

April 15, 2019

To: Members of the Committee on Judicial Review

From: Ron Levin and Blake Emerson

Re: Interpretive Rules Project: An Alternative Approach to the “Binding Effect” Issue

We appreciate the Committee’s thoughtful comments and suggestions during the initial discussion of the draft Interpretive Rules recommendation during the Committee’s meeting on April 1. The Committee members and other Conference members who participated in that discussion raised some important issues, but it is apparent that more work needs to be done.

A significant unresolved issue is what it means to say that interpretive rules may not have binding effect. In our report, we wrote that “the meaning of the word ‘binding’ can vary according to context. . . . Recommendations 92-2 and 2017-5 . . . contemplated that a guidance document would be ‘binding’ if an agency would not give fair consideration to an interested person’s request that the agency should rescind or modify the document or at least treat it as inapplicable to a given dispute. We use the term in the same sense here” (p. 18). The thrust of our proposals has been that interpretive rules should not have binding effect in that particular sense, even though they are sometimes regarded as having such effect in contexts such as the APA rulemaking exemption, *Auer* deference, and (perhaps) determining the availability of pre-enforcement judicial review. The draft recommendation follows that approach; the expectation has been that the preamble would clarify this focus.

We continue to believe that there are good arguments for this approach. Adhering to it would highlight the continuity between Recommendations 92-2 and 2017-5 and the forthcoming recommendation. However, the discussion at the April 1 meeting indicated that participants had continuing doubts and questions about whether a Conference recommendation can effectively articulate the intended meaning of the word “binding” in the context of interpretive rules.

The Committee may, therefore, wish to consider an alternative approach, which is set forth in the revised draft recommendation. This approach does not treat the concept of “binding effect” as an operative term. Instead, the proposed recommendations would simply assert more directly that interpretive rules should not be applied in a manner that forecloses interested persons from having a fair opportunity to seek reconsideration or modification of the rule. The proposed preamble, in turn, explains that this change of terminology is less of a departure from the thrust of Recommendation 2017-5 than it might appear to be.