FOR THE RECORD

[ I ASK UNANIMOUS CONSENT . . . ]

TESTIMONY
OF
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BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
U.S. HOUSE JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

OCTOBER 29, 2015

HEARING ON H.R. 3438, THE "REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS ACT OF 2015"; AND H.R.2631, THE "REGULATORY PREDICTABILITY FOR BUSINESS GROWTH ACT OF 2015"

Chairman Marino, Ranking Member Johnson, and Members of the Committee, thank you for inviting me here today to share with you my views on the two bills under consideration, H.R. 2631 and H.R. 3438.

I am the Lewis & Clark Distinguished Professor of Law at Lewis & Clark Law School in Portland, Oregon, where I teach Administrative Law and Constitutional Law. I have authored or co-authored five books on administrative and constitutional law, as well as numerous law review articles and chapters in collections on administrative law. Indeed, I have written three different articles on interpretive rules and their counterpart, general policy statements, one of which I am attaching for the record, inasmuch as it provides specific bill language and a draft committee report for a bill to address some of the outstanding problems with interpretive rules and statements of policy. I have chaired the American Bar Association's Section on Administrative Law and Regulatory Policy as well as the Association of American Law Schools' Section on Administrative Law. I am a member of the American Law Institute. I have also served as a consultant on more than once occasion for the Administrative Conference of the United States.

I am here on my own behalf and not on behalf of any organization or entity.

## I. H.R. 2631

H.R. 2631, the Regulatory Predictability for Business Growth Act of 2015, would require agencies to engage in notice-and-comment rulemaking whenever they revise a longstanding interpretive rule. This bill is an apparent reaction to the Supreme Court's decision earlier this year in *Perez v. Mortgage Bankers Ass'n*, 138 S.Ct. 1199 (2015). In *Perez*, the Supreme Court unanimously reversed a D.C. Circuit decision that followed what had become known as the *Paralyzed Veterans* doctrine, a requirement that in order to change its prior authoritative interpretation of law an agency must engage in notice-and-comment rulemaking. The Court held that the Administrative Procedure Act explicitly exempts agencies from having to engage in notice and comment before "formulating, amending, or repealing" an interpretive rule. For a court to require otherwise, as the D.C. Circuit had done, violated the Supreme Court's command in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), that courts may not require agencies to use procedures not required by statute or the Constitution. Unanimous decisions of the Supreme Court are increasingly rare, so the unanimity on this point clearly establishes how far off base the D.C. Circuit had been.

The Court, however, was only interpreting the law as it exists; it did not address the wisdom of changing the law. Nevertheless, there are a number of reasons why H.R. 2631 would not be an improvement to the law, and it fails to address any of the problems that interpretive rules and general statements of policy currently pose, problems identified in the separate opinions in *Perez* by Justices Alito, Scalia, and Thomas. Finally, there is a major drafting problem in H.R. 2631.

There are at least four effects that H.R. 2631 would have that would be deleterious to businesses regulated by federal agencies. First, by requiring an agency to go through notice-and-comment rulemaking to change a longstanding interpretive rule, the bill would make it relatively difficult

for an agency to change its mind as to an interpretation. That is the apparent intent of the bill, because it does not stop an agency from changing its mind; it merely makes it much harder. This could be deleterious to business because it would make it more difficult to get bad interpretations changed. For example, imagine that a Republican is elected President in 2016, perhaps the Wage and Hour Administration, that adopted the revised interpretation at issue in *Perez*, would now like to change that 2010 interpretation that had been adopted over the objections of mortgage bankers. Under this bill, that change could only be done through notice and comment with the attendant delays and obstructions that usually go along with notice-and-comment rulemaking. Indeed, the 2006 Wage and Hour Administration interpretation, which industry favored, was itself a change from a 2001 interpretation. Thus, requiring notice and comment to change an agency's longstanding interpretation does not necessarily favor business interests and can thwart them.

Second, if an agency goes through notice and comment to change a longstanding interpretation, then the changed interpretation will be a legislative rule, the law, not just an interpretation, and will receive the strong deference the Court has outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While the Court has not been entirely consistent as to when *Chevron* deference is appropriate, it has been clear that an agency's interpretation of a statute receives *Chevron* deference when the agency has gone through notice-and-comment rulemaking. *See United States v. Mead Corp*, 533 U.S. 218, 230 (2001). It has also said that: "Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (Thomas, J.). Thus, by requiring an existing agency longstanding interpretation, to which courts may not give great deference, to go through notice and comment to change it, will elevate that new interpretation to having the force of law. For example, in *Perez*, had the agency gone through notice and comment to make its new interpretation, then that new interpretation would have had the force of law and have been subject to *Chevron* deference. Currently, it is still an open question whether the Opinion Letter at issue in *Perez* is a valid interpretation.

Third, looking forward, if agencies know that once they adopt an initial interpretation they will not be able to change it without going through notice and comment, agencies may become more reluctant to issue interpretive rules at all. This will harm business, because interpretations are often sought by businesses. Indeed, the original interpretation in the *Perez* case had been requested by the Mortgage Bankers Association, and it received an interpretation that it was pleased with. If, however, the agency had known that it would not be able to change that interpretation in the future without going through notice and comment, then it might not have issued that original interpretation at all.

Fourth, H.R. 2631 only addresses "interpretive rules" and says nothing about "general statements of policy," another form of non-legislative rule that need not be adopted through notice-and-comment rulemaking. Most interpretive rules could as easily be issued as general statements of policy as well. For example, in *Perez*, the Wage and Hour Administration issued an Opinion Letter interpreting the law. It could, however, have issued a Field Directive to its enforcement

officers telling them not to grant an exemption to mortgage-loan officers. Because such a directive would not have itself interpreted the law, it probably would not be classified as an interpretive rule. *See, e.g., Brock v. Cathedral Bluffs Shale Co.*, 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.)(finding an enforcement policy to be a general policy statement).

This last point highlights the drafting problem in H.R. 2631. What is an "interpretive rule"? The Administrative Procedure Act does not define the term (or its predecessor "interpretative rule"). The courts have had a notoriously hard time determining what is an interpretive rule. As Professor Pierce has noted, courts have characterized the undertaking as "fuzzy," "tenuous," "blurred," "baffling," and "enshrouded in considerable smog." *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547 (2000). Because H.R. 2631 does not define the very term that is the subject of the bill, there would likely be much confusion as to its coverage, leading to much unnecessary litigation.

Up to this point I have focused on the particular problems that H.R. 2631 would cause, but I would like to turn now to the problems with interpretive rules and general statements of policy that it does not address, the very problems identified in *Perez* by Justices Alito, Scalia, and Thomas. There are three main problems.

First, as Justice Alito noted, agencies exploit the uncertain boundary between legislative and non-legislative rules by issuing interpretations or policy statements without notice and comment instead of legislative rules after notice and comment. And as noted, the courts have had difficulty in distinguishing between them. Providing a clear statutory basis for distinguishing between legislative and non-legislative rules would eliminate this problem.

Second, as Justices Alito, Scalia, and Thomas each related, the so-called *Seminole Rock/Auer* doctrine says that courts should defer to agency interpretations of their own regulations. And many lower courts, relying on the Court's lack of clarity regarding when to apply *Chevron* deference, have given deference to agency interpretations of statutes, even when those interpretations did not arise from a notice-and-comment rulemaking or formal adjudication. Because agencies can hope to obtain the same strong deference to their interpretations whether contained in legislative or non-legislative rules, agencies have a strong incentive to utilize non-legislative rulemaking (*i.e.*, without notice and comment) to make their interpretations in light of the significant procedural hurdles involved in notice-and-comment rulemaking. A statutory direction that deference should not be given to agency interpretations contained in non-legislative rules would cure this problem.

