



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation for Committee | April 18, 2019

1 The Administrative Procedure Act (APA) exempts policy statements and interpretive¹
2 rules from its requirements for the issuance of legislative rules, including notice and comment.²
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.”³ 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.⁴

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

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

² 5 U.S.C. § 553(b)(A).

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.”

⁴ 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>.

⁵ 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. Policy statements and interpretive rules are similar in
22 that they lack the force of law⁶ and are often issued without notice-and-comment proceedings, as
23 the APA permits. This similarity suggests that, as a matter of best practice, when interested
24 persons disagree with the views expressed in an interpretive rule, the agency should allow them a
25 fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the
26 practice that Recommendation 2017-5 already prescribes in the case of policy statements.⁷ The
27 benefits to the public of according such treatment, as well as the potential costs to agencies of
28 according it, are largely the same regardless of whether a given guidance document is concerned
29 with law, policy, or a combination of both.⁸

30 Recommendation 2017-5 provided that “[a]n agency should not use a policy statement to
31 create a standard binding on the public, that is, as a standard with which noncompliance may
32 form an independent basis for action in matters that determine the rights and obligations of any

⁶ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979), and referencing the Attorney General’s Manual on the Administrative Procedure Act, at 30 n.3).

⁷ Recommendation 2017-5, *supra* note 5, ¶ 2; *see also* Recommendation 92-2, *supra* note 5, ¶ II.B.

⁸ *See* Blake Emerson and Ronald M. Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis 31–32* (Mar. 8, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-guidance-through-interpretive-rules>.



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33 member of the public.”⁹ Although the same basic idea should apply to interpretive rules, the
34 concept of “binding” effect can give rise to misunderstanding in the context of those rules, for
35 several reasons.

36 [First, interpretive rules often use mandatory language when the agency is using that
37 language to describe an existing statutory or regulatory requirement. Recommendation 2017-5
38 itself recognized the legitimacy of such phrasing.¹⁰ Although the presence of such mandatory
39 language does not negate the benefits of allowing interested persons a fair opportunity to seek
40 reconsideration or revision of the particular interpretation the agency chose, it can, as a practical
41 matter, complicate admonitions that an agency should refrain from characterizing the rule as
42 “binding.”]

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

43 Second, discussions of the circumstances in which guidance may or may not be “binding”
44 bring to mind assumptions that stem from the case law construing the rulemaking exemptions in
45 the APA. Under that case law, it is universally understood that policy statements may not be
46 legally binding, but courts and commentators have disagreed about whether the same is true of
47 interpretive rules.¹¹ Because of this ambiguity, agency counsel sometimes assume that an
48 interpretive rule can be binding (although research for this project and for Recommendation
49 2017-5 disclosed little evidence that many of them act upon that belief¹²). In this
50 Recommendation the Administrative Conference addresses only best practices and expresses no
51 opinions about how the APA rulemaking exemption should be construed. Nevertheless,
52 assumptions derived from the APA background can distract attention from issues of what sound
53 principles of administration require, which this Recommendation does address.

⁹ Recommendation 2017-5, *supra* note 5, ¶ 1.

¹⁰ Recommendation 2017-5, *supra* note 5, ¶ 5; *accord*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, 72 Fed. Reg. 3,436, 3,440 (Jan. 25, 2007).

¹¹ Emerson & Levin, *supra* note 8, at 19–21; Parrillo, *supra* note 4, at 23–25; *see generally* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).

¹² Emerson & Levin, *supra* note 8, at 15–17; Parrillo, *supra* note 4, at 23–24n.36.



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

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

¹³ 519 U.S. 452 (1997).

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*.

¹⁵ See Emerson & Levin, *supra* note 8, at 23.



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74 What constitutes a fair opportunity to contest an interpretive rule will depend on the
75 circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of
76 factors can deter affected persons from contesting guidance documents with which they disagree;
77 these factors operate in approximately the same manner regardless of whether a policy statement
78 or interpretive rule is involved.¹⁶ Agencies that design procedures for requesting reconsideration
79 or modification of both types of guidance should be attentive to circumstances that affect the
80 practical ability of members of the public to avail themselves of the opportunity to be heard. At
81 the same time, agencies should also consider governmental interests such as the agency's
82 resource constraints and need for centralization.¹⁷ For example, Recommendation 3 recognizes
83 that the need for coordination of multiple decisionmakers in a given program may justify
84 requiring lower level employees to adhere to the agency's interpretive rules.

