AGENCY GUIDANCE THROUGH INTERPRETIVE RULES:

RESEARCH AND ANALYSIS

Blake Emerson[*] and Ronald M. Levin[†]

EXECUTIVE SUMMARY

Recommendation 2017-5 urges agencies to consider inviting public input before or after they issue policy statements, and also to take steps to ameliorate tendencies for policy statements to become coercive or "binding as a practical matter." This report explores the extent to which these recommendations should also apply to interpretive rules.

Part I explains the origins of Recommendation 2017-5, what it provides, and how deliberations on that recommendation gave rise to the present project.

Part II reports on the consultants' interviews with agency officials. These officials expressed a variety of opinions regarding what kinds of documents they consider "interpretive"; whether and how they differentiate between interpretive rules and policy statements; how interpretive rules are drafted, including any opportunities for public comment; and whether these officials thought that interpretive rules could in any sense be binding.

Part III analyzes case law on the Administrative Procedure Act rulemaking exemption for interpretive rules, as well as cases on judicial review. After critically examining assertions or intimations in these cases that interpretive rules may be binding, this part concludes that these authorities do not militate against a best-practices recommendation that would treat such rules as non-binding.

Part IV suggests that a Conference recommendation on extending the principles of Recommendation 2017-5 to interpretive rules might rest on the following premises: (1) Agencies should encourage public input on interpretive rules, both prior and subsequent to their promulgation, on terms similar to those for policy statements. (2) While agencies should not treat interpretive rules as binding, their decisions about what constitutes a fair opportunity to contest such rules may legitimately take account of considerations such as the agency's need for practicability, centralized control over staff, and protection of stability and reliance interests. (3) The expectation in Recommendation 2017-5 that a policy statement "should prominently state that it is not binding on members of the public" may be inapt as applied to some interpretive rules. (4) The provisions of Recommendation 2017-5 that encourage agencies to allow or invite members of the public to "argue for lawful approaches other than those put forward by a policy statement" would be an imperfect fit as applied to some interpretive rules but should be useful as applied to other ones.

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The purpose of this report is to explore the extent to which the best practices outlined in ACUS Recommendation 2017-5 should apply to interpretive rules. Recommendation 2017-5 covered "only policy statements, not interpretive rules."[1] However, the recommendation acknowledged that at least some of its recommendations "may also be helpful" with regard to interpretive rules.[2] Similarly, the underlying report by Nicholas Parrillo, which was couched as a study of agency "statements that are supposed to be nonbinding," focused on policy statements and left open the question of whether this "nonbinding" category might include interpretive rules.[3] The recommendation and report therefore raised a number of questions about agency use of interpretive rules, including whether the Conference should apply Recommendations 2017-5 in its entirety to interpretive rules, or, perhaps, recommend different or modified practices with regard to such rules. This report seeks to clarify some of those questions.

Policy statements and interpretive rules are collectively known as "guidance," and administrative lawyers often speak of them as a single category. During the past twenty-five years, other governmental and bar groups have issued pronouncements on the same general subject as Recommendation 2017-5, each using a single framework to apply to both policy guidance and interpretive guidance. These pronouncements have included a resolution by the American Bar Association;[4] the Food and Drug Administration's (FDA) good guidance practices policy;[5] the Final Bulletin on Good Guidance Practices issued by the Office of Management and Budget (OMB);[6] and a 2017 memorandum issued by the Department of Justice.[7] The FDA policy was actually ratified in relevant part by Congress.[8] The Administrative Conference does not necessarily have to reach conclusions that match those of the groups just mentioned, but these

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[1] ACUS Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734, 61,734 (Dec. 29, 2017) [cited herein simply as "Recommendation 2017-5"].

[2] *Id*.

[3] Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective, Final Report to the Administrative Conference of the United States (Dec. 1, 1017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf, 25. The report has subsequently been published in revised form in separate segments as (1) Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019), and (2) Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57 (2019). Citations in this report are to the ACUS version.

[4] ABA Recommendation 120C, 118-2 ANN. REP. A.B.A. 57 (Aug. 1993).

[5] 21 C.F.R. § 10.115 (2017) (FDA, Sept. 19, 2000).

[6] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (OMB, Jan. 25, 2007) [hereinafter OMB Bulletin]

[7] Prohibition on Improper Guidance Documents, (DOJ, Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download.

[8] *See* 21 U.S.C. § 371(h)(1)(B) (2012) ("guidance documents shall not be binding on the Secretary").

pronouncements do give impetus to the suggestion that the Conference should devote further study to this area in light of this developing body of professional opinion.[9]

I. BACKGROUND

A. Genesis of this Project

The roots of this project can be traced back to ACUS Recommendation 92-2, called "Agency Policy Statements."[10] In that recommendation the Conference expressed its concern about "situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address." Thus, in order "to prevent policy statements from being treated as binding as a practical matter," the Conference recommended that agencies should maintain "procedures [by which] affected persons [are] afforded a fair opportunity to challenge the legality or wisdom of [a policy statement] and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials." This recommendation was based on an extensive consultant's report by Professor Robert Anthony.[11] Interpretive rules were expressly excluded from the scope of the recommendation: the document defined policy statements to include "all substantive nonlegislative rules to the extent that they are *not* limited to interpreting existing law."[12]

Twenty-five years later, the Conference engaged Professor Nicholas Parrillo to revisit the same terrain and "update[]" Recommendation 92-2. He conducted very extensive interviewing and analysis and submitted a thorough research report. Taking the earlier recommendation as the basis for the scope of his research, Parrillo directed his questions to interviewees regarding policy statements; his interviews sometimes touched incidentally on interpretive rules, but he did not undertake to analyze them in depth. This research formed the foundation for the Assembly's adoption of Recommendation 2017-5 on December 14, 2107.

B. Recommendation 2017-5

The following is intended as a concise summary of Recommendation 2017-5, for the reader's convenience. (The appendix to this report contains the full text of the numbered recommendations in the 2017 document, "annotated" to reflect our suggestions as to whether and how each paragraph might be adapted to apply to interpretive rules.)

Recommendation 2017-5 began by explaining some of the ways in which policy statements "are of great value to agencies and the public alike." For example, "[c]ompared with adjudication

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[9] For details on the pronouncements cited in this paragraph, see Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 278-87 (2018) [hereinafter Levin, *Guidance Exemption*].

[10] ACUS Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,101 (July 8, 1992).

[11] Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

[12] ACUS Recommendation 92-2, *supra* note 10, at 30,104 (emphasis added).

or enforcement, policy statements can make agency decisionmaking faster and less costly, saving time and resources for the agency and the regulated public." They also "make agency decisionmaking more predictable and uniform and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law."

The recommendation then harked back to the main theme of Recommendation 92-2, recognizing that "policy statements are sometimes criticized for coercing members of the public as if they were legislative rules, notwithstanding their legally nonbinding status." However, it continued, the earlier document had defined the problem in terms of an agency's *intent* to use policy statements to bind the public." The 2017 document sought to "supplement[]" the earlier one by identifying "other reasons why members of the public may feel bound by what they perceive as coercive guidance," including factors "that are not of the making of an agency or its officials." For example:

> This is often the case if statutes or regulations (a) require a regulated party to obtain prior approval from an agency to obtain essential permissions or benefits; (b) subject a regulated party to repeated agency evaluation under a legal regime with which perfect compliance is practically unachievable, incentivizing the party to cultivate a reputation with the agency as a good-faith actor by following even non-binding guidance; or (c) subject the regulated party to the possibility of enforcement proceedings that entail prohibitively high costs regardless of outcome, or can lead to sanctions so severe that the party will not risk forcing an adjudication of the accusation.

The recommendation also mentioned another kind of situation in which a non-regulated party might feel practically bound by a policy statement. For example "the policy statement promises to treat regulated parties less stringently than the statute or legislative rule requires, effectively freeing those parties to shift their behavior in a direction that harms beneficiaries." In this case, regardless of its legal effect, the policy statement may de facto deprive some beneficiaries of the statute or legislative rule of its benefits, thereby in a sense "coercing" them. Likewise, the recommendation continued, a policy statement may encourage regulated parties to take steps not required by the statute or legislative rule that impose costs on members of the public, thereby effectively "coercing" those members of the public to bear those costs.

Finally, the recommendation said, agencies sometimes have legitimate reasons for displaying a lack of flexibility even in the context of a legally non-binding policy statement. "For example, if one regulated firm argues for a different approach from that in a policy statement and the agency approves, this may prompt other firms to criticize the agency for not keeping a level playing field among competitors[and] may open the agency to accusations of favoritism."

Having acknowledged that pressures such as the foregoing "tend to give at least some policy statements a quasi-binding character in fact regardless of their legal status," the recommendation turned to constructive suggestions—"important steps that agency officials can take to mitigate these legislative-rule-like effects of policy statements." We will briefly summarize them.

The first two numbered paragraphs in the Recommendation essentially reaffirmed the principal message of Recommendation 92-2: "An agency should not use a policy statement to create a standard binding on the public" (¶ 1), and it should "afford members of the public a fair opportunity to argue for lawful approaches other than those put forward by a policy statement or for modification or rescission of the policy statement" (¶ 2).

Next, the recommendation provided in ¶ 3 that these admonitions did not mean that the prescribed "fair opportunity" would necessarily have to be available at every level of the agency decisionmaking structure:

> Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement. But the agency should ensure that this does not interfere with the fair opportunity called for in Recommendation 2. For example, a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement.

In ¶ 4, the recommendation stated that "[a] policy statement should prominently state that it is not binding on members of the public" and explain how a member of the public can resort to the "fair opportunity" envisioned in ¶ 2. The basic ideas in these paragraphs had also appeared in Recommendation 92-2, although phrased somewhat differently.[13]

In ¶ 5, the recommendation provided in part: "A policy statement 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 Recommendation 2." This sentence came almost verbatim from the OMB Good Guidance Practices Bulletin (except that the Bulletin applied it to all "significant guidance documents," not just policy statements).[14] In ¶ 6, the recommendation urged that employees of the agency should be trained not to characterize policy statements as binding on the public.

In ¶ 7 the recommendation set forth additional measures that agencies might take to promote flexibility, "subject to considerations of practicability and resource limitations." Among them was a suggestion that when an agency authorizes one entity to follow an approach other than the one spelled out in a policy statement, it should also make that option known to similarly situated entities. Another suggestion was that responsibility for responding to proposals for departures from policy statements should be assigned to officials whom the agency believes are likely to respond to them constructively. In addition, the paragraph suggested additional training of employees in the interest of augmenting agency flexibility, as well as obtaining feedback from

[13] Recommendation 92-2, ¶¶ II.A., III, *supra* note 10, at 30,104.

[14] *See* OMB Bulletin, *supra* note 6, at 3,440.

outside entities as to how well the agency is achieving flexibility. In ¶ 8, the recommendation offered additional prudential factors for agencies to consider in choosing whether to pursue the measures described in ¶ 7.

In ¶ 9 the recommendation proposed means by which agencies might solicit public participation from the public, "with or without a response," during the formulation of policy statements. It discussed factors that bear on whether to invite such participation, as well as methods the agency might use. In ¶ 10 the recommendation proposed similar factors to consider in regard to soliciting *post*-promulgation input. In ¶ 11 the recommendation suggested that agencies might decide whether to solicit public input on policy statements on a document-by-document basis. It cautioned that an overly categorical approach might give rise to an unfortunate situation in which policy statements that were subject to pre-adoption procedures for public participation might remain in draft for substantial periods of time.

Finally, ¶ 12 recommended that written policy statements that affect persons outside the agency should be promptly made available electronically, along with explanations about what reliance may be placed on them and how one may seek reconsideration or modification of them or propose alternatives to them.

C. Adoption of the Recommendation and Subsequent Events

As proposed to the Assembly by the Committee on Judicial Review and the Council, the draft document that would become Recommendation 2017-5 stated that "[t]his recommendation . . . covers only policy statements, not interpretive rules; nevertheless, many of the recommendations herein regarding flexible use of policy statements may also be helpful with respect to agencies' use of interpretive rules."

During deliberations by the Assembly on the draft recommendation, Senior Fellow Ronald Levin (one of the authors of this report) proposed amendments that would have the effect of expanding the scope of the recommendation to encompass interpretive rules also. He emphasized that other governmental bodies had adopted procedures or guidelines regarding the same general subject, each using only one framework to address all guidance – that is, both policy statements and interpretive rules.[15] He based his arguments on research that he had conducted for a then-pending (since published) article on the exemptions for interpretive rules and policy statements in the rulemaking section of the APA.[16]

A prominent concern expressed during the ensuing debate was that the proposed action would be premature because Parrillo's research had not been directed toward interpretive rules. The upshot was that, although the Assembly declined to adopt the amendments, it also adopted by consensus a "sense of the Conference" resolution to the effect that the Conference should

[15] *See supra* notes 4-8 and accompanying text.

[16] Levin, *Guidance Exemption*, *supra* note 9.

undertake a study of interpretive rules. In this light, and after making unrelated amendments, the Assembly adopted the draft resolution, which became Recommendation 2017-5.[17] Subsequently, Levin submitted a separate statement to accompany the recommendation, expressing the hope that the study contemplated by the Assembly's hortatory resolution would be pursued.[18]

These discussions led directly to the initiation of the present study. The Conference staff enlisted Levin and Professor Blake Emerson to serve as co-consultants for the study. Emerson has also conducted research on guidance.[19]

D. Interview and Research Process

To inform our conclusions about agency best practices on interpretive rules, we interviewed officials from eleven federal agencies. ACUS staff initially sent requests for interviews to officials at twenty-two agencies. The agencies contacted were chosen based on our sense of their prominence in the federal regulatory space and the interpretive rules case law, as well as on input from ACUS staff. The agencies ultimately interviewed were structurally and substantively diverse. Some were executive branch agencies; some were components of departments; others were independent. Their subject-matter jurisdiction covered a wide range of the administrative responsibilities of the federal government, including economic and social regulation as well as benefit provision. Most of the officials interviewed were attorneys serving in their agencies' office of general counsel, though some worked in adjudication or in program offices.