Third, under current D.C. Circuit doctrine, which has been followed in some other circuits, interpretive rules and general statements of policy are not subject to pre-enforcement judicial review at all under the Administrative Procedure Act, because they are not "final agency action." In *Bennett v. Spear*, 520 U.S. 154, 178 (1997)(Scalia, J.), the Supreme Court said that in order for something to be "final agency action" subject to judicial review, it must be an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" While neither in that case nor in others has the Supreme Court been very demanding as to

what legal consequences must be involved, the D.C. Circuit in particular has been extremely strict. *See, e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015). The result of this strict interpretation has been to make interpretive rules and general statements of policy unreviewable. Indeed, this doctrine might make violations of the requirements of H.R. 2631 unreviewable. A statutory amendment to the Administrative Procedure Act to make clear that "final agency action" under that Act includes interpretive rules and general statements of policy adopted by agencies would solve this problem.

I am attaching for the record a copy of a law review article I wrote in 2004 that includes both a draft bill that would address these three problems and a draft committee report explaining the bill's provisions.

II. H.R. 3438

Under current law, a stay of the effective date of a rule may be granted by the agency itself or by the court reviewing the agency rule. The Supreme Court has instructed that courts should consider four factors when deciding whether to issue a stay: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009)(quoting from *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). H.R. 3438, the Require Evaluation before Implementing Executive Wishlists Act of 2015 or the REVIEW Act of 2015, would change this with respect to "high impact rules" by requiring agencies to postpone the effective date of these rules pending judicial review, if they were challenged within 60 days of publication in the Federal Register. "High impact rules" are defined as rules that "may impose an annual cost on the economy of not less than $1,000,000,000," as determined by the Administrator of the Office of Information and Regulatory Affairs (OIRA).

The question is whether the benefits of H.R. 3438 outweigh its costs.

Apparently there have been approximately two "high impact rules" a year in the past 15 years. I do not have the data on how many of those rules received stays under existing law. I also do not have the data on how many of these rules were ultimately held invalid. These would be particularly relevant statistics in considering the effect of this bill. For example, if almost all of these rules either received stays under existing law or were ultimately held valid, it would suggest that H.R. 3438 would not provide much benefit and in fact would create substantial costs.

Mention has been made of the Mercury Air Toxics (MATs) rule and the fact that it was not stayed and may be set aside, yet because it was not stayed industry has already effectively complied with it. However, the grounds upon which the Supreme Court found the rule invalid appear to be easily remedied. Moreover, the benefit/cost analysis approved by the Office of Information and Regulatory Affairs (OIRA) showed annual benefits of $30-90 billion compared

to annual costs of $9.6 billion. Consequently, delaying the effect of the rule would have cost the United States $20-80 billion dollars a year. Inasmuch as each of the "high impact rules" adopted in the past 15 years showed a net benefit to the nation to have delayed those rules for years, most of which were probably upheld on judicial review, again costing the nation billions of dollars for each year delayed.

H.R. 3438 would create an absolute incentive to anyone subject to the rule to challenge it no matter how unlikely success on the merits would be. That is, if one could challenge the rule in district court, even a frivolous claim could still take some time to decide, and then an appeal, again even if frivolous, would take additional time, and then a petition for certiorari would still further delay the effective date of the rule. Thus, totally frivolous claims could delay a high impact rule for years. For example, a frivolous claim involving a minor issue with the Information Quality Act took three years to resolve from filing of the initial claim to the date of the court of appeals decision, and that does not include what additional time would have been involved if a petition for certiorari had been filed. Again, to delay rules that will be upheld on review would cost the nation billions of dollars annually.

Moreover, as currently drafted, it is not clear how much effect this bill would have.

First, current practice under Executive Order 12866 is for executive branch agencies (those that are not an "independent regulatory agency") to submit proposed and final rules to OIRA before their publication in the Federal Register. A rule that is deemed to be a "significant regulatory action" under the Order because of the economic impact of the rule must be accompanied by a benefit/cost analysis. This analysis would be a basis for OIRA to make the determination as to the annual cost to the economy of a rule. However, currently under the Executive Order independent regulatory agencies need not comply with this requirement. Therefore, it is not clear that OIRA would determine the cost to the economy of a rule adopted by an independent regulatory agency. Perhaps this would mean H.R. 3438 would not apply to independent regulatory agencies' rulemaking.

Second, the whole concept of "annual cost on the economy" is somewhat unclear. There are questions of the appropriate baseline to be applied; whether the costs are direct costs or also include indirect costs; and whether it is net costs on the economy or gross costs. This will be left in OIRA's hands, for there is no provision for second-guessing or judicial review of OIRA's determinations.

Third, it is not clear what postponing the effective date of most high impact rules would have. That is, usually high impact rules have effective dates at least sixty days after their promulgation, but dates for coming into compliance with the rule generally are set years in the future, precisely because of the high cost of the rule. Thus, delaying the effective date may not delay the date by which regulated entities may have to come into compliance with the rule.

Fourth, and apparently inadvertently, it would appear that, if for some reason a high impact rule was not challenged within sixty days of publication, the bill would preclude a court from

granting a stay under currently existing law, and it would override an agency determination that a period longer than 60 days should be provided before the effective date of the rule. Section 2 (b)(2)(B) states that if no person seeks judicial review within the 60-day period after publication in the Federal Register, "the high-impact rule shall take effect on the date that is 60 days after the date on which the high-impact rule is published." This provision would mandate the effective date on the 60th day after publication whenever the rule had not been challenged within the 60 days. Thus, if someone challenged the rule only after 60 days, neither the agency nor any court could as an equitable matter stay the effective date. Or, if the agency had originally provided longer than 60 days for the effective date, H.R. 3438 would overrule that later effective date.

Given these problems and questions that H.R. 3438 would pose, one might ask what is the problem it is trying to solve. Existing law regarding stays weeds out frivolous claims and takes account of both the costs of the rule and the benefits of the rule that would be avoided by granting the stay. Unless there is some evidence of courts refusing to grant stays in appropriate cases, it would seem that existing law provides all the protection for the economy that is required.

ATTACHMENT

William Funk, *Legislating for Nonlegislative Rules*, 56 Admin. L. Rev. 1023 (2004)

# Legislating for Nonlegislative Rules

by William Funk*

The Administrative Law Forum's organizing topic this year was "How Should the Administrative Procedure Act be Modified or Amended?" For many years, I have believed that the courts have done a poor job in dealing with nonlegislative rules – interpretive rules and statements of policy -- in a variety of contexts: determining when a rule is an interpretive rule or statement of policy as opposed to a legislative rule, assessing when nonlegislative rules are judicially reviewable, and assigning the appropriate level of deference to agency interpretations contained in nonlegislative rules. While one might well address these issues in a traditional law review article, and I have addressed the first issue in more than one such article,[1] to treat them together in the holistic fashion that they deserve in such an article would exceed the space limitations imposed by this Forum. As a result, I chose a different and perhaps more direct path: drafting a proposed bill and its associated committee report explaining why the proposed bill is necessary and precisely how it works. It was my conceit to attach my name to the bill and report as if I were a member of the United States Senate and its Judiciary Committee. Needless to say, the bill does not in fact exist. But one can hope for the future.

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* Professor of Law, Lewis & Clark Law School; B.A., Harvard College; J.D., Columbia University. I want to thank the participants in the Administrative Law Forum for the comments on the original bill, and I want to give special thanks to Professor Robert A. Anthony, whose writings on and prior recommendations regarding nonlegislative rules provide the foundation from which anyone writing on the subject today must start, and who also provided important comments on the original bill and report.

1. *See* William Funk, When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules, 54 Admin. L. Rev. 659 (2002); William Funk, A Primer on Nonlegislative Rules, 53 Admin. L. Rev. 1321 (2001).

**Calendar No. 365**

108th CONGRESS
2D SESSION

# S. 2004

To amend the Administrative Procedure Act with respect to nonlegislative rules

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IN THE SENATE OF THE UNITED STATES

May 9, 2004

MR. FUNK introduced the following bill, which was read twice and referred to the Committee on the Judiciary.

June 9, 2004

Reported by MR. FUNK with amendments

# A BILL

To amend the Administrative Procedure Act with respect to nonlegislative rules.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Nonlegislative Rules Clarification Act of 2004."

