



## Agency Guidance Through Interpretive Rules

### Committee on Judicial Review

#### Proposed Recommendation for Committee | April 1, 2019

1           The Administrative Procedure Act (APA) exempts policy statements and interpretive<sup>1</sup>  
2 rules from its requirements for the issuance of legislative rules, including notice and comment.<sup>2</sup>  
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.”<sup>3</sup> Because of the commonalities between these two  
6 kinds of documents, including their advisory function, more recently many scholars and  
7 government agencies have adopted the umbrella term “guidance” to refer to both interpretive  
8 rules and policy statements.<sup>4</sup>

9           The Administrative Conference has issued several recommendations on policy  
10 statements.<sup>5</sup> The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*

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

<sup>2</sup> 5 U.S.C. § 553(b)(A).

<sup>3</sup> 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.”

<sup>4</sup> 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>.

<sup>5</sup> 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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11 *Statements*, offers best practices to agencies regarding policy statements. The Recommendation  
12 advises agencies not to treat policy statements as binding on the public and to take steps to make  
13 clear to the public that policy statements are non-binding. It also suggests measures agencies  
14 could take to allow the public to propose alternative approaches to those contained in a policy  
15 statement and offers suggestions on how agencies can involve the public in adopting and  
16 modifying policy statements.

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

21 This project takes up that charge. As a general matter, as with policy statements,  
22 interpretive rules can exert a de facto binding effect on regulated parties as well as on other  
23 interested persons insofar as they may feel they have no practical alternative but to comply.<sup>6</sup> The  
24 Conference takes no position here on whether agencies must treat interpretive rules as non-  
25 binding in order to satisfy the APA's exemption from notice and comment rulemaking nor on  
26 whether such treatment affects the availability of scope of judicial review of such rules. But the  
27 Conference here recommends that, as a matter of sound administrative practice, interpretive rules  
28 should, as a general matter, not be treated as binding.

29 At the same time, interpretive rules should not be treated as identical to policy statements  
30 in all respects. For example, with respect to policy statements, it is appropriate for agencies to  
31 allow members of the public to propose alternative approaches. While this is also true for many  
32 interpretive rules, there are certain kinds of interpretive rules, such as those in which an agency

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<sup>6</sup> See Blake Emerson and Ronald M. Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis 33–34* (Mar. 8, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-guidance-through-interpretive-rules>.



33 has determined that a statutory term has *only* one construction, that do not lend themselves to  
34 such flexibility.<sup>7</sup>

35 The recommendations that appear below are drawn directly from Recommendation 2017-  
36 5, but they have been modified in certain respects to account for any distinctions between  
37 interpretive rules and policy statements.

## RECOMMENDATION

### Recommendations Applicable to All Interpretive Rules

#### *Interpretive Rules Should Not Bind the Public*

- 38 1. An agency should not use an interpretive rule to create a standard binding on the public,  
39 that is, as a standard with which noncompliance may form an independent basis for  
40 action in matters that determine the rights and obligations of any member of the public.
- 41 2. An agency should afford members of the public a fair opportunity to argue for  
42 modification, rescission, or waiver of the interpretive rule.
- 43 3. Although an interpretive rule should not bind an agency as a whole, it is sometimes  
44 appropriate for an agency, as an internal agency management matter, and particularly  
45 when an interpretive rule is used in connection with regulatory enforcement, to direct  
46 some of its employees to act in conformity with an interpretive rule. But the agency  
47 should ensure that this does not interfere with the fair opportunity called for in  
48 Recommendation 2. For example, an interpretive rule could bind officials at one level of  
49 the agency hierarchy, with the caveat that officials at a higher level can authorize a  
50 modification, rescission, or waiver of that rule. Agency review should be available in

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<sup>7</sup> See *id.*



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51 cases in which frontline officials fail to follow interpretive rules in conformity with  
52 which they are properly directed to act.

### *Minimum Measures to Avoid Binding the Public*

- 53 4. An interpretive rule should prominently state that it is not binding on members of the  
54 public. An agency may have good cause not to include, or to modify, such a disclaimer  
55 where the matter is uncontroversial and the disclaimer would be liable to create  
56 confusion.
- 57 5. The agency should instruct all employees engaged in an activity to which an interpretive  
58 rule pertains that, although the interpretive rule may contain mandatory language, it does  
59 not have the force of law. It should further instruct employees to refrain from making any  
60 statements suggesting that an interpretive rule has the force of law. Insofar as any  
61 employee is directed, as an internal agency management matter, to act in conformity with  
62 an interpretive rule, that employee should be instructed as to the difference between such  
63 an internal agency management requirement and law that is binding on the public.  
64 Agencies should invest in training and monitoring of employees to ensure adherence to  
65 these practices.

### *Public Participation in Adoption or Modification of Interpretive Rules*

- 66 6. When an agency is contemplating adopting or modifying an interpretive rule, it should  
67 consider whether to solicit public participation, and, if so, what kind, before adopting or  
68 modifying the rule. Options for public participation include outreach to selected  
69 stakeholder representatives, stakeholder meetings or webinars, advisory committee  
70 proceedings, and invitation for written input from the public with or without a response.  
71 In deciding how to proceed, the agency should consider:



