October 13, 2017

To: Committee on Judicial Review

From: Ron Levin

Re: Comments on October 11 draft of Agency Guidance recommendation

I have taken the liberty of writing up some comments on the second draft of the Agency Guidance recommendation. I hope the memo will be read as an invitation to dialogue; responses would be welcome.

I. Types of challenges to agency guidance

The second draft would delete much of former paragraph 1, which stated in relevant part that "the agency should afford a fair opportunity to seek [a] modification of the guidance document in general, including rescission, and [b] departure from the guidance document as applied in a particular proceeding or to particular conduct in the case of a request from [an interested person]." Instead, new paragraph 2 would say that "the agency should afford a full opportunity to argue for lawful approaches other than those put forward in the guidance document." I do not take issue with the new language, but I oppose the omission of the language from former paragraph 1.

In the first place, the new language cannot fully substitute for the old, because it does not speak to all the situations in which a person might wish to raise disagreements with a guidance document (or even just a policy statement). Sometimes, for example, a policy statement has nothing to do, or at least not directly, with compliance *by regulated persons*. Instead, it explains how the *agency* intends to act. We could scarcely fence those statements out of our purview, because they fall squarely within the canonical definition of policy statements in the *Attorney General's Manual on the APA*: "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" (quoted in line 2 of the current draft). The document might, for example, set forth a plan for the exercise of enforcement discretion or a set of priorities by which the agency intends to bestow or withhold benefits.

In addition, the new paragraph 2 does not meet the interests of a private person who wishes to oppose the policy statement head-on rather than navigate around it. The agency should entertain such a submission and should respond meaningfully to it, because the statement is not supposed to be definitive. Abandonment of the 92-2 language that approves of that option would surely be interpreted as meaning that ACUS no longer supports it, and I do not think we could defend such a limitation. Thus, while the new paragraph 2 is all right on its own terms, the committee should revive the above-quoted language of former paragraph 1 (with minor language changes discussed at the meeting, such as repositioning the word "general" in clause [a]).

The impetus behind the replacement of former paragraph 1 by new paragraph 2 seems to be related to the preference expressed by some participants at the meeting for "softer," less "regulatory" language than the previous draft (and 92-2) used. In their view, if I understand it correctly, words like "challenge" or "modify" contemplate an act of rescission resembling the manner in which an agency might rescind a legislative rule. The speakers' point apparently was that a policy statement isn't law, so the agency can simply, and with no formality, decide to depart from what the guidance says, or to allow an alternative to the conduct specified therein, without actually changing the text of the document. I have no quarrel with this scenario as *one* model for structuring the interaction between an agency and a private stakeholder. As I suggested above, however, this model is incomplete by itself. The recommendation shouldn't avoid addressing the alternative situation in which a person seeks the kind of reconsideration that naturally *would* culminate in revision or withdrawal of the document if the submission were successful. In short, the recommendation should provide for both kinds of interactions.

II. Interpretive rules

1. At the October 2 meeting, there was no clear consensus as to whether interpretive rules should be included in the recommendation. In this memo I will endeavor to refocus my previous arguments in order to make a case for inclusion.

Nick's report notes (at p. 26 n.43) that the question of whether, as an administrative matter, statements couched as "interpretive" should have binding status "was not an issue that jumped out in the interviews. While a majority of the 135 interviewees discussed the issue of guidance's binding or nonbinding effect in some way or other, only four brought up the idea that the interpretive status of guidance entailed some special power to bind." In other words, the precise point under discussion here does not seem to have been a particularly salient issue for 97% of the interviewees. In this light, I hope that members of the committee who have heretofore been skeptics about inclusion will be open to taking a fresh look at the question.