**SECTION 2. DEFINITION OF NONLEGISLATIVE RULES**

(a) Section 551 of Title 5, United States Code, is amended by adding at the end the following subsections:

"(15) 'interpretive rule' means any rule which an agency identifies at the time of its adoption as being an interpretive rule issued for guidance purposes and as not having binding effect on any person outside the agency. An interpretive rule may bind persons inside the agency other than agency

adjudicators."

"(16) 'general statement of policy' means any rule which the agency identifies at the time of its adoption as being a general statement of policy, agency guidance document, or enforcement manual and as not having any binding effect on any person outside the agency. A general statement of policy may bind persons inside the agency other than agency adjudicators."

(b) Section 553 of Title 5, United States Code, is amended by substituting the word "interpretive" for the word "interpretative" each place it appears.

**SECTION 3. ASSURING REVIEWABILITY OF NONLEGISLATIVE RULES.**

(a) Subsection (b) of Section 701 of Title 5, United States Code, is amended by

(1) substituting for paragraph (2) the following: "(2) 'person,' 'rule,' 'interpretive rule,' 'general statement of policy,' 'order,' 'license,' 'sanction,' 'relief,' and 'agency action' have the meanings given them by section 551 of this title."

(2) adding at the end the following new paragraph: "(3) 'final agency action' includes any interpretive rule or general statement of policy."

(b) Section 704 of Title 5, United States Code, is amended by substituting the following for the first sentence of that section: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court and which is ripe for review are subject to judicial review. In assessing the ripeness for review of an interpretive rule or general statement of policy, the court

shall assess the hardship to the plaintiff in light of the practical consequences of the adoption of the rule or policy.

**SECTION 4. EFFECT OF A NONLEGISLATIVE RULE**

Section 706 of Title 5, United States Code, is amended by inserting after the first sentence: "In so doing, the court shall not defer to an agency's interpretation of law contained in an interpretive rule, general statement of policy, or agency adjudication not conducted pursuant to Section 554 of this title, but a court may afford such respect to the interpretation that it deserves in light of all the circumstances."

**SECTION 5. EFFECTIVE DATE**

Section 2 of this Act shall apply only to interpretive rules, general statements of policy, and legislative rules adopted after the date of this Act.

**Calendar No. 365**

108TH CONGRESS
*2d Session*

SENATE

REPORT
108-666

# THE NONLEGISLATIVE RULES CLARIFICATION ACT OF 2004

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MAY 8, 2004 – Ordered to be printed

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MR. FUNK, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany S. 2004]

The Committee on the Judiciary, to which was referred the bill (S. 2004) to amend the Administrative Procedure Act with respect to nonlegislative rules, reports favorably thereon and recommends that the bill do pass with amendments.

## I. PURPOSE AND SUMMARY

The purpose of S. 2004 is to clarify for the benefit of agencies, regulated entities, the public, and the courts when agencies need not use notice-and-comment rulemaking to adopt interpretive rules and statements of policy, when persons adversely affected by such rules or statements of policy may challenge them in federal court, and what influence such rules and statements should have with courts attempting to determine the meaning of statutes or agency rules. The bill amends the Administrative Procedure Act by amending 5 U.S.C. §§ 551, 553, 701, 704, and 706.

## II. BACKGROUND AND NEED FOR LEGISLATION

Under the Administrative Procedure Act (APA), rules adopted by agencies that have

binding legal effect on persons outside the agency are known as "legislative rules," because they have the same legal effect as legislation passed by Congress, if the rules are within the agency's authority, were adopted in accordance with the required procedures, and are not arbitrary and capricious. There are other rules, however, which are not intended and do not purport to be binding on persons outside the agency. These rules are known as "nonlegislative rules." The APA does not use either of these terms, nor does it specify that some rules have binding effect while others do not. Nevertheless, the Attorney General's Manual on the APA, adopted a year after the APA, and which has been found to be the primary document for interpreting the original meaning of the APA,[1] identifies what it calls "substantive" rules, those rules, other than organizational and procedural rules, that "have the force and effect of law."[2] These are the rules that we today call legislative rules. The Attorney General's Manual also identified two types of rules that it said were not substantive rules: interpretative rules[3] and general statements of policy.[4] These are the rules we today call nonlegislative rules.

In at least three different ways, nonlegislative rules have raised problems for courts, agencies, and private persons. First, courts, and consequently agencies and private persons, have had difficulty determining which rules are legislative and which are nonlegislative. The result is confusion in the courts and excessive litigation on the subject. Second, the Supreme Court has not clarified when nonlegislative rules are "final agency action" or are ripe for review and therefore subject to judicial review. Again, the result is confusion in the courts, and in many cases the denial of judicial review in circumstances in which the effect is to allow the government to extort compliance with its nonlegislative rules. Third, the Supreme Court has not made clear the extent to which nonlegislative rules, if reviewable, are subject to judicial deference. This results as well in judicial confusion and, if excessive deference is afforded the agency nonlegislative rule, can effectively provide the nonlegislative rule with the equivalent of binding legal effect.

In theory each of these problems could, in time, be addressed and resolved by courts rather than by legislation, but the nature of a judicial resolution would be to view each of these problems on its own, in its own case, without regard to the overall effects on the other problems or the overall issues that nonlegislative rules raise. This would result at best in a nonoptimal solution, if solution at all. A legislative solution can address these three problems in light of their interaction, while taking account of both the positive good that nonlegislative rules provide and the threats that they potentially pose to regulated entities or regulatory beneficiaries.

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[1] *See* William Funk, et al., ed., Federal Administrative Procedure Sourcebook (3d Ed.) 2 (2000).

[2] *See id.*, at 45, 54.

[3] The APA uses the term "interpretative," but the more modern and frequently used term is "interpretive." This bill would adopt this latter term.

[4] *Sourcebook*, at 45, 54.

It is widely accepted that there is a critical need for agencies to communicate with regulated entities and the public with regard to the agencies' expectations and understandings. Transparency with respect to agencies' understandings of and intents with regard to the law can only be a positive. Moreover, agencies need to regulate conduct within the agency to ensure that lower staff acts consistently with agency policy and to ensure consistency between lower staff entities. These positive aspects of nonlegislative rules would suffer if the adoption of such rules were burdened by the same procedural formalities governing legislative rules. For a full and persuasive argument for facilitating rather than hindering the adoption of nonlegislative rules, see Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001).

On the other hand, there is an extensive literature on, as well as popular outrage at, agencies' perceived use of nonlegislative rules to achieve impermissible ends.[5] Judicial opinions not infrequently reflect this view, perhaps most notably in Judge Raymond Randolph's opinion in *Appalachian Coal Co. v. EPA*.[6]

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.[7]

In reaction to the perceived abuse of nonlegislative rules, courts have undertaken inconsistent approaches to ruling that what agencies have stated are non-binding nonlegislative rules are in fact binding legislative rules adopted without the benefit of notice and comment and which, therefore, are invalid. While once courts relied on a "substantial impact" test to determine if a rule was a legislative rule, now the predominant test is whether the nonlegislative rule is legally binding. If so, it is invalid.[8] Some courts have gone so far as to hold that an otherwise

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[5] *See, e.g.*, Randolph May, *Ruling Without Real Rules--or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001); 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).

[6] 208 F.3d 1015 (D.C. Cir. 2000).

[7] *Id.*, at 1020.

[8] For a more elaborate critique of judicial tests for whether a rule is a valid nonlegislative rule or an invalid legislative rule, see William Funk, *When is a "Rule" a "Regulation"? Marking a Clear Line Between*

concededly interpretive rule could not in law be an interpretive law exempt from notice and comment because the interpretation contradicted an earlier, longstanding interpretive rule.[9] The tension between such a holding and the Supreme Court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[26] that courts are not at liberty to require notice-and-comment rulemaking absent a statutory requirement for it, has gone unremarked in these cases. But the circuits are split as to the appropriateness of such a rule.[11] Disagreement, if not confusion, reigns.

