# 120C

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 10-11, 1993

RECOMMENDATION

**Administrative Law and Regulatory Practice (Reports No. 120C)**

**BE IT RESOLVED** That the American Bar Association recommends that:

1. Before an agency adopts a nonlegislative rule that is likely to have significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoption comment and give notice of this opportunity.

2. When an agency proposes to apply a nonlegislative rule in an enforcement or other proceeding, it provide affected private parties an opportunity to challenge the wisdom or legality of the rule. The agency should not allow the fact that a rule has already been made available to the public to foreclose consideration of the positions advanced by the affected private parties.

3. When an agency proposes to act at variance with a policy or interpretation contained in an established nonlegislative rule on which a private party has reasonably relied:

a. the party have an opportunity to request relief, and
b. the agency explain why it is departing from its established policy or interpretation.

**Note:** Section 552 of the Administrative Procedure Act states circumstances in which an agency is permitted to apply standards, interpretations, or general statements of policy that adversely affect a member of the public, even though it has not employed the notice-and-comment procedures of 5 U.S.C. §553 in their adoption. For purposes of this recommendation, the term nonlegislative rule refers to any such document, in whatever format it may have been adopted, that comes within the requirements of section 552 to be indexed and published or made available to the public. The recommendation however, reaches only those agency documents respecting which public reliance or conformity is intended, reasonably to be expected, or derived from the conduct of agency officials and personnel; in particular, enforcement manuals setting internal priorities or procedures rather than standards for conduct by the public are not covered, whether or not they have been in fact published or otherwise made available to the public.

# 120C

REPORT

A "rule" under the Administrative Procedure Act (APA) is "the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy.[1] The APA requires notice and comment rulemaking for "legislative" rules; that is, rules that are legally binding on persons subject to them. But these procedures need not be followed for the adoption of "interpretative rules", and "general statements of policy," or for administrative staff manuals and instructions to staff, both of which are not legally binding on the public.[2]

An agency can require members of the public "to resort" to these nonlegislative rules, or it can rely on them in ways that "adversely affect[]" members of the public, only if the agency complies with the disclosure provisions of the APA.[3] The APA requires that such rules either be published in the Federal Register (policy statements and interpretative rules) or made available for public inspection and copying (administrative staff manuals and instructions to staff).[4]

The increasing reliance by agencies on nonlegislative rules, and the problems that they pose for the public, suggest the need for procedural reform. Building on the extensive

---

[1] 5 U.S.C. § 551(4).

[2] Id. § 553. Such rules are not legally binding on persons subject to them because they are not intended by the adopting agency to implement a grant of delegated legislative power. Because such rules are not legally binding, the APA does not require their adoption be preceded by notice and comment rulemaking. Thus, it is inappropriate for an agency to use such rules to impose a practical binding effect members of the public. Robert A. Anthony, Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like -- Should Federal agencies Use Them To Bind The Public?, 1992 DUKE L.J. 1311 [cited hereinafter as "Interpretive Rules"].

[3] Because such rules must be made available to the public by publishing them in the *Federal Register*, or making them available for copying, see *infra* note 4 & accompanying text, Peter Strauss describes these rules as "publication rules." PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 157 (1989). Although the more familiar term of "nonlegislative rules" is used in the text, that term is intended to be coextensive with Strauss' concept.

[4] 5 U.S.C. § 552(a).

analysis of nonlegislative rules by two members of this Section, Professors Anthony[5] and Asimow[6], this report justifies the procedural reforms that are recommended.

