



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation for Committee | April 1, 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. As a general matter, as with policy statements,
22 interpretive rules can exert a de facto ~~binding~~ coercive effect on regulated parties as well as on
23 other interested persons insofar as they may feel they have no practical alternative but to
24 comply.⁶ The Conference takes no position here on whether agencies must treat interpretive rules
25 as non-binding in order to satisfy the APA's exemption from notice and comment rulemaking
26 nor on whether such treatment affects the availability of scope of judicial review of such rules.
27 But the Conference here recommends that, as a matter of sound administrative practice,
28 interpretive rules should, as a general matter, not be treated as binding.

29 At the same time, interpretive rules should not be treated as identical to policy statements
30 in all respects. For example, with respect to policy statements, it is appropriate for agencies to
31 allow members of the public to propose alternative approaches. While this is also true for many
32 interpretive rules, there are certain kinds of interpretive rules, such as those in which an agency

Commented [CO1]: Edit from AV. Comment from AV:
Insert language from 2017-5 regarding examples of de facto
coercive effects on regulated parties.

⁶ See Blake Emerson and Ronald M. Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis 33–34* (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 has determined that a statutory term has *only* one construction, that do not lend themselves to
34 such flexibility.⁷

35 The recommendations that appear below are drawn directly from Recommendation 2017-
36 5, but they have been modified in certain respects to account for any distinctions between
37 interpretive rules and policy statements.

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

Interpretive Rules Should Not Bind the Public

- 38 1. An agency should not use an interpretive rule to create a standard-binding on the public,
39 independent of the statute or substantive rule it interprets. That is, an interpretive rule
40 should not establish ~~as~~ a standard with which noncompliance may form an independent
41 basis for action in matters that determine the rights and obligations of any member of the
42 public.
- 43 2. An agency should afford members of the public a fair opportunity, under the
44 circumstances, to argue for modification, rescission, or waiver of the interpretive rule.
- 45 3. ~~Although an interpretive rule should not bind an agency as a whole, it~~ is sometimes
46 appropriate for an agency, as an internal agency management matter, and particularly
47 when an interpretive rule is used in connection with regulatory enforcement, to direct
48 some of its employees to act in conformity with an interpretive rule. But the agency
49 should ensure that this does not interfere with the fair opportunity called for in
50 Recommendation 2. For example, a ~~An~~ interpretive rule could bind officials at one level
51 of the agency hierarchy, with the caveat that officials at a higher level can authorize a
52 modification, rescission, or waiver of that rule. Agency review should be available in

Commented [TR2]: AM's comment: Discuss what "fair opportunity under the circumstances" means in the preamble.

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⁷ See *id.*



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53 cases in which frontline officials fail to follow interpretive rules in conformity with
54 which they are properly directed to act.

Minimum Measures to Avoid Binding the Public

55 4. Agencies should prominently state that their interpretive rules are not binding on
56 members of the public ~~An interpretive rule should prominently state that it is not binding~~
57 ~~on members of the public but express the agency's current interpretation of the law, unless~~
58 ~~such a statement would create undue confusion.- Such a statement might not be necessary~~
59 ~~when it would create confusion. An agency may have good cause not to include, or to~~
60 ~~modify, such a disclaimer where the matter is uncontroversial and the disclaimer would~~
61 ~~be liable to create confusion.~~

Commented [TR4]: AM's comment: Expand on this in the preamble.

62 5. The agency should instruct all employees engaged in an activity to which an interpretive
63 rule pertains that, although the interpretive rule may contain mandatory language, it does
64 not have the force of law. It should further instruct employees to refrain from making any
65 statements suggesting that an interpretive rule has the force of law. Insofar as any
66 employee is directed, as an internal agency management matter, to act in conformity with
67 an interpretive rule, that employee should be instructed as to the difference between such
68 an internal agency management requirement and law that is binding on the public.
69 Agencies should invest, as needed, in training and monitoring of employees to ensure
70 adherence to these practices.

Commented [TR5]: NP's comment: Leave this last sentence to paragraph 12 / note the agency resource implication. KW's comment: Consider excluding.

Public Participation in Adoption or Modification of Interpretive Rules

71 6. When an agency is contemplating adopting or modifying an interpretive rule, it should
72 consider whether to solicit public participation, and, if so, what kind, before adopting or
73 modifying the rule. Options for public participation include ~~outreach to selected~~
74 ~~stakeholder representatives],~~ stakeholder meetings or webinars, advisory committee
75 proceedings, and invitation for written input from the public with or without a response.
76 In deciding how to proceed, the agency should consider:



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- 77 a. ~~Existing-The Agency's own~~ procedures for the adoption of interpretive rules,
78 ~~including any procedures adopted in response to the Office of Management and~~
79 ~~Budget's Final Bulletin for Agency Good Guidance Practices (2007).~~
- 80 b. The likely increase in useful information available to the agency and public
81 acceptance from broadening participation, keeping in mind that non-regulated
82 parties (regulatory beneficiaries and other interested parties) may offer different
83 information than regulated parties and that non-regulated parties will often have
84 no meaningful opportunity to provide input regarding interpretive rules other than
85 at the time of adoption.
- 86 c. The likely increase in rule acceptance from broadening participation, keeping in
87 mind that non-regulated parties will often have no opportunity to provide input
88 regarding interpretive rules other than at the time of adoption, and that rule
89 acceptance may be less likely if the agency is not responsive to stakeholder input.
- 90 d. Whether the agency is likely to learn more useful information by having a specific
91 agency proposal as a focal point for discussion, or instead having a more free-
92 ranging and less formal discussion.
- 93 e. The practicability of broader forms of participation, including invitation for
94 written input from the public, keeping in mind that broader participation may
95 slow the adoption of interpretive rules and may diminish resources for other
96 agency tasks, including the provision of interpretive rules on other matters.
- 97 7. If an agency does not provide for public participation before adopting or modifying an
98 interpretive rule, it should consider offering an opportunity for public participation after
99 adoption or modification. As with Recommendation 6, options for public participation
100 include outreach to selected stakeholder representatives, stakeholder meetings or
101 webinars, advisory committee proceedings, and invitation for written input from the
102 public with or without a response.