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

- 85 1. An agency should not use an interpretive rule to create a standard noncompliance with
86 which may form an independent basis for action in matters that determine the rights and
87 obligations of any member of the public.
- 88 2. An agency should afford members of the public a fair opportunity to argue for
89 modification, rescission, or waiver of an interpretive rule.
- 90 3. It is sometimes appropriate for an agency, as an internal agency management matter, and
91 particularly when an interpretive rule is used in connection with regulatory enforcement,
92 to direct some of its employees to act in conformity with an interpretive rule. But the
93 agency should ensure that this does not interfere with the fair opportunity called for in

¹⁶ Parrillo, *supra* note 4, at 25.

¹⁷ See Emerson & Levin, *supra* note 8, at 36–39.



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- 94 Recommendation 2. For example, an interpretive rule could require officials at one level
95 of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a
96 higher level can authorize a modification, rescission, or waiver of that rule. Agency
97 review should be available in cases in which frontline officials fail to follow interpretive
98 rules in conformity with which they are properly directed to act.
- 99 4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that
100 the rule expresses the agency's current interpretation of the law but that a member of the
101 public will, upon proper request, be accorded a fair opportunity to seek reconsideration or
102 revision of the rule.
- 103 5. An interpretive rule should not include mandatory language unless the agency is using
104 that language to describe an existing statutory or regulatory requirement, or the language
105 is addressed to agency employees and will not interfere with the fair opportunity called
106 for in Recommendation 2.
- 107 6. An agency should make clear to members of the public which agency officials are
108 required to follow an interpretive rule and where to go within the agency to seek
109 modification, rescission, or waiver from the agency.
- 110 7. An agency should instruct all employees engaged in an activity to which an interpretive
111 rule pertains that, although the interpretive rule may contain mandatory language, they
112 should refrain from making any statements suggesting that an interpretive rule may not
113 be contested within the agency to the extent provided in Recommendation 2. Insofar as
114 any employee is directed, as an internal agency management matter, to act in conformity
115 with an interpretive rule, that employee should be instructed as to the expectations set
116 forth in Recommendations 2 and 3.
- 117 8. When an agency is contemplating adopting or modifying an interpretive rule, it should
118 consider whether to solicit public participation, and, if so, what kind, before adopting or
119 modifying the rule. Options for public participation include stakeholder meetings or



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120 webinars, advisory committee proceedings, and invitation for written input from the
121 public with or without a response. In deciding how to proceed, the agency should
122 consider:

- 123 a. The agency's own procedures for the adoption of interpretive rules.
 - 124 b. The likely increase in useful information available to the agency from broadening
125 participation, keeping in mind that non-regulated parties (regulatory beneficiaries
126 and other interested parties) may offer different information than regulated parties
127 and that non-regulated parties will often have no meaningful opportunity to
128 provide input regarding interpretive rules other than at the time of adoption.
 - 129 c. The likely increase in rule acceptance from broadening participation, keeping in
130 mind that non-regulated parties will often have no opportunity to provide input
131 regarding interpretive rules other than at the time of adoption, and that rule
132 acceptance may be less likely if the agency is not responsive to stakeholder input.
 - 133 d. Whether the agency is likely to learn more useful information by having a specific
134 agency proposal as a focal point for discussion, or instead having a more free-
135 ranging and less formal discussion.
 - 136 e. The practicability of broader forms of participation, including invitation for
137 written input from the public, keeping in mind that broader participation may
138 slow the adoption of interpretive rules and may diminish resources for other
139 agency tasks, including the provision of interpretive rules on other matters.
- 140 9. If an agency does not provide for public participation before adopting or modifying an
141 interpretive rule, it should consider offering an opportunity for public participation after
142 adoption or modification. As with Recommendation 8, options for public participation
143 include stakeholder meetings or webinars, advisory committee proceedings, and
144 invitation for written input from the public with or without a response.



