Comment by Nick Parrillo (ACUS public member, Yale Law School) for the Committee on Judicial Review regarding "Agency Guidance Through Interpretive Rules" (April 17, 2019)

This comment is to respond to the thoughtful message circulated by Andy Vollmer on April 3, in which he proposes that paragraph 3 of the draft Recommendation, which currently says an agency may sometimes direct some of its employees to follow an interpretive rule, be revised to say "that an interpretive rule should play no role or at least no undue role in an adjudication."

I have three thoughts about Andy's proposal.

--(a) In support of his proposal, Andy says that the "interests in administrative uniformity are not strong or predominant in an adjudication, especially one charging a private party with a violation of law." He adds that "[n]o reliance interests arise in an enforcement adjudication against a defendant when the interpretive rule could be asserted against the defendant to its detriment rather than in its favor." Of course I have nothing approaching Andy's direct experience with agency enforcement adjudication, and other members of the Committee may have their own direct experience on which they can draw. For what it's worth, in my study for Recommendation 2017-5 (which covered all guidance that interviewees considered legally nonbinding, meaning policy statements and sometimes interpretive rules), some interviewees expressed the view that uniformity and adherence to guidance were especially important in the enforcement context in order to provide predictability and a level playing field for competing firms (pp. 94-95; see also pp. 97, 125-26). Without such uniformity, firms may be less inclined to cooperate with agency enforcement efforts (e.g., self-reporting violations or agreeing to settlements) out of fear that they cannot predict the consequences of such cooperation and that their competitors might be getting better deals. Relatedly, one can argue that, when an agency applies guidance to the detriment of an enforcement target, doing so vindicates reliance interests of the targets of prior adjudications who settled on the assumption that their competitors would receive the same treatment. To be sure, one might draw a distinction between (1) guidance on how the agency should select enforcement targets and what settlement terms it should offer them and (2) guidance on how liability is defined. My interviewees were speaking mainly about the former, but the concerns about competition and cooperation may carry over to the latter.

--(b) Andy notes: "It is true that a defendant in an adjudication would be able to argue that the [interpretive] rule is not binding and would be able to present reasons why a rule should not apply in its particular circumstances, but that is not sufficient protection. Proceedings before an ALJ are expensive and burdensome, and a defendant should not be required to appeal an ALJ loss, which could cause serious commercial and reputational harm, to higher agency review to avoid the binding effect of an interpretive rule." I certainly see Andy's point, and I think the current draft of paragraph 3 already acknowledges the point in principle, for it says any binding effect on selected agency employees must not "interfere with the fair opportunity called for in" paragraph 2, that is, a fair opportunity "to argue for modification, rescission, or waiver of the interpretive rule." The more costly and risky it is for a regulated party to reach the level of the agency at which departure from guidance is authorized, the stronger the argument that the agency has failed to provide the required "fair opportunity." What I understand Andy to be advocating is a per se rule that, in enforcement adjudication, the cost of going over the first-instance adjudicator's head is always so high that there cannot be a "fair opportunity" to contest

the guidance. I'm sure that is in fact true in many instances, but I am not sure ACUS can conclude it is true in all instances, considering the breadth and variation of agency internal structures and processes. Indeed, the OMB Good Guidance Practices -- which of course apply well beyond ALJ enforcement adjudications just as the present draft recommendation does -- contemplate that an official above the first-instance decisionmaker will typically be involved whenever there is a departure from guidance. See OMB GGP's, § II(1)(b), 72 Fed. Reg. 3432, 3440 (2007) ("Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence"). Perhaps, rather than changing the recommendation text, the Committee could add language to the preamble suggesting the kinds of process costs and risks that, if they rise too high, would negate the "fair opportunity" that paragraph 2 demands?

--(c) Andy formulates his proposal as covering all adjudications. The scope may present some difficulties because, in addition to the ALJ-governed formal adjudications that arise in Andy's examples, it would seem also to encompass informal adjudications -- a large and indefinite residual category of agency activities, some of which may be numerous and low-level, increasing the agency's interest in some sort of managerial control. If the Committee adopts the proposal, it should perhaps be revised to make the scope more definite. One possibility is to cover formal adjudications plus what Recommendation 2016-4 calls "Type B" adjudications, i.e., those with "legally required evidentiary hearings" even if not governed by APA §§ 554, 556-57.