Recommendation 2017-5, *supra* note 6, uses. The Conference believes that “interested person” is more precise than “stakeholder” and that “stakeholder,” as used in Recommendation 2017-5, should be understood to mean “interested person.”

²¹ *Id.* at 42–44.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 115 should not form an independent basis for action in matters that determine the rights and
116 obligations of any member of the public.
- 117 2. An agency should afford members of the public a fair opportunity to argue for
118 modification, rescission, or waiver of an interpretive rule. In determining whether to
119 modify, rescind, or waive an interpretive rule, an agency should give due regard to any
120 reasonable reliance interests.
- 121 3. It is sometimes appropriate for an agency, as an internal agency management matter, to
122 direct some of its employees to act in conformity with an interpretive rule. But the agency
123 should ensure that this does not interfere with the fair opportunity called for in Paragraph
124 2. For example, an interpretive rule could require officials at one level of the agency
125 hierarchy to follow the interpretive rule, with the caveat that officials at a higher level can
126 authorize a modification, rescission, or waiver of that rule. Agency review should be
127 available ~~in cases in which~~ when frontline officials fail to follow interpretive rules ~~in~~
128 ~~conformity with which~~ they are properly directed to ~~not~~ follow.
- 129 4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that
130 the rule expresses the agency's current interpretation of the law but that a member of the
131 public will, upon proper request, be accorded a fair opportunity to seek modification,
132 rescission, or waiver of the rule.
- 133 5. An interpretive rule should not include mandatory language unless the agency is using
134 that language to describe an existing statutory or regulatory requirement, or the language
135 is addressed to agency employees and will not interfere with the fair opportunity called
136 for in Paragraph 2.
- 137 6. An agency should make clear to members of the public which agency officials are
138 required to follow an interpretive rule and where to go within the agency to seek
139 modification, rescission, or waiver from the agency.
- 140 7. An agency should instruct all employees engaged in an activity to which an interpretive
141 rule pertains that, although the interpretive rule may contain mandatory language, they
142 should refrain from making any statements suggesting that an interpretive rule may not
143 be contested within the agency. Insofar as any employee is directed, as an internal agency



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

144 management matter, to act in conformity with an interpretive rule, that employee should
145 be instructed as to the expectations set forth in Paragraphs 2 and 3.

146 8. When an agency is contemplating adopting or modifying an interpretive rule, it should
147 consider whether to solicit public participation, and, if so, what kind, before adopting or
148 modifying the rule. Options for public participation include ~~stakeholder meetings or~~
149 ~~webinars with interested persons~~, advisory committee proceedings, and invitation for
150 written input from the public with or without a response. In deciding how to proceed, the
151 agency should consider:

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- 152 a. The agency's own procedures for ~~the adoption of adopting~~ interpretive rules.
- 153 b. The likely increase in useful information available to the agency from broadening
154 participation, keeping in mind that non-regulated persons (regulatory beneficiaries
155 and other interested persons) may offer different information than regulated
156 persons and that non-regulated persons will often have no meaningful opportunity
157 to provide input regarding interpretive rules other than at the time of adoption.
- 158 c. The likely increase in rule acceptance from broadening participation, keeping in
159 mind that non-regulated persons will often have no opportunity to provide input
160 regarding interpretive rules other than at the time of adoption, and that rule
161 acceptance may be less likely if the agency is not responsive to ~~stakeholder input~~
162 ~~from interested persons~~.
- 163 d. Whether the agency is likely to learn more useful information by having a specific
164 agency proposal as a focal point for discussion, or instead having a more free-
165 ranging and less formal discussion.
- 166 e. The practicability of broader forms of participation, including invitation for
167 written input from the public, keeping in mind that broader participation may
168 slow the adoption of interpretive rules and may diminish resources for other
169 agency tasks, including ~~the provision of issuing~~ interpretive rules on other
170 matters.

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171 9. If an agency does not provide for public participation before adopting or modifying an
172 interpretive rule, it should consider offering an opportunity for public participation after



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

173 adoption or modification. As with Paragraph 8, options for public participation include
174 stakeholder meetings or webinars with interested persons, advisory committee
175 proceedings, and invitation for written input from the public with or without a response.

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176 10. An agency may make decisions about the appropriate level of public participation
177 interpretive rule-by-interpretive rule or by assigning certain procedures for public
178 participation to general categories of interpretive rules. If an agency opts for the latter, it
179 should consider whether resource limitations may cause some interpretive rules, if subject
180 to pre-adoption procedures for public participation, to remain in draft for substantial
181 periods of time. If that is the case, agencies should either (a) make clear to

182 stakeholders interested persons which draft interpretive rules, if any, should be understood
183 to reflect current agency thinking; or (b) provide in each draft interpretive rule that, at a
184 certain time after publication, the rule will automatically either be adopted or withdrawn.

