



Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation from Committee on Judicial Review | April 18, 2019

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, more recently many scholars and government agencies have adopted the
10 umbrella term "guidance" to refer to both interpretive rules and policy statements.⁵

11 The Administrative Conference has issued several recommendations on policy
12 statements.⁶ The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*

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/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>.

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 92-2, *Agency Policy Statements*, 57 Fed.



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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.

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 law⁷ 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.⁸ The
29 benefits to the public of according such treatment, as well as the potential costs to agencies of
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.⁹

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

Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

⁷ 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), and referencing the Attorney General’s Manual on the Administrative Procedure Act, at 30 n.3).

⁸ Recommendation 2017-5, *supra* note 6, ¶ 2; *see also* Recommendation 92-2, *supra* note 6, ¶ II.B.

⁹ See Blake Emerson and Ronald M. Levin, Agency Guidance Through Interpretive Rules: Research and Analysis 31–32 (Mar. 8, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-guidance-through-interpretive-rules>.



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34 form an independent basis for action in matters that determine the rights and obligations of any
35 member of the public.”¹⁰ 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 2017-5
40 itself recognized the legitimacy of such phrasing.¹¹ 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. Courts and commentators have disagreed about whether, under that case
48 law, interpretive rules may be binding on the agency that issues them.¹² Despite this diversity of
49 views, officials interviewed for this project did not express the view that they would
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 issues of what sound principles of administration require, which this Recommendation does
55 address.

¹⁰ Recommendation 2017-5, *supra* note 6, ¶ 1.

¹¹ *Id.* ¶ 5; accord OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, 72 Fed. Reg. 3,436, 3,440 (Jan. 25, 2007).

¹² Emerson & Levin, *supra* note 9, at 19–21; 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).



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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*¹³ 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.”¹⁴ 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
64 other standard of review) may augment the challenger’s interest in raising this interpretive issue
65 at the agency level.¹⁵ 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 the foregoing reasons, the Administrative Conference has worded the initial operative
69 provisions of the Recommendation so that it avoids using the phrase “binding on the public.”
70 Instead it urges that agencies not treat interpretive rules as setting independent standards for
71 action and that interested persons should have a fair opportunity to seek modification, rescission,
72 or waiver of an interpretive rule. In substance, this formulation expresses positions that largely
73 correspond with prescriptions that Recommendation 2017-5 made regarding policy statements,
74 but it does so without implicating unintended associations that the word “binding” might
75 otherwise evoke.

¹³ 519 U.S. 452 (1997).

¹⁴ *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*.

¹⁵ See Emerson & Levin, *supra* note 9, at 23.



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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.¹⁶ 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.¹⁷ 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 decisionmakers 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.
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 to those spelled out in interpretive rules. These paragraphs are largely drawn from corresponding
100 provisions in Recommendation 2017-5. Interpretive rules that lend themselves to alternative

¹⁶ Parrillo, *supra* note 5, at 25.

¹⁷ See Emerson & Levin, *supra* note 9, at 36–39.



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101 approaches include those that lay out several lawful options for the public but do not purport to
102 be exhaustive, and those that speak at a general level, leaving space for informal adjustments and
103 negotiation between the agency and its stakeholders about how the rule should be applied. On the
104 other hand, certain kinds of interpretive rules do not lend themselves to such flexible treatment.
105 This category may include rules in which an agency has determined that a statutory term has
106 only one construction, such as where the rule takes the view that certain conduct is categorically
107 required or forbidden.¹⁸

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

- 108 1. An agency should not use an interpretive rule to create a standard independent of the
109 statute or legislative rule it interprets. That is, noncompliance with an interpretive rule
110 should not form an independent basis for action in matters that determine the rights and
111 obligations of any member of the public.
- 112 2. An agency should afford members of the public a fair opportunity to argue for
113 modification, rescission, or waiver of an interpretive rule. In determining whether to
114 modify, rescind or waive an interpretive rule, an agency should give due regard to any
115 reasonable reliance interests.
- 116 3. It is sometimes appropriate for an agency, as an internal agency management matter, to
117 direct some of its employees to act in conformity with an interpretive rule. But the agency
118 should ensure that this does not interfere with the fair opportunity called for in paragraph
119 2. For example, an interpretive rule could require officials at one level of the agency
120 hierarchy to follow the interpretive rule, with the caveat that officials at a higher level can
121 authorize a modification, rescission, or waiver of that rule. Agency review should be

¹⁸ *Id.* at 40–41.



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122 available in cases in which frontline officials fail to follow interpretive rules in
123 conformity with which they are properly directed to act.

- 124 4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that
125 the rule expresses the agency's current interpretation of the law but that a member of the
126 public will, upon proper request, be accorded a fair opportunity to seek modification,
127 rescission, or waiver of the rule.
- 128 5. An interpretive rule should not include mandatory language unless the agency is using
129 that language to describe an existing statutory or regulatory requirement, or the language
130 is addressed to agency employees and will not interfere with the fair opportunity called
131 for in paragraph 2.
- 132 6. An agency should make clear to members of the public which agency officials are
133 required to follow an interpretive rule and where to go within the agency to seek
134 modification, rescission, or waiver from the agency.
- 135 7. An agency should instruct all employees engaged in an activity to which an interpretive
136 rule pertains that, although the interpretive rule may contain mandatory language, they
137 should refrain from making any statements suggesting that an interpretive rule may not
138 be contested within the agency. Insofar as any employee is directed, as an internal agency
139 management matter, to act in conformity with an interpretive rule, that employee should
140 be instructed as to the expectations set forth in paragraphs 2 and 3.
- 141 8. When an agency is contemplating adopting or modifying an interpretive rule, it should
142 consider whether to solicit public participation, and, if so, what kind, before adopting or
143 modifying the rule. Options for public participation include stakeholder meetings or
144 webinars, advisory committee proceedings, and invitation for written input from the
145 public with or without a response. In deciding how to proceed, the agency should
146 consider:



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- 147 a. The agency's own procedures for the adoption of interpretive rules.
- 148 b. The likely increase in useful information available to the agency from broadening
149 participation, keeping in mind that non-regulated persons (regulatory beneficiaries
150 and other interested persons) may offer different information than regulated
151 persons and that non-regulated persons will often have no meaningful opportunity
152 to provide input regarding interpretive rules other than at the time of adoption.
- 153 c. The likely increase in rule acceptance from broadening participation, keeping in
154 mind that non-regulated persons will often have no opportunity to provide input
155 regarding interpretive rules other than at the time of adoption, and that rule
156 acceptance may be less likely if the agency is not responsive to stakeholder input.
- 157 d. Whether the agency is likely to learn more useful information by having a specific
158 agency proposal as a focal point for discussion, or instead having a more free-
159 ranging and less formal discussion.
- 160 e. The practicability of broader forms of participation, including invitation for
161 written input from the public, keeping in mind that broader participation may
162 slow the adoption of interpretive rules and may diminish resources for other
163 agency tasks, including the provision of interpretive rules on other matters.
- 164 9. If an agency does not provide for public participation before adopting or modifying an
165 interpretive rule, it should consider offering an opportunity for public participation after
166 adoption or modification. As with paragraph 8, options for public participation include
167 stakeholder meetings or webinars, advisory committee proceedings, and invitation for
168 written input from the public with or without a response.
- 169 10. An agency may make decisions about the appropriate level of public participation
170 interpretive rule-by-interpretive rule or by assigning certain procedures for public
171 participation to general categories of interpretive rules. If an agency opts for the latter, it



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172 should consider whether resource limitations may cause some interpretive rules, if subject
173 to pre-adoption procedures for public participation, to remain in draft for substantial
174 periods of time. If that is the case, agencies should either (a) make clear to stakeholders
175 which draft interpretive rules, if any, should be understood to reflect current agency
176 thinking; or (b) provide in each draft interpretive rule that, at a certain time after
177 publication, the rule will automatically either be adopted or withdrawn.

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

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches

183 12. Interpretive rules that lend themselves to alternative approaches include those that lay out
184 several lawful options for the public but do not purport to be exhaustive, and those that
185 speak at a general level, leaving space for informal adjustments and negotiation between
186 the agency and its stakeholders about how the rule should be applied. Paragraphs 1-11
187 above apply with equal force to such rules. However, with respect to such rules, agencies
188 should take additional steps to promote flexibility, as discussed below.

189 13. Agencies should afford members of the public a fair opportunity to argue for lawful
190 approaches other than those put forward by an interpretive rule, subject to any binding
191 requirements imposed upon agency employees as an internal management manner. The
192 agency should explain that a member of the public may take a lawful approach different
193 from the one set forth in the interpretive rule or request that the agency take such a lawful
194 approach. The interpretive rule should also include the identity and contact information
195 of officials to whom such a request should be made. Additionally, with respect to such



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196 rules, agencies should take further measures to promote such flexibility as provided in
197 paragraph 14.

198 14. In order to provide a fair opportunity for members of the public to argue for other lawful
199 approaches, an agency should, subject to considerations of practicability and resource
200 limitations and the priorities described in paragraph 15, consider additional measures,
201 including the following:

- 202 a. Promoting the flexible use of interpretive rules in a manner that still takes due
203 account of needs for consistency and predictability. In particular, when the agency
204 accepts a proposal for a lawful approach other than that put forward in an
205 interpretive rule and the approach seems likely to be applicable to other situations,
206 the agency should disseminate its decision and the reasons for it to other persons
207 who might make the argument, to other affected stakeholders, to officials likely to
208 hear the argument, and to members of the public, subject to existing protections
209 for confidential business or personal information.
- 210 b. Assigning the task of considering arguments for approaches other than that in an
211 interpretive rule to a component of the agency that is likely to engage in open and
212 productive dialogue with persons who make such arguments, such as a program
213 office that is accustomed to dealing cooperatively with regulated parties and
214 regulatory beneficiaries.
- 215 c. In cases where frontline officials are authorized to take an approach different from
216 that in an interpretive rule but decline to do so, directing appeals of such a refusal
217 to a higher-level official who is not the direct superior of those frontline officials.
- 218 d. Investing in training and monitoring of frontline personnel to ensure that they (i)
219 treat parties' ideas for lawful approaches different from those in an interpretive
220 rule in an open and welcoming manner; and (ii) understand that approaches other
221 than that in an interpretive rule, if undertaken according to the proper internal



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222 agency procedures for approval and justification, are appropriate and will not
223 have adverse employment consequences for them.

224 e. Facilitating opportunities for members of the public, including through
225 intermediaries such as ombudspersons or associations, to propose or support
226 approaches different from those in an interpretive rule and to provide feedback to
227 the agency on whether its officials are giving reasonable consideration to such
228 proposals.

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

234 a. An agency should assign a higher priority to an interpretive rule the greater the
235 rule's impact is likely to be on the interests of regulated parties, regulatory
236 beneficiaries, and other interested parties, either because regulated parties have
237 strong incentives to comply with the rule or because the rule practically reduces
238 the stringency of the regulatory scheme compared to the status quo.

239 b. An agency should assign a lower priority to promoting flexibility in the use of a
240 rule insofar as the rule's value to the agency and to stakeholders lies primarily in
241 the fact that it is helpful to have consistency independent of the rule's substantive
242 content.