GOVERNING FOR IMPACT

Notice and Comment

Part I: Legislative Rules and Guidance Documents

May 2025
Issue Brief

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I. INTRODUCTION

The Administrative Procedure Act (APA) requires agencies to provide advance notice and an opportunity for public comment before issuing so-called legislative rules[1]—i.e., agency actions that "'purport[] to impose legally binding obligations or prohibitions on regulated parties'" and "have the force and effect of law."[2] Notice-and-comment procedures are meant to ensure "fair notice" to regulated parties and beneficiaries,[3] "foster public participation[,] and facilitate reasoned decisionmaking" by the agency.[4] But the APA also contains several narrow exceptions to these requirements, including for what the APA describes as "interpretative rules" and "general statements of policy" (often colloquially lumped together as "guidance documents").[5] We discuss other exceptions to notice and comment in a separate Issue Brief.[6]

To be sure, guidance documents can serve an important function. Using such documents, agencies can quickly inform the public and their own staff about how they interpret and plan to enforce the statutes under their purview.[7] But notice-and-comment rulemaking has grown more cumbersome over the decades since the APA's enactment,[8] leading agencies to use guidance documents more aggressively to advance their policy goals. The Trump administration has not yet issued many policies that it has labeled as guidance documents, but it *has* taken various steps to

[1] *See generally* 5 U.S.C. § 553.

[2] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 122–23 & n.4 (2015) (quoting *National Mining Assn. v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014)).

[3] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

[4] *Humane Soc'y of the United States v. U.S. Dep't of Agric.*, 41 F.4th 564, 568 (D.C. Cir. 2022) (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987)); *see also Azar v. Allina Health Servs.*, 587 U.S. 566 (2019) (explaining that notice and comment "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision").

[5] 5 U.S.C. § 553(b)(A).

[6] *See Notice and Comment, Part II: Good Cause and Other Exceptions*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[7] *See* Admin. Conf. of the U. S., Guidance Documents, Information Interchange Bulletin No. 023 (May 2022), https://www.acus.gov/sites/default/files/documents/IIB-23%20Guidance%20Documents.pdf.

[8] *See* Jeffrey Lubbers, *The U.S. Rulemaking Process: Has it Become Too Difficult?*, 67 Coast Guard J. of Safety at Sea 66 (2010), https://digitalcommons.wcl.american.edu/facsch_lawrev/1071/.

eschew notice-and-comment rulemaking,[9] including implicitly invoking the APA's guidance document exception in issuing statements announcing blanket nonenforcement of regulations and statutes.[10] Moreover, forgoing notice and comment by improperly designating policies as guidance documents might be particularly appealing to this administration, given that it has sought to slash the career civil servant workforce that typically reviews and responds to important comments.[11]

Litigants might seek to challenge the Trump administration's attempts to violate notice-and-comment requirements. Such challenges might be particularly valuable because, when successful, they generally result in vacatur of an unlawfully promulgated regulation.[12]

This Issue Brief describes the APA's notice-and-comment requirements; explains how courts define "legislative rules" in contrast to "interpretative rules" and "general statements of policy"; and identifies key characteristics that litigants might search for when considering a claim that an agency action is unlawful based on an agency's failure to use the APA's notice-and-comment procedures.

[9] *See, e.g.*, The White House, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/ (invoking an expansive reading of the APA's "good cause" exception to notice and comment).

[10] *See, e.g.*, John Lewis, *Enforcing the Payday Lending Rule*, Yale J. on Reg. Notice & Comment (Apr. 17, 2025), https://www.yalejreg.com/nc/enforcing-the-payday-lending-rule-by-john-lewis/ (explaining why the Consumer Financial Protection Bureau's decision to pause enforcement of the Payday Lending Rule amounts to an effective repeal of a legislative rule and therefore should have gone through notice and comment.).

[11] *See* Elena Shao & Ashley Wu, *The Federal Work Force Cuts So Far, Agency by Agency*, N.Y. Times, https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html (last visited Apr. 23, 2025).

