Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation for Committee | April 18, 2019

The Administrative Procedure Act (APA) exempts policy statements and interpretive rules from its requirements for the issuance of legislative rules, including notice and comment. 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.” 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.

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

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

Recommendation 2017-5 provided that “[a]n agency should not use a policy statement 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

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7 Recommendation 2017-5, supra note 5, ¶ 2; see also Recommendation 92-2, supra note 5, ¶ II.B.
Although the same basic idea should apply to interpretive rules, the concept of “binding” effect can give rise to misunderstanding in the context of those rules, for several reasons.

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

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

Commented [TR1]: We would like to hear the Committee’s thoughts on whether this paragraph should remain.

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9 Recommendation 2017-5, supra note 5, ¶ 1.
12 Emerson & Levin, supra note 8, at 15–17; Parrillo, supra note 4, at 23–24 n.36.

DRAFT April 16, 2019
Third, administrative lawyers currently differ on the question of whether interpretive rules are effectively rendered “binding” when they are reviewed in court under the Auer v. Robbins\textsuperscript{13} standard of review, which provides that an agency’s interpretation of its own regulation becomes of “controlling weight” if it is not “plainly erroneous or inconsistent with the regulation.”\textsuperscript{14} The question of whether interested persons should be able to ask an agency to reconsider or revise an interpretive rule does not intrinsically have to turn on what level of deference the courts would later accord to the agency’s interpretation in the event of judicial review. Indeed, the possibility of judicial deference at the appellate level (under Auer or any other standard of review) may augment the challenger’s interest in raising this substantive issue at the agency level.\textsuperscript{15} Even so, the doctrinal debate over whether an interpretive rule is or is not “binding” under Auer can have the effect of directing the focus of attention away from these practical considerations.

For the foregoing reasons, the Administrative Conference has phrased the initial operative provisions of the Recommendation so that it no longer uses the term “binding on the public.” Instead it urges that agencies not treat interpretive rules as setting independent standards for action and that interested persons should have a fair opportunity to seek revision or reconsideration of an interpretive rule. In substance, this formulation expresses positions that largely correspond with prescriptions that Recommendation 2017-5 made regarding policy statements, but it does so without implicating unintended associations that the word “binding” might otherwise evoke.

\textsuperscript{13} 519 U.S. 452 (1997).
\textsuperscript{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.
\textsuperscript{15} See Emerson & Levin, supra note 8, at 23.

DRAFT April 16, 2019
What constitutes a fair opportunity to contest an interpretive rule will depend on the circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of factors can deter affected persons from contesting guidance documents with which they disagree; these factors operate in approximately the same manner regardless of whether a policy statement or interpretive rule is involved. Agencies that design procedures for requesting reconsideration or modification of both types of guidance should be attentive to circumstances that affect the practical ability of members of the public to avail themselves of the opportunity to be heard. At the same time, agencies should also consider governmental interests such as the agency’s resource constraints and need for centralization. For example, Recommendation 3 recognizes that the need for coordination of multiple decisionmakers in a given program may justify requiring lower level employees to adhere to the agency’s interpretive rules.

**RECOMMENDATION**

**Recommendations Applicable to All Interpretive Rules**

1. An agency should not use an interpretive rule to create a standard noncompliance with which 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 an interpretive rule.

3. 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

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16 Parrillo, *supra* note 4, at 25.
Recommendation 2. For example, an interpretive rule could require officials at one level of the agency hierarchy to follow the interpretive rule, 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 cases in which frontline officials fail to follow interpretive rules in conformity with which they are properly directed to act.

4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that the rule expresses the agency’s current interpretation of the law but that a member of the public will, upon proper request, be accorded a fair opportunity to seek reconsideration or revision of the rule.

5. An interpretive rule should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement, or the language is addressed to agency employees and will not interfere with the fair opportunity called for in Recommendation 2.

6. An agency should make clear to members of the public which agency officials are required to follow an interpretive rule and where to go within the agency to seek modification, rescission, or waiver from the agency.

7. An agency should instruct all employees engaged in an activity to which an interpretive rule pertains that, although the interpretive rule may contain mandatory language, they should refrain from making any statements suggesting that an interpretive rule may not be contested within the agency to the extent provided in Recommendation 2. 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 expectations set forth in Recommendations 2 and 3.

8. 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 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:

a. The agency’s own procedures for the adoption of interpretive rules.

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 meaningful 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.

9. 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 8, options for public participation include stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response.
10. 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.

11. 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**

12. 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
1-11 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.

13. 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 14.

14. 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 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 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.

15. Because measures to promote flexibility (including those listed in Recommendation 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.