One reason, albeit not precisely articulated, why many courts have felt justified in finding purported nonlegislative rules as practically binding, if not legally binding, and therefore requiring the agency to go through notice and comment, is that many courts have granted substantial deference to agencies' interpretations contained in nonlegislative rules. When courts will uphold all but the most unreasonable interpretations agencies make in interpretive rules, agencies can effectively bend the law, if not make new law altogether. Of course, in legislative rules agencies *are permitted* to make law if they follow the necessary procedures, but these procedures are somewhat cumbersome – as they should be when an agency makes law binding on the public – in order to assure that the agency has given adequate consideration of the issues. Moreover, when courts give substantial deference to agency interpretations in interpretive rules, these nonlegislative rules, even while technically not legally binding, may as a practical matter have almost the same effect as a binding rule.

Often the agency can avoid any pre-enforcement judicial review of the rule at all by stating that the rule has no legal effect. Under the APA, in order to obtain judicial review of an agency interpretation, the interpretation must be a "final agency action." The Supreme Court has adopted a two-part test for whether an agency action is "final agency action." First, the action must be the consummation of the agency's decisionmaking. Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[12] Because nonlegislative rules do not have binding legal effect, some courts have held that they fail the second part of the test and are not judicially reviewable as final agency action. The Supreme Court, however, has itself sometimes articulated the second part of the finality test as being whether the agency action "is sufficiently direct and immediate" and has a "direct effect on ... day-to-day business." This way of describing the required impact focuses on the practical effect, rather than the legal effect. As a result of these two different ways of stating the test, lower courts have been inconsistent in their decisions regarding the reviewability of nonlegislative rules.

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*Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002).

[9] *See, e.g.*, Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997).

[10] 435 U.S. 519 (1978).

[11] *See, e.g.*, Warder v. Shalala, 149 F.3d 73 (1st Cir. 1998).

[12] Bennett v. Spear, 520 U.S. 154, 177-178 (1997).

In addition, even if the agency cannot avoid review on the basis that the rule is not final, it may still attempt to evade review by claiming that the rule is not ripe for review. In *Abbott Laboratories v. Gardner*,[27] the Supreme Court laid out the classic test for whether an issue is ripe for judicial review. That test tells courts to weigh essentially two factors: the fitness of the issue for decision and the hardship to the parties of withholding decision. In a more recent case the Supreme Court suggested that weighing these factors would involve consideration of "(1) whether delayed review would cause hardship to the plaintiffs, (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[14] Arguments have been made in various cases that nonlegislative rules are not ripe in light of these considerations, in some cases because there is allegedly no hardship imposed by rules that do not have binding legal effect and in other cases because the tentative nature of the agency policy statement means that judicial intervention both would inappropriately interfere with further administrative action and deprive the courts of possible further factual development of the issues.[15] On the other hand, a highly cited case, *National Automatic Laundry and Cleaning Council v. Shultz*,[16] undertook an extensive analysis of the applicability of the ripeness doctrine to interpretive rules and found that a purely interpretive rule could impose precisely the same kind of hardship on plaintiffs as was suffered in *Abbott Labs*. Again, there is a lack of certainty as to the standard for ripeness for nonlegislative rules.

There is also confusion regarding the degree of deference that should be afforded agencies' nonlegislative rules that interpret the agencies' statutes or regulations. Two Supreme Court cases counsel strong deference to certain agency rules. *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), held that when a statutory provision which an agency is responsible for administering is ambiguous, courts should accept any reasonable interpretation made by the agency. Similarly, in the older case of *Bowles v. Seminole Rock & Sand Co.*,[17] the Court held that courts should give an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Neither of these cases, however, explicitly dealt with the form in which the agency interpretation was made. In *Chevron* the interpretation was made in a legislative rule; in *Seminole Rock* it was made in an interpretive bulletin, a nonlegislative rule. Since *Chevron*, the Supreme Court has occasionally addressed what form of agency action is necessary to qualify for *Chevron* deference, but it has not explicitly addressed what form of agency action is necessary to qualify for *Seminole Rock* deference. The cases explaining when *Chevron* deference should apply are confusing, and even

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[27] 387 U.S. 136 (1967).

[14] Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998).

[15] *See, e.g.*, ACLU v. FCC, 823 F.2d 1554, 1577 (D.C. Cir. 1987)("Interpretative rules as a general matter raise ripeness concerns, given that questions often arise as to the binding effect of the rule, the absence of immediate enforcement, and the need for further factual development").

[16] 443 F.2d 689 (D.C. Cir. 1971).

[17] 325 U.S. 410 (1945).

experts and Supreme Court justices do not seem to agree on what the test is, although it appears that interpretive rules and general statements of policy do not qualify for *Chevron* deference.[18] However, lower courts have not unanimously agreed.[28]

## III. DISCUSSION

In order to clarify the law, as well as to facilitate the use of nonlegislative rules to give guidance and assure agency consistency and effective management, and at the same time attempting to guard against abuse of the process, the bill makes a number of amendments to the APA.

In 1992, the Administrative Conference of the United States adopted Recommendation 92-2, Agency Policy Statements,[20] which addressed some of the issue involved in this legislation. That recommendation, despite its label, effectively called upon agencies to label their legislative rules as such when they adopted them and also to label their interpretive rules and general policy statements as such when they adopted them. In this way, private parties would have effective notice of whether the agency intended the rules to be legally binding on them or not. The Administrative Conference hoped that such a practice would reduce confusion as to which rules were legally binding. Unfortunately, however, agencies did not uniformly adopt the practice, and courts did not give determinative effect to the agency's label in deciding whether a rule was legislative or not, thereby continuing the confusion as to which rules were procedurally valid nonlegislative rules and which rules, because they had not gone through notice and comment, were procedurally invalid legislative rules. Both of these failings could be cured by legislation.

The Committee considered the approach suggested by the Administrative Conference but ultimately rejected it in favor of having agencies specifically label only their interpretive rules and general statements of policy, rather than also having to label their legislative rules. The reason the Committee adopted this approach rather than the Administrative Conference's approach is the consequences of an agency error. The Committee has concluded that requiring only a label for nonlegislative rules creates less potential for judicial challenges and less consequence as a result of challenges. That is, what happens under the two different approaches on judicial review if the agency fails to assign a label? First, the Administrative Conference's approach, if adopted into law, would essentially require all rules to be labeled, so that there would be greater opportunity for agency error. Second, if an agency failed to label a rule, what would be the effect? A legislative rule that had gone through notice-and-comment and otherwise had complied with all procedural requirements might be invalidated for having failed to be properly labeled. This, however, would serve no purpose sought by this legislation, which is concerned with the effects of nonlegislative rules. Third, the Committee believes that in order

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

[28] *See, e.g.,* Hospital Corporation of America and Subsidiaries v. Commissioner, 348 F.3d 136 (6th Cir. 2003).

[20] Available online at: www.law.fsu.edu/library/admin/acus/305922.html (visited on June 11, 2004).

for an agency to obtain the procedural advantages of not having to go through notice-and-comment and the assurance that the rule will not be deemed procedurally invalid, the agency should be required to affirmatively state that the rule is an interpretive rule or a general statement of policy. On the other hand, when an agency has already complied with the significant procedural requirements attendant to legislative rulemaking, the agency should not be further encumbered by having to label such a rule as a legislative rule.

Under the Committee's approach, requiring only that interpretive rules and general statements of policy be labeled as such, the likelihood of error is lessened simply because less rules will be subject to a labeling requirement. Moreover, when they are so labeled the label is to have determinative effect. Still, the question remains, what would be the effect of an agency failure to label properly a rule that had not gone through notice and comment? Because the rule cannot be an interpretive rule or general statement of policy, as defined in the statute, the rule must be a legislative rule that is procedurally invalid. The agency, if it wishes to revive the rule, could go through notice and comment if the agency indeed wishes the rule to be binding on persons outside the agency. Or, alternatively, the agency could reissue the rule without notice and comment but properly labeling it an interpretive rule or general statement of policy, if the agency does not desire to bind persons outside the agency.