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185 11. All written interpretive rules affecting the interests of regulated parties, regulatory
186 beneficiaries, or other interested parties should be promptly made available electronically
187 and indexed, in a manner in which they may readily be found. Interpretive rules should
188 also indicate the nature of the reliance that may be placed on them and the opportunities
189 for modification, rescission, or waiver of them.

**Recommendations Applicable Only to Those Interpretive Rules Amenable to
Alternative Approaches or Analyses**

190 12. Interpretive rules that lend themselves to alternative approaches or analyses include those
191 that lay out several lawful options for the public but do not purport to be exhaustive.

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192 They may also include rules that, in spelling out decisional factors that are relevant to the
193 meaning of a statute or regulation, leave open the possibility that other decisional factors
194 might also be relevant. Typically, such rules, and those that speak at a general level,
195 leaving space for informal adjustments and negotiation between the agency and its

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196 stakeholders interested persons about how the rule should be applied. Paragraphs 1-11
197 above apply with equal force to such rules. However, with respect to such rules, agencies
198 should take additional steps to promote flexibility, as discussed below.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

199 13. Agencies should afford members of the public a fair opportunity to argue for lawful
200 approaches or analyses other than those ~~put forward by~~ spelled out in an interpretive rule,
201 subject to any binding requirements imposed upon agency employees as an internal
202 management manner. The agency should explain that a member of the public may take a
203 lawful approach different from the one set forth in the interpretive rule, ~~or~~ request that the
204 agency take such a lawful approach, or request that the agency endorse an alternative or
205 additional analysis of the rule. The interpretive rule should also include the identity and
206 contact information of officials to whom such a request should be made. Additionally,
207 with respect to such rules, agencies should take further measures to promote such
208 flexibility as provided in Paragraph 14.

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209 14. In order to provide a fair opportunity for members of the public to argue for other lawful
210 approaches or analyses, an agency should, subject to considerations of practicability and
211 resource limitations and the priorities described in Paragraph 15, consider additional
212 measures, including the following:

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213 a. Promoting the flexible use of interpretive rules in a manner that still takes due
214 account of needs for consistency and predictability. In particular, when the agency
215 accepts a proposal for a lawful approach or analysis other than that put forward in
216 an interpretive rule and the approach or analysis seems likely to be applicable to
217 other situations, the agency should disseminate its decision and the reasons for it
218 to other persons who might make the argument, to other affected
219 ~~stakeholders~~ interested persons, to officials likely to hear the argument, and to
220 members of the public, subject to existing protections for confidential business or
221 personal information.

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222 b. Assigning the task of considering arguments for approaches or analyses other than
223 those in an interpretive rule to a component of the agency that is likely to engage
224 in open and productive dialogue with persons who make such arguments, such as
225 a program office that is accustomed to dealing cooperatively with regulated
226 parties and regulatory beneficiaries.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 227 c. ~~In cases where~~When frontline officials are authorized to take an approach ~~or~~
228 ~~endorse an analysis~~ different from that in an interpretive rule but decline to do so,
229 directing appeals of such a refusal to a higher-level official who is not the direct
230 superior of those frontline officials.
- 231 d. Investing in training and monitoring of frontline personnel to ensure that they: (i)
232 treat parties' ideas for lawful approaches ~~or analyses~~ ~~that are~~ different from those
233 in an interpretive rule in an open and welcoming manner; and (ii) understand that
234 approaches ~~or analyses~~ other than those in an interpretive rule, if undertaken
235 according to the proper internal agency procedures for approval and justification,
236 are appropriate and will not have adverse employment consequences for them.
- 237 e. Facilitating opportunities for members of the public, including through
238 intermediaries such as ombudspersons or associations, to propose or support
239 approaches ~~or analyses~~ different from those in an interpretive rule and to provide
240 feedback to the agency on whether its officials are giving reasonable
241 consideration to such proposals.

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242 15. Because measures to promote flexibility (including those listed in Paragraph 14) may
243 take up agency resources, it will be necessary to set priorities for which interpretive rules
244 are most in need of such measures. In deciding when to take such measures, the agency
245 should consider the following, bearing in mind that these considerations will not always
246 point in the same direction:

- 247 a. An agency should assign a higher priority to an interpretive rule the greater the
248 rule's impact is likely to be on the interests of regulated parties, regulatory
249 beneficiaries, and other interested parties, either because regulated parties have
250 strong incentives to comply with the rule or because the rule practically reduces
251 the stringency of the regulatory scheme compared to the status quo.
- 252 b. An agency should assign a lower priority to promoting flexibility in the use of a
253 rule insofar as the rule's value to the agency and ~~to stakeholders~~ interested persons
254 ~~lies is primarily in the fact that it is helpful to have consistency independent of the~~
255 ~~rule's~~ rather than substantive content.

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