**Popularity**

Agencies have increasingly relied on nonlegislative rules in part to escape the "ossification" of the rulemaking process attributable to judicially and politically imposed burdens of explanation. Agencies issuing nonlegislative rule have been able to bypass the Office of Management and Budget (OMB).[7] In addition, it is unlikely that a nonlegislative rule will be subject to pre-enforcement review; instead, the rule probably will be challenged only in connection with review of a denial of permission or an enforcement proceeding, if it is ever reviewed at all. If so, an agency avoids the necessity of constructing a rulemaking record at the time it adopts the rule.[8]

Nonlegislative rules have been the "bread and butter" of the administrative process for three additional reasons.[9] Such rules are not only more easily issued and amended than legislative rules, but they permit agency personnel to fill in the details of a regulatory regime, especially the technical details, without necessarily involving top agency administrators.[10] A third reason that agencies issue interpretive rules is that courts are

---

[5] Interpretive Rules, supra note 2; Robert A. Anthony, "Well, You Want The Permit Don't You": Agency Efforts To Make Nonlegislative Documents Bind The Public, 33 ADMIN. L. REV. 31, 34 (1992); Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 YALE J. REG. 1 (1990) [hereinafter cited as Which Agency Interpretations Should Bind"]

[6] Michael Asimow, California Underground Regulations, 44 ADMIN. L. REV. 43 (1992)[cited hereinafter as "Underground Regulations"]; Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 DUKE L. REV. 381, 404-08 [cited hereinafter as "Nonlegislative Rules"]; Michael Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 MICH. L. REV. 520 (1977) [ cited hereinafter as "Public Participation"].

[7] Thomas O. McGarity, Some Thoughts On "Deossifying" The Rulemaking Process, 41 DUKE L.J. 1385, 1441 (1992). OMB did try to plug this loophole, but its effectiveness is uncertain. Id. at 1442 n. 271.

[8] Id. at 1441.

[9] The output of nonlegislative rules dwarfs the promulgation of rules pursuant to notice and comment rulemaking. Peter L. Strauss, The Rulemaking Continuum, 1992 DUKE L.J. 1463, 1468.

[10] Id. at 1477.

likely to grant at least some deference to the agency's interpretation.[11]

**Beneficial Purposes**

Nonlegislative rules serve two beneficial purposes. First, they are a method to inform the public about agency interpretations or policies in circumstances where the agency chooses not to adopt a legislative rule. For example, because a policy statement signals the position that an agency may take in an enforcement action, it eliminates the surprise that might otherwise result if a person did not anticipate the agency's position. Second, nonlegislative rules permit an agency to issue authoritative guidance to agency employees, thereby ensuring administrative uniformity and policy coherence. Agencies rely on staff manuals, for example, as a means of regularizing employee action that directly affects the public.

**Adverse Impact**

Nonlegislative rules can also have the following three adverse impacts. First, such rules can be adopted without public input. A person who believes the rule to be unwise or illegal must either comply, or challenge the policy in an enforcement or application proceeding at the agency or in pre-enforcement judicial review.[12] Because of the time and expense of challenging a nonlegislative rule, however, members of the public may simply comply. Moreover, problems of ripeness and finality may prevent pre-enforcement review.[13] In cases where review is not sought or is unavailable, members of the public will have no opportunity to contest the rule, unless they were in a position to oppose it by lobbying the agency before the rule was adopted, and the agency is denied the educative value of their facts and arguments.[14]

---

[11] Skidmore v. Swift & Co., 323 U.S. 134 (1944). Under Skidmore, the agency interpretation

> is a substantial input and counts for something, much as legislative history may count. But the authoritative act of interpretation remains with the court. The court considers the agency view, and approves it only it is deemed correct.

Which Agency Interpretations Should Bind, supra note 5, at 13.

[12] National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971).

[13] RICHARD J. PIERCE, SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, ADMINISTRATIVE LAW & PROCESS § 5.7 (1992).

[14] Interpretive Rules, supra note 2, at 1317.

# 120C

Second, an agency may treat a nonlegislative rule as binding on members of the public. This can occur because of inadvertence -- agency personnel erroneously assume the policy is legally binding -- or strategic behavior -- agency personnel treat the policy as legally binding in the hope that members of the public will acquiesce in its enforcement, thereby enabling the agency to avoid notice and comment rulemaking. Persons who challenge this behavior are protected as long as a court detects that the agency has imposed a binding obligation.[15] But those who acquiesce are denied the opportunity to comment on legislative rules which is afforded them under the APA.

