

Todd

Thanks for the word version. I have made some edits in red line on it. Here are a few overall thoughts.

1. Suppose an agency goes through notice and comment rulemaking that satisfies section 553 and what arrives is a rule that interprets a term in the statute, such as employee. In some sense, it is plainly an interpretive rule, but it is also a substantive rule that creates rights etc. I suggest a footnote that excludes from this recommendation rules that follow 553 and interpret the words in a statute or regulation.

2. Recommendations 12-15 discuss a subject that is not mentioned in the preamble, yet seems to be broad enough to warrant a separate section within this overall recommendation. In addition, I notice that it addresses topics in the prior recommendations and often in greater detail. The more that I thought about these, the less sure I was that a "rule" that suggests a number of options is what I would think of as a rule, even an interpretive rule, but more closely resembles a policy statement. My reaction is the preamble should describe this form of guidance (see 12, as amended) and then say that even if called interpretive rules, they should be seen as policy statements and handled accordingly. In this connection, I found much of the extra discussion in 13-15 to be unnecessary (too detailed), but if it is necessary, then it is not clear why it does not belong in the earlier recommendations that relate to the same topics..

Hope these are helpful. I am around for another hour and then for much of tomorrow if anyone wants to discuss. I am sending this only to you, but this should go to the committee etc and of course are public.

Alan



Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation for Committee | April 18, 2019

MORRISON SUGGESTIONS

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 interpretive rules
4 as “rules or statements issued by an agency to advise the public of the agency’s construction of
5 the statutes and rules which it administers.”³ Because of the commonalities between policy
6 statements and interpretive rules, including their advisory function, more recently many scholars
7 and government agencies have adopted the umbrella term “guidance” to refer to both interpretive
8 rules and policy statements.⁴

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9 The Administrative Conference has issued several recommendations on policy
10 statements.⁵ 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). The Manual defines “statements of policy” as agency statements of general applicability “issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”

⁴ 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>.

⁵ 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. 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).



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12 *Statements*, offers best practices to agencies regarding policy statements. The Recommendation
13 advises agencies not to treat policy statements as binding on the public and to take steps to make
14 clear to the public that policy statements are non-binding. It also suggests measures agencies
15 could take to allow the public to propose alternative approaches to those contained in a policy
16 statement and offers suggestions on how agencies can involve the public in adopting and
17 modifying policy statements.

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

22 This project takes up that charge. Policy statements and interpretive rules are similar in
23 that they lack the force of law⁶ and are often issued without notice-and-comment proceedings, as
24 the APA permits. This similarity suggests that, as a matter of best practice, when interested
25 persons disagree with the views expressed in an interpretive rule, the agency should allow them a
26 fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the
27 practice that Recommendation 2017-5 already prescribes in the case of policy statements.⁷ The
28 benefits to the public of according such treatment, as well as the potential costs to agencies of
29 according it, are largely the same regardless of whether a given guidance document is concerned
30 with law, policy, or a combination of both.⁸

31 Recommendation 2017-5 provided that “[a]n agency should not use a policy statement to
32 create a standard binding on the public, that is, as a standard with which noncompliance may
33 form an independent basis for action in matters that determine the rights and obligations of any

⁶ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015) (quoting *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).

⁷ Recommendation 2017-5, *supra* note 5, ¶ 2; *see also* Recommendation 92-2, *supra* note 5, ¶ II.B.

⁸ *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 member of the public.”⁹ Although the same basic idea should apply to interpretive rules, the
35 concept of “binding” effect can give rise to misunderstanding in the context of those rules, for
36 several reasons.

37 [First, interpretive rules often use mandatory language when the agency is using that
38 language to describe an existing statutory or regulatory requirement. Recommendation 2017-5
39 itself recognized the legitimacy of such phrasing.¹⁰ Although the presence of such mandatory
40 language does not negate the benefits of allowing interested persons a fair opportunity to seek
41 reconsideration or revision of the particular interpretation the agency chose, it can, as a practical
42 matter, complicate admonitions that an agency should refrain from characterizing the rule as
43 “binding.”]

44 Second, discussions of the circumstances in which guidance may or may not be “binding”
45 bring to mind assumptions that stem from the case law construing the rulemaking exemptions in
46 the APA. Under that case law, it is universally understood that policy statements may not be
47 legally binding, but courts and commentators have disagreed about whether the same is true of
48 interpretive rules.¹¹ Because of this ambiguity, agency counsel sometimes assume that an
49 interpretive rule can be binding (although research for this project and for Recommendation
50 2017-5 disclosed little evidence that many of them act upon that belief¹²). In this
51 Recommendation the Administrative Conference addresses only best practices and expresses no
52 opinions about how the APA rulemaking exemption should be construed. Nevertheless,
53 assumptions derived from the APA background can divert attention from issues of what sound
54 principles of administration require, which this Recommendation does address.