The interviews were semi-structured, probing agencies' procedures and practices regarding interpretive rules and other public-facing documents that do not go through the notice-and-comment rulemaking process. The conversations were not narrowly focused around those documents labeled as "interpretive rules." Rather, the interviewer first sought to get a broader picture of agencies' guidance practices. The goal was to learn what sorts of distinctions, if any, officials drew between documents they thought of as "interpretive" and other forms of guidance. Conversations covered a wide range of topics related to: the various categories of guidance documents the agencies use; the processes the agencies went through to draft interpretive rules and related documents; the role interpretive rules played in the agencies' rulemaking, adjudicatory, and enforcement activities; the functional importance of the distinction between "law" and "policy" at the level of guidance; and whether interpretive rules might use mandatory terms or have any binding effects.

In order to promote candor, the interviewer asked interviewees whether they were comfortable having their employing agency identified in the report. Though some officials agreed to such attributions, others preferred to remain anonymous. For the sake of consistency and to

[17] Minutes, 68th Plenary Sess. of the Admin. Conf. of the U.S., Dec. 14-15, 2017, at 3.

[18] Recommendation 2017-5, 82 Fed. Reg. at 61,737-38 (separate statement of Senior Fellow Ronald M. Levin).

[19] Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122 (forthcoming 2019).

preserve requested anonymity, this report does not provide the name of the interviewees or the interviewees' employing agencies. Instead, each agency interviewed has been assigned a number, and any comments from agency officials during these interviews are cited as "Agency [number]."

This report uses quotation marks to signify comments from agency personnel as reported in contemporaneous notes taken during each interview. Thus, such comments reflect our best effort to transcribe comments in the course of the interviews. We have used the quotation marks because we believe it is helpful to distinguish such close approximations of the interviewees' words from more general characterizations of the thrust of their remarks. Nevertheless, the reader should understand that some quotations may not be verbatim.

II. AGENCIES' INTERPRETIVE RULES PRACTICE

This part describes major themes and insights from the eleven agency interviews. It reports on the perceptions of our interviewees as they themselves expressed them. We regard these interviews as supplementing, not superseding, the extensive research that Professor Parrillo conducted in the preceding project. His work encompassed perspectives that ours did not—notably, industry and NGO views. We have drawn critically from both of these sources in developing our evaluative conclusions in Part IV.

Anonymous attribution prevents any detailed assessment of any particular agency's interpretive rules practice. Instead, this part begins with an overview of the diverse ways in which documents that agency officials described as "interpretive" are used in agency proceedings. It then surveys whether and how officials thought the distinction between "interpretive" documents and other forms of guidance mattered in practice. Next it considers how interpretive rules are drafted, including the role of various offices within the agency and any opportunities for public comment. Finally, this part reports on whether agency officials thought that interpretive rules could in any sense be binding.

Throughout, officials' views on interpretive rules are often presented in comparison to their understanding of guidance, in general, and policy statements, in particular. The term "interpretive rule" is used to describe both guidance documents that the agency explicitly labels as "interpretive rules" as well as guidance documents (or parts of guidance documents) that agency officials described as "interpretive" in nature during interviews. Some interviewees also used the term "guidance" in referring to their procedural rules, and we report that usage as well, although such rules do not always fit our own definition of guidance (i.e., some procedural rules are legislative rules).

A. The Uses of Interpretive Rules

Interpretive rules and other documents that officials describe as "interpretive" serve a wide variety of functions at different agencies. Several agencies use interpretive rules to address certain "narrow," "discrete," or "specific" legal issues concerning the meaning of a statute or rule the

agency administers.[20] Interviewees universally understood that interpretive rules could not create substantive legal rights and duties or amend legislative rules. Because of this categorical difference between rules that were "substantive" and those that were not, some officials did not make a sharp distinction between interpretive rules and internal procedural rules.[21] On their understanding, interpretive rules might be used to describe how internal administrative proceedings and decision-making would work. Nonetheless officials from several other agencies noted that interpretive rules could sometimes address issues with significant policy implications.[22]

Most agencies interviewed use interpretive rules in adjudication and enforcement processes.[23] Several agencies use interpretive rules to instruct adjudicatory officials about how the agency understands the legal requirements the adjudicators are to apply.[24] Other agencies use interpretive rules to guide officials' enforcement of statutory and regulatory requirements.[25] Interpretive rules might also be directed towards members of the public, providing clarity or announcing a change in the agency's position concerning the meaning of regulatory or statutory terms.[26] Interpretive documents in the enforcement context could also be used to establish "safe harbors" against enforcement.[27] At one agency, interpretive rules provide applicants with ways to comply with licensing requirements.[28]

Interpretive rules related to legislative rules in several different ways. One official distinguished interpretive rules from legislative rules on the grounds that an interpretive rule would not include any new regulatory text to be included in the Code of Federal Regulations, since it would not change any existing "determinative" requirements.[29] Some agencies would couple documents styled "interpretive rules" with legislative rules.[30] One agency attached interpretive rules as appendixes to legislative rules so that they "stay[] with" the regulation and attain greater "permanence" than other forms of guidance would.[31] Another agency similarly required that an interpretive rule "travel with" the underlying regulation."[32] At a third, "rulemakings combine rules that are legislative and those that are interpretive."[33] Interpretive rules sometimes served as a stepping stone or short-term placeholder for rulemaking. In cases where members of the public

[20] Agency 1; Agency 2; Agency 7; Agency 8; Agency 11.

[21] Agency 9; Agency 11.

[22] Agency 2; Agency 5; Agency 8.

[23] Agency 1; Agency 2; Agency 3; Agency 5; Agency 6; Agency 7; Agency 8; Agency 9; Agency 10; Agency 11.

[24] Agency 1; Agency 2; Agency 3; Agency 4; Agency 5; Agency 8; Agency 9.

[25] Agency 1; Agency 3; Agency 8;

[26] Agency 1; Agency 2; Agency 4; Agency 6; Agency 7; Agency 8; Agency 9; Agency 11;.

[27] Agency 10.

[28] Agency 4.

[29] Agency 8.

[30] Agency 1; Agency 4; Agency 10.

[31] Agency 1.

[32] Agency 4.

[33] Agency 10.

urgently requested clarification on a matter and there was insufficient time to issue a legislative rule, an interpretive rule might be put out in the interim.[34] Several agency officials observed that one of the advantages of interpretive rules, like policy statements, was that they could be issued more quickly and with less formal process that legislative rules.[35] This permitted regulatory flexibility and quick responses to urgent questions. Interpretive rules could also be used to "start a conversation" with the courts and legislators about the substance of the law, providing suggestions for how the laws could be constructed or amended in the future.[36]

B. The Meaning of Interpretive Rules

Agency officials held different views about whether "interpretive rules" were meaningfully distinct from "general statements of policy" or other forms of guidance. Officials from several agencies reported that interpretive rules have relatively higher stature than other forms of guidance documents, either in terms of their authority for agency personnel or the specificity of their terms.[37] This conception of interpretive rules appeared unrelated to the regulatory powers at the agency's disposal. For one agency, interpretive rules sit at the apex of their hierarchy of internal law, serving a role that is fundamentally distinct form other forms of guidance.[38] At this agency interpretive rules could set "mandates" for agency personnel or determine aspects of the agency's adjudicatory procedure, whereas policy statements and other forms of guidance provided more detailed, subsidiary information on the terms of the interpretive rule.[39] Another agency with adjudicatory and rulemaking powers treats interpretive "rulings" as the most important category of guidance document.[40] At this agency, operational manuals and other policy statements were categorically less authoritative than these interpretive rules in shaping officials' conduct.[41] By contrast, officials at another agency with varying powers across subject matters did not view interpretive rules and policy statements as categorically distinct.[42] Instead, these officials viewed the distinction between the two as "more a function of timing and history."[43] As the judicial case law on guidance has

[34] Agency 5; Agency 11. We note parenthetically that, abstractly speaking, an option for agencies in this situation may be to issue an interim rule. *See generally* ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Aug. 18, 1995). However, the cited comments in the interviews concerned situations in which that possible option was not pursued.

[35] Agency 3; Agency 5; Agency 8.

[36] Agency 1.

[37] Agency 1; Agency 4; Agency 5.

[38] Agency 9

[39] Agency 9.

[40] Agency 5.

[41] Agency 5.

[42] Agency 1.

[43] Agency 1.

evolved, the perceived benefits of issuing a document that is labeled "interpretive" would increase or diminish, and agencies would often respond to these incentives.[44]

Officials expressed a wide variety of views on the distinction between "law" and "policy," which usually but not always tracked whether they differentiated interpretive rules from policy statements. Some officials did not draw a bright line between interpretive rules and policy statements in part because they did not believe that the distinction between "law" and "policy" was meaningful at the level of guidance.[45] But one official did not believe that questions of law and policy could be separated even though interpretive rules played a categorically more authoritative role in his agency's hierarchy of internal law than policy statements.[46] This official observed that all guidance documents generally consist of some "policy determination . . . [B]ut all there is for us effectively is to interpret what we are given as law from the people who make the law. . . . I can't think of an instance where there's a policy issue that isn't a matter of interpretation, or the converse."[47]

Officials from a majority of agencies interviewed thought questions of law and policy were meaningfully different.[48] But how officials understood the difference between the two varies. One agency that drew hierarchical distinctions between interpretive rules and other guidance treated "questions of law" as concerning more serious value choices.[49] A "question of policy," on the other hand, was an "operational" or clerical matter, such as how to fill out forms or interact with the agency.[50] Another agency official treated a question of policy as one that involved "agency priorities" and "efficiency," addressing "confusion in the field," or causing "impact to the public" or that provided "ways to comply with a legal standard."[51] Questions of law, on the other hand, were solely concerned with the proper construction of a statute or regulation.[52] An official at a different agency similarly thought that interpretive rules address the question, "what is the strongest meaning of the statute?"[53] Policy statements, on the other hand, made "more of a process determination," in which "we recommend you do something in a particular way."[54] An official at another agency likewise thought there was a clear difference between "what a statute means," which was interpretation, and "how we're going to implement it,"[55] which was policy. These policy questions would tend to involve more technical issues about the feasibility of compliance

[44] Agency 1; Agency 8; Agency 10.

[45] Agency 1; Agency 10.

[46] Agency 9.

[47] Agency 9.

[48] Agency 2; Agency 3; Agency 5; Agency 7; Agency 8; Agency 11.

[49] Agency 5.

[50] Agency 5.

[51] Agency 3.

[52] Agency 3.

[53] Agency 11.

[54] Agency 11.

[55] Agency 2.

alternatives.[56] Another official understood interpretive rules to set more "specific rules," whereas policy statements provide more general information about good practices at the "1000 foot level" or "10,000 foot level."[57]

Officials from several agencies recognized that questions of law and questions of policy were distinct, but nonetheless thought they overlapped significantly at the level of guidance.[58] Officials from two agencies noted that law and policy were often "intertwined" in guidance documents.[59] Officials from two other agencies conceptualized the relationship between law and policy in terms of two possibilities.[60] First, there are cases in which officials at the agency conclude that a provision of the statute or regulation has one clear meaning based on standard techniques of legal interpretation, such as analysis of text, structure, and legislative history. This would be a pure question of law that agency officials would classify as interpretive. In that case, the interpretive rule merely "crystallize[s]" the statute or regulation.[61] Second, there are cases where officials conclude, based on these same sources, that the statute or regulation could equally well mean two or more things. In that case, the interpretation of the statute or regulation would raise matters of policy as well as issues of legal interpretation. The agency might then weigh any number of practical considerations in determining which interpretation to endorse in guidance, and would likely benefit from public input on the topic.[62] One of the two officials who conceptualized the relationship between law and policy this way used the *Chevron* framework to explain the difference: some matters dealt with in an interpretive rule are purely legal, because the meaning statute of regulation or regulation is clear; others involve both interpretation and policy, because the statute or regulation is ambiguous.[63] At several agencies, the same document might include both interpretive elements, in which the meanings of particular statutory or regulatory terms were delineated, and policy elements, which would set out methods of enforcement for agency personnel or methods of compliance for regulated parties.[64]

Several interviewees distinguished interpretive rules and policy statements by whether they were action-oriented or not. Whereas an interpretive rule would say what the agency takes a law or regulation to mean or require, a policy statement would instruct an official or private person about what they should do.[65] According to one official "interpretive documents are how we lay out our view of the law or regulation we administer," whereas policy documents "have this additional layer of saying, this is how our enforcement discretion will be deployed. Policy

[56] Agency 2.

[57] Agency 4.

[58] Agency 7; Agency 8; Agency 9; Agency 10.

[59] Agency 3; Agency 11.

[60] Agency 7; Agency 8.

[61] Agency 8.

[62] Agency 7.

[63] Agency 8.

[64] Agency 3; Agency 7; Agency 8.

[65] Agency 2; Agency 6.

documents say we're exercising our enforcement discretion in a way because of our views."[66] An official from another agency similarly observed that "[i]nterpretive rules may be more suited to discrete legal issue. [A] general statement[] of policy is where you stake out a broad policy and then you carry through the legal ramifications . . . from that policy position."[67]

C. The Drafting of Interpretive Rules

There was significant variation in the internal procedures by which interpretive rules were drafted, corresponding to the diverse structures, sizes, and responsibilities of the agencies interviewed. As the preceding discussion indicates, not all agencies sharply distinguished between interpretive rules and policy statements in all cases; one and the same document might contain both interpretations and exercises of enforcement discretion.[68] For such agencies, the drafting of interpretive rules was not meaningfully different from the drafting of policy statements, and general guidance practices would apply to both. Other agencies, however, distinguished interpretive rules from policy statements, using the former either to address discrete legal issues or to set relatively authoritative rules within the agency's hierarchy of internal law.[69] It is impossible to generalize about how these differences in the use and meaning of interpretive rules impacted the way in which agencies drafted them. But this section lays out some of the prominent procedural features of the drafting of interpretive rules, some of which differ from the methods by which policy statements are drafted.