Finally, because members of the public rely on nonlegislative rules as authoritative guidance of an agency's intentions, these persons may be adversely affected by their reliance.[16] This can occur, for example, when an agency asserts in an enforcement proceeding a position different from that adopted in an existing nonlegislative rule on which the defendant reasonably relied. Except for the possibility of an estoppel remedy,[17] an agency can disown a nonlegislative rule without prior notice because it has not been adopted by notice and comment rulemaking.[18]

---

[15] RICHARD PIERCE, SIDNEY SHAPIRO, & PAUL VERKUIL, supra note 13, §§ 6.4.4a-b; Interpretative Rules, supra note 2, at 1355-59.

[16] Agencies warn individuals not to rely, see, e.g., infra note 22 & accompanying text, but such warnings are disregarded for good reasons. For example, the agency may adopt a policy statement for the express purpose of guiding the public. Moreover, there is a reasonable expectation that agency employees will follow staff instructions and manuals.

[17] Whether a person will have an estoppel remedy in the previous circumstance is doubtful. Although the Supreme Court has stated that an agency must follow its own regulations, United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954), this principle is limited to legislative rules. Peter Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own Laws, 64 TEX. L. REV. 1, 15 (1985); Joshua I. Schwartz, The Irresistible Force Meets The Immovable Object: Estoppel Remedies For An Agency's Violation of Its Own Regulations Or For Other Misconduct, 44 ADMIN. L. REV. 653, 676 (1992). A person's reliance on a nonlegislative rule may justify estoppel, but the case law is in disagreement concerning what circumstances would justify this remedy. See Raven-Hansen, supra, at 27-54 (description of case law); Schwartz, supra, at 660-93 (same). Moreover, recent commentators disagree when estoppel should be available. Compare Raven-Hansen, supra, at 73 with Schwartz, supra, at 744.

[18] See supra note 2 & accompanying text; but see Strauss, supra note 9, at 1472-73 ("question of what jural effect to give to nonlegislative rules is not settled").

Some agencies, such as the Food and Drug Administration (FDA),[19] have addressed the problem of detrimental reliance by voluntarily committing themselves to abide by their nonlegislative rules, but in Community Nutrition Institute (CNI) v. Young, FDA's policy was held to be in violation of the notice and comment requirements of section 553.[20] CNI reasoned that notice and comment rulemaking was required because FDA's commitment to abide by its policy statements and interpretative rules meant that the agency had adopted a rule which is *binding on itself* whenever it promulgated a policy statement or interpretative rule. Cases like CNI have made agencies reluctant to commit themselves to abide by nonlegislative regulations.[21] FDA, for example, has proposed a

---

[19] 21 C.F.R. § 10.85(e) (1992) (advisory opinions); id. § 10.90(b)(2) (guidelines).

[20] 818 F.2d 943 (D.C. Cir. 1987).

[21] CNI has been followed several times within the D.C. Circuit, but it has been cited only once by another federal appellate court. New England Tank Indus. of New Hampshire v. United States, 861 F.2d 685 (Fed. Cir. 1988) (remanding to Armed Services Bd. of Contract Appeals for determination whether DOD funding regulation was a substantive rule or a policy statement, but noting that the regulation contained mandatory language of the type found dispositive in CNI). However, Guardian Federal Savings and Loan Ass'n. v. FSLIC, 589 F.2d 658 (D.C. Cir. 1978) held that notice and comment rulemaking is required when an agency promulgates a policy statement or interpretative rule and binds itself to follow that rule. Guardian Federal involved FSLIC criteria for measuring the adequacy of audits of savings and loan institutions which were challenged as substantive rules promulgated without notice and comment procedures. The court identified the critical factor as whether the regulations limited the agency's discretion, stating "If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is -- a binding rule of substantive law." Id at 666-67. Having said that, the court upheld the regulations as policy statements, finding that they preserved the agency's discretion. Id at 666. Although this approach to defining a legislative rule has been criticized because it focusses on whether a rule is binding on an agency, rather than on whether it is binding on private parties, Interpretive Rules, supra note 2, at 1859-63, Guardian Federal has gained wide acceptance on this point in other circuits. See, e.g., W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir. 1987) (invalidating Bellmon Review Program used by HHS Secretary because it limited agency discretion); Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983) (upholding ICC formula used to grant private carrier status as a policy statement analogous to FSLIC regulations in Guardian Federal); Burroughs Wellcome v. Schweiker, 649 F.2d 221, 224 (4th Cir. 1981) (upholding FDA memo regarding procedure for approving new drug applications as a policy statement allowing agency to exercise discretion); Farmland Industries Inc. v. United States, 642 F.2d 208, 210 (7th Cir. 1981) (classifying ICC pronouncement as a policy statement); Iowa Power and Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 811 (8th Cir. 1981) (upholding ICC procedure for enforcement of certain rate contracts on a case-by-case basis as a policy statement); American Trucking