Accordingly, the bill amends the definition section of the APA to define both "interpretive rule" and "general statement of policy." There are no such definitions currently in the APA. The purpose of these definitions is to create a clear and unambiguous means of determining which rules are interpretive rules or general statements of policy and therefore do not need to be adopted through notice-and-comment rulemaking. This will reduce litigation and uncertainty. At the same time, by requiring that these rules explicitly state that they do not have binding legal effect on persons outside the agency, these definitions will minimize the ability of the agency to abuse its latitude in adopting interpretive rules and general statements of policy by attempting to bind persons by such rules.

Second, the bill amends the Judicial Review chapter of the APA to address the reviewability of interpretive rules and general statements of policy. The bill defines "final agency action" in the judicial review chapter of the APA to make clear that interpretive rules and general statements of policy within the meaning of the new definition are final agency actions potentially subject to judicial review. Moreover, the bill also amends Section 704 of the APA to make clear that interpretive rules and general statements of policy can be ripe for judicial review even if they do not have binding legal effect. While the amendments contained in this bill eliminate procedural hurdles to agencies issuing interpretive rules and general statements of policy and thus assure that such nonlegislative rules will not be subject to procedural challenges, the amendments also assure that persons who are adversely affected or aggrieved by interpretive rules or general statements of policy may challenge them on the merits as invalid interpretations or stating policies that are beyond the agency's authority or are arbitrary and capricious.

Third, the bill amends Section 706 of the APA, governing the scope of judicial review, to specify that courts should not defer to agencies' interpretations of either their statutes or their regulations if those interpretations are contained in nonlegislative rules. As noted above, this appears to codify the rule of *Christensen* with respect to agency interpretations of their governing statutes, but it would change the apparent rule of *Seminole Rock* with respect to interpretations of an agency's own regulations. Commentators have widely criticized applying *Seminole Rock* deference to agency interpretations contained in nonlegislative rules.[21] The amendment does allow courts to give such respect to the agency interpretation as the circumstances suggest. This is intended to codify the "weak" deference concept contained in *Skidmore v. Swift & Co.*[22] In that regard, the committee agrees with the majority of the Supreme Court that perceives a significant difference between *Skidmore* deference and *Chevron* deference and disagrees with Justice Breyer who apparently perceives no significant difference.[23]

Finally, the bill provides that the new definitions of "interpretive rule" and "general statement of policy" shall only apply to rules adopted after the date of this Act. This is to assure that the requirement for an explicit statement not be applied to those rules adopted before this requirement was placed into the law.

## IV. SECTION-BY-SECTION ANALYSIS

*Section 1. Short Title*

This bill may be cited as the "Nonlegislative Rules Clarification Act of 2004."

*Section 2. Definition of Rules*

The bill would add a new subsection (15) to Section 551 of Title 5, the definitions section of the APA. It would define "interpretive rule" as any rule an agency adopts, if the agency states at the time of the rule's adoption that the rule is an interpretive rule issued for guidance purposes and does not have binding effect on any person outside the agency. Some commentators have argued that under existing law an agency's statement that the rule is an interpretive rule should have determinative effect,[24] but courts have not adopted this standard, resulting in decisions that are highly subjective and unpredictable. Requiring the agency to make such a statement in order to obtain the flexibility to issue the rule without notice and comment has a number of advantages. First, it makes the agency focus on what it is doing and why. In the past, agencies have not always done this, and only when challenged in court have tried to rationalize why they did not follow notice-and-comment procedure. Second, it gives clear notice to regulated entities

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[21] *See, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1343 (2001).

[22] 323 U.S. 134 (1944).

[23] *See* Christensen v. Harris County, 529 U.S. 576, 596 (2000)(Breyer, J., dissenting).

[24] *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389-90.

and the public that this rule is for guidance purposes only. Third, it provides an absolutely clear and unambiguous test for courts to apply. If the rule contains the required statement, the rule is an interpretive rule and was not required to follow notice-and-comment procedures. If the rule does not contain the statement, it is not an interpretive rule. The effectiveness of requiring an agency to make a contemporaneous explanation of why it is not using notice and comment has been demonstrated by Section 553(b)(B) and (d)(3), which require an agency to make a contemporaneous statement of "good cause" when issuing a rule without notice and comment on the basis of good cause.

While an interpretive rule does not bind anyone outside the agency, the amendment makes clear that an interpretive rule *can* bind persons inside the agency and still be an interpretive rule. This only makes sense. In using the word "can," the committee intends to provide an agency the opportunity affirmatively withhold that effect, if it so wishes. Absent such an affirmative statement to the contrary, however, if the *agency* issues its interpretation of the law, its employees *should* be bound by the agency's interpretation or else the guidance to the public would be good for nothing. The committee is aware that Administrative Law Judges are usually the employees of the agency issuing interpretive rules, unless they are employees of an independent adjudicatory body as is used in split enforcement models, like the Occupational Safety and Health Review Commission. Nevertheless, ALJs do not act as agency employees; they act as independent adjudicators. They act more like federal judges than agency employees.[25] Accordingly, ALJs should not be treated like other agency employees. They should not be bound by the agency's interpretation that was adopted for guidance purposes. The committee recognizes that this treatment of ALJs is a change to the generally prevalent practice in agencies today, but as is more fully described below, the contrary practice with respect to general statements of policy has created a legal distinction between interpretive rules and general statements of policy that serves no worthwhile purpose. Consistency of treatment between interpretive rules and general statements of policy is preferred, especially because their characteristics are often overlapping. Moreover, to allow agencies to bind ALJs to the agency's interpretations contained in nonlegislative rules would be effectively to give those interpretations binding legal effect on persons outside the agency. This change does not ultimately alter agencies' powers, however, because the agency has the authority to review ALJ decisions on the law de novo. That is, the agency has recourse if an ALJ indeed does not concur in the agency's interpretation. In this context, issuing a decision on review of the ALJ's decision, the agency then would be making a decision having the force of law and therefore can render a legally binding interpretation.

The above discussion has focused on the particular role of ALJs, but the bill's language refers to "agency adjudicators." While this term clearly encompasses ALJs, it is broader, reaching any agency employee who actually adjudicates cases before the agency. These other adjudicators are generally called Administrative Judges, but they also have other names, such as

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[25] *See* Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002).

hearing officers, presiding officers, and the like. The committee intends that all such persons would be considered agency adjudicators under the Act. Although such persons do not enjoy all the protections and independence that ALJs, they do perform functionally identical tasks – adjudicating cases. Moreover, the assignment of some adjudications to ALJs and others to administrative judges has not been done with particular attention to differences in the nature of the adjudications, but has occurred largely because of political concerns or happenstance. Were the effect of interpretive rules different for these two classes of adjudicators this would create an unnecessary and unwanted incentive for agencies to avoid the use of ALJs in favor of administrative judges. Finally, this identity of treatment with respect to ALJs' and administrative judges' powers to review interpretive rules is consistent with the identical powers of ALJs and administrative judges with respect to general statements of policy.

Section 2 of the bill also adds a new subsection (16) to the definitions section of the APA, defining "general statement of policy." This definition mirrors the definition of interpretive rule. Again, in order to avoid notice-and-comment rulemaking, the agency must include the contemporaneous statement that the rule is a general statement of policy, an agency guidance document, or enforcement manual that does not have a binding effect on any person outside the agency. Here, the agency statement identifying the type of rule is not limited to a general statement of policy, because what has become known as a general statement of policy includes internal agency guidance documents, such as an enforcement manual, adopted less for guidance to the public and more for internal management purposes. Arguably, such internal rules might be classified as a rule "relating to agency management," and therefore exempt from Section 553 generally pursuant to Section 553(A)(2), but courts have not generally interpreted them as such. In any case, these rules, if accompanied by the necessary statement, qualify as general statements of policy.

Again, like interpretive rules, general statements of policy, as defined, while they cannot bind persons outside the agency, can bind persons inside the agency. As *agency* statements, they appropriately bind agency personnel. An agency must be able to direct its own employees as to internal matters, even internal matters that have effects on those outside the agency, such as what kind of triggers justify an agency investigation of a regulated entity. Accordingly, this provision in the Act would overrule those lower court decisions that have held to the contrary.[26] Again, as is the case with respect to interpretive rules, the Act would allow an agency affirmatively to deny binding effect on agency employees, if it so wished.