[12] 5 U.S.C. § 706(2)(D) requires courts to "hold unlawful and set aside agency action[s]" taken "without observance of procedure required by law." Typically, failure to follow notice-and-comment procedures is a "fundamental flaw" that requires vacatur of the rule. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009). For more information about the remedies available under the APA, see *Remedies*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

II. THE APA'S NOTICE-AND-COMMENT REQUIREMENTS

The APA bars agency action taken "without observance of procedure required by law."[13] Said procedure includes the APA's requirements that agencies provide notice of and invite public comment on their rulemakings.[14] That requirement generally applies when an agency "issue[s] [a] rule in the first instance," as well as when it "amend[s] or repeal[s] a rule."[15]

Notice generally takes the form of a notice of proposed rulemaking (NPRM), which must include general information about the rulemaking, "reference to the legal authority under which the rule is proposed," and proposed regulatory language or a "description of the subjects and issues involved."[16] After providing notice, an agency must provide an opportunity for "interested persons" to provide written comments and data,[17] usually over the course of 30-60 days.[18]

To finalize the rule, the agency must publish final regulatory text with a preamble that explains the rule and demonstrates that the agency considered all "relevant and

[13] 5 U.S.C. § 706(2)(D).

[14] *Id.* § 553.

[15] *Perez*, 575 U.S. at 101. An agency announcement that purports to cease enforcement of a regulation may also need to go through notice and comment if it is essentially a repeal of that regulation. *See Challenging Non-Enforcement*, Governing for Impact 21 (May 2025), https://governingforimpact.org/apa-library/.

[16] 5 U.S.C. § 553(b). Courts have also held that agencies' NPRMs must contain "the most critical factual material that is used to support the agency's position," such as "technical studies and data that it has employed in reaching the decisions to propose particular rules." *Window Covering Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1283 (D.C. Cir. 2023) (quotations omitted).

[17] 5 U.S.C. § 553(c).

[18] Exec. Order 13563, 76 Fed. Reg. 3821, 3821–22 (Jan. 18, 2011); *see also* Exec. Order 12866, 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993). Agencies sometimes allow shorter comment periods, but "when substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment." *Nat'l Lifeline Ass'n v. F.C.C.*, 921 F.3d 1102, 1117 (D.C. Cir. 2019); *see also Chamber of Com. of United States v. Sec. & Exch. Comm'n*, 670 F. Supp. 3d 537, 552 (M.D. Tenn. 2023) (surveying cases holding that "periods around 30 days—and even, on occasion, longer than 30 days"—are "insufficient"), *aff'd*, 115 F.4th 740 (6th Cir. 2024).

significant comments."[19] Although the APA only requires a "concise" preamble[20] and courts are generally not permitted to require procedures above the requirements of the APA,[21] in practice agencies have issued increasingly lengthy final rule preambles pursuant to Executive Branch decisionmaking requirements and in anticipation of increasingly searching judicial review.[22] Agencies' final rules also cannot deviate too far from the substance of the proposed rule—the final rule must be a "logical outgrowth" of the NPRM.[23]

Notice-and-comment procedures can be burdensome for an agency. It takes staff time to prepare an NPRM and sift through and respond to comments (which, for a given rule, can range in number from a few dozen to millions[24]). In addition, rulemaking is often subject to lengthy interagency processes and White House approval, which can cause it to stretch on for months and even years.[25]

[19] *Del. Dep't of Natural Res. & Envtl. Ctrl. v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015) (quotation omitted).

[20] 5 U.S.C. § 553(c).

[21] *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

[22] For example, agencies frequently prepare extensive cost benefit analyses to comport with White House-imposed regulatory review processes and provide detailed responses to public comments to comply with arbitrary-and-capricious review. *See* Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (establishing processes for agency rulemaking and regulatory review); Bob Needham, *5Qs: Bagley on* Ohio v. EPA, *SCOTUS Citation, and the Future of the Administrative State*, Mich. Law (Jul. 9, 2024), https://michigan.law.umich.edu/news/5qs-bagley-ohio-v-epa-scotus-citation-and-future-administrative-state (describing an arguably heightened standard for review of agencies' response to public comments imposed by the Supreme Court in 2024's *Ohio v. EPA*).

[23] *Long Island Care at Home, Ltd.* 551 U.S. at 174 (quotation omitted).

[24] *See* Paul Hitlin, Kenneth Olmstead & Skye Toor, *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, Pew Res. Cntr. (Nov. 29, 2025), https://www.pewresearch.org/internet/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/.