procedure rule that warns:

> an advisory opinion does not bind the agency, and it does not create or confer any rights, privileges, or benefits for or on any person. FDA may, in its discretion, recommend or initiate legal or administrative action against a person or product with respect to an action taken in conformity with an advisory opinion, provided that the legal or administrative action is consistent with applicable statutes and regulations.[22]

This reluctance by agencies to abide by nonlegislative rules harms the public as Richard Thomas has perceived:

> In short, under those cases following the reasoning of CNI[], the more unstructured, variable, and undisciplined the agency's prosecutorial approach, the more shielded an agency's prosecutorial discretion will be from public participation and, ultimately, from judicial review. But, if regularity of agency enforcement action, centralized control of agency personnel, and imposition of public, agency-wide policy are desired -- and they are desired by most citizens -- then a rule that essentially penalizes an agency for restricting the discretion of its own personnel would appear to be counter-productive.[23]

**Analysis of the Recommendation**

The recommendation has two goals. One is to increase the opportunity for public comment on nonlegislative rules, including the opportunity to challenge a nonlegislative rule at the time it is proposed to be applied. The other goal is to reduce the hardship that results when a person or entity relies on a nonlegislative rule that an agency decides to change without prior notice.

**Opportunity To Comment**

Paragraph 1 recommends that "[b]efore an agency adopts a nonlegislative rule that is likely to have significant impact on the public, the agency should provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so" and that "[w]hen

---

Associations v. ICC, 659 F.2d 452, 463 n.41 (5th Cir. 1981) (classifying ICC guidelines for determining restriction removal applications as substantive rules, and invalidating them -- not as violating the APA, but as unreasonable legislative rules under Motor Carrier Act).

[22] 57 Fed. Reg. 47314 (Oct. 15, 1992).

[23] Richard M. Thomas, Prosecutorial Discretion and Agency Self-Regulation: *CNI v. Young* and the Aflatoxin Dance, 44 ADMIN. L. REV. 131, 155 (1992).

nonlegislative rules are adopted without prior public participation, the agency should afford members of the public an opportunity for post-adoption comment and give notice of this opportunity." The Administrative Conference[24] and the American Bar Association[25] have recommended that agencies use notice and comment rulemaking procedures for policy statements and interpretative rules. This recommendation would extend the opportunity to comment to administrative staff manuals and instructions to staff as defined in paragraph 5, which is discussed below.

Paragraph 2 recommends that "[w]hen an agency proposes to apply a nonlegislative rule in an enforcement or other proceeding, it should provide affected private parties an opportunity to challenge the wisdom or legality of the rule, either in the instant proceeding or in a separate proceeding established for that purpose" and that "[t]he agency should not allow the fact that a rule has already been published or made available to the public to foreclose consideration of the positions advanced by the affected private parties." The Administrative Conference has adopted a similar recommendation for policy statements.[26]

---

[24] The Administrative Conference has recommended that agencies voluntarily comply with the requirements of section 553 of the APA when issuing policy statements and interpretive rules, 5 U.S.C. § 553 (1988), except in cases where it would be impracticable, unnecessary, or contrary to the public interest. Recommendation 76-5, 1 C.F.R. §305.76-5 (1992). The Conference recommends that when there has been no prepromulgation notice and opportunity to comment, the public be notified of an opportunity to submit post-adoption comments. Id. The recommendation is based on Public Participation, supra note 6.