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⁹ Recommendation 2017-5, *supra* note 5, ¶ 1.

¹⁰ Recommendation 2017-5, *supra* note 5, ¶ 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).

¹¹ Emerson & Levin, *supra* note 8, at 19–21; Parrillo, *supra* note 4, at 23–25; *see generally* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).

¹² Emerson & Levin, *supra* note 8, at 15–17; Parrillo, *supra* note 4, at 23–24n.36.



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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 reconsider or revise 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 issue at the
65 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 phrased the initial
69 operative provisions of the Recommendation so that it no longer uses the term “binding on the
70 public.” Instead it urges that agencies not treat interpretive rules as setting independent standards
71 for action and that interested persons should have a fair opportunity to seek revision or
72 reconsideration of an interpretive rule. In substance, this formulation expresses positions that
73 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.

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 *Perez* 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, nor on what the Court may decide in *Kisor*.

¹⁵ See Emerson & Levin, *supra* note 8, at 23.

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77 What constitutes a fair opportunity to contest an interpretive rule will depend on the
78 circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of
79 factors can deter affected persons from contesting guidance documents with which they disagree;
80 these factors operate in approximately the same manner regardless of whether a policy statement
81 or interpretive rule is involved.¹⁶ Agencies that design procedures for requesting reconsideration
82 or modification of both types of guidance should be attentive to circumstances that affect the
83 practical ability of members of the public to avail themselves of the opportunity to be heard. At
84 the same time, agencies should also consider governmental interests such as the agency’s
85 resource constraints and need for centralization.¹⁷ For example, Recommendation 3 recognizes
86 that the need for coordination of multiple decisionmakers in a given program may justify
87 requiring lower level employees to adhere to the agency’s interpretive rules.

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

- 88 1. An agency should not use an interpretive rule to create a standard **where** noncompliance
89 **may form an independent basis for action in matters that determine the rights and**
90 **obligations** of any member of the public.
- 91 2. An agency should afford members of the public a fair opportunity to argue for
92 modification, rescission, or waiver of an interpretive rule.
- 93 3. It is sometimes appropriate for an agency, as an internal agency management matter, and
94 particularly when an interpretive rule is used in connection with regulatory enforcement,
95 to direct some of its employees to act in conformity with an interpretive rule. But the
96 agency should ensure that this does not interfere with the fair opportunity called for in

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¹⁶ Parrillo, *supra* note 4, at 25.

¹⁷ See Emerson & Levin, *supra* note 8, at 36–39.



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- 98 Recommendation 2. For example, an interpretive rule could require officials at one level
99 of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a
100 higher level can authorize a modification, rescission, or waiver of that rule. Agency
101 review should be available in cases in which frontline officials fail to follow such rules.
- 102 4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that
103 the rule expresses the agency's current interpretation of the law but that a member of the
104 public will, upon proper request, be accorded a fair opportunity to seek reconsideration or
105 revision of the rule.
- 106 5. An interpretive rule should not include mandatory language unless the agency is using
107 that language to describe an existing statutory or regulatory requirement, or the language
108 is addressed to agency employees and will not interfere with the fair opportunity called
109 for in Recommendation 2.
- 110 6. An agency should make clear to members of the public which agency officials are
111 required to follow an interpretive rule and where to go within the agency to seek
112 modification, rescission, or waiver from the agency.
- 113 7. An agency should instruct all employees engaged in an activity to which an interpretive
114 rule pertains that, although the interpretive rule may contain mandatory language, they
115 should refrain from making any statements suggesting that an interpretive rule may not
116 be contested within the agency to the extent provided in Recommendation 2. Insofar as
117 any employee is directed, as an internal agency management matter, to act in conformity
118 with an interpretive rule, that employee should be instructed as to the expectations set
119 forth in Recommendations 2 and 3.
- 120 8. When an agency is contemplating adopting or modifying an interpretive rule, it should
121 consider whether to solicit public participation, and, if so, what kind, before adopting or
122 modifying the rule. Options for public participation include stakeholder meetings or
123 webinars, advisory committee proceedings, and invitation for written input from the

- Commented [ABM8R7]:
- Commented [ABM9]: Omitted words not necessary.
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- Deleted: in conformity with which they are properly directed to act
- Commented [ABM10]: How does "elsewhere" fit into "the rule"? I think we discussed allowing an agency to have a general statement to this effect for all its interp rules: is that still alive and if so, we should make that clear by a sentence at the end of this Rec.
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127 public with or without a response. In deciding how to proceed, the agency should
128 consider:

- 129 a. The agency’s own procedures for the adoption of interpretive rules.
- 130 b. The likely increase in useful information available to the agency from broadening
131 participation, keeping in mind that non-regulated parties (regulatory beneficiaries
132 and other interested parties) may offer different information than regulated parties
133 and that non-regulated parties will often have no meaningful opportunity to
134 provide input regarding interpretive rules other than at the time of adoption.