[25] *See, e.g.,* Mine Safety & Health Admin., U.S. Dep't of Labor, *Why Does It Take So Long To Get a Rule Published?*, https://www.msha.gov/training-education/frequently-asked-questions/why-does-it-take-so-long-get-rule-published (last visited Apr. 23, 2025).

III. DISTINGUISHING LEGISLATIVE RULES FROM GUIDANCE DOCUMENTS

The default posture in the APA is that an agency action is a legislative rule (sometimes referred to as a "substantive rule") and that notice and comment is therefore required. As explained, legislative rules are those agency pronouncements that "purport[] to impose legally binding obligations or prohibitions on regulated parties'" and "have the force and effect of law."[26]

To avoid being bogged down in procedural delays, agencies often look for ways to forgo notice and comment.[27] As noted above, one way to do that is by issuing guidance documents through the APA's exception to notice and comment for "interpretative rules" and "general statements of policy" (or simply, "policy statements").[28] Although the APA does not define either term, courts usually contrast them to legislative rules.[29] Unfortunately, the law distinguishing legislative and non-legislative action is "difficult," "fuzzy," and "confused,"[30] and the Supreme Court's guidance has been limited and generally unhelpful.[31] Circuit courts have different tests, but they generally focus on whether a policy creates new law or otherwise has "legal effect[s]" on private parties or the agency itself.[32] Importantly,

[26] *Perez*, 575 U.S. at 122–23 & n.4 (quotation omitted).

[27] *Mock v. Garland*, 75 F.4th 563, 578 (5th Cir. 2023) (explaining that "[m]ost litigation about whether a rule should be properly considered legislative or interpretive arises because the agency did not go through the time and expense of notice-and-comment rulemaking").

[28] 5 U.S.C. § 553(b)(A).

[29] *Perez*, 575 U.S. at 96 (2015).

[30] *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017) (internal quotation marks omitted).

[31] For example, in *Perez*, the Court largely declined to "wade into th[e] debate" about the line between legislative and non-legislative rules. 575 U.S. at 96–97.

[32] *Huashan Zhang v. U.S. Citizenship & Immigr. Servs.*, 344 F. Supp. 3d 32, 58 (D.D.C. 2018), *aff'd*, 978 F.3d 1314 (D.C. Cir. 2020) (internal quotation omitted); *Apogee Coal Co., LLC v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 112 F.4th 343, 355 (6th Cir. 2024) (explaining that "a hallmark of a substantive rule is that the action affects individual rights and obligations" (cleaned up)).

an agency statement that has the effect of withdrawing a legislative rule is itself a legislative rule.[33]

As among non-legislative actions, courts sometimes treat interpretative rules and policy statements as interchangeable categories.[34] However, the D.C. Circuit has emphasized that there are important differences between the two.[35] Moreover, these carveouts, like all exceptions to the APA's notice-and-comment requirements, are "narrowly construed."[36] Therefore, when agencies use them, litigants might consider claims that they improperly bypassed the APA's procedural commands.

A. Interpretive Rules

The precise meaning of "interpretative rule … is the source of much scholarly and judicial debate."[37] But interpretative rules' "critical feature" is that "they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[38] They generally "remind[] parties of existing statutory [or regulatory] duties."[39] A "classic example" of an interpretative rule is one that "clarifies a statutory term."[40]

"To decide whether a rule is interpretive or legislative," the D.C. Circuit "ask[s] whether the agency intended to speak with the force of law."[41] The inquiry considers factors like whether the "agency has published the rule in the Code of Federal

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[33] *See Challenging Non-Enforcement*, Governing for Impact 21 (May 2025), https://governingforimpact.org/apa-library/.

[34] *See, e.g.*, *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 168 (D.C. Cir. 1997) (addressing guidance that, according to the government, could "fall[] into any … category[y]" of non-legislative rule).

[35] *Nat'l Min. Ass'n*, 758 F.3d at 251 (emphasizing the importance of dividing agency actions "into three boxes: legislative rules, interpretive rules, and general statements of policy" because "[a] lot can turn on which box an agency action falls into"); *accord Flight Training Int'l, Inc. v. Fed. Aviation Admin.*, 58 F.4th 234, 242 (5th Cir. 2023) (explaining that "[t]he text of the APA makes clear that 'general statements of policy' are different from 'interpretive rules'").

[36] *Texas v. United States*, 40 F.4th 205, 228 (5th Cir. 2022) (internal quotation omitted).

