

Comment on Proposed ACUS Recommendation: Agency Guidance Through Interpretive Rules

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This document identifies edits offered by Senior Fellow Alan Morrison in redline format. The recommendation numbers and line numbering correspond to the draft recommendation dated June 6, 2019, which the full Assembly will be considering at the June 13, 2019 Plenary Session.

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

12. Interpretive rules that lend themselves to alternative approaches or analyses include those that lay out several lawful options for the public but do not purport to be exhaustive. They may also include rules that, in spelling out decisional factors that are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules speak at a general level, leaving space for informal adjustments and negotiation between the agency and its stakeholders about how the rule should be applied. Paragraphs 1-11 above apply with equal force to such rules. However, with respect to such rules, agencies should take additional steps to promote flexibility, as discussed below.

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

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14. In order to provide a fair opportunity for members of the public to argue for other lawful approaches or analyses, an agency should, subject to considerations of practicability and

resource limitations and the priorities described in paragraph 15, consider additional measures, including the following:

- a. Promoting the flexible use of interpretive rules in a manner that still takes due account of needs for consistency and predictability. In particular, when the agency accepts a proposal for a lawful approach or analysis other than that put forward in an interpretive rule and the approach or analysis seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected stakeholders, to officials likely to hear the argument, and to members of the public, subject to existing protections for confidential business or personal information.
- b. Assigning the task of considering arguments for approaches or analyses other than that in an interpretive rule to a component of the agency that is likely to engage in open and productive dialogue with persons who make such arguments, such as a program office that is accustomed to dealing cooperatively with regulated parties and regulatory beneficiaries.
- c. In cases where frontline officials are authorized to take an approach or endorse an analysis different from that in an interpretive rule but decline to do so, directing appeals of such a refusal to a higher-level official who is not the direct superior of those frontline officials.
- d. Investing in training and monitoring of frontline personnel to ensure that they (i) treat parties' ideas for lawful approaches or analyses different from those in an interpretive rule in an open and welcoming manner; and (ii) understand that approaches or analyses other than that in an interpretive rule, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them.
- e. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support approaches or analyses different from those in an interpretive rule and to provide

feedback to the agency on whether its officials are giving reasonable consideration to such proposals.

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

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

[SUGGESTED CONFORMING CHANGE TO PREAMBLE, lines 97-107:]

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

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