Also, again as with interpretive rules, the committee believes that general statements of policy should never bind agency adjudicators. Under current law, a popular test for whether an agency rule is a general statement of policy turns on whether the rule is "tentative." While the committee rejects that as a test for whether a rule should be a general statement of policy, the idea behind that concept is that there is a distinction between a policy that is law, which would

[26] *See, e.g.,* Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987).

require a legislative rule, and a policy that is merely the agency's position that it will take in an adjudication. If a general statement of policy was binding upon ALJs, for example, the effect of a general statement of policy on a regulated entity would be indistinguishable from the effect of a legislative rule. That is, in an adjudication before an ALJ, a regulated entity can be foreclosed from arguing that the legislative rule being applied in the adjudication was beyond the agency's authority or was arbitrary and capricious or without substantial evidence. If an ALJ were similarly foreclosed from considering the validity of the general statement of policy in the adjudication, the general statement of policy would become as much "law" as the legislative rule. The general practice under current law allows ALJs to assess the validity of their agencies' general statements of policy. As is discussed above, what is true for ALJs should be equally true for agency adjudicators in adjudications that are not subject to Section 554. Accordingly, the amendment specifies that general statements of policy cannot be binding on agency adjudicators.

The fact that neither interpretive rules nor general statements of policy can be binding on persons outside the agency does not mean that persons outside the agency cannot rely on such nonlegislative rules to a certain extent. For example, if a person complies with an agency's interpretation of the law or complies with the terms of a general statement of policy, the agency could not thereafter penalize the person for such compliance. Due process, if nothing else, would preclude the agency from penalizing someone for reliance on the agency's official position.[27] This does not mean, however, that any reliance interest precludes the agency from changing its position. The agency may change its mind and adopt a new interpretive rule or new general statement of policy at any time without having to go through notice-and-comment. The amendment in this bill is intended to overrule court decisions to the contrary. Of course, if an agency changes its mind, it may be subject to judicial challenge on the merits of its action, and a failure to explain its change would likely lead to the change being held arbitrary and capricious.

Finally, Section 2 makes a technical amendment changing the term "interpretative rule," as currently used in the APA, to "interpretive rule," the nearly universal term in use today.

*Section 3. Assuring Reviewability of Nonlegislative Rules*

Subsection (a) of Section 3 makes two amendments to 5 U.S.C. § 701(b). Section 701(b) contains the definitions of terms applicable to Chapter 7 of Title 5, governing judicial review of agency action. The first amendment to Section 701(b)(2) would add the terms "interpretive rule" and "general statement of policy" to the list of terms whose definitions in Section 551 of Title 5 also apply in Chapter 7 of Title 5 governing judicial review.

The second amendment would add a new definition to Section 701(b), a definition of "final agency action." It specifies that interpretive rules and general statements of policy are final agency actions. Interpretive rules and general statements of policy, as they would now be

[27] *See, e.g.*, General Electric Co. v. U.S.E.P.A., 53 F.3d 1324 (D.C. Cir. 1995).

defined in Section 551, would be authoritative agency statements. This should make them final, in the sense of having been fully considered and reflect the conclusion of the agency process. Because only persons who are adversely affected or aggrieved by final agency action may bring a judicial challenge to the action, a person will only be able to challenge an interpretive rule or general statement of policy if the nonlegislative rule adversely affects or aggrieves them. This requirement should substitute for the second part of the finality test -- that either practical or legal effects stem from the agency action. If there are neither practical nor legal effects, one would not be adversely affected or aggrieved by the nonlegislative rule. Because this definition is phrased in terms of "includ[ing]" any interpretive rule, etc., it makes clear that other types of agency action may be final agency action under appropriate judicial precedents.

Subsection (b) of Section 3 of the Act would amend 5 U.S.C. § 704. Section 704 generally describes the actions reviewable under Chapter 7. First, this amendment would codify that only agency actions "ripe for review" are subject to judicial review under the APA. "Ripeness" as a requirement for judicial review of agency actions has long been a judge-made requirement, but there is nothing in the language of the APA authorizing it. Indeed, it is arguable in light of the Supreme Court's decision in *Darby v. Cisneros*,[28] that the specification in Section 704 of when actions are reviewable precludes judge-made rules imposing additional requirements for review.[29] By codifying the ripeness requirement in Section 704, it eliminates any question as to its appropriateness. Moreover, there is no intent generally to change the nature of the Court's ripeness jurisprudence.

However, the amendment of Section 704 would also add a new sentence to that Section stating that: "In assessing the ripeness for review of an interpretive rule or general statement of policy, the court shall assess the hardship to the plaintiff in light of the practical consequences of the adoption of the rule or policy." The purpose of this language is to make clear that interpretive rules and general statements of policy can be ripe for review notwithstanding that they do not have binding legal effect. An interpretive rule that interprets a statute to require persons to take certain specific actions that are not apparent on the face of the statute, for example, has practical consequences, even if the interpretive rule has no force of law.[30]

This is not to say that all interpretive rules and general statements of policy will be ripe for review. Courts will still weigh the hardship to the plaintiff in light of the fitness of the issue for review, in particular with respect to whether the courts would benefit from further factual development of the issues presented. Normally, with respect to interpretive rules, the issue presented should be a purely legal question; after all, the agency is purportedly interpreting a

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[28] 509 U.S. 137 (1993).

[29] *See* William Funk, Supreme Court News, Administrative Law News, Fall 1993, at 4-5.

[30] *See, e.g.,* Oregon v. Ashcroft, — F.3d — (9th Cir. 2004)("This case is ripe for review because, under the Directive, health care practitioners risk criminal prosecution and loss of the privilege to prescribe medication if they choose to [act inconsistently with the Directive]").

statute or regulation, and therefore no further factual development would seem necessary. Similarly, while general statements of policy often involve factual considerations, when the agency adopts a policy, it should already be in possession of the relevant facts upon which the policy is based. For example, if an agency adopts a general statement of policy that in order to assure the statutorily required secure containment of dangerous animals a person must provide an 8-foot high fence enclosing such animals,[31] the agency should have some factual basis for that policy. The agency expects and desires that regulated entities will act consistently with the agency's policy, but before regulated entities should be expected to expend large sums of money to comply with such a policy, the agency should have sufficient facts to justify the adoption of the policy. Consequently, a regulated entity, which would suffer substantial hardship if it had to change its fences to comply with the agency's policy, should be able to obtain review of that policy; it should be ripe for review, because the agency should already have the facts justifying the setting of that policy, even in a non-legally binding format.

Compare this hypothetical, however, with a general statement of policy by an agency saying that any fence over 8 feet high will be presumed to provide secure containment, but that other forms of containment may also provide the required secure containment. Here, a regulated entity is unlikely to suffer hardship in having review postponed. The entity benefits from knowing that an 8-foot fence will be deemed sufficient, but it also knows that other, as yet unknown methods of containment, can also qualify. It might desire to have certainty, but it is not forced to follow a particular path in order to avoid a citation. Moreover, review at this point of what other methods of containment might satisfy the statutory requirements would surely interfere inappropriately with further administrative action, and courts would clearly benefit from further factual development. At the same time, a person living near a facility housing dangerous animals might well be adversely affected by a standard that irrebuttably presumes an 8-foot fence is sufficient. Delaying review as to this person would cause substantial hardship, because there is no "enforcement" context in which the person could otherwise challenge the agency's decision. Only, when the inadequacy of the 8-foot presumption is demonstrated by a dangerous animal escaping from a facility with such a fence will the case be more concrete, and then it may well be too late. In addition, in setting the 8-foot presumption, the agency should have facts sufficient for establishing that standard. The agency is not waiting for individual cases to further develop that presumption; it stands on its own. Accordingly, this general statement of policy, while not ripe for review by a regulated entity, would probably be ripe for review by a regulatory beneficiary.