At some agencies, any guidance that set out a new legal interpretation or policy generally had to be approved by the office of the agency's appointed head(s).[70] Other guidance documents that merely explained an existing policy or interpretation—such as FAQs or operational manuals—could be formulated and issued without the involvement of political leadership.[71] At others, however, interpretive rules did not always require involvement or sign off from the agency's head(s).[72] One agency's internal procedures required that interpretive rules be issued with the approval of the agency head or her designee in the event the rule was a "significant guidance document" under the Office of Management and Budget's (OMB) terminology.[73] The issuing office, in consultation with the agency's office of legal counsel, would determine whether the document should be classified as "significant."[74] By contrast, officials from another agency reported that they would not classify a guidance document as "significant" unless OMB classified

[66] Agency 6.

[67] Agency 1.

[68] Agency 1; Agency 3; Agency 4; Agency 8.

[69] Agency 1; Agency 2; Agency 4; Agency 5; Agency 7; Agency 8; Agency 9; Agency 11.

[70] Agency 1; Agency 5; Agency 9.

[71] Agency 1 Agency 5; Agency 9.

[72] Agency 4; Agency 6; Agency 7; Agency 10; Agency 11.

[73] Agency 7.

[74] Agency 7.

it as such.[75] OMB would either learn about a guidance document through informal channels and review it to determine if it was "significant," or officials in the agency's Office of General Counsel (OGC) would send guidance documents that might qualify as "significant" to OMB for review.

Agencies' offices of general counsel, or their organizational equivalent, usually played a central role in drafting interpretive rules.[76] In administrative parlance, the legal staff would "hold" or "take the pen" if the guidance raised issues of legal interpretation.[77] OGC review of interpretive issues in guidance documents served a rule of law function within some agencies. For example, one official said that "[i]nternally within our legal office, we'll discover that our practice contradicts statute or regulation, and suggest an amendment. We see this area, we flag this area where there are legal risks, the policy office will always take the lead and OGC will make sure it meets APA requirements. We tend to be more involved where there is an interpretation, where it concerns legality."[78] An official from another agency observed that "OGC are the APA lawyers. If somebody came to us and said we want to do an interpretive rule that's general or broad, we would have a problem with that; we'd take a harder look at that."[79] At a third agency, OGC affirmatively educated program offices about the distinction between general statements of policy and interpretive rules.[80] OGC would give trainings instructing agency officials that policy statements set out "best practices," provide that "you should do x," or give examples of how a program "might be implemented."[81] Interpretive rules, by contrast, had to be "linguistically tied to a statutory or regulatory provision."[82] OGC would communicate the requirements of the OMB's Good Guidance Practices Bulletin to program components, including provisions relating to the use of mandatory language in interpretive rules.[83]

Most of the agencies interviewed would provide for public comment on at least some of their interpretive rules.[84] Some of the agencies provide this opportunity as a matter of routine.[85] Other agencies provide for public comment on "significant" interpretive rules, or interpretive rules that are "high profile and controversial," or some other subset of interpretive rules.[86] Some generally did not put out interpretive rules for public comment.[87] For those agencies that did sometimes provide for public comment, the form of input varied. At some agencies, public

[75] Agency 3.

[76] Agency 1; Agency 2; Agency 3; Agency 4; Agency 7; Agency 11.

[77] Agency 7; Agency 11.

[78] Agency 3.

[79] Agency 11.

[80] Agency 7.

[81] Agency 7.

[82] Agency 7.

[83] Agency 7.

[84] Agency 1; Agency 2; Agency 3; Agency 4; Agency 6; Agency 8; Agency 9; Agency 11.

[85] Agency 1; Agency 4; Agency 6; Agency 9.

[86] Agency 2; Agency 3; Agency 7; Agency 8; Agency 11.

[87] Agency 5; Agency 10.

comment for interpretive rules was functionally identical with the notice and comment process for legislative rulemaking.[88] At others, the agencies would solicit comment before the interpretive rule was issued and take it into account before finalizing it, but would not publish the same kind of response to comments as would appear in a regulatory preamble.[89] Another agency would issue the final interpretive rule and state in the document that members of the public were welcome to comment on the rule after the fact.[90]

Several agency officials were explicit about reasons why their agency seeks public comment on interpretive rules.[91] One agency put interpretive rules out for public comment, just like any other form of guidance, so that "the content would be more considered."[92] Providing opportunity for comment might earn an interpretive rule enhanced judicial deference.[93] An official from another agency agreed, stating that if the interpretive rule addresses "something high profile and controversial, it may be useful to have public comment. . . . . In case there might be judicial review, taking comments and responding to them . . . might help us build a better record for judicial review."[94] An official from a different agency observed that, through public comment on interpretive rules, "[w]e often get perspectives on what's not clear, ambiguities, practicality, transparency and buy-in. We definitely make changes in response to comments and occasionally we might even decide that we might need to redo something. We get very substantive comments."[95] An official from a third agency observed, "More public participation fosters a better document, fosters a better understanding of a document, helps us to understand tradeoffs. . . . Questions of law do sometimes require public input," especially where the statutory language includes "broad concepts. To the extent you have time and can do so, you can benefit from public participation."[96] An official from another agency also explained the agency's solicitation of comments in functional terms: "We seek public comment because we want to get support and comment from public. So we want to know, is there some unforeseen consequence we haven't thought about. We get a lot of supportive feedback. Even on those rules that we think are procedural and interpretive rules, we'll get feedback where we'll modify the rule slightly."[97] The perspective shared by these officials was that, at least in some cases, public comment could aid the

[88] Agency 4; Agency 9.

[89] Agency 1; Agency 2; Agency 3; Agency 8.

[90] Agency 7.

[91] Agency 1; Agency 3; Agency 4; Agency 6.

[92] Agency 1.

[93] Agency 1.

[94] Agency 8.

[95] Agency 4.

[96] Agency 6.

[97] Agency 9.

agency in reaching a factually well informed and legally defensible reading of statutory and regulatory text.

On the other hand, officials from several agencies expressed the view that public comment was not necessary or useful where the interpretive rule addressed a purely legal question.[98] "Are you really open to public comment on what the statute means?" one official asked, and then answered that rhetorical question: "Not really. . . . If we think the statute says 'x' then that's our decision; it's not a plebiscite."[99] At this agency, there had been internal disagreement over whether to provide for public comment on a relatively high profile interpretive rule. The view of the general counsel's office was that "this interpretive rule did not need to go out for comment, given that it was about the meaning of the law and not disputed questions of policy. But political leadership overruled [them] on that."[100] An official from another agency similarly observed that "for an interpretive rule, it's a legal call: what is the strongest meaning of the statute? OGC wouldn't go out and ask for a legal interpretation from the public. That's fully within the purview of our chief legal officer."[101] An official from a third agency observed that where the "best read" of the statute or regulation was clear to staff at the general counsel's office "public comments might not be appropriate there, because there is a legally correct answer."[102] For "policy matters," by contrast, "public comments would be a real positive."[103]

The common perspective among this group of officials was that the task of interpreting an agency's organic statute or its own regulations was the special province of the agency's legal officials. In cases where traditional tools of legal interpretation led to an unambiguous conclusion, therefore, public comment would not aid the legal staff in determining the statute's or the regulation's meaning. The text, structure, purpose, and history of the relevant norms were sufficient. Nonetheless, even though these agencies were doubtful that public comment would be useful in drafting interpretive rules, they did not categorically deny the public the opportunity to comment on that basis.

D. Binding Aspects of Interpretive Rules

Agencies had differing views on the extent to which interpretive rules could have internally binding effect. Interviews focused on the questions of whether interpretive rules could use binding language, whether the agency or its decisionmakers could depart from the terms of the interpretive rule, and whether private parties could seek departure from the terms of the interpretive rule in

[98] Agency 2; Agency 7; Agency 11.

[99] Agency 2.

[100] Agency 2.

[101] Agency 11.

[102] Agency 7.

[103] Agency 7.

proceedings before the agency. Officials reported a wide range of views and practice on these matters.

Officials interviewed recognized that interpretive rules could not create substantive legal rights or obligations. But an agency might nonetheless use mandatory language where it came to the conclusion that a particular provision in a legislative rule or a statute it administered had a specific meaning. For example, regulation R might say "Regulated parties shall 'q'," and "q" could reasonably mean "x" or "y." The agency might conclude that the best construction of "q" was "x." It would then issue an interpretive rule stating "'q' means 'x' for the purpose of R."[104] Such an interpretation would do more than "parrot" the language of the regulation, and instead "describe" its requirements in a way that purports to resolve statutory ambiguities.[105] In such a case, the interpretive rule setting forth the agency's construction of a statutory or regulatory norm would speak in the same authoritative register as the binding norm itself. As one official put it, "you want to speak in binding terms, because that's your interpretation of binding law."[106] A contrary approach could result in confusion for the agency and regulated parties. Officials at another agency with licensing powers, for example, reported disagreements within the agency over whether interpretive rules should use binding language.[107] Because regulated parties would often lift language directly out of interpretive rules in their applications for licenses, the use of precatory language in the interpretive rule could create serious problems in investigation and enforcement—the agency would have difficulty bringing an enforcement action against a party for failing to do something they merely stated they "should" do in their approved application.[108] Several agencies negotiated the issue of binding language by including a proviso in interpretive rules that they were not binding or did not create substantive rights, nothwithstanding that other terms of the interpretive rule might be phrased as requirements.[109]

Beyond the question of binding language, agencies took different approaches concerning the agency's discretion to deviate from the terms of interpretive rules, as well as the opportunity of private parties to contest them. Several agencies took the position that an interpretive rule could not preclude case-by-case deviation from the rule's terms.[110] According to one official in an agency with significant adjudicatory responsibilities, "We try pretty hard to walk the line in policy memos [which include interpretive elements] to preserve adjudicators' discretion. Certain things are options, [e.g.,] here are factors that would be helpful in determining eligibility. The memos apply to all personnel. Someone would have to consider the memorandum in adjudicating particular issues [and] consider other relevant factors that may be presented by a party."[111] An official from

[104] Example based on conversations with Agency 7 and Agency 8.

[105] Agency 7.

[106] Agency 7.

[107] Agency 4.

[108] Agency 4.

[109] Agency 3; Agency 4; Agency 7; Agency 8.

[110] Agency 3; Agency 6; Agency 8; Agency 10.

[111] Agency 3.

another agency that focused its energies on enforcement emphasized that there was "definitely an opportunity to contest" the position stated in an interpretive rule.[112] At this agency, decisions about whether or not private parties were in compliance would ultimately be fact-specific and based on dialogue with regulated parties, rather than conformity with standards set in interpretive rules.[113] An official from another agency affirmed that "if someone said, 'this is not the correct interpretation of the statute,' we would hear them out."[114] However, it was unclear to this official what such a dispute would look like in practice.

Other officials did, however, describe interpretive rules as binding in one sense or another. An official from one agency that issues interpretive rules only occasionally viewed such rules as "dispositive," in the sense that the agency would not depart from the interpretation so long as it remained in effect.[115] The agency would entertain private parties' legal objections to the interpretation or claims that "fresh evidence" rendered it inappropriate.[116] But the interpretive rule would have to be amended or rescinded before the agency would deviate from its terms. This was because agency attorneys "read our interpretive rule as being binding."[117] The official squared this position with the doctrine that interpretive rules lack "the force of law" on the grounds that "[w]e are only advising what the statute already says. It's the statute that gives this the force of law. It's not the interpretation where the binding power originates."[118] The point of interpretive rules, for this official, is to "address something definitive" where the legislative rulemaking process could not meet that demand in time.[119] Other interviewees, by contrast, spoke of binding effects in terms of the impact of the rule on staff. More specifically, an official from another agency reported that an interpretive rule could bind the division that issued it but could not bind the agency itself.[120] Even though an interpretation might provide a "safe harbor" from enforcement by staff within the agency, political leadership was not necessarily bound to adhere to such staff assurances.[121] Officials from another agency with vast adjudicatory responsibilities similarly reported that the agency mandated that frontline adjudicators conform their decisions to the positions stated in interpretive rules.[122] This level of binding effect was necessary to protect a "strong institutional interest in people being treated fairly and being treated equally, and getting benefits they are entitled to and desperately need."[123] Permitting adjudicatory departure from the rules would undermine these rule of law values and programmatic considerations. Beneficiaries did have a

[112] Agency 6.

[113] Agency 6.

[114] Agency 8.

[115] Agency 11.

[116] Agency 11.

[117] Agency 11.

[118] Agency 11.

[119] Agency 11.

[120] Agency 10.

[121] Agency 10.

[122] Agency 5.

[123] Agency 5.

right to mount challenges to interpretive rules at the appellate adjudication level, but for practical reasons such challenges were rarely pursued. Nonetheless, this agency held regular listening sessions with stakeholder groups, in which objections to interpretive rules could be raised.

III. THE LEGAL BACKDROP

Part of the background of this project is the treatment that administrative law gives to interpretive rules in various contexts. In this part we will briefly discuss the relevant doctrines. We do not mean to suggest that the Conference should undertake to pronounce on the scope of these legal principles. To the contrary, Recommendation 2017-5 focused on giving advice to agencies as to best practices, and we presume that the Conference will adhere to that focus in the present project. It would be difficult to reach a consensus on these issues in any event.

Nevertheless, legal norms often do shape administrative lawyers' thinking about best practices, and our experience from the interviews we conducted for this project bears out that truism. In the case of policy statements, Anthony's work on the case law regarding the APA rulemaking exemption was closely integrated with his recommendations for Conference action, and 92-2 did reflect those concerns. The question we will explore in this Part is whether the legal background on interpretive rules sheds comparable light on practice issues. We conclude that it does not.