[37] *Perez*, 575 U.S. at 96.

[38] *Id.* (internal quotation omitted).

[39] *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992).

[40] *Id.* at 236.

[41] *POET Biorefining, LLC v. Env't Prot. Agency*, 970 F.3d 392, 407 (D.C. Cir. 2020).

Regulations," whether it "explicitly invoked [the agency's] general legislative authority," and "whether the challenged rule comports with or changes the text of whatever prior rule it professes to interpret."[42] Put differently, interpretive rules "clarif[y], rather than create[], law," while legislative rules "bind the public and courts in a manner indistinguishable from a statute."[43] The critical distinction is whether the agency action interprets preexisting law (i.e., it is derived "from an existing document whose meaning compels or logically justifies" it"[44]) or "claim[s] to be exercising authority to itself make positive law."[45]

For example, in *POET Biorefining v. Environmental Protection Agency*, the D.C. Circuit considered an EPA guidance document interpreting a regulation the agency had issued to implement the Clean Air Act's Renewable Fuel Standard. A provision of that regulation allowed renewable fuel producers to use a measurement method "'that would produce reasonably accurate results as demonstrated through peer reviewed references.'"[46] Finding wide variance in how producers implemented that provision, EPA issued guidance explaining its view that a producer could not "demonstrate reasonably accurate results" under the regulation without using a "known, representative reference material" as a comparison.[47] The D.C. Circuit explained that the guidance document was an interpretative rule, properly issued without notice and comment, because it did no more than "spell[] out what EPA believe[d] it means to 'produce reasonably accurate results' under" the rule.[48]

In contrast, the D.C. Circuit in 2014's *Mendoza v. Perez* held that two of the Department of Labor's Training and Employment Guidance Letters (TEGLs), which the Department framed as interpretative rules, were actually legislative rules that should have gone through notice and comment.[49] The court emphasized that the TEGLs created substantive requirements that were not in the statute and that the statute "explicitly envision[ed] implementing regulations that will clarify the

[42] *Id.* (internal quotations omitted).
[43] *Flight Training Int'l*, 58 F.4th at 241 (internal quotations omitted).
[44] *POET Biorefining*, 970 F.3d at 407.
[45] *Flight Training Int'l*, 58 F.4th at 241 (internal quotations omitted).
[46] *POET Biorefining*, 970 F.3d at 397 (quoting 40 C.F.R. § 80.1450(b)(1)(xiii)(B)(3)).
[47] *Id.* at 401 (internal quotations omitted).
[48] *Id.* at 407–08.
[49] 754 F.3d 1002, 1021–22 (D.C. Cir. 2014).

meaning and application of its provisions."[50] The Department's failure to point to even one specific requirement that the statute or regulations themselves imposed and that the TEGLs merely interpreted led the court to decide that the documents should have gone through notice and comment as a legislative rule.[51]

B. Policy Statements

Policy statements are generally understood to be "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[52] In contrast to interpretative rules, policy statements do "not seek to … elaborate or interpret a legal norm," but instead they "let[] the public know" an agency's "current enforcement or adjudicatory approach."[53]

The D.C. Circuit describes policy statements as announcements of how agencies "will exercise [their] broad enforcement discretion or permitting discretion under some extant statute or rule."[54] Policy statements "are binding on neither the public nor the agency, and the agency retains the discretion and the authority to change its position in any specific case."[55]

For example, the D.C. Circuit in 2015 rejected a challenge to a Federal Aviation Administration (FAA) "internal guidance document" on the grounds that it did not "impose any obligation or prohibition on regulated entities."[56] The FAA issued a

[50] *Id.*

[51] *Id.* at 1022.

[52] *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (internal quotations omitted).

[53] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

[54] *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *R.J. Reynolds Vapor Co. v. Food & Drug Admin.*, 65 F.4th 182, 193 (5th Cir. 2023) (the question of whether an agency action is a policy statement rather than a substantive rule "turns on whether an agency intends to bind itself to a particular legal position.") (internal quotation omitted).

[55] *Huerta*, 785 F.3d. at 716 (internal quotation omitted). Similarly, the Fifth Circuit's test for distinguishing between legislative rules and policy statements focuses on two criteria: "whether the pronouncement (1) imposes any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Flight Training Int'l, Inc.*, 58 F.4th at 242 (internal quotation and emphasis omitted).