2. The basic reason why I would make the draft recommendation apply to interpretive rules is that they are fundamentally similar to policy statements in the respects that matter most for our purposes. At the October 2 meeting, committee members argued cogently that an agency should not treat its policy statements as definitive. Such statements are not the law in themselves, the argument runs; the law is found in the underlying statute or regulation. Thus, staff should be instructed that the guidance document "may not form an independent basis for action in matters that determine the rights and obligations of any person outside the agency" (the 92-2 language, although it may be reworded). In these respects, the policy statement differs from a legislative rule, which the agency is obliged to follow until such time as it is changed or rescinded through another rulemaking proceeding. Per paragraph 1 of the previous draft, which I would revive, a person should be afforded a fair opportunity to seek modification of the statement or departure from it in a particular situation.

As I see the matter, all of these points apply, or should apply, to interpretive rules as well. If a private person comes forward with reasons as to why an interpretive rule, or part of it, should

be rethought or not applied in a particular situation, the agency should not respond that the interpretive rule is determinative. At the meeting, members from a few agencies said that they do, in fact, entertain such submissions asking them to consider changing the guidance, granting a waiver, or otherwise acting favorably on the submitter's interpretation. This would seem to be an appropriate accommodation to the public's interest in getting its views considered by the agency, inasmuch as the rule presumably would not have been subjected to the notice and comment process earlier.

I have been unable to discern a persuasive reason why this level of responsiveness, already acknowledged to be available as to policy statements, should not be afforded with respect to interpretive guidance also. In explaining his original basis for limiting the recommendation, Bob Anthony took the position that interpretive rules merely articulate binding requirements that are already present in the statute or regulation being interpreted. As Nick's report explains (pp. 24-25), I have challenged that rationale as patently inadequate. The agency's reading of the statute may be debatable and hotly contested, so it begs the question to say that because the statute is binding, the particular interpretation espoused by the agency must also be binding. Indeed, the Conference did not endorse that line of reasoning, and I have not heard any member of the current committee defend it.[*]

3. Coverage of both policy statements and interpretive rules is all the more desirable because there is no clear line of distinction between them. As one EPA source told Nick (pp. 23-24 n.35): "[I]n most instances, a guidance document consist[s] of a mixture of interpretive-rule material and policy-statement material that [is] hard to disentangle." This should not be surprising, because it is well recognized that many administrative judgments that we commonly characterize as "interpretation" (particularly interpretations that survive scrutiny under *Chevron* step one and are then reviewed under step two) are analytically equivalent to policymaking that is typically reviewed for abuse of discretion. It would be unwise to make the applicability of the recommendation turn on which label one chooses to affix to a particular guidance document.

A good illustration of the close interrelationship between interpretive guidance and policy guidance is line 161 of the October 11 draft, which provides that a guidance document "should not contain mandatory language unless the agency is using that language to describe a statutory or regulatory requirement . . . ." As a matter of logic, this principle would have to be deleted from the draft if interpretive guidance is to be categorically omitted from the recommendation. But as a matter of good sense, the principle – which actually comes straight out of the OMB Good

[*] I will not prolong this already lengthy memo by rebutting other arguments for differential treatment that have not even been raised within the committee. For consideration by those who might be interested in my responses to some of those arguments, I attach as an appendix to this memo a CLE outline that I prepared for an ABA program later in the month. It should be regarded as strictly optional reading. Anyone with even greater intellectual curiosity is welcome – but certainly not expected – to look at the draft law review article that the outline summarizes. The outline contains a link to that manuscript.

Guidance Practices Bulletin – ought to be brought to the attention of agency personnel who draft guidance documents. I do not see why we would not want to do that.

4. One reason for some committee members' hesitation to include interpretive rules in the recommendation was they often will receive deference on judicial review. Such deference adds to the pressure to obey them and can be characterized as a "binding" effect, or so it was argued.

My objection to this line of argument is that it refers to a different kind of binding effect from the one with which this recommendation is concerned. The two kinds do not have to go hand-in-hand. The recommendation basically sets forth a set of behavioral expectations, which could apply or not apply regardless of the level of deference a guidance document would receive if judicially reviewed. One could say, in a directly analogous fashion, that a policy statement may well have a "binding effect" in the sense that if it reaches the courts, it is likely to be upheld unless it is arbitrary and capricious, ultra vires, etc. Such merits review occurs less often than merits review of interpretive rules, because of justiciability limitations, but it does sometimes happen, and the courts' review surely isn't de novo. That kind of binding effect is entirely compatible with the nonbinding status that everyone recognizes should be accorded to policy statements in the sense relevant to the recommendation.