The usual starting point for legal analysis of guidance is the APA, which mentions it in several provisions. The most important of these textual reference points is § 553(b)(A), which contains an exemption from notice-and-comment requirements for "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice."[124] The text of the Act does not expressly define those terms. To fill that gap, most authorities rely on the definitions offered in the *Attorney General's Manual on the Administrative Procedure Act*, the Justice Department's widely respected explication of the Act. The Manual defined substantive rules (today more often called *legislative* rules) as rules "issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission (SEC) pursuant to § 14 of the Securities Exchange Act of 1934. Such rules have the force and effect of law."[125] In contrast, "interpretative" rules were "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[126] General statements of policy were "statements issued by an

[124] Like most other authors, we use the term "interpretive" in place of the APA's word "interpretative." Procedural rules, also mentioned in § 553(b)(A), are outside the scope of this report.

[125] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) (citations omitted).

[126] *Id*. (citations omitted).

agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[127]

In *Chrysler Corp. v. Brown*,[128] the Supreme Court drew attention to the statement in the Manual that substantive rules "have the force and effect of law."[129] "In contrast," the Court continued, the Manual "suggests that interpretative rules and policy statements do not have the force and effect of law." That remark was written more than forty years ago, but the Supreme Court reaffirmed its thrust only a few years ago in *Perez v. Mortgage Bankers Ass'n,* [130] referring to "the longstanding recognition that interpretive rules do not have the force and effect of law."[131]

Notwithstanding this seemingly unequivocal premise, however, one finds language in a variety of doctrinal areas to the effect that interpretive rules may be binding after all. Given the emphasis in Recommendation 2017-5 on the proposition that policy statements are not binding, and our charge to consider whether the principles of the recommendation should be applied to interpretive rules, we will need to examine this case law critically.

These divergences in perspective may reflect, to some extent, semantic differences. Courts and commentators have used the term "binding" in varying ways.[132] The issue raised by the authorities quoted just above was whether or not a rule was *legally* binding. Recommendations 92-2 and 2017-5 expanded upon this conception (or at least one aspect of it) by asking whether a guidance document was or was not *practically* binding. In this context, the recommendations contemplated that a guidance document would be "binding" if an agency would not give fair consideration to an interested person's request that the agency should rescind or modify the document or at least treat it as inapplicable to a given dispute.[133] We use the term in the same sense here. However, the term "binding" can have a different meaning in, for example, the judicial review context. One purpose of this part of our report is to distinguish those meanings from the one with which the report is concerned.

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[127] *Id*.

[128] 441 U.S. 281 (1979).

[129] *Id*. at 302 n.31.

[130] 135 S. Ct. 1199 (2015).

[131] *Id*. at 1208.

[132] *See generally* Emerson, *supra* note 19, at 2130-32, 2142-56 (describing use of the term "binding" to mean either compelling official action, or establshing legal obligations or rights for private persons, or merely threatening governmental sanction in a way that shapes private behavior.)

[133] The recommendations also framed the issue by providing that "an agency rule is 'binding' when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency." Recommendation 92-2, *supra* note 10, at 30,104 & n.3; Recommendation 2017-5, ¶ 1. We take this usage to be equivalent to the concept explained in the above text.

A. Rulemaking Exemption

The postulate just mentioned – that guidance documents lack the force of law – logically implies that such documents should not be applied in a binding fashion. Insofar as policy statements are concerned, that premise pervades Recommendations 92-2 and 2017-5, as well as the case law construing and applying the rulemaking exemption in the APA.

For decades, however, case law construing the APA's interpretive rules exemption has turned on other inquiries. The most prominent test applying the interpretive rules exemption compares the substance of the rule's interpretation with the text of the provision (statute or regulation) that it interprets. To qualify for the exemption, the interpretation must be "derived from the [interpreted text] by a process reasonably described as interpretive,"[134] or, to use another formulation, "spells out a duty that is 'fairly encompassed' within the [statute or] regulation that the interpretation purports to construe."[135] Another test is that of *American Mining Congress v. MSHA*,[136] which said that a court could determine whether a purported interpretive rule should be deemed legislative by asking whether 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."[137]

A detailed review of these precedents in this report would serve no purpose, although it should be noted that scholars who have examined the case law on this subject have expressed strong criticisms of it.[138] Suffice it to say that the cases turn on conceptual criteria that do not seem to have much to offer in terms of suggesting norms that might shed light on the question of whether or how the Conference should apply the principles of Recommendation 2017-5 to interpretive rules.

More directly relevant here is what these cases do *not* say. As currently understood, the case law on the APA exemption for interpretive rules does not generally prohibit agencies from

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[134] Hoctor v. U.S. Dept. of Agric., 82 F.3d 165, 170 (7th Cir. 1996).

[135] Air Transp. Ass'n of Am. v. FAA, 291 F.3d 49, 55–56 (D.C. Cir. 2002); *see also* Catholic Health Initiatives v. Sebelius, 618 F.3d 490, 494 (D.C. Cir. 2010) ("The substance of the derived proposition must flow fairly from the substance of the existing document.").

[136] 995 F.2d 1106 (D.C. Cir. 1993).

[137] *Id*. at 1112.

[138] *See, e.g.*, Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 353, 357 (1991) (calling the case law "exceptionally elusive" and "maddeningly indeterminate"); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007) (contending that the debate over this exemption "conjure[s] doctrinal phantoms, circular analytics, and fundamental disagreement even about correct vocabulary"). For a recent, extensive critique of the case law applying the interpretive rules exemption, see Levin, *Guidance Exemption*, *supra* note 9, at 317-45.

treating those rules as binding. There is a serious argument that it should,[139] but the Administrative Conference is not going to resolve that issue in this project. For present purposes, the key question is whether the case law and scholarship on the exemption embodies norms or value judgments that could be applied to the best-practice context that ACUS does address. In other words, does that literature suggest reasons why, as a matter of sound practice, agencies *should* feel free to treat their interpretive rules in a more binding fashion than Recommendation 2017-5 advises with regard to their policy statements?

The judicial and academic literature on the APA rulemaking exemption contains surprisingly little exploration of that issue. Some cases do state that nonlegislative rules – including interpretive rules – are not binding.[140] That is just what one might expect in light of the statement in *Mortgage Bankers* that interpretive rules do not have the force of law. Elsewhere, however, judges and scholars have occasionally offered affirmative justifications for the notion that an interpretive rule should be immune from being contested within an agency. We now turn to an examination of their reasoning.

First, Professor Anthony, the Conference's consultant for Recommendation 92-2, argued that an agency should feel free to apply an interpretive rule in a rigid, binding way because "the agency (at least in theory) is simply applying existing law and not creating new law."[141] However, the premise of that claim is not convincing. Kenneth Culp Davis forcefully challenged it many years ago:

> The conception that interpretative rules do not embody new law but merely interpret previous law seldom accords with the reality. Here as elsewhere the process of interpretation necessarily involves the creation of new law. . . . The theoretical distinction between legislative and interpretative rules is imperfect. . . . But the case law and the practices of the agencies can be gradually molded to get rid of the misconception that what is theoretically interpretation never involves the creation of new law.[142]

In any event, whatever one's jurisprudential views about statutory interpretation, it is a fact of life that lawyers frequently disagree about what a statute or regulation means. Consequently, input from interested persons as to what interpretation the agency should adopt is hardly extraneous. As Levin wrote in his recent article:

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[139] Levin, *Guidance Exemption*, *supra* note 9, at 346-53.

[140] *See, e.g.*, Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710 (D.C. Cir. 2015); Vietnam Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 537–38 (D.C. Cir. 1988) ("[T]he agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest. . . . In such a case, any affected private party is free to appeal to the agency for such a divergent result."); Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) ("an interpretative rule does not have the force of law and is not binding on anyone").

[141] Anthony, *supra* note 11, at 1375-76.

[142] Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 933-34 (1948).

> A choice among competing interpretations is still a choice, even if circumscribed, and the public has an interest in weighing in on those choices, which are often hotly contested. [T]he notion that the interpretation needs no formalities because it can be conceived as 'merely spelling out what is in some sense latent in a statute or regulation' begs the question, because the public has an interest in being heard on the issue of what the latent messages may be.[143]

Moreover, on a more practical level, "[t]he discipline of having to respond to the perspectives of interested private parties is bound to enhance the quality of the legal interpretations that agencies adopt. Further, an agency's willingness to listen and respond to parties' arguments should bolster the legitimacy of its ultimate stances."[144]

Second, it has been argued that an interpretive rule must be binding because it explicates the meaning of a statute or regulation that is itself binding. This seems to be the premise of the Seventh Circuit's remark in *Metropolitan School District v. Davila*: "All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent. Could an agency announce, 'We think Congress intended this when it enacted this statute, but you don't have to do it.'?"[145]

It is possible that the only point that the court in *Davila* intended to make was that an interpretive rule may legitimately use mandatory language without losing its identity as a nonlegislative rule that is exempt from notice-and-comment obligations. That proposition is well accepted among administrative lawyers, as can be discerned from the OMB Good Guidance Practices Bulletin as well as Recommendation 2017-5 itself.[146] Indeed, an alleged violation of the APA rulemaking requirements was the only issue before the court, and the court did not discuss the agency's actual practices in administering the rule. If, however, the court meant to say that an agency may, on the basis of this theory, refuse to allow a person to raise questions about the correctness of the agency's interpretation, its claim did not follow from its premise. The very purpose of an interpretive rule, at least in most instances, is to specify which of various conceivable readings of the interpreted text the agency considers correct. Normally, the agency will have promulgated the rule precisely because there has been doubt about that issue. It begs the question to suggest that if the statute or regulation is binding, the interpretation that the agency happens to have chosen must also be binding.

Third, the Sixth Circuit suggested in *Dismas Charities, Inc. v. U.S. Department of Justice*[147] that notice and comment on interpretive rules is not required because it simply would not be illuminating: "The interpretative rule exception reflects the idea that public input will not help the agency make the legal determination of what the law already is."[148] That explanation, however, is

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[143] Levin, *Guidance Exemption*, *supra* note 9, at 334-35.

[144] *Id*. at 329.

[145] Metro. School Dist. v. Davila, 969 F.2d 485, 493 (7th Cir. 1992).

[146] *See supra* note 14 and accompanying text.

[147] 401 F.3d 666 (6th Cir. 2005).

[148] *Id.* at 679–80.

belied by basic norms of our legal system. On an everyday basis, courts and agencies resolve interpretive questions (like other questions) after considering competing arguments from interested persons.

In sum, an examination of judicial and scholarly sources discussing the APA exemption for interpretive rules suggests that their policy arguments for allowing agencies to treat such rules in a more binding fashion than they would treat policy statements are sparse and misdirected, or at best debatable. This conclusion may or may not indicate that the case law itself should be reappraised. As we emphasized above, the challenge for ACUS will be one of defining best practices, not resolving disputed legal questions. At least, however, the foregoing analysis appears to indicate that these authorities say little or nothing to *detract* from proposals to expand the principles of Recommendation 2017-5 to reach interpretive rules.

B. Judicial Deference

Another context in which interpretive rules have been characterized as "binding" is in certain discussions of judicial deference. As we will explain, that characterization arises only in the context of a subclass of interpretive rules, is controversial on its own terms, and soon may be a thing of the past. However, even if one takes that description at face value, it does not necessarily militate against an extension of the principles of Recommendation 2017-5 to interpretive rules. In fact, in some ways, deference doctrine may actually militate in favor of such an extension.

We will begin with some basics. Courts do not generally regard interpretive rules that construe statutes as 'binding.' Since 2000[149] it has been clear that courts should review such rules using the review standard of *Skidmore v Swift & Co.*[150] Under that test, the agency's interpretation is "entitled to respect," but its weight depends on its "power to persuade," because it is "not controlling on the courts by reason of [its] authority."[151]

The doctrine regarding the deference that courts owe to interpretive rules that construe regulations is more contested. The applicable review standard, at least at present, is that of *Auer v. Robbins*[152] (previously called the *Seminole Rock* test[153]). Under *Auer*, the agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Justice Scalia contended a few years ago that this test *does* render interpretive

[149] *See* Christensen v. Harris County, 529 U.S. 576 (2000).

[150] 323 U.S. 134 (1944).

[151] *Id*. at 140. There have been exceptions, such as Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (applying *Chevron* to review of an interpretive rule), but they are very rare.

[152] Auer v. Robbins, 519 U.S. 452, 461 (1997).

[153] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

rules "binding." Concurring in the result in *Perez v. Mortgage Bankers Ass'n*,[154] he argued as follows:

> By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.[155]

Justice Thomas's concurring opinion in that case also endorsed the view that *Auer* deference effectively makes agency interpretations of their own rules binding."[156]

However, Justice Sotomayor's majority opinion in *Mortgage Bankers* expressly disagreed with Justices Scalia and Thomas on this issue:

> MBA alternatively suggests that interpretive rules have the force of law because an agency's interpretation of its own regulations may be entitled to deference under *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* 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.[157]

The life span of this disagreement may turn out to be fleeting, because in December 2018 the Supreme Court granted certiorari in *Kisor v. Wilkie*[158] for the precise purpose of considering whether to overrule *Auer*. If the Court does decide to overrule that case, one cannot be sure what review standard would take the place of *Auer* deference, but precedent suggests that the Court will decide that judicial review of agencies' interpretations of their own regulations should henceforth be governed by *Skidmore* instead.[159] In that event, presumably, the above analysis of judicial deference to agency interpretations of statutes would apply in this context as well.

These disputed questions about deference doctrine obviously do not lend themselves to being resolved in a recommendation of the Administrative Conference. In our view, however, the Conference does not need to resolve them in order to decide whether the principles of Recommendation 2017-5 should apply to interpretive rules. Even if one believes that a reviewing court is "bound" by an interpretive rule under deference principles, that assessment does not have to mean that the agency need not allow affected persons to contest a rule at the administrative level, as a matter of good practice. The former simply doesn't foreclose the latter. The principles

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[154] 135 S. Ct. 1199 (2015).

[155] *Id*. at 1211 (Scalia, J., concurring in the judgment).

[156] *Id*. at 1219-20, 1221 (Thomas, J., concurring in the judgment).

[157] *Id*. at 1208 n.4 (opinion of the Court).

[158] 139 S. Ct. 657 (2018).

