

March 31, 2019

To: Committee on Judicial Review
From: Ron Levin and Blake Emerson
Re: Jon Siegel's March 29 memo

This is to reply to Jon Siegel's memo of March 29 about the initial draft of the Conference recommendation on Agency Guidance Through Interpretive Rules. Jon has raised some central issues that the Committee on Judicial Review should consider as it works to refine the draft recommendation, but some of his points do warrant a response.

We will begin with a few points on which we agree with Jon, although he discerns contrary implications in the draft recommendation. First, we fully support and seek to encourage agency officials to use guidance to advise the public and their own staff members about their positions (both interpretive and policy). Second, mandatory language in an interpretive rule is entirely legitimate when used to explain a mandatory requirement in the underlying statute or regulation. Third, we do not in any way intend to suggest (as Jon appears to believe) that an agency should be encouraged to "pretend" that it is more open to change than it actually is. Possibly the draft recommendation needs revision in order to clarify one or more of these points, but we did not intend to call them into question.

That said, however, Jon does appear to have a bona fide disagreement with at least one central premise of the consultants' report. He seems to argue that an agency should be able to make an interpretive rule "definitive" within an agency, in the sense that it will not be open to any reconsideration except in court. In contrast, the report maintains that, as a matter of good practice, affected persons should have some opportunity to ask an agency to revise or reconsider an interpretive rule. Jon does not mention any of our arguments supporting this proposition, although we hope the committee will consider them.

The basic justification for the report's position is that an interpretive rule does not have the force of law. Agencies already understand that they should allow interested persons to request revision or reconsideration where policy statements are concerned; ACUS has long taken that position in Recommendations 92-2 and 2017-5. It has not spoken to the situation of interpretive rules, but a premise of the draft recommendation is that the agencies' approaches to these two forms of guidance should not be radically different.

In our interviews, no agency official maintained that interpretive rules should be treated as beyond all challenge at the administrative level. Some interviewees did indicate that their agency would expect persons who disagree with a rule to seek reconsideration outside the context of particular adjudicated cases; that is a policy option that the committee can examine. But none at all took the position that they would treat guidance as beyond dispute at the agency level simply because it is interpretive.

According to Jon, "the real protection for the public" is that an agency must justify its interpretation in court without relying on the rule as such. The report addresses this specific point. In some situations, Jon's alternative may not provide much practical benefit to objectors, because of justiciability obstacles as well as deference at the judicial review level. More

fundamentally, as the report explains, the thrust of Recommendations 92-2 and 2017-5 is that people who disagree with a policy statement will not always have the resources or fortitude to go to court, so principles of good practice should ensure that they can have some opportunity to seek reconsideration of the document at the agency level. That argument has force regardless of whether a guidance document relates to law, policy, or a combination of both.

Aside from legalistic arguments, we could agree that an expectation that private persons should have a fair opportunity to seek reconsideration or revision of an interpretive rule could potentially have some impact on some agencies' workload (as most ACUS recommendations may). Our report discusses a variety of policy options that might make this expectation more or less palatable to agencies. For example, paragraph 4 of the draft recommendation states that an agency should prominently state that an interpretive rule is not binding on the public, except for good cause. But the report is neutral as to how strong that expectation should be or whether it should be expected at all. This is an issue for the committee to address. The report also contains some suggestions as to how the recommendation might flesh out the practical implications of what a "fair opportunity" to seek modification or rescission of the rule should mean in various circumstances.

All this is grist for the committee's discussion, but we do not think Jon has made the case for rejecting the basic concept that an agency should allow interested persons to seek reconsideration or revision of its interpretive rules at the administrative level.