Administrative Conference Recommendation 2019-1

Agency Guidance Through Interpretive Rules

Adopted June 13, 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 "general statements of policy" as agency statements "issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[3] The *Manual* similarly 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."[4] Because of the commonalities between policy statements and interpretive rules, including their advisory function, many scholars and government agencies have more recently adopted the umbrella term "guidance" to refer to both interpretive rules and policy statements.[5]

The Administrative Conference has issued several recommendations on policy statements.[6] 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).

[4] *Id.*

[5] *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/report/agency-guidance-final-report.

[6] *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 1992-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 1976-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

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 nonbinding. 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.[7]

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[8] 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.[9] 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.[10]

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

[7] *See* Recommendation 2017-5, *supra* note 6, ¶ 9.

[8] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) (citing the ATTORNEY GENERAL'S MANUAL, *supra* note 3)).

[9] Recommendation 2017-5, *supra* note 6, ¶ 2; *see also* Recommendation 1992-2, *supra* note 6, ¶ II.B.

[10] *See* Blake Emerson & Ronald M. Levin, Agency Guidance Through Interpretive Rules: Research and Analysis 33–34 (May 28, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/agency-guidance-through-interpretive-rules-final-report.

form an independent basis for action in matters that determine the rights and obligations of any member of the public."[11] 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 describing an existing statutory or regulatory requirement. Recommendation 2017-5 itself recognized the legitimacy of such phrasing.[12] For this reason, administrative lawyers sometimes describe such rules as "binding." That common usage of words, however, can lead to confusion: it can impede efforts to make clear that interpretive rules should remain nonbinding in a different sense, i.e., that members of the public should be accorded a fair opportunity to request that such rules be modified, rescinded, or waived.

Second, discussions of the circumstances in which interpretive rules may or may not be "binding" bring to mind assumptions that stem from the case law construing the rulemaking exemption in the APA.[13] Courts and commentators have disagreed about whether, under that case law, interpretive rules may be binding on the agency that issues them.[14] Despite this diversity of views, officials interviewed for this project did not express the view that they would categorically deny private parties the opportunity to seek modification, rescission, or waiver of an interpretive rule. 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 divert attention from consideration of what sound principles of administration require, which this Recommendation does address.

[11] Recommendation 2017-5, *supra* note 6, ¶ 1.

[12] *Id.* ¶ 5; *accord* Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,440 (Jan. 25, 2007).

[13] *See* 5 U.S.C. § 553(b)(A).

[14] Emerson & Levin, *supra* note 10, at 20–23; Parrillo, *supra* note 5, at 23–25; *see also* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).

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*[15] 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."[16] The question of whether interested persons should be able to ask an agency to modify, rescind, or waive an interpretive rule does not intrinsically have to turn on what level of deference the courts would later accord to the agency's interpretation. 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 interpretive issue at the agency level.[17] Even so, the doctrinal debate over whether an interpretive rule is or is not "binding" under *Auer* can direct attention away from these practical considerations.

For these reasons, the Administrative Conference has worded the initial operative provisions of the Recommendation so that it avoids using the phrase "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 modification, rescission, or waiver 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.

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

[15] 519 U.S. 452 (1997).

[16] *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 id.* 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, or on what the Court may decide in *Kisor*.

[17] *See* Emerson & Levin, *supra* note 10, at 25.

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.[18] 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. The mere existence of an opportunity to contest an interpretive rule through an internal appeal may not be enough to afford a "fair opportunity" because of the very high process costs that pursuing such an appeal could entail.

At the same time, agencies should also consider governmental interests such as the agency's resource constraints and need for centralization.[19] For example, an agency should be able to deal summarily with requests that it finds to be obstructive, dilatory, or otherwise tendered in apparent bad faith. It should not be expected to entertain and respond in detail to repetitive or frivolous challenges to the agency's position. Additionally, Paragraph 3 recognizes that the need for coordination of multiple decision makers in a given program may justify requiring lower-level employees to adhere to the agency's interpretive rules.

The recommendations below pertaining to public participation in the formulation of interpretive rules closely track the public participation provisions of Recommendation 2017-5. The recommendations here have been modified to reflect differences between interpretive rules and statements of policy.

Paragraphs 12 through 15 set forth principles that agencies should consider in determining whether and how to invite members of the public to suggest alternative approaches or analyses to those spelled out in interpretive rules. These paragraphs are largely drawn from corresponding provisions in Recommendation 2017-5. 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. They may also include rules that, in setting forth decisional factors that

[18] Parrillo, *supra* note 5, at 25.

[19] *See* Emerson & Levin, *supra* note 10, at 38–41.

are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules speak at a general level, leaving space for informal adjustments and negotiation between the agency and interested persons[20] about how the rule should be applied. On the other hand, certain kinds of interpretive rules, such as those in which an agency has determined that a statutory term has only one construction (e.g., rules that take the view that certain conduct is categorically required or forbidden), do not lend themselves to such flexible treatment.[21]

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

1. An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule should not 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. In determining whether to modify, rescind, or waive an interpretive rule, an agency should give due regard to any reasonable reliance interests.
3. It is sometimes appropriate for an agency, as an internal agency management matter, 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 Paragraph 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

[20] This Recommendation uses "interested person" rather than "stakeholder," which Recommendation 2017-5, *supra* note 6, uses. The Conference believes that "interested person" is more precise than "stakeholder" and that "stakeholder," as used in Recommendation 2017-5, should be understood to mean "interested person."

[21] *See* Emerson & Levin, *supra* note 10, at 42–44.

available when officials fail to follow interpretive rules they are properly directed to follow.

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 modification, rescission, or waiver 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 Paragraph 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. 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 Paragraphs 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 meetings or webinars with interested persons, 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 adopting interpretive rules.
    b. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated persons (regulatory beneficiaries and other interested persons) may offer different information than regulated

persons and that non-regulated persons 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 persons 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 input from interested persons.

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 issuing 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 Paragraph 8, options for public participation include meetings or webinars with interested persons, 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 interpretive rule-by-interpretive rule or by assigning certain procedures for public participation to general categories of interpretive rules. If an agency opts for the latter, it should consider whether resource limitations may cause some interpretive rules, 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 interested persons 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 rule 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. Interpretive rules should also indicate the nature of the reliance that may be placed on them and the opportunities for modification, rescission, or waiver of them.

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches or Analyses

12. Interpretive rules that lend themselves to alternative approaches or analyses include those that lay out several lawful options for the public but do not purport to be exhaustive. They may also include rules that, in setting forth decisional factors that are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules speak at a general level, leaving space for informal adjustments and negotiation between the agency and interested persons about how the rule should be applied. Paragraphs 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 or analyses other than those set forth in 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, request that the agency take such a lawful approach, or request that the agency endorse an alternative or additional analysis of the rule. 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 Paragraph 14.
14. In order to provide a fair opportunity for members of the public to argue for other lawful approaches or analyses, an agency should, subject to considerations of practicability and

resource limitations and the priorities described in Paragraph 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 or analysis other than that set forth in an interpretive rule and the approach or analysis 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 interested persons, 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 or analyses other than those 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. When officials are authorized to take an approach or endorse an analysis different from that in an interpretive rule but decline to do so, directing appeals of such a refusal to a higher-level official.

d. Investing in training and monitoring of personnel to ensure that they: (i) treat parties' ideas for lawful approaches or analyses that are different from those in an interpretive rule in an open and welcoming manner; and (ii) understand that approaches or analyses other than those 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 or analyses 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 Paragraph 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 interested persons is primarily consistency rather than substantive content.