Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation for Committee | April 1, 2019

The Administrative Procedure Act (APA) exempts policy statements and interpretive\(^1\) rules from its requirements for the issuance of legislative rules, including notice and comment.\(^2\) The Attorney General’s Manual on the Administrative Procedure Act defines interpretive rules as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”\(^3\) Because of the commonalities between these two kinds of documents, including their advisory function, more recently many scholars and government agencies have adopted the umbrella term “guidance” to refer to both interpretive rules and policy statements.\(^4\)


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1 In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”
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.”
Statements, offers best practices to agencies regarding policy statements. The Recommendation advises agencies not to treat policy statements as binding on the public and to take steps to make clear to the public that policy statements are non-binding. It also suggests measures agencies could take to allow the public to propose alternative approaches to those contained in a policy statement and offers suggestions on how agencies can involve the public in adopting and modifying policy statements.

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

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

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

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has determined that a statutory term has only one construction, that do not lend themselves to such flexibility.\(^7\)

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

**RECOMMENDATION**

**Recommendations Applicable to All Interpretive Rules**

*Interpretive Rules Should Not Bind the Public*

1. An agency should not use an interpretive rule to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.

2. An agency should afford members of the public a fair opportunity to argue for modification, rescission, or waiver of the interpretive rule.

3. Although an interpretive rule should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when an interpretive rule is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with an interpretive rule. But the agency should ensure that this does not interfere with the fair opportunity called for in Recommendation 2. For example, an interpretive rule could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize a modification, rescission, or waiver of that rule. Agency review should be available in

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\(^7\) See id.
cases in which frontline officials fail to follow interpretive rules in conformity with which they are properly directed to act.

Minimum Measures to Avoid Binding the Public

4. An interpretive rule should prominently state that it is not binding on members of the public. An agency may have good cause not to include, or to modify, such a disclaimer where the matter is uncontroversial and the disclaimer would be liable to create confusion.

5. The agency should instruct all employees engaged in an activity to which an interpretive rule pertains that, although the interpretive rule may contain mandatory language, it does not have the force of law. It should further instruct employees to refrain from making any statements suggesting that an interpretive rule has the force of law. Insofar as any employee is directed, as an internal agency management matter, to act in conformity with an interpretive rule, that employee should be instructed as to the difference between such an internal agency management requirement and law that is binding on the public. Agencies should invest in training and monitoring of employees to ensure adherence to these practices.

Public Participation in Adoption or Modification of Interpretive Rules

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

b. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated parties (regulatory beneficiaries and other interested parties) may offer different information than regulated parties and that non-regulated parties will often have no opportunity to provide input regarding interpretive rules other than at the time of adoption.

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

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

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

7. If an agency does not provide for public participation before adopting or modifying an interpretive rule, it should consider offering an opportunity for public participation after adoption or modification. As with Recommendation 6, options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response.
8. An agency may make decisions about the appropriate level of public participation document-by-document or by assigning certain procedures for public participation to general categories of documents. If an agency opts for the latter, it should consider whether resource limitations may cause some documents, if subject to pre-adoption procedures for public participation, to remain in draft for substantial periods of time. If that is the case, agencies should either (a) make clear to stakeholders which draft interpretive rules, if any, should be understood to reflect current agency thinking; or (b) provide in each draft interpretive rule that, at a certain time after publication, the document will automatically either be adopted or withdrawn.

9. All written interpretive rules affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found. Written interpretive rules should also indicate the nature of the reliance that may be placed on them and the 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*

10. 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, and those that 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. Recommendations 1-9 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.
Minimum Measures to Avoid Binding the Public to Interpretive Rules Amenable to Alternative Approaches

11. Agencies should afford members of the public a fair opportunity to argue for lawful approaches other than those put forward by 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 or request that the agency take such a lawful approach. 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 Recommendation 12.

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

12. In order to provide a fair opportunity for other lawful approaches, an agency should, subject to considerations of practicability and resource limitations and the priorities described in Recommendation 13, 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 other than that put forward in an interpretive rule and the approach 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 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 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 different from those in an interpretive
rule in an open and welcoming manner; and (ii) understand that approaches 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 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.

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

13. Because measures to promote flexibility (including those listed in Recommendation 12)
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.