[159] Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012).

of the recommendation are behavioral norms. The agency can observe them (or not) without regard to what level of deference the courts would later accord to the rule during judicial review.

Indeed, in several respects the prospect of deference at the judicial level may *strengthen* the argument that ACUS should encourage agencies to allow dialogue about their interpretive rules at the administrative level. From the point of view of a member of the public, the opportunity to present a view in the agency forum may be critical, because whatever choice the agency makes will stand as long as it meets the level of reasonableness that the applicable standard of judicial review requires. Even *Skidmore* review is more deferential than review in which the court reviews de novo.[160] Of course, this argument will apply all the more strongly if *Auer* remains in force.

At the same time, deference doctrine suggests a few reasons why agencies themselves may benefit if they allow affected persons a "fair opportunity" to take issue with their interpretive rules. In the first place, when *Skidmore* does apply to review of an interpretive rule, the weight of the agency's judgment is supposed to depend in part on "the thoroughness evident in its consideration."[161] Thus, the very fact that the agency did engage in a dialogue with interested persons at the administrative level may ultimately give the agency a better chance of prevailing when its interpretation is tested on appeal. Secondly, dialogue about an interpretive rule at the administrative level can encourage the agency to build a record that it can then use in the event of judicial review. In other words, the agency may be induced to construct a body of reasoning—including responses to the challenger's contentions—at a time when responsible officials are in the best position to do so. The alternative for the agency is to formulate and present responses to those contentions for the first time at the judicial review stage. At that point, the court might well discount the government's arguments as "post hoc rationalizations."

C. Access to Judicial Review

A final doctrinal area to consider is reviewability. One might initially think that questions regarding access to judicial review of agency action have nothing to do with the intra-agency concerns of Recommendation 2017-5. However, a considerable body of case law, particularly emanating from the D.C. Circuit, rests on the premise that the issue of whether a purported policy statement or interpretive rule is susceptible of preenforcement review is largely coextensive with the issue of whether the document has such binding or coercive force as to fall outside the APA rulemaking exemption.[162] As we said above, settling such doctrinal disputes is not the purpose of this project or this report. Nevertheless, it is a fact that some administrative lawyers, inside and outside government, are inclined to believe that these two areas of doctrine do coincide;[163] this fact

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[160] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017) (presenting empirical data suggesting that agencies win more often when *Skidmore* applies than when courts review de novo).

[161] *Skidmore*, 323 U.S. at 140.

[162] *See infra* notes 172-173 and accompanying text (citing cases).

[163] One of our interviewees expressed this view. Agency 8.

suggests that we cannot evaluate the possible relevance of legal doctrine to our subject without paying at least some attention to reviewability principles. The conclusion that we draw from those principles is that, *especially* where interpretive rules do not qualify for preenforcement review, an opportunity to challenge the rule before the agency may provide a crucial safeguard.

Until about twenty years ago, questions about the reviewability of guidance documents were addressed with a focus on the doctrine of ripeness. The case law was plentiful and not entirely consistent,[164] but we will not linger on it. Ripeness is basically a function of whether the issue raised in the appeal is fit for judicial review and whether the person seeking judicial review would experience hardship if review were withheld.[165] Even on their face, those criteria do not seem to have much to say about the "practical binding effect" problems underlying Recommendation 2017-5. Meanwhile, the APA's requirement of "final agency action"[166] was applied "in a pragmatic way" during this period.[167]

During the past two decades, however, the issue of whether an interpretive rule or policy statement constitutes "final agency action" has become more prominent and sometimes applied more restrictively. The dominant Supreme Court case is *Bennett v. Spear*,[168] which articulates a two-prong test for deciding whether a rule is "final agency action": "First, the action must mark the 'consummation' of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[169] Application of the first of these prongs is generally (with a few exceptions[170]) quite straightforward. In this context, it basically means that one may not seek review of a rule, including a guidance document, while the agency is still in the process of developing the rule.[171]

In contrast, the second prong is ambiguous and has been the subject of much debate and disagreement. The ambiguity goes to whether the effects to which the test refers must be legally operative, or can extend to practical consequences that have a profound effect on the party who has sought judicial review. Taking the former view, the D.C. Circuit has handed down a number of decisions that hold that a document had no legal effect and was thus a bona fide guidance for APA purposes, so it was also unreviewable; and, conversely, if the court finds that a purported guidance was actually a legislative rule for purposes of finality, it must also be invalid if not adopted with notice and comment procedure. Many, perhaps most, of these decisions have

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[164] 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.15 (6th ed. 2018).

[165] Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

[166] 5 U.S.C. § 704 (2012).

[167] *Abbott Laboratories*, 387 U.S. at 149-52.

[168] 520 U.S. 154 (1997).

[169] *Id*. at 177-78 (citations omitted).

[170] *See* Soundboard Ass'n v. FTC, 888 F.3d 1261 (D.C. Cir. 2018) (holding by 2-1 vote that staff opinion letter was unreviewable because Commission had not approved it).

[171] *Cf. In re* Murray Energy Corp., 788 F.3d 330, 334-35 (D.C. Cir. 2015) (so holding, with regard to a proposed legislative rule).

involved policy statements,[172] but the same principle has also found its way into the case law on review of interpretive rules.[173]

It cannot be said that the law has reached equilibrium on this topic. As Professor William Funk documented in a recent article, a host of pre-*Bennett* opinions had taken a more flexible and pragmatic approach to defining finality.[174] Indeed, he notes, the action that the Court found to be final in *Bennett* itself "did not determine any rights or obligations, and any legal consequences were significantly attenuated."[175] The Supreme Court's very recent decision in *United States Army Corps of Engineers v. Hawkes*[176] resulted in fragmented opinions by various Justices, thus offering further evidence of doctrinal instability.[177] Moreover, even the D.C. Circuit has manifested some lack of resolve on this issue. In *National Mining Association v. McCarthy*,[178] the court remarked that interpretive rules are "sometimes" reviewable on a pre-enforcement basis,[179] although a later opinion by the court seemed to recede from this concession.[180] Meanwhile, there are also significant criticisms of the formalist approach in the scholarly literature.[181]

As already stated, insofar as the pragmatic approach to finality is followed, it would seem to undermine any link between finality and the concerns of Recommendation 2017-5. For the sake of discussion, however, we may assume for the moment that the formalist reading of *Bennett* is essentially correct. Even on that premise, the logic of the formalist approach does not necessarily

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[172] *See*, *e.g.*, Ctr. for Auto Safety v. NHTSA, 758 F.3d 243 (D.C. Cir. 2014); NRDC v. EPA, 643 F.3d 311, 319-20 (D.C. Cir. 2011); Nat'l Home Builders Ass'n v. Norton, 415 F.3d 8, 13-16 (D.C. Cir. 2005).

[173] *See, e.g.,* Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 716 (D.C. Cir. 2015) ("In this case, it really does not matter whether the [challenged guidance] is viewed as a policy statement or an interpretive rule."); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014) (dictum) (discussed *infra* note 179 and accompanying text); Am. Tort Reform Ass'n v. OSHA, 738 F.3d 387, 395 (D.C. Cir. 2013); Sec. Indus. & Fin. Mkts. Ass'n v. CFTC, 67 F. Supp. 3d 373, 424-25 (D.D.C. 2014).

[174] William Funk, *Final Agency Action After* Hawkes, 11 N.Y.U. J.L. & LIBERTY 285, 294-99 (2017).

[175] I*d*. at 301.

[176] 136 S. Ct. 1807 (2016).

[177] In *Hawkes* the Court held that a "jurisdictional determination" (JD) by the Army Corps of Engineers was a final agency action. One concurring Justice relied heavily on the existence of an interagency memorandum of agreement that, in her view, established that the JD was "binding on the Government." *Id*. at 1817 (Kagan, J., concurring). Another concurrence, in contrast, found that the JD was final without regard to the memorandum. *Id*. at 1817-18 (Ginsburg, concurring in part and concurring in the judgment). The Chief Justice's opinion for the majority appeared to straddle these two positions, highlighting the memorandum but also emphasizing that pragmatic factors supported the Court's result. *Id*. at 1814-15 (opinion of the Court).

[178] 758 F.3d 243 (D.C. Cir. 2014).

[179] *Id*. at 251.

[180] Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710 (D.C. Cir. 2015).

[181] *See, e.g.*, Funk, *supra* note 174, at 305-07; Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371 (2008); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 379-80 (2011); Peter L. Strauss, *Domesticating Guidance*, ENVTL. L. (forthcoming), at 15-17, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3321446_code48184.pdf?abstractid=3321446&mirid=1; Recent Case, 132 HARV. L. REV. 1345 (2019).

answer the questions that our project raises. In *Center for Auto Safety v. NHTSA*,[182] the D.C. Circuit found that a policy statement was not reviewable immediately because it did not have formal legal effect, even though it did have practical binding effect.[183] Yet practical binding effect is the very issue with which Recommendations 92-2 and 2017-5 are concerned. What *Center for Auto Safety* illustrates, then, is that a policy statement may be unreviewable for judicial review purposes but may also fall squarely within the purview of Recommendation 2017-5. It seems reasonable to think, therefore, that an interpretive rule might similarly be unreviewable for finality purposes but could also become the subject of a Conference recommendation growing out of the present project.

To put the matter another way, finality case law may or may not, in various circumstances, determine whether a given guidance document must be reclassified as a legislative rule and become subject to notice and comment; but the essential goal of Conference recommendations in this area is to address the manner in which agencies should draft and implement documents that assumedly are *exempt* from APA rulemaking requirements.

Indeed, insofar as an interpretive rule is not a final agency action that could readily be brought before the courts, that circumstance may *strengthen* challengers' interest in obtaining consideration of their positions at the agency level. Our point here is similar to the one we made at the end of the preceding section about the prospect of judicial deference to the substance of an interpretive rule.

IV. INTERPRETIVE RULES AND THE PRINCIPLES OF RECOMMENDATION 2017-5

This part of our report seeks to frame issues that the Conference might address in a potential recommendation on interpretive rules. We summarize several factors that militate in favor of extending many of the principles of Recommendation 2017-5 to such rules. We also discuss various arguable differences between interpretive rules and policy statements—differences that might warrant the Conference's adopting recommendations that would differentiate between these two forms of guidance. We draw here from the interview data summarized in Part II, as well as from Professor Parrillo's report, our own research, and discussions that occurred during the Conference's earlier consideration of Recommendation 2017-5.

A. Public Participation in the Drafting or Reconsideration of Interpretive Rules

1. Pre-adoption public participation

In ¶ 9, Recommendation 2017-5 suggests factors for agencies to take into account as they decide whether and how to solicit public input in the course of promulgating or amending policy

[182] 452 F.3d 798 (D.C. Cir. 2006).

[183] *See id.* at 811. To similar effect, see Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 645 (6th Cir. 2004).

statements. In our view, essentially the same principles should apply in the interpretive rules context.

One theme that emerged from the interviews is that a number of agencies appear to treat interpretive rules and policy statements equally in practices aimed at eliciting public participation in their formulation and implementation of these documents. As Parrillo reported, this approach is set forth in written practice rules at some agencies, including the FDA and USDA.[184] The Conference took note of these policies in its recommendation.[185]

In the interviews, as we discussed in Part II.C., agency officials expressed a range of opinions about the inherent value of such input, including input on legal issues. Some saw virtues in the practice. They said, for example, that public input can help them spot ambiguities, anticipate practical consequences of an interpretation, and build public support for the interpretive rule. Moreover, the discipline of taking comments and responding to them (if the agency chooses to respond) can help to build a record for judicial review. On the other hand, some of the interviewees expressed a contrasting viewpoint, suggesting that they have little if any interest in hearing from the public about their interpretive rules. The thrust of their arguments was that they themselves know their statutes and can identify a legally correct answer; issuance of guidance is "not a plebiscite."[186]

These latter comments are reminiscent of the Sixth Circuit opinion discussed in Part III.A.,[187] but we doubt that in the last analysis they will prove palatable to the Conference as a whole. Longstanding ACUS positions suggest that these reservations about the potential value of public input in the development of interpretive rules are too broadly stated. Although the APA does exempt both interpretive rules and policy statements from notice-and-comment obligations, the Conference has for many years urged agencies to obtain public input voluntarily in their development of at least some rules in both categories. According to ACUS Recommendation 76-5:

> At times policy statements and interpretive rules are barely distinguishable from substantive rules for which notice and comment is required. For that and other reasons many agencies have often utilized the notice-and-comment procedures set forth in section 553 of the Act, without regard to whether their pronouncements fall into one category or another. This is, in general, beneficial to both the agencies and potentially affected elements of the public. Providing opportunity for comment upon interpretive rules and

[184] Parrillo, *supra* note 3, at 168-69. The NRC has a similar rule, with certain exceptions allowed. *See* 10 C.F.R. § 2.804(e)(2) ("The Commission shall provide for a 30-day post-promulgation comment period for — . . . (2) Any interpretative rule, or general statement of policy adopted without notice and comment . . . except for those cases for which the Commission finds that such procedures would serve no public interest, or would be so burdensome as to outweigh any foreseeable gain.").

[185] Recommendation 2017-5, at 61,735 & n.12.

[186] Agency 2.

[187] *See supra* note 147 and accompanying text (discussing Dismas v. U.S. Dept. of Justice, 401 F.3d 666 (6th Cir. 2005)).

> policy statements of general applicability, sometimes before and sometimes after their adoption, makes for greater confidence in and broader acceptance of the ultimate agency judgments.[188]

Indeed, in the context of rulemaking proceedings to which the APA requirements do apply, it is common if not routine for comments to address purely interpretive issues and for agencies to consider them seriously; indeed, an agency's failure to consider such comments would invite judicial reversal. Although we do not mean to equate the legislative rulemaking process with the process of drafting guidance, these well-accepted APA expectations add persuasive support for the proposition that public comments submitted on the identical issues during the promulgation of interpretive rules do have intrinsic value.