Similarly, if an agency adopts a general statement of policy that establishes "action levels," informing food producers of the allowable levels of unavoidable contaminants such as aflatoxins that may be present in food without being subject to agency enforcement actions, there

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[31] *See* Hoctor v. Department of Agriculture, 82 F.3d 165 (7th Cir. 1996)(internal agency memo instructed field personnel to cite persons not having an 8-foot fence to enclose dangerous animals).

are obvious factual issues involved.[32] Persons who consume food with "allowable" contaminants are adversely affected and denying them review of the policy when adopted would be substantial hardship, because otherwise there will be no review ever of their claim that the action level is set too high. Moreover, they should not be made subject to that adverse effect unless the agency has sufficient facts to justify its setting those action levels where it did. Thus, the issues in the case should be ripe for review.

*Section 4. Effect of a Nonlegislative Rule*

This section amends Section 706 of Title 5, which governs the scope of judicial review of agency action. That section begins by stating that a court is to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The new amendment would then provide that, in making the aforementioned decisions or determinations, the court is not to defer to an agency's interpretation of law contained in an interpretive rule or general statement of policy. The intent behind this language is to codify the majority's decision in *Christensen v. Harris County* that interpretive rules and general statements of policy should not qualify for *Chevron* deference. However, this amendment goes further, by overruling the majority's decision in *Christensen* that such nonlegislative rules would qualify for *Seminole Rock* deference. The committee agrees with the majority of commentators who believe that, if an agency wishes to obtain the benefit of the "strong" deference afforded by either *Chevron* or *Seminole Rock*, the agency should utilize notice-and-comment rulemaking or formal adjudication. Only when the agency utilizes that law-making power under a delegation of law-making authority should the agency receive such deference. The amendment does make clear that, even though the agency should not receive the "strong" deference of *Chevron* or *Seminole Rock*, the agency may still qualify for the "weak" deference of *Skidmore*. The availability and extent of that "weak" deference depends not on the exercise of law-making powers but on all the facts and circumstances involved in the agency's interpretation.

This amendment also specifies that interpretations made in agency adjudications that are not conducted pursuant to the APA's adjudication procedure, contained in 5 U.S.C. § 554, also should not receive the "strong" deference of *Chevron* or *Seminole Rock*. Adjudications pursuant to the APA procedures assure that interpretations are made through a suitably formal process that guarantees appropriate consideration. While some adjudications not made pursuant to the APA procedures also share a high degree of formality, there is no guarantee that all such adjudications have the requisite formality to ensure appropriate agency consideration. To leave the question of the requisite amount of deference to a case-by-case determination, given the wide variety of types of non-APA adjudications, would be an invitation to uncertainty and confusion. Accordingly, the committee believes it is best to have a clear, definite rule. Accordingly, the

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[32] *See* Young v. Community Nutrition Institute, 474 U.S. 1018 (1985)(judicial review of agency general statement of policy).

committee believes that interpretations made in non-APA adjudications as a class should not receive strong deference. They would, of course, qualify for *Skidmore* deference, and contextual factors, such as the more formal the proceeding or the greater degree of consideration afforded to the decision, can affect the respect afforded the agency decision beyond its substantive merits.

*Section 5. Effective date.*

This section makes clear that the new definitions of "interpretive rule" and "general statement of policy" do not apply to nonlegislative rules adopted prior to this Act. Given the new requirements imposed in this Act for nonlegislative rules to qualify as interpretive rules or general statements of policy, only such nonlegislative rules adopted after the Act becomes law should be subject to it.

**WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**
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July 23, 2015

Barack Obama
President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

**RE: NAACP STRONG SUPPORT FOR AN UPDATED, STRONG FINAL OZONE RULE WHICH MANDATES A STANDARD OF NO MORE THAN 60 PARTS PER BILLION**

Dear President Obama,

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots-based civil rights organization, I am writing to express our organization's support for an updated, strong final ozone rule which mandates a standard of no more than 60 parts per billion. This rule is important to the NAACP and to the communities we serve and represent because air pollution is a serious problem which disproportionately affects too many racial and ethnic minorities.

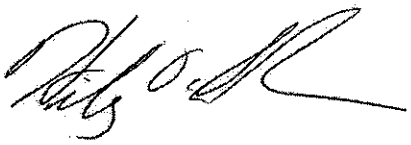
Approximately 71% of African Americans live in areas in violation of air pollution standards. Studies have determined that race, over income, is the #1 predictor of whether a person lives near a polluting facility. Furthermore, an African American making $50,000 per year is more likely to live in an area cited for air pollution than a Caucasian American making $15,000 per year.

The results of these disparities are as disheartening as they are predictable: Low-income populations and racial and ethnic minorities are exposed to greater levels of certain air pollutants and, in turn, suffer more asthma-related difficulties, from asthma attacks and daily medication needs to work absences and emergency room visits. African American children have double the risk for asthma than white children; and between 2003-2005, African American children had a death rate 7 times that of White children due to asthma. In 2009, African Americans overall were 3 times more likely to die from asthma related causes than the White population, and currently African Americans are hospitalized for asthma at 3 times the rate of White Americans.

This issue is sufficiently important to the NAACP, that in 2011 the delegates to our national convention passed a resolution, which was later ratified by our National Board of Directors and became the policy of the NAACP, calling for an updated strong final Ozone rule mandating a standard of approximately 60 parts per billion (ppb). Our policy has certainly not changed since then: if anything, more of our members are becoming aware of the problems associated with high levels of ozone in the air, and the potential fix. Pursuant to the policies established through our resolution process, the NAACP Washington Bureau has worked hard to defeat several proposals in the U.S. House and the Senate which would in any way impede the ability of the U.S. EPA to implement the Clean Air Act.

In conclusion, allow me to reiterate the NAACP's strong and unwavering support for an ozone rule which mandates a standard of no more than 60 ppb. This would help ensure the right to fresh air and a shot at good health, regardless of your race or ethnicity. Should you have any questions or comments on the NAACP position, please feel free to call me in my office at (202) 463-2940.

Sincerely,



Hilary O. Shelton
Director, NAACP Washington Bureau &
Senior Vice President for Policy and Advocacy

cc: Gina McCarthy
Administrator
US Environmental Protection Agency

Regina "Gina" McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

July 24, 2015

**Re: Overburdened Communities Require A Strong Smog Standard**

We, the undersigned community health, labor, faith-based, environmental justice, and frontline community organizations write to respectfully urge the U.S. Environmental Protection Agency (EPA) to finalize a ground-level ozone limit of 60 ppb. Scientific support for a 60 ppb standard is overwhelming. Noting that "[c]hildren suffer a disproportionate burden of ozone-related health impacts due to critical developmental periods of lung growth in childhood and adolescence that can result in permanent disability," EPA's Children's Health Protection Advisory Committee "strongly re-affirm[ed] its "recommendation of 60 ppb based on the expanding scientific evidence base documenting adverse childhood health impacts in relation to ambient ozone exposure" and explained that "[t]he higher end of the range 60 ppb – 70 ppb, put forth by [CASAC] . . . will not be sufficient to protect children's health."

Political opponents of stronger environmental health protections have cynically asserted they are doing so in the name of environmental justice. This type of rhetoric is both appalling and outrageously offensive to communities living with oppressive health and financial burdens tied to smog and climate pollution. After years of leading federal clean air policy, visiting our communities, attending National Environmental Justice Advisory Council meetings, and receiving public comment, EPA is fully aware that breathing the cleanest air possible is high on the environmental justice agenda. The ball is in EPA's court to transform high-minded commitments to prioritizing environmental justice into meaningful air pollution limits.