[56] *Huerta*, 785 F.3d at 717.

"Notice" that offered guidance to aviation safety inspectors about how to enforce the agency's regulations on airlines' personal electronic device policies.[57] Calling the notice's aim "archetypal … of a policy statement," the court emphasized that the policy did not limit inspectors' discretion to enforce existing regulations and did not require regulated airlines to make any changes to their policies.[58] The FAA, the court concluded, did not intend for the notice to be a legislative rule and therefore properly issued it without notice and comment.[59]

In contrast, the D.C. Circuit held in 2011 that the Transportation Security Administration's (TSA's) decision to implement advanced imaging technology instead of magnetometers at airport security checkpoints constituted a legislative rule and therefore should have gone through notice and comment.[60] The agency attempted to frame its decision as a policy statement,[61] but the D.C. Circuit rejected that characterization because it created new requirements on private parties. "[A] passenger is bound to comply with whatever screening procedure the TSA is using on the date he is to fly at the airport from which his flight departs."[62]

IV. IDENTIFYING LEGISLATIVE RULES

There are legitimate reasons agencies might opt to issue guidance documents. However, to the extent that those documents are, in effect, legislative rules issued without notice and comment, they may be vulnerable to legal challenge.

[57] *Id.* at 714–15.

[58] *Id.* at 717–18; *see also id.* at 718 (noting that the FAA's "use of language like 'may' and 'should' instead of 'shall' or 'must' suggest that the provisions that follow are meant to be 'precatory, not mandatory.'").

[59] *Id.* at 717–18.

[60] *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011).

[61] And, alternatively, as a procedural rule and interpretative rule. *Id.* at 5–7.

[62] *Id.* at 7.

As noted above, the law on identifying legislative rules masquerading as guidance documents is unclear.[63] Adding to the ambiguity is the fact that agencies will not always identify their pronouncements as interpretative rules or policy statements. Even when they do, an "agency's own label is indicative but not dispositive,"[64] and is "only the starting point" of, a court's inquiry into whether a policy is in fact a legislative rule.[65]

As a result, litigants might consider bringing notice-and-comment claims against a wide variety of agency action, including those for which an agency does not offer a label and those that may not be obviously recognizable as legislative rules, but that contain statements or directives that nonetheless meet the legal standard. Such actions include, but are not limited to:

- Letters to entities or lawmakers[66]
- Press releases[67]
- Guidance to states[68]
- Blog posts[69]

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[63] *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017).

[64] *Chamber of Com. of U.S. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980).

[65] *Texas*, 50 F.4th at 522 (internal quotations omitted).

[66] *See, e.g., Iowa League of Cities v. EPA*, 711 F.3d 844, 875 (8th Cir. 2013) (vacating two letters sent by the EPA to Senator Charles Grassley as containing new legislative rules without satisfying notice and comment procedures because the letters effectively created "new legal norm[s]" for particular environmental policies).

[67] *See, e.g., Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (holding that a press release announcing a new USDA program was a legislative rule because it "set forth" new procedures for applicants and prospective sanctions); *see also Safari Club Int'l v. Zinke*, 878 F.3d 316, 320 (D.C. Cir. 2017) (holding that a press release establishing a prospective policy should have gone through notice and comment); *CropLife Am. v. E.P.A.*, 329 F.3d 876, 881 (D.C. Cir. 2003) (vacating a press release for not following notice and comment procedures because it was binding on private parties.); Brad Lipton, *After Years of Lectures, New CFPB Violates APA via Press Release*, Consumer Federation of America (Apr. 1, 2025), https://consumerfed.org/after-years-of-lectures-new-cfpb-violates-apa-via-press-release/.

[68] *See, e.g., Nebraska, Dep't of Health & Hum. Servs. v. U.S. Dep't of Health & Hum. Servs.*, 340 F. Supp. 2d 1, 18 (D.D.C. 2004) (finding that Administration for Children and Families "transmittals" to states were legislative rules because the agency treated them as binding law.).