At the same time, the skepticism expressed by some agency officials is well taken insofar as it suggests that an agency should not necessarily be expected to solicit public input on a proposed interpretive rule in every instance. Paragraph 9 of Recommendation 2017-5 itself sets forth factors that agencies should consider in deciding whether and how to solicit public participation before adopting or modifying a policy statement. The factors include the applicability of any existing procedures; the likely increase in useful information and public acceptability that would result from broadening participation; the practicability of such participation; and the magnitude of the impact of the proposed rule on interested parties.[189] Most, if not all, of these factors could readily be applied in the interpretive rule context.

2. Post-adoption public participation

The above discussion focuses on the benefits of public participation *in advance of* the issuance of an interpretive rule. One might ask whether an agency could likewise derive such benefits in the context of entertaining requests to reconsider interpretive rules that have already been issued. We believe they could.

Recommendation 76-5 and ¶ 10 of Recommendation 2017-5 encouraged agencies to solicit post-promulgation comments on guidance documents. In Recommendation 2017-5 the encouragement applied only to policy statements, but in Recommendation 76-5 it applied to both policy statements and interpretive rules (if they are likely to have a substantial impact upon the public). Presumably, similar benefits could be expected in the context of requests that develop in other contexts, such as in an enforcement proceeding or in response to an inquiry initiated by a member of the public. As discussed in Part II of this Report, several agencies provide such an ex

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[188] ACUS Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976); *see also* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 573-75 (1977) (summarizing the policy basis for this recommendation). The ABA has made a substantially equivalent recommendation. *ABA Recommendation 120C*, 118-2 A.B.A. ANN. REP. 57 (1993).

[189] "Impact" is included within this calculus by virtue of ¶ 8(a), incorporated by reference into ¶ 9(b). To this extent, the factors identified for consideration in Recommendation 2017-5 can be harmonized with the "substantial impact" threshold test in Recommendation 76-5.

post opportunity for input, ranging from entertaining emailed comments on published documents to case-by-case engagement with particular regulated parties.

Although ¶ 10 of Recommendation 2017-5 did not expressly say that an agency considering solicitation of post hoc public input should take into account the prudential factors listed in ¶ 9, the parallel construction of these two paragraphs at least implies that it should. By extension, therefore, one might infer that these factors would also be relevant to an agency's decision about whether and how to solicit post hoc public input on interpretive rules.

The potential benefits from such a post hoc opportunity for input would be most evident when there are affirmative indications that circumstances have changed since the rule was adopted. Those changes might be attributable to turnover in the agency's leadership or staffing on the issue involved (whether or not due to the advent of a new presidential administration). Or they might result from an alteration in the facts on the ground, or evolution in the surrounding legal landscape. As Justice Ginsburg pointed out in a very recent opinion, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.'"[190] Even if no such change in circumstances is immediately apparent, interaction with persons who may wish to take issue with the interpretive rule would enable the agency to come to terms with a viewpoint other than its own.

But what if the agency actually did invite public participation during the drafting of its interpretive rule – as some of the counsel quoted in Part II say they frequently do? Such participation might entail either notice-and-comment or, perhaps, one of the more informal methods discussed in Recommendation 2017-5.[191] One could argue that, under these circumstances, an agency should not be expected to allow challenges to the merits of the rule as the agency proceeds to apply the rule in later regulatory action. It may be thought that this "second look" might have minimal payoffs, insufficient to justify any notion that the agency should be receptive to a challenge to the interpretive rule whenever a dissatisfied citizen wishes to lodge one. Indeed, one of our interviewees, a staff member of an independent commission, remarked that procedural expectations described in Recommendation 2017-5 "should not apply to the interpretive rules that have gone through the notice and comment."[192]

Certainly, an agency has a significant interest in being able to manage its workload and set priorities; the Conference has recognized as much in, for example, the context of petitions for rulemaking.[193] One implication of that truism is that an agency should have a degree of latitude to limit the circumstances in which it will entertain requests to reconsider an interpretive guidance document. It might understandably decide to be less accommodating to such requests when they

[190] New Prime, Inc. v. Oliveira, 139 S. Ct. 32, 544 (2019) (Ginsburg, J., concurring) (*quoting* West v. Gibson, 527 U. S. 212, 218 (1999)).

[191] Recommendation 2017-5, ¶ 8.

[192] Agency 10.

[193] *See* ACUS Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117, 75,118 (Dec. 17, 2014) (recommending measures to make the right to petition meaningful, but also observing that "petitions for rulemaking may adversely affect an agency's ability to control its agenda and make considered, holistic judgments about regulatory priorities, particularly in the face of limited resources").

are directed toward interpretations that the agency has already devoted substantial resources to examining. Moreover, even when an agency has chosen to make opportunities for reconsideration generally available, it 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 unfounded or frivolous challenges to the agency's position.

That said, however, we would not endorse a blanket policy of refusing to entertain requests for reconsideration of an interpretive rule (or policy statement) that had originally been issued after an opportunity for public input had been afforded. The above point about changed circumstances might still apply in such situations. Furthermore, at least some persons affected by a guidance document may not have participated in the earlier outreach effort, perhaps for entirely legitimate reasons. One would not want to foreclose them from asking the agency to reconsider the guidance; and there would be theoretical and practical objections to a regime in which those persons were eligible to make such a request while persons who did participate were not.[194]

In any event, one should not assume that the only way to respond to the concern about duplicative proceedings is to bar stakeholders from taking issue at all with the interpretive rule that had previously been adopted after an opportunity for public input. A more modest response would be to say that, when a private person asks an agency to reexamine an interpretive rule, the agency may consult, rely on, and cite to the rule insofar as the analysis in it is responsive to the request. If the challenger's arguments are the same as the ones raised during the prior public engagement, the answers that the agency reached at that time could simply be repeated.

Judge Williams made an equivalent point about an agency's use of policy statements in *Bechtel v. FCC*:[195] "Although the agency must respond to challenges and be ready to consider 'the underlying validity of the policy itself,' it need not repeat itself incessantly. When a party attacks a policy on grounds that the agency already has dispatched in prior proceedings, the agency can simply refer to those proceedings if their reasoning remains applicable and adequately refutes the challenge." [196] Much other case law on policy statements has proceeded on the same assumption.[197] Insofar as an agency treats its interpretive rules as susceptible of being open to reconsideration, it should be able to use its past explications of the reasoning behind the interpretation in precisely the same manner.

The Conference stated in Recommendation 2017-5 that an agency should consider accepting pre-adoption or post-adoption input from interested persons "with or without response."[198] The foregoing discussion is not intended to cast doubt on the recommendation's implication that an agency should feel free not to respond to comments on guidance. Nevertheless, the Conference may wish, in its recommendation stemming from this project, to point out that

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[194] Similar conundrums have arisen in the context of issue exhaustion in rulemaking. *See* Ronald M. Levin, *Making Sense of Issue Exhaustion in Rulemaking*, 70 ADMIN. L. REV. 177, 202 (2018).

[195] 10 F.3d 875 (D.C. Cir. 1993).

[196] *Id*. at 878 (citations omitted).

[197] *See* Levin, *Guidance Exemption*, *supra* note 9, at 297-301.

[198] Recommendation 2017-5, ¶¶ 9, 10.

writing responses can offer potential efficiency advantages to agencies in terms of memorializing analysis on which it can rely in subsequent challenges, whether those challenges occur in administrative or judicial proceedings.

B. Binding Effect

Recommendation 2017-5 provides that an agency should not use a policy statement to create a standard binding on the public; to the contrary, it should afford members of the public a "fair opportunity" to seek modification or rescission of the statement. For purposes of this report, a key set of issues concerns whether these principles should apply to interpretive rules, and also what measures, if any, the agencies should consider taking in order to make this "fair opportunity" more of a practical reality. As we will discuss, our view is that the Conference should say clearly that an agency should not treat interpretive rules as binding on members of the public; but there is room for debate about the extent to which agencies should be expected to strive to ameliorate the "practical binding effects" of such rules.

As explained in Part II, agency counsel expressed a variety of views on the issue of interpretive rules' internally binding effect. Some would allow for deviation from the terms of an interpretive rule or an opportunity for private parties to contest it. One official from an agency that issues relatively few interpretive rules said that the agency would not depart from the rule so long as it remained in effect, though it would entertain legal and factual challenges to the rule that might lead to its amendment or rescission. Still other agencies spoke of interpretive rules in terms of binding effects on staff rather than on the agency as a whole. This diversity of views mirrors the results that Parrillo reported on the basis of his interviews with agency officials.[199] In any event, we will attempt in the following discussion to clarify some of the issues involved.

1. The question of intrinsically binding effect

A threshold question is whether agencies should properly treat interpretive rules as binding in the first place. As just stated, we think not.

In our view, the appropriate guidepost for this issue is the postulate to which we drew attention at the beginning of Part III: what the Supreme Court recently called "the longstanding recognition that interpretive rules do not have the force and effect of law."[200] This proposition suggests to us that an agency's uses of an interpretive rule should be subject to roughly the same principle that Recommendation 2017-5 articulated with respect to policy statements. The recommendation said that an agency should not use a policy statement "as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public." If that principle were applied to interpretive rules, the result would be that when private persons come forward with reasons as to why an interpretive

[199] Parrillo, *supra* note 3, at 23-25 n.36.

[200] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015) (citing Chrysler Corp v. Brown, 441 U.S. 281, 302 n. 31 (1979), and the Attorney General's Manual on the APA).

rule, or part of it, should be rethought or modified, the agency should not respond that the interpretive rule is determinative. Rather, it should provide a "fair opportunity" for those persons to get their views considered by the agency. (As we indicated in the preceding section, an agency should have some latitude to determine the occasions on which such an opportunity may be exercised. Other factors that could contribute to defining the scope of the "fair opportunity" to question an interpretive rule are discussed below in Part IV.B.4.)

As we discussed in Part III, some judicial case law sources can be read to suggest, in various contexts, that interpretive rules may be binding, but these sources are not necessarily persuasive in their own right and, in any event, do not shed much light on the distinct question of what good practice in this area should be. The Conference has, of course, made recommendations in this area that go well beyond prevailing legal requirements. Recommendation 2017-5 itself did this to some extent. Another notable example is Recommendation 76-5, which, as has been mentioned, urged agencies to allow notice and comment voluntarily when they issue interpretive rules and policy statements with substantial impact.[201]

There may be a temptation to argue that an agency need not allow any opportunity for affected persons to contest an interpretive rule at the agency level, because the person could contest it during judicial review instead. We have already discussed some of the legal factors that could make this alternative unsatisfactory in some contexts from a litigant's point of view, including uncertainties about obtaining preenforcement review of the rule, as well as the deference that the court may give to the agency in such an appeal.

But, more fundamentally, this argument would be out of synch with the basic thrust of Recommendations 92-2 and 2017-5. The concept of "practical binding effect" that underlay those recommendations rested on the premise that not everyone affected by the administrative process can realistically be expected to muster the resources and fortitude to resort to a judicial remedy. The recommendations took account of that reality by emphasizing that agencies' creation and use of policy statements should be accompanied by a regard for fairness *within* the administrative process. The present project offers ACUS an opportunity to extend that thinking a few steps further, by applying the same basic approach to interpretive rules.

As we discuss below, the scope of the "fair opportunity" to contest an interpretive rule should be determined in light of important countervailing factors such as the agency's implementation needs and the desirability of respecting reliance interests. Agencies should have latitude to strike a balance among these competing interests. For the moment, however, we are considering only the issue of whether good practice requires giving interested persons at least some opportunity to contest an interpretive rule with which they may disagree.

2. Practical binding effects

Whether or not agencies have the legal authority to treat their interpretive rules as categorically binding, our interviews made clear that, in practice, many agencies do entertain submissions in which affected persons seek to persuade them to alter or revoke such rules. We

[201] ACUS Recommendation 76-5, *supra* note 188.

now consider questions as to whether these agencies make these opportunities as well known and easy to access as they should.

These questions correspond directly to some of the very issues that Recommendation 2017-5 explored in considerable depth. That recommendation did not probe very far into the issues that we addressed in the preceding section, because its scope was limited to policy statements; it is universally understood that such statements are not supposed to be binding. Rather, the recommendation focused on a concept that Recommendation 92-2 called "practical binding effect." The 2017 recommendation used different terminology, noting that various pressures may "tend to give at least some policy statements a quasi-binding character in fact regardless of their legal status."[202] Thus, it "supplement[ed] Recommendation 92-2 by addressing . . . reasons why members of the public may feel bound by what they perceive as coercive guidance,"[203] even where the agency did not intend that consequence.

The present project gives the Conference an occasion to come to terms with the fact that both interpretive rules and policy statements can implicate the de facto coercive consequences that Recommendation 2017-5 seeks to ameliorate. Several relevant considerations can be gleaned from that recommendation itself.

As discussed above, the earlier recommendation discussed "reasons why members of the public may feel bound by what they perceive as coercive guidance," even where the agency did not intend that result. This may occur because regulated parties feel that the costs of noncompliance with the guidance document would be too high – e.g., because they want to maintain the agency's good will or cannot afford to risk incurring litigation costs and possible sanctions if they were to resist. On the other hand, the agency's leniency toward regulated parties, or its encouragement to them to take steps that may exceed those required by statute or legislative rule, may cause indirect harm to other interests. In addition, the agency might decline to show flexibility toward one party so that it can maintain consistency with the way it has treated similarly situated parties.

These pressures, and others discussed in the recommendation, do not depend on whether the subject matter of the guidance is more akin to "law" than "policy" or vice versa. There would seem to be no reason to doubt that, in both the interpretive rule and policy statement contexts, affected persons have significant interests in measures that agencies might take to ameliorate these pressures. These findings in the recommendation were based on Parrillo's voluminous report, which supports essentially the same conclusion. The report's discussion of coercive factors was directed at "guidance," not at policy statements alone. Parrillo took no position on the normative question of whether interpretive rules should be nonbinding or not, but he explained that his descriptive account of the de facto consequences of guidance "covers interpretive rules insofar as people believe or assume . . . that interpretive rules are supposed to be nonbinding."[204]

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[202] Recommendation 2017-5, 82 Fed. Reg. at 61,735.