The health burdens of ozone are not evenly distributed, and lower-income communities and communities of color bear a disproportionate share of the health burden of air pollution. As EPA has recognized, "[n]early 26 million Americans, including seven million children, are affected by asthma . . . . But when emergency room doors burst open for someone with an asthma attack, chances are the patient will be a poor, minority child."[1] African-Americans are the group most heavily burdened by asthma in the United States, and Black non-Hispanic children are more than 60 percent more likely to experience asthma than White non-Hispanic children. Racial disparities

[1] http://epa.gov/sciencematters/oct2012/asthmagap.htm.

extend to emergency department visits and asthma-related hospitalizations.[2] The CDC reports that more than 1 in 4 Black adults cannot afford their asthma medication and Black Americans are 2 to 3 times more likely to die from asthma than any other racial or ethnic group.[3]

The Center for Effective Government recently released a report noting that 537,500 black children with asthma as well as the almost 16 million more people living in poverty, are far more protected protected by a 60 ppb v. 75 ppb ozone NAAQS.[4] With their health and welfare in mind, our communities require and respectfully demand that EPA prioritize transparency, science and our health over polluter profits. In the final chapter of the Obama Administration's environmental health legacy, we hope we can count on the promulgation of the most health-protective final smog standard.

Sincerely,

**National**
Global Alliance for Incineration Alternatives
Labor Council for Latin American Advancement
Physicians for Social Responsibility
Women's Voices for the Earth

**State and Regional**
Air Alliance Houston (TX)
Alaska Community Action on Toxics
Apostolic Faith Center (CA)
Clean Water Action New Jersey
California Communities against Toxics
California Kids IAQ
Citizens' Environmental Council (NY)
Clean Air Carolina (NC)
Clean Air Watch (National)
Coalition For A Safe Environment (CA)
Community Dreams (CA)
Community Science Center (CA)
Connecticut Coalition for Environmental Justice
Respiratory Health Association (IL)
People for Community Recovery (IL)
Physicians for Social Responsibility (National)

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[2] *See* CDC, Asthma's Impact on the Nation: Data from the CDC National Asthma Control Program, at 3.
[3] *Id.*, at 4.
[4] http://www.foreffectivegov.org//files/regs/gasping-for-support.pdf

Jesus People Against Pollution (MS)
Beyond Toxics (OR)
Del Amo Action Committee (CA)
Diesel Health Project (MO)
Downwinders At Risk (TX)
Earthkeepers of Heartland Presbytery (KS/MO)
Greenlaw (GA)
HEAL Utah
Interfaith Partners for the Chesapeake (MD)
Institute of Neurotoxicology & Neurological Disorders (OR)
Labadie Environmental Organization (MO)
Medical Advocates for Healthy Air (NC)
Montana Environmental Information Center
Montanans Against Toxic Burning
Nature Abounds (PA)
Regional Asthma Management and Prevention (CA)
Texas Campaign for the Environment
Utah Moms for Clean Air
WE ACT for Environmental Justice (NY)
West Oakland Environmental Indicators Project (CA)

CC:

EPA Assistant Administrator Janet McCabe

CEQ Managing Director Christy Goldfuss


October 13, 2015

Dear Representative:

The undersigned public health and medical organizations urge you to strongly oppose any legislation or amendments that would block, weaken or otherwise hinder the U.S. Environmental Protection Agency's work to update and enforce strong limits on dangerous air pollution.

With the passage of the Clean Air Act more than 40 years ago, Congress made a commitment that the air in the United States would be safe for all to breathe, based on the best evidence from the health and medical science. This set our nation on a path toward safe, healthy air for all – including children, the elderly, and those with lung or heart disease. Thanks to that commitment, we have made tremendous progress to reduce pollution.

Implementing and enforcing the Clean Air Act is a strong investment in the health of our nation. Reducing air pollution saves lives and reduces health care costs by preventing thousands of adverse health outcomes, including cancer cases, asthma attacks, strokes, heart attacks, emergency department visits, and hospitalizations. A rigorous, peer reviewed analysis, *The Benefits and Costs of the Clean Air Act from 1990 to 2020*, conducted by EPA, found that the air quality improvements under the Clean Air Act will save $2 trillion by 2020 and prevent at least 230,000 deaths annually.

With benefits like these, it is no surprise that the American public supports EPA efforts to reduce pollution, and believes overwhelmingly that Congress should not interfere with EPA scientists as they work to protect public health. A recent bipartisan poll by the American Lung Association found that more than two-thirds of voters enter the debate supporting safer, stricter standards. An overwhelming 68 percent of voters across party and demographic lines support EPA setting stricter smog pollution standards to protect public health.

Despite the success of the Clean Air Act and the strong public support for continued protection, some in Congress have proposed legislation that would dismantle or delay Clean Air Act safeguards. Doing so would undermine the health of our nation, and could expose millions of

Americans to unsafe levels of air pollution, increasing the number of missed work and school days due to illness, hospitalizations for respiratory and cardiovascular distress, and premature deaths due to air pollution.

Therefore, we ask you to support full implementation of the Clean Air Act and resist any efforts to weaken, delay or block progress toward the continued implementation of these vital public health protections. Further, we ask that you speak out publicly in defense of the fundamental human right to breathe healthy air.

Sincerely,

Allergy and Asthma Network
American College of Preventive Medicine
American Lung Association
American Heart Association
American Public Health Association
American Thoracic Society
Asthma and Allergy Foundation of America
Children's Environmental Health Network
Health Care Without Harm
National Association of County & City Health Officials
National Association of Hispanic Nurses
National Association of School Nurses
National Environmental Health Association
Physicians for Social Responsibility
Public Health Institute
Trust for America's Health

THE HILL

November 03, 2015, 06:00 am

# Arguing about the costs of regulation, but ignoring the benefits

**By Stuart Shapiro, contributor**


*Getty Images*

Last week, the Office of Management and Budget (OMB) published its ***Draft Report to Congress on the Costs and Benefits of Federal Regulations***. (The report was eight months late, but that is a subject for another column.) Like nearly all of the annual reports since OMB was required to produce them in 1997, the report shows the benefits of regulation far exceed the costs under both Republican and Democratic administrations.

In fiscal year 2014, the regulations in the OMB report produced total benefits that range from $9.8 billion to $22.8 billion and costs that range from $3.0 to $4.4 billion in 2010 dollars. A large share of the benefits come from regulations from the Environmental Protection Agency (EPA) and the Department of Energy's (DOE) energy efficiency standards. Over the years, the lion's share of benefits and costs of regulation have come from the EPA.

Reactions to the OMB reports have been relatively stable over the years, as well. Opponents of regulation generally assert that the costs have been underestimated. **They** point to the many regulations that are **not included**, a reasonable objection but an incomplete one: Those regulations that are not included also have benefits.

So, presumably, those who support regulations designed to protect public health, secure the financial system or defend the homeland are out there complaining about how OMB underestimates the benefits of regulations? Nope. These same groups largely oppose the very use of benefit-cost analysis and in doing so, they leave the argument that costs are underestimated unanswered. While some supporters of regulation have argued that this is a **misplaced strategy**, these groups have still largely failed to engage.

It's a shame because there are important arguments worth having on the benefits of regulation. **Some have contended that they are overestimated**, particularly by the EPA and the DOE. Others have argued that, because many benefits are inherently unquantifiable, attempts to monetize the benefits will **leave out a great deal**.

Instead, debates over regulation too often focus just on one side of the equation. Costs are important, no doubt. But so are benefits. And every regulation, no matter what its supporters or opponents tell you, has costs and has benefits. Environmental regulations cost industry, their workers and their customers. These same regulations provide cleaner air for people to breathe. Regulations on homeland security lead to longer lines at the airport and losses in privacy. Presumably, they also make us safer. Financial regulations impede the working of the financial system. They also reduce the risk of a financial catastrophe.

Those regulations whose benefits and costs have been quantified have largely shown that the benefits are larger than the costs. The **numbers behind these estimates are by no means perfect**, but they are the best we have.

Few people realize that analysis shows that the benefits of regulations outweigh the costs, because debates about regulation (including the Republican debate on Wednesday night where numerous presidential candidates mentioned the cost of regulations) often focus only on the costs. Don't forget the benefits.

*Shapiro is an associate professor and director of the Public Policy Program at Rutgers University and a member of the* ***Scholars Strategy Network****.*

**TAGS: Office of Management and Budget, OMB, Environmental Protection Agency, EPA, Department of Energy's, DOE, Regulation**