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- 103 8. An agency may make decisions about the appropriate level of public participation
104 document-by-document or by assigning certain procedures for public participation to
105 general categories of documents. If an agency opts for the latter, it should consider
106 whether resource limitations may cause some documents, if subject to pre-adoption
107 procedures for public participation, to remain in draft for substantial periods of time. If
108 that is the case, agencies should either (a) make clear to stakeholders which draft
109 interpretive rules, if any, should be understood to reflect current agency thinking; or (b)
110 provide in each draft interpretive rule that, at a certain time after publication, the
111 document will automatically either be adopted or withdrawn.
- 112 9. All written interpretive rules affecting the interests of regulated parties, regulatory
113 beneficiaries, or other interested parties should be promptly made available electronically
114 and indexed, in a manner in which they may readily be found. Written interpretive rules
115 should also indicate the nature of the reliance that may be placed on them and the
116 opportunities for reconsideration, modification, or waiver of them.

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches

Examples of Interpretive Rules That Are Amenable to Alternative Approaches

- 117 10. Interpretive rules that lend themselves to alternative approaches include those that lay out
118 several lawful options for the public but do not purport to be exhaustive, and those that
119 speak at a general level, leaving space for informal adjustments and negotiation between
120 the agency and its stakeholders about how the rule should be applied. Recommendations
121 1-9 above apply with equal force to such rules. However, with respect to such rules,
122 agencies should take additional steps to promote flexibility, as discussed below.



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Minimum Measures to Avoid Binding the Public to Interpretive Rules Amenable to Alternative Approaches

123 11. Agencies should afford members of the public a fair opportunity to argue for lawful
124 approaches other than those put forward by an interpretive rule, subject to any binding
125 requirements imposed upon agency employees as an internal management manner. The
126 agency should explain that a member of the public may take a lawful approach different
127 from the one set forth in the interpretive rule or request that the agency take such a lawful
128 approach. The interpretive rule should also include the identity and contact information
129 of officials to whom such a request should be made. Additionally, with respect to such
130 rules, agencies should take further measures to promote such flexibility as provided in
131 Recommendation 12.

Additional Measures to Avoid Binding the Public to Interpretive Rules Amenable to Alternative Approaches

- 132 12. In order to provide a fair opportunity for other lawful approaches, an agency should,
133 subject to considerations of practicability and resource limitations and the priorities
134 described in Recommendation 13, consider additional measures, including the following:
- 135 a. Promoting the flexible use of interpretive rules in a manner that still takes due
136 account of needs for consistency and predictability. In particular, when the agency
137 accepts a proposal for a lawful approach other than that put forward in an
138 interpretive rule and the approach seems likely to be applicable to other situations,
139 the agency should disseminate its decision and the reasons for it to other persons
140 who might make the argument, to other affected stakeholders, to officials likely to
141 hear the argument, and to members of the public, subject to existing protections
142 for confidential business or personal information.
 - 143 b. Assigning the task of considering arguments for approaches other than that in an
144 interpretive rule to a component of the agency that is likely to engage in open and



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145 productive dialogue with persons who make such arguments, such as a program
146 office that is accustomed to dealing cooperatively with regulated parties and
147 regulatory beneficiaries.

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

151 d. Investing in training and monitoring of frontline personnel to ensure that they (i)
152 treat parties' ideas for lawful approaches different from those in an interpretive
153 rule in an open and welcoming manner; and (ii) understand that approaches other
154 than that in an interpretive rule, if undertaken according to the proper internal
155 agency procedures for approval and justification, are appropriate and will not
156 have adverse employment consequences for them.

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

*Priorities in Deciding When to Invest in Promoting Flexibility with Respect to
Interpretive Rules Amenable to Alternative Approaches*

162 13. Because measures to promote flexibility (including those listed in Recommendation 12)
163 may take up agency resources, it will be necessary to set priorities for which interpretive
164 rules are most in need of such measures. In deciding when to take such measures the
165 agency should consider the following, bearing in mind that these considerations will not
166 always point in the same direction:



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- 167 a. An agency should assign a higher priority to an interpretive rule the greater the
168 rule's impact is likely to be on the interests of regulated parties, regulatory
169 beneficiaries, and other interested parties, either because regulated parties have
170 strong incentives to comply with the rule or because the rule practically reduces
171 the stringency of the regulatory scheme compared to the status quo.
- 172 b. An agency should assign a lower priority to promoting flexibility in the use of a
173 rule insofar as the rule's value to the agency and to stakeholders lies primarily in
174 the fact that it is helpful to have consistency independent of the rule's substantive
175 content.