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- 72 a. Existing agency procedures for the adoption of interpretive rules, including any  
73 procedures adopted in response to the Office of Management and Budget's Final  
74 Bulletin for Agency Good Guidance Practices (2007).
- 75 b. The likely increase in useful information available to the agency from broadening  
76 participation, keeping in mind that non-regulated parties (regulatory beneficiaries  
77 and other interested parties) may offer different information than regulated parties  
78 and that non-regulated parties will often have no opportunity to provide input  
79 regarding interpretive rules other than at the time of adoption.
- 80 c. The likely increase in rule acceptance from broadening participation, keeping in  
81 mind that non-regulated parties will often have no opportunity to provide input  
82 regarding interpretive rules other than at the time of adoption, and that rule  
83 acceptance may be less likely if the agency is not responsive to stakeholder input.
- 84 d. Whether the agency is likely to learn more useful information by having a specific  
85 agency proposal as a focal point for discussion, or instead having a more free-  
86 ranging and less formal discussion.
- 87 e. The practicability of broader forms of participation, including invitation for  
88 written input from the public, keeping in mind that broader participation may  
89 slow the adoption of interpretive rules and may diminish resources for other  
90 agency tasks, including the provision of interpretive rules on other matters.
- 91 7. If an agency does not provide for public participation before adopting or modifying an  
92 interpretive rule, it should consider offering an opportunity for public participation after  
93 adoption or modification. As with Recommendation 6, options for public participation  
94 include outreach to selected stakeholder representatives, stakeholder meetings or  
95 webinars, advisory committee proceedings, and invitation for written input from the  
96 public with or without a response.



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- 97 8. An agency may make decisions about the appropriate level of public participation  
98 document-by-document or by assigning certain procedures for public participation to  
99 general categories of documents. If an agency opts for the latter, it should consider  
100 whether resource limitations may cause some documents, if subject to pre-adoption  
101 procedures for public participation, to remain in draft for substantial periods of time. If  
102 that is the case, agencies should either (a) make clear to stakeholders which draft  
103 interpretive rules, if any, should be understood to reflect current agency thinking; or (b)  
104 provide in each draft interpretive rule that, at a certain time after publication, the  
105 document will automatically either be adopted or withdrawn.
- 106 9. All written interpretive rules affecting the interests of regulated parties, regulatory  
107 beneficiaries, or other interested parties should be promptly made available electronically  
108 and indexed, in a manner in which they may readily be found. Written interpretive rules  
109 should also indicate the nature of the reliance that may be placed on them and the  
110 opportunities for reconsideration, modification, or waiver of them.

### **Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches**

#### *Examples of Interpretive Rules That Are Amenable to Alternative Approaches*

- 111 10. Interpretive rules that lend themselves to alternative approaches include those that lay out  
112 several lawful options for the public but do not purport to be exhaustive, and those that  
113 speak at a general level, leaving space for informal adjustments and negotiation between  
114 the agency and its stakeholders about how the rule should be applied. Recommendations  
115 1-9 above apply with equal force to such rules. However, with respect to such rules,  
116 agencies should take additional steps to promote flexibility, as discussed below.



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### *Minimum Measures to Avoid Binding the Public to Interpretive Rules Amenable to Alternative Approaches*

117 11. Agencies should afford members of the public a fair opportunity to argue for lawful  
118 approaches other than those put forward by an interpretive rule, subject to any binding  
119 requirements imposed upon agency employees as an internal management manner. The  
120 agency should explain that a member of the public may take a lawful approach different  
121 from the one set forth in the interpretive rule or request that the agency take such a lawful  
122 approach. The interpretive rule should also include the identity and contact information  
123 of officials to whom such a request should be made. Additionally, with respect to such  
124 rules, agencies should take further measures to promote such flexibility as provided in  
125 Recommendation 12.

### *Additional Measures to Avoid Binding the Public to Interpretive Rules Amenable to Alternative Approaches*

- 126 12. In order to provide a fair opportunity for other lawful approaches, an agency should,  
127 subject to considerations of practicability and resource limitations and the priorities  
128 described in Recommendation 13, consider additional measures, including the following:
- 129 a. Promoting the flexible use of interpretive rules in a manner that still takes due  
130 account of needs for consistency and predictability. In particular, when the agency  
131 accepts a proposal for a lawful approach other than that put forward in an  
132 interpretive rule and the approach seems likely to be applicable to other situations,  
133 the agency should disseminate its decision and the reasons for it to other persons  
134 who might make the argument, to other affected stakeholders, to officials likely to  
135 hear the argument, and to members of the public, subject to existing protections  
136 for confidential business or personal information.
  - 137 b. Assigning the task of considering arguments for approaches other than that in an  
138 interpretive rule to a component of the agency that is likely to engage in open and



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- 139 productive dialogue with persons who make such arguments, such as a program  
140 office that is accustomed to dealing cooperatively with regulated parties and  
141 regulatory beneficiaries.
- 142 c. In cases where frontline officials are authorized to take an approach different from  
143 that in an interpretive rule but decline to do so, directing appeals of such a refusal  
144 to a higher-level official who is not the direct superior of those frontline officials.
- 145 d. Investing in training and monitoring of frontline personnel to ensure that they (i)  
146 treat parties' ideas for lawful approaches different from those in an interpretive  
147 rule in an open and welcoming manner; and (ii) understand that approaches other  
148 than that in an interpretive rule, if undertaken according to the proper internal  
149 agency procedures for approval and justification, are appropriate and will not  
150 have adverse employment consequences for them.
- 151 e. Facilitating opportunities for members of the public, including through  
152 intermediaries such as ombudspersons or associations, to propose or support  
153 approaches different from those in an interpretive rule and to provide feedback to  
154 the agency on whether its officials are giving reasonable consideration to such  
155 proposals.

### *Priorities in Deciding When to Invest in Promoting Flexibility with Respect to Interpretive Rules Amenable to Alternative Approaches*

- 156 13. Because measures to promote flexibility (including those listed in Recommendation 12)  
157 may take up agency resources, it will be necessary to set priorities for which interpretive  
158 rules are most in need of such measures. In deciding when to take such measures the  
159 agency should consider the following, bearing in mind that these considerations will not  
160 always point in the same direction:



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