I don't entirely disagree with the intuition that the question of how an agency treats its interpretive rules at the administrative level has something to do with deference, but the relationship works in the opposite direction. Under cases like *Mead* and *Skidmore*, the manner in which the agency handles the guidance could affect the deference it receives (e.g., careful and thorough reasoning is good, but vacillation is bad). But the procedure determines the deference. The deference doesn't determine the procedure – that would be circular. Thus, agencies can decide (hopefully with our input) what procedure to follow with regard to interpretive rules, and other fora can then decide what the ramifications for the level of deference should be.

5. Another argument that appeared to underlie some of the reluctance to include interpretive rules in the recommendation was the idea that controversies about them inevitably turn into broad challenges aimed at forcing rescission or modification of those rules. Thus, it was argued, they do not lend themselves to the kind of individualized adjustments that can be arranged with policy statements, such as by saying "this document explains one way in which you can comply with the statute or regulation, but we are open to discussing alternative ways with you." The assumption was that the recommendation should focus on the latter sort of opportunities for dialogue between the agency and regulated entities.

The descriptive premise of the argument does not seem correct to me. An interpretive rule might say, for example, "We read the statute to mean X as a general rule, but there may be exceptions." In essence, this language would invite affected persons to come in to discuss whether they may fall within such an exception, effectively resulting in the same kind of informal adjustments that the above argument contemplates as occurring with policy statements. Such uses of interpretive rules might be especially apt when the underlying statute contains broad language like "discrimination" or "public interest, convenience, and necessity." Such statutes are normally fleshed out through a continuing process of reinterpretation over time, so that any given

interpretation is susceptible of both formal and informal refinement within the administrative process.

Regardless, as I maintained in Part I, our recommendation should provide for stakeholders to seek both the informal adjustments just mentioned and also situations in which the stakeholder simply disagrees with the guidance document and seeks to induce the agency to withdraw or revise it. In the latter context, the similar status of policy statements and interpretive rules seems especially clear.

6. As I said above, I recognize that some members of the committee have had doubts about the position I advocate. So, in the event that those doubts persist, I will speak to alternatives.

As among the other options the committee discussed, my second choice would be the one that, on the surface, is the opposite of my own. Under this option, the recommendation would apply only to policy statements, but the preamble would state that many ideas discussed in it could apply to interpretive rules. The disclaimer would say that interpretive rules are excluded because they were not squarely within the scope of the research for the project. This approach would make the recommendation less ambitious than what I hope we can achieve, but it would be intellectually defensible on its own terms.

The "compromise" approach discussed at the meeting would have the recommendation say that it applies to interpretive rules to the extent, but only to the extent, that an agency considers its rules to be binding. This solution strikes me as quite problematic, for three reasons. First, it would look curious for the Conference to say that its recommendation applies to a class of rules if agencies *believe* it should, with no comment as to whether the belief may be well founded. Second, the compromise language carries the unmistakable implication that, in the Conference's view, an agency *may* legitimately treat its interpretive rules as binding. For reasons sketched above, however, I question this proposition. If the committee disagrees with my reasoning, I would prefer us to remain silent about it. Third, during the October 2 meeting, some attendees were dubious about my proposal because, they suggested, some provisions of the recommendation *intrinsically cannot* apply to interpretive rules. If that is what they think, however, it seems contradictory to raise the possibility that, if the agency regards its interpretive rules as nonbinding, those provisions should apply to such rules after all.

I wonder, however, whether a different sort of compromise might be considered. Between the extremes of remaining silent about interpretive rules and applying every provision of the emerging recommendation to them, there might be a middle ground that resembles the disclaimer already under discussion but makes at least a few affirmative observations about interpretive rules. I will not try to anticipate what such a middle ground might look like, but if the committee were to agree on a notion of limited coverage of interpretive rules (rather than full coverage, as I advocate), I would be willing to draft up language for consideration at the third meeting.