[69] *See, e.g.,* Letter from The Clearing House Association LLC, et al. to Seth Frotman, General Counsel, Consumer Financial Protection Bureau (Jun. 22, 2024), https://bpi.com/wp-content/uploads

- FAQs[70]
- New methodologies for determining benefits or obligations[71]
- Miscellaneous informational materials (e.g., fact sheets)[72]
- Statements about blanket non-enforcement[73]

More generally, litigants considering a challenge based on lack of notice and comment might assess an agency policy's effect, language, and statutory basis to determine whether it is a legislative rule. A policy may constitute a legislative rule if:

- ***It alters, contradicts, or otherwise "[a]dds content" to governing standards.***[74] The policy might be inconsistent with a legislative rule or statute that it purports to interpret or enforce.[75] It might have the effect of whole or partial repeal[76] or rewriting[77] of a regulation, of delegating

/2024/06/Letter-to-CFPB-Re-NYAG-Litigation_6.22.pdf (decrying the CFPB's "regulation by blog post" where the agency "threaten[s] financial institutions with enforcement actions").

[70] *See, e.g., Veneman*, 289 F.3d at 96 (holding that a "Questions and Answers" document was a legislative rule subject to notice and comment because it "set forth" new procedures for applicants and prospective sanctions.").

[71] *See, e.g., Batterton v. Marshall*, 648 F.2d 694, 706 (D.C. Cir. 1980) (holding unlawful a new methodology for collecting and computing unemployment statistics never published or announced by the Department of Labor because the relevant statute delegated rulemaking authority to the department to issue rules governing unemployment statistics and the department's policy "conclusively determines the unemployment statistics which trigger the emergency job program allocations.").

[72] *See, e.g., Texas v. Cardona*, 743 F. Supp. 3d 824, 889 (N.D. Tex. 2024) (holding that a "Notice of Interpretation," a "Dear Educator Letter," and a "Fact Sheet" constituted legislative rules because they purported to change the legal standard under Title IX's regulations.).

[73] *See Challenging Non-Enforcement*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[74] *State of Tennessee v. Dep't of Educ.*, 104 F.4th 577, 609 (6th Cir. 2024).

[75] *Id.* at 610; *Mendoza*, 754 F.3d at 1009 (letters explaining visa requirements were legislative where they "impose[d] different minimum wage requirements and provide[d] lower standards for employer-provided housing" than underlying regulations).

[76] *See Challenging Non-Enforcement*, Governing for Impact 21 (May 2025), https://governingforimpact.org/apa-library/.

[77] *Liquid Energy Pipeline Ass'n v. FERC*, 109 F.4th 543, 548 (D.C. Cir. 2024) (explaining that an order "substantively altered" a legislative rule); *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992) ("[The agency] may not constructively rewrite the regulation, which was expressly based upon a specific interpretation of the statute, through internal memoranda or

authority in a way not contemplated by the underlying statute or regulation,[78] or of delaying or suspending the compliance or effective date of a particular rule or part of a rule.[79]

- ***It imposes new obligations.*** The policy might impose new duties on the agency or parties that "did not arise from a statute or a [prior] notice-and-comment rule."[80] This may be evident if the action imposes a compliance burden that "involve[s] significant time and expense."[81]

- ***It "grant[s] rights."[82]*** The policy might create rights that did not previously exist under the relevant statute or regulation, establish a new program, or grant systematic forbearance from enforcement.[83]

- ***It creates penalties.[84]*** The action might subject entities (including individuals, companies, or states) to penalties, monetary or otherwise, that did not exist before the policy.[85]

- ***Application of the policy indicates bindingness.*** Later adjudications might identify prohibitions laid out in the policy as the basis for a decision.[86]

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guidance directives that incorporate a totally different interpretation and effect a totally different result.")

[78] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (guidance imposing testing requirements for power plants under the Clean Air Act was legislative rule where it delegated authority to states in ways not explicitly contemplated in underlying rulemaking)

[79] *See, e.g., Nat'l Ass'n of Manufacturers v. U.S. Sec. & Exch. Comm'n*, 631 F. Supp. 3d 423, 429 (W.D. Tex. 2022) (finding a delay of a compliance date for a regulation to be itself a legislative rule requiring notice and comment).

[80] *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022).

[81] *CIC Servs., LLC v. Internal Revenue Serv.*, 593 U.S. 209, 220 (2021) (describing an IRS rule that imposed "affirmative reporting obligations" as a rule).

[82] *Texas*, 50 F.4th at 522 (5th Cir. 2022) (internal quotation omitted).

[83] *Id.* at 522–24.

[84] Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 524 (2013) (characterizing penalties as a leading indicator that a regulation is legislative rather than interpretative).