[25] The ABA endorsed the ACUS recommendation, see supra note 24, and recommended that Congress should consider amending the APA to require the use of notice and comment rulemaking for policy statements and interpretative rules if agencies failed to utilize these procedures voluntarily. Recommendation on Nonlegislative Rulemaking, August, 1989.

[26] Agency Policy Statements, Recommendation 92-2, 57 Fed. Reg. 30103 (1992). Concerning policy statements, ACUS recommends:

> Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document or to suggests alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy

# 120C

These procedures should have several beneficial effects. They would relieve members of the public of their "Hobson's choice" and make it possible for the agency to obtain more input from the public. In addition, the procedures address the situation where an agency treats a nonlegislative rule as binding through inadvertence or design. A person or entity could use the recommended procedures to challenge the agency's action on a procedural (as well as substantive) basis in cases where a court challenge is impracticable.

The recommendation could discourage the use of nonlegislative rules by agencies because of the procedural obligations,[27] but since these procedural burdens are relatively minor this result should not be a serious problem. All that is asked of an agency is to obtain input from the public, and recommendation 1, which asks agencies to permit comments before a nonlegislative rule is issued, applies only in instances where the rule is likely to have a significant effect on the public, and only if a comment period prior to issuance of the rule is not impracticable. Moreover, even if an agency is burdened by obtain such input, this result must be weighed against the increased accountability that the recommendation would create. Finally, agencies should not regard these recommendations as a deadweight cost. Agencies can benefit from the procedures because they invite members of the public to inform the agency concerning the wisdom and legality of its rule.

**Relief From A Policy Change**

Paragraph 3a recommends that "[w]hen an agency proposes, in an enforcement proceeding or otherwise, to act at variance with a policy or interpretation contained in an established nonlegislative rule on which a private party has reasonably relied, the party should have an opportunity to request relief." This procedure would permit an agency to correct any injustice attributable to detrimental reliance on unrevoked nonlegislative rules, or any other injustice attributable to the agency's change in policy.

The recommendation does not speak to whether a person requesting relief can

---

statement is applied to affected persons unless it is inappropriate or impracticable to do so.

Id. Concerning instructions to agency staff, ACUS states: "Agencies are encouraged to obtain public comment on such guidance." Id.

[27] Nonlegislative Rules, supra note 6, 404-08 (economic model of bureaucratic choice suggests that additional procedures discourages use of nonlegislative rules); cf. Underground Regulations, supra note 6 (elaborate California procedural requirements have discouraged use of nonlegislative rules).

obtain judicial review of an agency decision not to grant such relief. If there is judicial review of a decision not to grant a waiver, and if such a decision is not committed to agency discretion by law, an agency would receive deference as long as it could articulate a rational reason why a waiver or exemption was inappropriate, such as the waiver was inconsistent with the agency's statutory enforcement obligations. The recommendation therefore respects separation of powers considerations that limit the extent to which courts can estop agencies.[28]

**Obligation to Explain Policy Changes**

Paragraph 3b recommends that "[w]hen an agency proposes, in an enforcement proceeding or otherwise, to act at variance with a policy or interpretation contained in an established nonlegislative rule on which a private party has reasonably relied, the agency should explain why it is departing from its established policy or interpretation." The recommendation, which addresses the problem of detrimental reliance on established nonlegislative rules, is a middle ground between giving agencies complete discretion to abandon such nonlegislative rules and asking agencies to bind themselves voluntarily to follow such rules. By asking the agency to defend its change in policy or interpretation, which is an obligation it might have anyway,[29] the recommend protects persons who have reasonably relied on the established rule from an arbitrary change in policy.[30]