"Policy Statements and Interpretive Rules: A Unified Approach to the Rulemaking Exemptions"

Outline of comments for panel on
"Federal Agency Guidance: Its Role in Agency Operations, Industry Compliance, and Litigation"
2017 Fall Administrative Law Conference, October 19, 2018
ABA Section of Administrative Law and Regulatory Practice

Ronald M. Levin
William R. Orthwein Distinguished Professor of Law,
Washington University in St. Louis

This presentation is adapted from my article *Rulemaking and the Guidance Exemption*, forthcoming in 70 ADMIN. L. REV. #2 (Spring 2018). A draft is currently posted on SSRN at *http://ssrn.com/abstract=2958267*. The draft contains full elaboration and documentation of statements made in this outline.

A vigorous debate over the merits of interpretive rules and policy statements – collectively, "guidance" – has been under way for more than two decades. There is a parallel debate over application of 5 U.S.C. § 553(b)(A), the provision of the Administrative Procedure Act that exempts both categories of rules from notice-and-comment obligations. Definitionally, the difference between a legislative rule and guidance is that the former has the force of law and the latter does not, but the implications of that distinction are difficult to tease out.

According to a well-worn metaphor, the case law in this area is "enshrouded in considerable smog." My article maintains, however, that

the smog is not evenly distributed as between the two exemptions. It is thicker and more toxic on the interpretive rules side. To put it more prosaically, the doctrine on policy statements is more orderly than many people recognize, but the doctrine on interpretive rules is in worse shape than is generally recognized and could use a major overhaul. The article recommends that the principles now used in applying the policy statement exemption should be applied to both contexts.

The Background Normative Debate on Guidance

Administrative lawyers tend to acknowledge that the pervasive use of guidance by administrative agencies has both positive and negative aspects.

On the positive side, agency guidance dispels uncertainty about the agency's views. Many regulated persons, and many regulatory beneficiaries, want to know the agency's positions, so that they know what they need to do to avoid liability or obtain benefits. Also, agencies benefit from issuing guidance, because it enables them to manage their own staff, in the interest of ensuring well-informed and consistent implementation of their programs throughout the country.

On the negative side, a standard critique of guidance is that it can too easily lead to a circumvention of the objectives that has led Congress to prescribe notice and comment procedure as the norm for issuance of rules. Those purposes include enabling agencies to learn from the

comment process and to subject themselves to the discipline of the rulemaking process.

More specifically, the critique is that, even though a guidance document theoretically does not have the force of law, agencies may utilize it in ways that will be binding as a practical matter. People will sometimes experience guidance as coercive and feel obliged to comply with it even if they believe the agency is misinterpreting its mandate or abusing its discretion.

Administrative lawyers tend to discern merit in both sides of this debate. One can discover evidence of this in the pronouncements of professional organizations such as the ABA and the Administrative Conference, as well as the Good Guidance Practices Bulletin of the Office of Management and Budget. All of these groups have published statements that caution agencies against giving binding effect to guidance documents, but that nevertheless acknowledge that, within reasonable boundaries, agencies will and should issue and rely on them.

The Policy Statement Exemption in the Courts

The best way to explain the case law applying the policy statement exemption is to say that it seeks to give effect to approximately the same set of policy considerations just discussed.

In a litigation context, when an agency is accused of violating the APA notice-and-comment requirement and the agency relies on the policy

statement exemption, the controversy typically turns on whether the guidance document is or will be binding as a practical matter.

When a court finds that this is occurring or likely to occur, it will typically hold that the document is in fact a legislative rule and is legally deficient because of the absence of APA procedures. Specifically, a so-called policy statement is at risk of being characterized as legislative, and thus deficient in the absence of notice and comment, if (1) its *language* indicates that they agency would not be open to reconsidering the legality or wisdom of the stated policy when the agency applies it in subsequent proceedings, or if (2) agency *behaves* as though the document were binding, even if the document on its face does not read that way.