[203] *Id*.

[204] Parrillo, *supra* note 3, at 25.

In practice, members of the public who agree with an interpretation or see no reason to question it will presumably comply with the rule and assume they are following the law. But those other members of the public who disagree with the interpretation, or at least entertain serious doubts about it, may nevertheless experience significant de facto pressure to comply with it or bear costs stemming from it, for precisely the same reasons that Recommendation 2017-5 identified in relation to policy statements – the "practical binding effect" concept that the Conference has explicated in its two recommendations on that theme.

3. Disclaimers and other ameliorative measures

It is one thing to recognize that these pressures exist, and another to decide what kinds of efforts, if any, agencies should take to ameliorate them. Paragraph 4 of Recommendation 2017-5 urges that "[a] policy statement should prominently state that it is not binding on members of the public and explain that a member of the public may take a lawful approach different from the one set forth in the policy statement or request that the agency take such lawful approach." In this section we will sketch out several alternative perspectives on whether, and how far, this advice can appropriately be transferred to the interpretive rules context.

For the moment we will put aside the latter part of the quoted sentence and focus on the first part, i.e., the recommendation that the policy statement should prominently state that it is not binding on members of the public. A number of agency representatives have expressed reservations about the wisdom of applying a similar expectation to interpretive rules, and these reservations deserve consideration.

We argued above that, in principle, there is no contradiction between an agency's saying that a statute or regulation, as the agency construes it, imposes a mandatory obligation, while also saying that a person who disagrees with that reading should be permitted to argue, in an appropriate agency forum, that the agency misconstrued the statute.[205] But it is not self-evident that agencies can clearly and effectively convey that meaning to the public in every regulatory context. One can imagine a potential for misunderstanding or confusion. The fact that mandatory language is considered allowable in interpretive rules may compound the potential for mixed messages. The Conference should, therefore, consider acknowledging that, under such circumstances, an agency should not necessarily be expected to recite *in the interpretive rule itself* that members of the public are free to dispute it.

During our interviews, we learned about one type of situation that appears to raise this question with clarity. Agencies sometimes publish "practice guides" that explain basic, uncontroversial legal principles regarding the programs they administer. Such pronouncements would presumably fall within the definition of interpretive rules, but they may be essentially *educational* in nature. For example, an agency might disseminate a brochure or maintain a website on which it publishes informational pages for the guidance of members of the general public. The document may recite legal principles that experienced practitioners in the area regard as entirely

[205] *See supra* text following note 144.

uncontroversial.[206] In such a pronouncement, a statement that outlines steps that readers might take in order to ask the agency to reconsider or rescind its interpretations might look superfluous if not incongruous.[207]

Against this background, we can identify at least four approaches to the disclaimer issue that the recommendation might invite agencies to consider, bearing in mind that different agencies might legitimately make different choices among them:

First, an agency might simply adhere in an interpretive rule context to an approach closely modeled on ¶ 4 of Recommendation 2017-5. It may be that in some regulatory regimes the challenge of avoiding mixed messages are not especially great. The FDA's procedural regulation on Good Guidance Practices might be a model. It requires that each guidance must "[p]rominently display a statement of the document's nonbinding effect,"[208] and this requirement applies to interpretive and policy guidance alike.[209] Other agencies may also find such an approach to be congenial, depending on their resources and experiences. It avoids the need to classify a given guidance document as either interpretive or policy.

Second, the agency might decide to follow the same approach *except* for interpretive rules that it judges will be noncontroversial. Under these circumstances, one could argue, there is no actual de facto coercive effect. Moreover, a proviso stating that the agency will make available a fair opportunity to contest a noncontroversial interpretation may invite confusion. The decision about whether a given interpretation would be noncontroversial would be a judgment call, but this criterion may not be unmanageable. It could be compared with the determination that the Conference has recommended that agencies make when deciding that an anticipated regulation may be issued without rulemaking procedure because notice and comment would be "unnecessary."[210]

Third, the recommendation might provide, in a more open-ended manner, that the agency may omit the § 4 disavowal of binding effect in a particular guidance document (or all documents

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[206] One interviewee from the staff of an independent commission stated that his agency does put drafts of its practice guides out for notice and comment. Agency 6. Presumably, however, the purpose of the invitation is to elicit editorial improvements, not substantive debate.

[207] Levin's article observed that guidance documents that expound completely uncontroversial legal interpretations do not raise significant analytical problems under the APA's interpretive rule exemption, because they would be exempt from rulemaking obligations anyway on the basis that notice and comment would be "unnecessary" (assuming that the agency had made the proper "good cause" finding). Levin, *Guidance Exemption*, *supra* note 9, at 329 (citing 5 U.S.C. § 553(b)(B)). Outside of a litigation context, however, a best-practices recommendation on interpretive rules must take account of the special questions they raise.

[208] 21 C.F.R. § 10.115(i)(1)(4) (2018).

[209] *Id*. § 10.115(b). Note that the regulation provides that "Level 2" guidance documents, which "set forth existing practices or minor changes in interpretation or policy," § 10.115(c)(2), may be promulgated using streamlined promulgation procedures, § 10.115(g)(4); but Level 2 guidance is *not* exempted from the disclaimer obligation discussed in the accompanying text.

[210] 5 U.S.C. § 553(b)(B) (2012). The Conference has recommended that agencies use direct final rulemaking in such situations. ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Aug. 18, 1995).

in a specified class) if it concludes that inclusion of such a disclaimer would lead to significant confusion. Or, as a fourth option (at the opposite extreme from the first), the recommendation could simply dispense with the disclaimer expectation altogether where interpretive rules are concerned.

It should be clearly recognized that an option like either the third or fourth approach would entail a tradeoff of values, in that it would afford less protection against inadvertent coercive effects of the rule than the other approaches mentioned. We think the merits of such a tradeoff are worthy of consideration. To clarify, however, we do not mean to endorse a departure from the underlying proposition that agencies should provide a "fair opportunity" to request reconsideration of an interpretive rule under appropriate circumstances. Rather, this discussion is intended to speak to steps that an agency might or might not take to ensure effective access to such an opportunity. Or perhaps the issue could be better described as an aspect of the task of defining what opportunity is "fair" in that program's context.

The recommendation might suggest that if the agency avails itself of either of these latter two options, it should at least issue a widely available procedural regulation that spells out generically how a person may seek reconsideration of the interpretive rule. However, that prescription might not be right for every agency. One official from a small agency said that, because that agency is not multitiered, disagreements with an interpretive rule could be raised informally.[211] This comment suggests that the ultimate recommendation should not be overly prescriptive as to details.

4. Limiting factors

The similarities between interpretive rules and policy statements include not only the general principle that an affected person should have a fair opportunity to take issue with a guidance document, but also certain factors that serve to define the scope of, or delimit, that principle. Several potential limiting factors come to mind.

Practicability. One was identified in Recommendation 2017-5 in connection with "additional" measures to avoid binding the public: "considerations of practicability and resource limitations."[212] One of our interviewees observed that their agency would provide much more extensive opportunity for public engagement as provided for by 2017-5 if they had "munificent resources." But in reality,

> [w]e do the best we can with the resources we have to get it right . . . [W]e have the resources that Congress has chosen to give us, and we have the time that Congress and circumstances have given us. We try to give people timely answers consistent with their business needs. So it is important as always to recognize that practical reality creates limits as to what you can achieve.[213]

[211] Agency 6.

[212] Recommendation 2017-5, ¶ 7.

[213] Agency 10.

A particular reason to be concerned about overloading the procedural expectations associated with the development and implementation of guidance at the administrative level is the possibility that excessive burdens might deter agencies from issuing guidance in the first place. Recommendation 2017-5 recognizes that risk indirectly when it discusses at length some of the ways in which policy statements are "important instruments of administration across numerous agencies, and are of great value to agencies and the public alike."[214]

Consistency in implementation. Second, a related governmental interest that is in tension with the aspiration to facilitate interested persons' ability to seek modification or rescission of guidance (whether interpretive or policy-laden) is the agency's objective of maintaining effective control over administration.[215] Paragraph 3 of Recommendation 2017-5 remarked in this connection that, "[a]lthough a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal management matter, . . . to direct some of its employees to act in conformity with a policy statement." Justifications for such control over employees can be framed not only in terms of managerial efficiency, but also as a basic part of the agency head's responsibility to carry out her statutory mandate. More particularly, it can promote uniformity of interpretation among the numerous officials who implement a nationwide program.[216]

The above acknowledgement in Recommendation 2017-5 was qualified with the caveat that "the agency should ensure that this does not interfere with the fair opportunity called for [elsewhere in the recommendation]." As phrased, ¶ 3 could be read to say that the "fair opportunity" objective should be determined in isolation from any consideration of the agency's managerial goals. However, in line with the reasoning suggested just above, an alternative way of considering this tension would be to treat the agency's interest in effective administration as one

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[214] One of the benefits mentioned was that policy statements can "promot[e] compliance with the law," a goal that arguably is served even more directly by interpretive rules.

[215] There is an extensive law review literature on the analogous problem of reconciling this interest with the goal of promoting compliance with APA rulemaking procedure. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1484-85 (1992); Richard M. Thomas, *Prosecutorial Discretion and Agency Self- Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131 (1992).

[216] For some, the analysis here may be reminiscent of the claim in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), that an administrator's statutory interpretation is "entitled to respect," in part because it is rendered "in pursuance of official duty." *Id*. at 139-40. In that context, the Court was referring to the "respect" that reviewing courts should accord to such interpretations during judicial review, but the same general idea applies internally: an agency head's interpretations, rendered "in pursuit of official duty," are "entitled to respect" by subordinates. The issuing official can only carry out her statutory duties if she can communicate to and instruct other officials about her interpretation of the Act. Extending the comparison, if "[g]ood administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons," *id*. at 140, one might also say that "good administration of the Act" justifies efforts to discourage "variance" in the "standards of public enforcement" applied within the agency itself. For discussion of the *Skidmore* comparison, see Emerson, *supra* note 19, at 2147-50.

factor bearing on the "fairness" of the opportunities that the agency does offer when an interested person seeks reconsideration or modification of a policy statement or interpretive rule.[217]

In our interviewing, one agency representative articulated this governmental interest forcefully:

> The interpretive rules by regulation are binding on agency adjudicators. From our perspective, with everything the agency issues, there is an expectation the employees will follow it. Appeals counsel will remand if they don't comply. . . . The agency has a strong institutional interest in people being treated fairly and being treated equally . . . . The agency has a strong institutional interest in putting out instructions that apply to everybody. Policy compliance [should be] as uniform as possible.[218]

(This official also told us that, in principle, affected persons do have a right to request reconsideration of an interpretive rule at the highest level of review, although for structural reasons this option is almost never pursued. The agency does field and sometimes respond to critiques of the interpretive rules at public forums and the like, outside the setting of litigated cases.)

Stability and reliance. Agencies are also permitted, and at times expected, to take account of the public interest in preserving stability and respecting reliance interests. These factors tend to detract from private persons' opportunity to question the substance of a guidance document, but they do so in a different fashion from the factors just discussed. That is, they do not tend to prevent an agency from considering the private person's arguments against a guidance document, but they make those arguments somewhat less likely to prevail. In the context of formally adjudicated precedents, the Supreme Court has recognized this social interest. One element of abuse of discretion doctrine, the Court has said, is a "presumption" favoring adherence to the status quo; the agency may change its direction but must explain its decision to do so.[219] The OMB's Good Guidance Practices bulletin bolsters this constraint by providing that "agency employees should not depart from significant agency guidance documents without appropriate justification and

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[217] For general discussion of this problem, see Levin, *Guidance Exemption*, *supra* note 9, at 306-08. Compare how these competing objectives were addressed in Recommendation 92-2. The latter recommendation emphasized that it did not "preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public." The recommendation then added, however, that agencies "should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency." ACUS Recommendation 92-2, ¶ III, *supra* note 10, at 30,104.

[218] Agency 5.

[219] Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973) (plurality opinion) ("A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.") (relying on Secretary of Agric. v. United States, 347 U.S. 645, 653 (1954)).

supervisory concurrence." (The preamble to Recommendation 2017-5 quoted this language in a footnote,[220] although it arguably did not squarely endorse that expectation.)

Finally, an agency might also have legitimate reservations about revising or revoking a guidance document because of its desire to protect legitimate reliance interests. As staff at an executive agency told us, "Once we issue a final [guidance], you can rely on it. It creates a safe harbor; if you follow the guidance, you are in compliance."[221] Such accommodation of reasonable reliance interests is often encouraged or even compelled by principles of administrative law, stemming from due process as well as abuse of discretion doctrine.[222]

This is not to say that an interpretive rule that might induce members of the public to rely on it thereby becomes "binding" in the sense we use that term in this report. That characterization would be difficult to reconcile with the postulate that an interpretive rule lacks the force of law. It would also unnecessarily impede agencies from revising their interpretations, even where they reasonably explain their decision. In addition, it might give impetus to what we regard as a regrettable tendency among some courts to hold that a rule that creates or purportedly creates a "safe harbor" must be issued through notice-and-comment procedure.[223]

But, even though an interpretive rule cannot be categorically binding, reliance expectations can often be protected to a considerable extent by the due process and abuse of discretion principles mentioned above. Moreover, agencies themselves are often careful to maintain their reputations for living up to their word, as part of sustaining their continuing relationships with stakeholders. These combined assurances are often enough to give regulated entities confidence that they can make business planning decisions on the basis of agencies' interpretive rules or other representations. Entities who feel the need for even more definitive guarantees from an agency can ask it to issue a declaratory order.[224]

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[220] Recommendation 2017-5 at n.8.

[221] Agency 2.

[222] *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016); Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (citing FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502, 515 (2009)); Smiley v. Citibank, 517 U.S. 735, 742 (1996) (dictum); Emerson, *supra* note 19, at 2201-07.