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145 10. An agency may make decisions about the appropriate level of public participation
146 document-by-document or by assigning certain procedures for public participation to
147 general categories of documents. If an agency opts for the latter, it should consider
148 whether resource limitations may cause some documents, if subject to pre-adoption
149 procedures for public participation, to remain in draft for substantial periods of time. If
150 that is the case, agencies should either (a) make clear to stakeholders which draft
151 interpretive rules, if any, should be understood to reflect current agency thinking; or (b)
152 provide in each draft interpretive rule that, at a certain time after publication, the
153 document will automatically either be adopted or withdrawn.

154 11. All written interpretive rules affecting the interests of regulated parties, regulatory
155 beneficiaries, or other interested parties should be promptly made available electronically
156 and indexed, in a manner in which they may readily be found. Written interpretive rules
157 should also indicate the nature of the reliance that may be placed on them and the
158 opportunities for reconsideration, modification, or waiver of them.

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches

159 12. Interpretive rules that lend themselves to alternative approaches include those that lay out
160 several lawful options for the public but do not purport to be exhaustive, and those that
161 speak at a general level, leaving space for informal adjustments and negotiation between
162 the agency and its stakeholders about how the rule should be applied. Recommendations
163 1-11 above apply with equal force to such rules. However, with respect to such rules,
164 agencies should take additional steps to promote flexibility, as discussed below.

165 13. Agencies should afford members of the public a fair opportunity to argue for lawful
166 approaches other than those put forward by an interpretive rule, subject to any binding
167 requirements imposed upon agency employees as an internal management manner. The
168 agency should explain that a member of the public may take a lawful approach different
169 from the one set forth in the interpretive rule or request that the agency take such a lawful



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170 approach. The interpretive rule should also include the identity and contact information
171 of officials to whom such a request should be made. Additionally, with respect to such
172 rules, agencies should take further measures to promote such flexibility as provided in
173 Recommendation 14.

174 14. In order to provide a fair opportunity for other lawful approaches, an agency should,
175 subject to considerations of practicability and resource limitations and the priorities
176 described in Recommendation 15, consider additional measures, including the following:

177 a. Promoting the flexible use of interpretive rules in a manner that still takes due
178 account of needs for consistency and predictability. In particular, when the agency
179 accepts a proposal for a lawful approach other than that put forward in an
180 interpretive rule and the approach seems likely to be applicable to other situations,
181 the agency should disseminate its decision and the reasons for it to other persons
182 who might make the argument, to other affected stakeholders, to officials likely to
183 hear the argument, and to members of the public, subject to existing protections
184 for confidential business or personal information.

185 b. Assigning the task of considering arguments for approaches other than that in an
186 interpretive rule to a component of the agency that is likely to engage in open and
187 productive dialogue with persons who make such arguments, such as a program
188 office that is accustomed to dealing cooperatively with regulated parties and
189 regulatory beneficiaries.

190 c. In cases where frontline officials are authorized to take an approach different from
191 that in an interpretive rule but decline to do so, directing appeals of such a refusal
192 to a higher-level official who is not the direct superior of those frontline officials.

193 d. Investing in training and monitoring of frontline personnel to ensure that they (i)
194 treat parties' ideas for lawful approaches different from those in an interpretive
195 rule in an open and welcoming manner; and (ii) understand that approaches other



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196 than that in an interpretive rule, if undertaken according to the proper internal
197 agency procedures for approval and justification, are appropriate and will not
198 have adverse employment consequences for them.

199 e. Facilitating opportunities for members of the public, including through
200 intermediaries such as ombudspersons or associations, to propose or support
201 approaches different from those in an interpretive rule and to provide feedback to
202 the agency on whether its officials are giving reasonable consideration to such
203 proposals.

204 15. Because measures to promote flexibility (including those listed in Recommendation 14)
205 may take up agency resources, it will be necessary to set priorities for which interpretive
206 rules are most in need of such measures. In deciding when to take such measures the
207 agency should consider the following, bearing in mind that these considerations will not
208 always point in the same direction:

209 a. An agency should assign a higher priority to an interpretive rule the greater the
210 rule's impact is likely to be on the interests of regulated parties, regulatory
211 beneficiaries, and other interested parties, either because regulated parties have
212 strong incentives to comply with the rule or because the rule practically reduces
213 the stringency of the regulatory scheme compared to the status quo.

214 b. An agency should assign a lower priority to promoting flexibility in the use of a
215 rule insofar as the rule's value to the agency and to stakeholders lies primarily in
216 the fact that it is helpful to have consistency independent of the rule's substantive
217 content.