In practice, these inquiries can give rise to various complexities. For example, "binding effect" can be a matter of degree. Agencies are permitted, indeed encouraged, to rely on guidance documents as influential resources in the administration of their programs, so long as affected persons will have a fair opportunity to try to persuade the agency to take a different view. What constitutes a fair opportunity may, in practice, be a contentious issue in particular cases.

Also, the legal status of guidance that is addressed to agency staff is not well defined in the case law. Some court decisions hold that a binding effect on staff as just as suspect as a binding effect on outsiders. Other court decisions take the opposite perspective: An agency needs to be able to instruct its own employees as to how to carry out its mandate. Thus, they argue, only a binding effect on outsiders counts for purposes of the exemption. Still other case law takes an intermediate approach:

An agency can issue mandatory instructions to low-level personnel, but only if it allows an internal appeal to a superior authority that does have discretion.

Notwithstanding these and other complications, I view the case law on policy guidance as fairly stable, because its outlines are more or less orderly and understandable. The binding norm test is widely accepted, and subsidiary issues can be analyzed in light of that same framework. Judgment calls are inherent in working with so openended a test, but I do not view these uncertainties as a sign of rampant confusion in the case law.

Interpretive Rules: Critique of the "Genuine Interpretation" Approach

On the interpretive rules side of the exemption, the picture looks very different. My comments on the policy statement exemption have been largely an endorsement of the status quo, but on interpretive rules my perspective is decidedly revisionist.

Virtually all observers would agree that an interpretive rule is a rule that purports to state what existing law requires, as opposed to creating new law. But how shall we determine when that condition is satisfied?

I will quote here from Professor Bill Jordan, the Secretary of the Administrative Law Section. In his chapter on Rulemaking in the latest volume of the Section's annual series of books on Developments in Administrative Law, Bill referred to the usual perception that the law in

this area is confused. But then he wrote: "*Fortunately*, courts now seem more frequently [to recognize] that the question is simply whether the purported interpretation can plausibly be said to have been drawn from the language of the underlying statute or regulation."

In Hoctor v. USDA, 82 F.3d 165 (7th Cir. 1996), Judge Posner articulated an equivalent formulation: the question is whether an interpretive rule is "derived from the [underlying text] by a process reasonably described as interpretation."

I fully agree with Bill that courts tend to use that approach in resolving claims under the exemption, but I respectfully disagree that this tendency is "fortunate." I consider it "unfortunate" for two reasons.

The first is that this test is incoherent. Virtually *every* agency interpretation entails a degree of reliance on the text being interpreted, and also involves a degree of creativity. There is no objective way of determining how much of the latter is too much. The subjectivity of the criterion has become all the more glaring in the post-*Chevron* world, in which our legal system candidly recognizes that much of what we call "interpretation" of a regulatory statute is directly equivalent to policymaking. These are often two names for the same activity.

The incoherency problem has been well recognized in the literature for decades. But I have a further critique. The criterion that Bill mentioned is not only incoherent – it is also pointless. That is to say, there is no good reason why a so-called interpretive rule that "interprets" in a narrow sense deserves notice and comment any less (or any more)

than a guidance document that does not "interpret" in that sense. A rule that rests solely on orthodox statutory construction methods and only purports to explain congressional intent is neither more nor less deserving of notice and comment than a rule with a larger creative or discretionary component.

In either of these situations, the agency has the same interest in making its views known to the public and to its own staff, without having to run the gauntlet of the notice-and-comment process.

And conversely, in either situation, members of the public have an interest in receiving guidance, *or*, if they disagree with it, presenting their views to the agency. If they cannot be heard when the rule is promulgated, they should have a meaningful opportunity to contest the rule later in the administrative process.

Bear in mind that if the agency's interpretation is really self-evident – a true no-brainer – the agency would not need to rely on the interpretive rules exemption at all. The APA contains a separate exemption for situations in which the agency finds for good cause that notice and comment would be "unnecessary." So, as a practical matter, the interpretive rule is important only with respect to interpretations that are *debatable*. And if it is debatable, people should have a chance to try to persuade the agency to adopt *their* reading of the statute instead of the one that the agency would otherwise follow.