---

[28] A balancing test is implicit in this approach because to determine whether the agency's failure to grant a waiver is an abuse of discretion, a court would compare the extent of the detrimental reliance with the agency's justifications concerning why a waiver would be inappropriate. Current law and commentators envision such a balancing approach. Raven-Hansen, supra note 17, at 70; Schwartz, supra note 17, at 659. Professor Schwartz, for example, recommends:

> The rationality of refusing to grant a waiver must be considered in light of the agency's authority, if any, to grant a waiver, the relationship between the government's "wrong" and the requirement of law to be estopped, the availability and adequacy of other remedies to redress the agency "wrong," and the impact of estoppel-like relief on the applicable policy or policies.

Id.

[29] Motor Vehicle Mfgs. Assoc. v. State Farm Automobile Ins. Co., 463 U.S. 29 (1983).

[30] Peter Strauss has explained the value of requiring such explanations in terms of "publication rules," which for this purpose can be regarded as coextensive with nonlegislative rules. See supra note 3. Strauss notes:

> One may assert in the course of agency adjudication that a publication rule is

# 120C

The recommendation that courts should require an agency to explain a departure from an unrevoked nonlegislative rule is not intended to alter the extent to which such rules receive judicial deference. As noted earlier, nonlegislative rules receive a weak form of judicial deference. Although an agency's decision (and justification) is taken into account, a court is expected to make an independent interpretative decision.[31] Instead, the purpose of requiring an explanation is to require an agency to defend departures from such rules. Thus, an agency could avoid following an unrevoked nonlegislative rule by straightforwardly disapproving the prior precedent in an adjudicatory proceeding, providing it explains what it is doing and why.

Although this approach offers some protection for those who reasonably rely on a nonlegislative rule, it also preserves substantial flexibility for an agency. As noted in the last paragraph, if an agency wishes to change the policy adopted in a nonlegislative rule, it can simply disapprove of the existing policy in an adjudicatory proceeding as long as it defends its departure from the nonlegislative rule. Or it can issue a new nonlegislative rule. This second option would require the agency to meet the publication and availability

---

> inappropriate on the facts, whereas a legislative rule binds the agency adjudicator as well as a court; and an agency is not permitted to treat departure from the advice of a publication rule as an infraction -- it still must make its case in terms of the statute or rule underlying the publication rule. But it does not follow that the agency of its staff are free to disregard validly adopted publication rules on which a private party may have relied absent the demonstration of its inappropriateness. The whole point of the exercise is to structure discretion, to provide a warning and context for efficient interaction between the agency and the affected public.

Strauss, supra note 9, at 1486.

[31] Supra note 11. Some analysts have urged that courts apply Chevron U.S.A. Inc. v. Natural Resources Defense Council, *Inc.*, 467 U.S. 837 (1984), to give actual deference to nonlegislative rules. E.g., Russell L. Weaver, *Chevron: Martin*, Anthony, and Format Requirements, 40 KAN. L. REV. 587 (1992). In Martin v. Occupational Safety and Health Review Commission, 111 S. Ct. 1171, 1179 (1991), however, the Court suggested that interpretations not involving lawmaking power would not qualify for Chevron. If a court were to grant Chevron deference to a nonlegislative rule, the legal effect on the public would be the same as if the agency had adopted a legislative rule. That is, in cases of statutory ambiguity, the court would be bound to accept the agency's interpretation unless it was "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. Thus, Professor Anthony warns that applying Chevron would therefore eliminate as a conceptual matter the distinction between legislative rules and nonlegislative rules. Which Interpretations Should Bind, supra note 5, at 40.

requirements imposed by the APA[32] and this recommendation, but, as noted earlier, the recommended procedures should not significantly burden an agency.