[223] *See, e.g.*, Texas v. EEOC, 827 F. 3d 372 (5th Cir. 2016), *opinion withdrawn*, 838 F.3d 511 (5th Cir. 2016); Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987). These decisions have elicited strong criticism, in part because they may tend to deter agencies from regularizing their enforcement policies. *See, e.g.,* Thomas, *supra* note 215, at 152, 155 (criticizing *Community Nutrition*); Emerson, *supra* note 19, at 2165-72 (criticizing *Texas*).

[224] *See* ACUS Recommendation 2015-3, *Declaratory Orders,* 80 Fed. Reg. 78,163 (Dec. 16, 2015); Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1170 (2017) (consultant's report for that recommendation).

C. Invited Flexibility

Having spent much of this report highlighting similarities between interpretive rules and policy statements, we will conclude this discussion by addressing one relevant area in which these two types of guidance can play out very differently, at least some of the time.

An important function of policy statements is to open up a dialogue with regulated entities about alternative modes of compliance. The agency offers one method of compliance in the policy statement but invites members of the public to suggest other lawful approaches. The result is often an informal negotiation that leads to creative solutions that the agency did not foresee when it promulgated the guidance.

Recommendation 2017-5 recognizes the importance of this administrative tool by stating in ¶ 2 that "[a]n agency should afford members of the public a fair opportunity to argue for lawful approaches other than those put forward by a policy statement." Moreover, ¶ 4 provides that the policy statement should affirmatively state that members of the public may follow such a different approach or request the agency to follow one. In addition, ¶¶ 7 and 8 contain extended discussion of managerial measures that agencies can take to promote or facilitate dialogue with private interests about flexible alternative approaches.

Some agency counsel have argued that interpretive rules will normally not lend themselves well to such invited flexibility. This argument has force, at least some of the time. However, it does not fully capture real-world circumstances in which the line between interpretive rules and policy statements can be indistinct.

An interpretive rule might characterize the law in such a manner as to be essentially non-negotiable. If the rule asserts that a statute or regulation flatly requires something, this statement means by definition that a failure to comply with the requirement is not a "lawful approach." Conversely, if the rule asserts that the statute or regulation forbids something, a request to be able to do it anyway would amount to a negation of the rule, not a "flexible approach" to it. Thus, in these contexts, controversies about an interpretive rule tend almost inexorably to turn into efforts to elicit rescission or modification of those rules. Of course, affected persons should nevertheless be able to seek such relief; earlier sections of this report would be relevant to the Conference's recommendations as to the terms on which such requests should be considered.

Another possibility to consider is that an interpretive rule might on its face purport to forbid certain conduct, but an affected person could ask the agency to allow it anyway through a waiver or an exercise of prosecutorial discretion. Such exercises of administrative leniency can play an important role in the administrative process, but they would not necessarily be regarded as the kind of flexibility that Recommendation 2017-5 addresses. Moreover, this sort of administrative relief has ramifications that were not within the scope of the research conducted for the present project. They were, however, the subject of a contemporaneous Conference action, Recommendation

2017-7.[225] If the Conference wishes to refer to devices such as waiver and prosecutorial discretion as being at least functionally comparable to the "alternative flexible approaches" addressed by Recommendation 2017-5, it could cover much of that terrain by simply citing to Recommendation 2017-7.

Other interpretive rules, however, may be more conducive to "flexible approaches." The rule might, for example, speak at a general level, leaving space for informal adjustments and negotiation between the agency and its stakeholders about how the rule should be applied. Alternatively, the rule might speak in specific terms but not purport to be exhaustive. It might say, for example, that certain types of conduct are *authorized* by law, leaving open the possibility that other conduct could also be lawful. In either of these situations, the agency may contemplate that affected persons could propose elaborations on the rule and could even invite such proposals, by analogy to ¶ 4 of Recommendation 2017-5.

Even if an interpretive rule is exhaustive on its face, the agency may in reality be open to modifying it,[226] especially if the modification would entail only an incremental adjustment in its coverage rather than wholesale reversal of its basic principle. In this context, a request for flexibility could potentially be conceived as a form of legal interpretation or as an exercise of prosecutorial discretion. Even so, such a request may also implicate the policy considerations that Recommendation 2017-5 discussed in regard to inviting or displaying flexibility in the implementation of policy statements.

A larger point underlying this discussion is that, as may be seen from the interview comments summarized in Part II.B. of this report, agencies often implement interpretive rules and policy statements in similar ways. Indeed, they do not always distinguish between the two, or they may issue guidance documents that contain both interpretive and policy elements. Parrillo reported hearing similar comments in his interviews.[227] The confluence between the two types of guidance may be especially apparent when an interpretive rule explicates the meaning of a broadly worded statutory term such as "discrimination" or "in the public interest." In such situations, agencies typically use the language of "interpretation" because the substantive law in their fields of specialty has developed that way, but the reality may be that such a rule reflects a sort of common law reasoning that is not easily distinguished from policymaking.

This analysis suggests that, in drafting a recommendation on this issue, the Conference should take a nuanced approach. Paragraphs 7 and 8 of Recommendation 2017-5 already list prudential factors that agencies should consider in deciding how far to invest in promoting flexibility in the implementation of policy statements; the above reasoning suggests that, for interpretive rules, additional variables should be put forward for the agencies' consideration.

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[225] Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017); *see* Aaron L. Nielson, *How Agencies Choose to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018) (article based on consultant's report for that recommendation).

[226] One of our interviewees referred specifically to this possibility. *See supra* notes 115-117 and accompanying text.

[227] Parrillo, *supra* note 3, at 23-25 n.36. *See also* Levin, *Guidance Exemption*, *supra* note 9, at 351-53 (citing cases that have discerned similar overlaps between the interpretive rule and policy statement categories).

We can suggest a few possible examples, not intended to be definitive. The prior recommendation suggested in ¶ 7(a) that "when the agency accepts a proposal for a lawful approach other than that put forward in a policy statement and the approach seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other [interested] persons." Probably, this suggestion would in many situations be at least as apposite to interpretive rules as to policy statements, because interpretive rules by their nature purport to define norms that would apply generally to similarly situated persons.

On the other hand, ¶ 7(b) and 7(c) would seem applicable to some interpretive rules and not to others. Those paragraphs contemplate that an agency should route requests for flexibility to a specially designated unit of the agency or to an official who stands at a higher level in the agency hierarchy than the frontline officials to whom the request might be initially directed. With respect to interpretive rules that, as a substantive matter, do not seem conducive to the flexibility approaches contemplated by Recommendation 2017-5, these structural steps may be superfluous. But other interpretive rules may well be susceptible of such application, particularly where the potential alternative approaches could be seen as elaborating on the rule rather seeking modification of it.

APPENDIX

[As a means of drawing together the foregoing suggestions for a recommendation growing out of this project, we offer for consideration the following annotated version of Recommendation 2017-5. Language in roman type is the verbatim text of the numbered recommendations in that 2017 document, and the language in italic type explains how we think those provisions should or should not apply to interpretive rules. This material is offered only for explanatory purposes; we recognize, of course, that the contents of the Conference's ultimate recommendation will be determined by the reactions and judgments of its membership.]

Policy Statements Should Not Bind the Public

1. An agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.

> *In principle, the same should be true of an interpretive rule, because such a rule, like other guidance, lacks the force of law. In an enforcement context, the issue should be whether or not the opposing litigant complied with the statute or regulation that the rule interprets. The issue of compliance with the interpretive rule should not, as such, be the basis of liability.*

2. An agency should afford members of the public a fair opportunity to argue [a] for lawful approaches other than those put forward by a policy statement or [b] for modification or rescission of the policy statement.

> *In our view, clause [b] of this paragraph should be just as applicable to interpretive rules as to policy statements, with the understanding that the scope of the specified "fair opportunity" may, as to both kinds of guidance, be defined in light of various legitimate administrative interests.*
>
> *Clause [a] would seem to be inapplicable to some interpretive rules. If such a rule purports to state what approaches <u>are</u> lawful, a disagreement with it may be, in effect, an attack on the rule itself. Alternatively, a member of the public might persuade the agency that the rule is mistaken or imprecise; or the agency might agree to grant a waiver of the provision of law that the rule interprets, but those circumstances might not be directly analogous to the "lawful approaches" that Recommendation 2017-5 encourages agencies to invite. As a practical matter, however, sometimes these or other methods of seeking relief from the application of an interpretive rule would be functionally similar to the "flexibility" provisions of the recommendation. See related discussion under ¶ 7 below.*

3. Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement. But the agency should ensure that this does not interfere

with the fair opportunity called for in Recommendation 2. For example, a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement. Agency review should be available in cases in which frontline officials fail to follow policy statements in conformity with which they are properly directed to act.

The substance of this paragraph should apply just as much to interpretive rules as to policy statements (at least insofar as the cross-reference to Recommendation 2 applies to the "fair opportunity to argue . . . . for modification or rescission" discussed therein).

Minimum Measures to Avoid Binding the Public

4. A policy statement should prominently state that it is not binding on members of the public and explain that a member of the public may take a lawful approach different from the one set forth in the policy statement or request that the agency take such a lawful approach. The policy statement should also include the identity and contact information of officials to whom such a request should be made.

The "lawful approach" language would not always be relevant to interpretive rules. Whether the remaining language– i.e., a "prominent statement" that the rule is not binding – should apply to interpretive rules may depend on context. Different agencies might appropriately address this question in different ways.

5. A policy statement 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 Recommendation 2.

Interpretive rules typically do describe an existing statutory or regulatory requirement; thus, mandatory language in such rules is obviously not disfavored.

6. The agency should instruct all employees engaged in an activity to which a policy statement pertains to refrain from making any statements suggesting that a policy statement is binding on the public. Insofar as any employee is directed, as an internal agency management matter, to act in conformity with a policy statement, that employee should be instructed as to the difference between such an internal agency management requirement and law that is binding on the public.

A version of this paragraph should apply to interpretive rules. If anything, training may be particularly important in order to enable agencies to explain that, although the rule may contain mandatory language, it does not have the force of law.

Additional Measures to Avoid Binding the Public

7. In order to avoid using policy statements to bind the public and in order to provide a fair opportunity for other lawful approaches, an agency should, subject to considerations of practicability and resource limitations and the priorities described in Recommendation 8, consider additional measures, including the following:

For reasons stated in ¶ 2, the provisions in this paragraph, which are designed to encourage agencies to be flexible in allowing other "lawful approaches" other those expressed in a policy statement, may not always be relevant to interpretive rules, which by definition express the agency's views as to what approaches <u>are</u> lawful. But the distinction should not be drawn too sharply; some possible applications of the paragraph to interpretive rules are suggested below.

a. Promoting the flexible use of policy statements 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 other than that put forward in a policy statement and the approach 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 stakeholders, to officials likely to hear the argument, and to members of the public, subject to existing protections for confidential business or personal information.

This substance of this subparagraph should apply to interpretive rules.

b. Assigning the task of considering arguments for approaches other than that in a policy statement 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.

Some interpretive rules may not be conducive to being ameliorated through "flexible approaches" as discussed herein, so that the structural measure contemplated by this subparagraph could be unnecessary.

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

Same response as to the preceding subparagraph.

d. Investing in training and monitoring of frontline personnel to ensure that they (i) understand the difference between legislative rules and policy statements; (ii) treat parties' ideas for lawful approaches different from those in a policy statement in an open and welcoming manner; and (iii) understand that approaches other than that in a policy statement, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them.

To whatever extent interpretive rules do lend themselves to being administered through flexible approaches in the sense under discussion, the training and monitoring contemplated by this subparagraph should be recommended.

e. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support approaches different from those in a policy statement and to provide feedback to the agency on whether its officials are giving reasonable consideration to such proposals.

Again, to whatever extent interpretive rules do lend themselves to being administered through flexible approaches in the sense under discussion, this subparagraph should also apply.

Priorities in Deciding When to Invest in Promoting Flexibility

8. Because measures to promote flexibility (including those listed in Recommendation 7) may take up agency resources, it will be necessary to set priorities for which policy statements 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 a policy statement the greater the statement'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 statement or because the statement 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 policy statement insofar as the statement's value to the agency and to stakeholders lies primarily in the fact that it is helpful to have consistency independent of the statement's substantive content.

This paragraph seeks to calibrate the uses of the techniques set forth in ¶ 7, so it is relevant when, but only when, those techniques are potentially implicated..

Public Participation in Adoption or Modification of Policy Statements

9. When an agency is contemplating adopting or modifying a policy statement, it should consider whether to solicit public participation, and, if so, what kind, before adopting the statement. Options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, 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. Existing agency procedures for the adoption of policy statements, including any procedures adopted in response to the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices (2007).

b. The factors listed in Recommendation 8.

c. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated parties (regulatory beneficiaries and other interested parties) may offer different information than regulated parties and that non-regulated parties will often have no opportunity to provide input regarding policy statements other than at the time of adoption.

d. The likely increase in policy acceptance from broadening participation, keeping in mind that non-regulated parties will often have no opportunity to provide input regarding policy

statements other than at the time of adoption, and that policy acceptance may be less likely if the agency is not responsive to stakeholder input.

e. 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.

f. 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 policy statements and may diminish resources for other agency tasks, including the provision of policy statements on other matters.

The substance of this recommendation should apply fully to interpretive rules.

10. If an agency does not provide for public participation before adopting or modifying a policy statement, it should consider offering an opportunity for public participation after adoption. As with Recommendation 9, options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response.

The substance of this recommendation should apply fully to interpretive rules.

11. An agency may make decisions about the appropriate level of public participation document-by-document or by assigning certain procedures for public participation to general categories of documents. If an agency opts for the latter, it should consider whether resource limitations may cause some documents, 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 stakeholders which draft policy statements, if any, should be understood to reflect current agency thinking; or (b) provide in each draft policy statement that, at a certain time after publication, the document will automatically either be adopted or withdrawn.

The substance of this recommendation should apply fully to interpretive rules.

12. All written policy statements 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. Written policy statements should also indicate the nature of the reliance that may be placed on them and the opportunities for reconsideration or modification of them or the taking of different approaches.

The substance of this recommendation should apply fully to interpretive rules.