So, I argue, we simply cannot expect courts to apply the approach that Bill described in a principled or consistent manner. The criterion is

not only vague, but also bears no connection to practical arguments as to whether notice-and-comment is a good idea or a bad idea.

Interpretive Rules: The *American Mining Congress* Alternative

I should say a few words about an alternative approach that has gained favor in some recent opinions. In *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993), Judge Stephen Williams formulated a four-factor test for applying the interpretive rules exemption. He said that a purported interpretive rule should be deemed legislative, and thus would require notice and comment, if any of the following four conditions were satisfied:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

I agree with these factors as far as they go, but the formula has two problems. The first is that the four criteria identify circumstances in which the rule must be *legislative*, but they have nothing to do with whether a rule is *interpretive* or not. They would, or at least should,

negate the agency's claim to an APA exemption just as fully if the guidance in question is a purported policy statement rather than an interpretation.

The second problem is that the four criteria, by themselves, are quite narrow. Almost no guidance documents will flunk any of the four tests (especially when one considers that any guidance document that effectively amends a prior legislative rule – the fourth *American Mining* factor – could be set aside on substantive grounds anyway).

So, while I support Judge Williams' tests as far as they go, the question that comes to mind is, why not extend the symmetry between interpretive rules and policy statements still further, by applying the binding norm test to the former as we do to the latter? And that brings me to my own recommendation

A Proposed Approach to the Interpretive Rules Exemption

My suggestion is that the courts should forget about asking whether a so-called interpretive rule can be "reasonably described as interpretive" or not. Instead, they should simply ask whether the agency uses interpretive guidance, or threatens to use it, in a coercive manner, just as they do now in cases involving policy statements. Just as with policy statements, if the agency chooses not to resort to notice-and-comment at the time of promulgation, it should be prepared to deal seriously with disagreements when they seek to apply the guidance later on. Just as with policy statements, an agency should be allowed (and

expected) to adhere to their interpretive guidance on a day-to-day basis (unless they justify the departure), but they should not treat it as binding if someone takes issue with the interpretation later.

This analysis would give the interpretive rules exemption something it currently lacks: a discernible normative basis. Just as with policy statements, it would rest on the premise that guidance does not have the force of law.

People have assumed for decades that because the APA exemption mentions interpretive rules and policy statements separately, the two exemptions must call for different modes of analysis. But there was never any compelling reason to make that assumption, because the APA applies the same rule of law to both. Indeed, it would be possible to think of the interpretive rules provision and the policy statement provision as comprising a single exemption – the guidance exemption.

My proposal may seem counter-intuitive to some, because interpretive rules are often phrased in mandatory terms. They say that a person *must* do X or *must not* do Y. The agency would, therefore, be likely to say that its interpretations declare statutory principles that people have no option not to obey. Indeed, the agency should not have to hedge about *what its position is*. But this does not mean that, in the process of making up its mind about *what position to take*, it should never be expected to allow members of the public to be heard about whether that position is wrong. Rather, it suggests that, because interpretive rules are often phrased in mandatory terms, a court would frequently need to look their wording alone in order to make a judgment about

whether the agency would be willing to allow contestation of their substance.

If courts were to follow my approach, they would in a sense simply be catching up to the way the rest of the world thinks of interpretive rules and policy statements. People routinely refer to both types of documents using the collective term "guidance." Indeed, the Senate version of the Regulatory Accountability Act would actually substitute the word "guidance" for the existing terms "interpretative rules" and "general statements of policy." That would effectively force the unification that I am discussing, but I do not think the courts should have to wait for that revision, because the unification makes sense on its own terms.

Even if the courts do not sign onto this perspective immediately, agencies can adopt a common position as a matter of their own practice. The ABA and OMB pronouncements that I mentioned earlier did treat both kinds of rules in substantially the same manner. The 1992 ACUS recommendation addressed policy statements only and was silent about interpretive rules. During the Conference's pending deliberations on its Agency Guidance project, it will have a chance to extend its recommendation to interpretive rules also, and I hope it will.