**Scope of the Recommendation**

Paragraph 4 explains the scope of the recommendation:

> Section 552 of the Administrative Procedure Act states circumstances in which an agency is permitted to apply standards, interpretations, or general statements of policy that adversely affect a member of the public, even though it has not employed the notice-and-comment procedures of 5 U.S.C. §553 in their adoption. For purposes of this recommendation, the term nonlegislative rule refers to any such document, in whatever format it may have been adopted, that comes within the requirements of section 552 to be indexed and published or made available to the public. The recommendation, however, reaches only those agency documents respecting which public reliance or conformity is intended and reasonably to be expected; in particular, enforcement manuals setting internal priorities or procedures rather than standards for conduct by the public are not covered, whether or not they have been in fact published or otherwise made available to the public.

The recommendation encompasses administrative staff manuals and staff instructions, as well as other nonlegislative rules if they are made public and given substantial circulation in such a way that affected persons have actual and timely notice of the documents' terms, because these documents, no less than policy statements or interpretive rules, can pose the problems identified earlier, concerning lack of public input, agency treatment of nonlegislative rules as binding, and detrimental reliance by the public.[33] These documents are included for a practical reason as well. If the recommendation applied only to general statements of policy and interpretations of general applicability contained in policy statements and interpretive rules, agencies could avoid the impact of the recommendation by switching to staff manuals and instructions to adopt such rules.

---

[32] See supra note 4 & accompanying text.

[33] The recommendation does not extend to nonlegislative rules that do not come within the requirements of section 552 to be indexed and published or made available to the public for two reasons. First, a person can not be required to resort to, or be adversely affected by, such rules, unless an agency complies with Section 552 in terms of publishing such rules or otherwise making them available to the public. 5 U.S.C. §§ 552(1)-(2). Second, because such rules are not published or otherwise made available to the public, there is little likelihood of adverse reliance if an agency does not follow such rules.

**120C**

## GENERAL INFORMATION FORM

**Submitting Entity:** Section on Administrative Law and Regulatory Practice

**Submitted By:** Peter L. Strauss, Chair

1. *Summary of Recommendation.*
   The resolution recommends that concerning nonlegislative rules, agencies should provide an opportunity to comment on such rules, to challenge the wisdom or legality of such rules in enforcement or other proceedings, or in separate proceedings established for that purpose, and to request relief from a policy decision that is different from such an established rule, and that courts should require agencies to explain departures from such established rules when such departures are judicially reviewed.

2. *Approval by Submitting Entity:*
   Approved at a regularly scheduled meeting of the Section Council on May 1, 1993.

3. *Has this or a similar recommendation been submitted to the House or Board previously?*
   No.

4. *What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?*
   It is related to the recommendation on Nonlegislative Rulemaking (August, 1989) which suggested that Congress should consider amending the Administrative Procedure Act to require the use of notice and comment rulemaking for policy statements and interpretative rules if agencies failed to utilize these procedures voluntarily. The previous recommendation is unaffected by this recommendation.

5. *What urgency exists which requires action at this meeting of the House?*
   The increasing agency reliance on nonlegislative rules, and the problems they pose for the public, suggests the need for procedural reform.

6. *Status of Legislation.*
   None.

7. *Cost to the Association.*
   None.

# 120C

8. *Disclosure of Interest.*
None.

9. *Referrals.*
A copy of the Report with Recommendation was circulated to all Section and Division Chairs in May, 1993.

10. *Contact Persons.* (Prior To Meeting)
Sidney A. Shapiro, Chair
Rulemaking Committee
University of Kansas School of Law
Green Hall
Lawrence, KS. 66045

Peter Strauss, Chair
Section on Administrative Law and Regulatory Practice
Columbia University School of Law
435 West 116th St.
New York, N.Y. 10027

11. *Contact Person.* (Who will present the report to the House.)
William E. Murane
Section Delegate
555 17th Street
PO Box 8749
Denver, Colorado 80201

Edward J. Grenier, Jr.
Section Delegate
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404

12. *Contact Person Regarding Amendments to This Recommendation.* (Are thre any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the persont to contact.)
There are no known amendments at this time.