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- 135 c. The likely increase in rule acceptance from broadening participation, keeping in
136 mind that non-regulated parties will often have no opportunity to provide input
137 regarding interpretive rules other than at the time of adoption, and that rule
138 acceptance may be less likely if the agency is not responsive to stakeholder input.

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- 139 d. Whether the agency is likely to learn more useful information by having a specific
140 agency proposal as a focal point for discussion, or instead having a more free-
141 ranging and less formal discussion.

- 142 e. The practicability of broader forms of participation, including invitation for
143 written input from the public, keeping in mind that broader participation may
144 slow the adoption of interpretive rules and may diminish resources for other
145 agency tasks, including the provision of interpretive rules on other matters.

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- 146 9. If an agency does not provide for public participation before adopting or modifying an
147 interpretive rule, it should consider offering an opportunity for public participation after
148 adoption or modification of the kinds discussed in Recommendation 8.

- 149 10. An agency may make decisions about the appropriate level of public participation
150 document-by-document or by assigning certain procedures for public participation to
151 general categories of documents. If an agency opts for the latter, it should consider

Commented [ABM19]: I think you mean rule by rule; there may be several documents that comprise a rule or many rules in a single document. Also other lines below use document.

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

163 11. All written interpretive rules affecting the interests of regulated parties, regulatory
164 beneficiaries, or other interested parties should be promptly made available electronically
165 and indexed, in a manner in which they may readily be found. Written interpretive rules
166 should also indicate the nature of the reliance that may be placed on them and the
167 opportunities for reconsideration, modification, or waiver of them.

Commented [ABM20]: How does this last sentence fit in with Rec 4?

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches SEE EMAIL COMMENT ABOUT WHETHER ALL OF THIS IS NECESSARY OR CORRECT AS APPLIED TO INTERPRETIVE RULES.

168 12. Some (policy statements) rules lay out several lawful options for the public but do not
169 purport to be exhaustive, and others speak at a general level, leaving space for informal
170 adjustments and negotiation between the agency and its stakeholders about how they
171 should be applied. However, with respect to such rules, agencies should take additional
172 steps, beyond those provided in Recommendations 1-11, to promote flexibility, as
173 discussed below in Recommendations 13-15.

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174 13. Agencies should afford members of the public a fair opportunity to argue for lawful
175 approaches other than those put forward by an interpretive rule, subject to any binding
176 requirements imposed upon agency employees as an internal management manner. The
177 agency should explain that a member of the public may take a lawful approach different
178 from the one set forth in the interpretive rule or request that the agency take such a lawful
179 approach. The interpretive rule should also include the identity and contact information



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187 of officials to whom such a request should be made. Additionally, with respect to such
188 rules, agencies should take further measures to promote such flexibility as provided in
189 Recommendation 14.

190 14. In order to provide a fair opportunity for other lawful approaches, an agency should,
191 subject to considerations of practicability and resource limitations and the priorities
192 described in Recommendation 15, consider additional measures, including the following:

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



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- 213 agency procedures for approval and justification, are appropriate and will not
214 have adverse employment consequences for them.
- 215 e. Facilitating opportunities for members of the public, including through
216 intermediaries such as ombudspersons or associations, to propose or support
217 approaches different from those in an interpretive rule and to provide feedback to
218 the agency on whether its officials are giving reasonable consideration to such
219 proposals.
- 220 15. Because measures to promote flexibility (including those listed in Recommendation 14)
221 may take up agency resources, it will be necessary to set priorities for which interpretive
222 rules are most in need of such measures. In deciding when to take such measures the
223 agency should consider the following, bearing in mind that these considerations will not
224 always point in the same direction:
- 225 a. An agency should assign a higher priority to an interpretive rule the greater the
226 rule's impact is likely to be on the interests of regulated parties, regulatory
227 beneficiaries, and other interested parties, either because regulated parties have
228 strong incentives to comply with the rule or because the rule practically reduces
229 the stringency of the regulatory scheme compared to the status quo.
- 230 b. An agency should assign a lower priority to promoting flexibility in the use of a
231 rule insofar as the rule's value to the agency and to stakeholders lies primarily in
232 the fact that it is helpful to have consistency independent of the rule's substantive
233 content.