[85] *Mann Constr.*, 27 F.4th at 1143–44.

[86] *R.J. Reynolds Vapor Co. v. FDA,* 65 F.4th 182, 194 (5th Cir. 2023) (explaining that "subsequent, myriad Denial Orders refer to the same deficiencies identified as 'fatal' in the memo").

- ***It constrains agency discretion.*** The action could limit staff's ability to apply statutes and regulations as they see fit.[87]

Additionally, litigants should look to the policy's language to help assess its legal effects. Of particular significance is whether:

- ***It includes mandatory language, notwithstanding boilerplate disclaimers.***[88] That the policy uses mandatory language like "must" and "shall" might be evidence that it is "binding."[89] However, many courts recognize that interpretative rules may use mandatory language.[90]

- ***It includes precise language.*** A policy is more likely to be "binding" if the language it uses clearly delineates what is acceptable and unacceptable conduct and gives a clear prioritization of "enunciated policies."[91]

- ***It is published in the Code of Federal Regulations or Federal Register or is otherwise characterized as a regulation.***[92] Actions may be more likely to be binding or official if they are formally published.

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[87] *Id.* at 193–94 (noting that the agency rule at issue "took away the [Food and Drug Administration] reviewers' former discretion to consider individual PMTAs solely on their merits and instead requires a cursory, box-checking review")

[88] *Texas*, 50 F.4th at 523 (explaining that a DACA memorandum was a legislative rule even though it "state[d] that it 'confers no substantive right, immigration status, or pathway to citizenship.'").

[89] *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("To the applicant reading the Guidance Document the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in the Document."). *But see Flight Training Int'l, Inc.*, 58 F.4th at 242 ("rejecting the proposition that a rule cannot be interpretive if it limits discretion or uses binding language").

[90] *Flight Training Int'l, Inc.*, 58 F.4th at 242 ("If the law is mandatory, then it is natural for an agency's restatement of the law to speak in mandatory terms as well.") (collecting cases).

[91] *See Wilderness Soc. v. Norton*, 434 F.3d 584, 595–96 (D.C. Cir. 2006) (government duties described in guidance were unenforceable because, though they occasionally used mandatory language, they generally "lack[ed] precision").

[92] *POET Biorefining, LLC*, 970 F.3d at 407; *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Syncor Int'l Corp.*, 127 F.3d at 95. *But see Gonnella v. U.S. Sec. & Exch. Comm'n*, 954 F.3d 536, 546 (2d Cir. 2020) (explaining that a section of the Code of Federal Regulations was a "policy statement, not a rule").

- ***The signing official had authority to bind the agency.*** A policy is less likely to have legal effect if the issuing official was not delegated the authority to bind the agency to a particular course of action.[93]

The statutory basis for the policy can also help determine its legal effects. In particular, whether:

- ***The statute directly authorizes the rulemaking.*** If a rule "carries out an express delegation of authority from Congress to an agency, it usually leads to legislative rules."[94]

- ***There would be no adequate basis for enforcement in the rule's absence.*** When a statute leaves the task of defining specific prohibited practices to an agency, and the agency does so, the agency's action creates new law.[95]

However, if prospective litigants believe that a policy is a legislative rule, they might also ensure that the policy does not fall into the APA's other exceptions to notice and comment.[96]

V. CONCLUSION

Particularly as the Trump administration reduces the federal workforce, resource-constrained agencies might be more likely to conduct policymaking through informal

[93] *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (explaining that an agency policy may not be a "rule at all" if it is not "capable of[] binding the agency") (internal quotation omitted).

[94] *Mann Constr.*, 27 F.4th at 1143 ("The Notice also stems from an express and binding delegation of rulemaking power. Congress tasked the IRS with determining "by regulations" how taxpayers must "make a return or statement" and the information they must provide to the IRS when doing so.); *see, e.g., Tennessee*, 104 F.4th at 609 (finding a rule to be legislative when the statute created a prohibition and then directed an agency to "effectuate" the prohibitory provisions "by issuing rules, regulations, or orders of general applicability.")

[95] *See Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169–70 (7th Cir. 1996); *Am. Min. Cong.*, 995 F.2d at 1106; *State of Tennessee*, 104 F.4th at 609 ("Prior to the Documents, the States had no obligation to investigate these claims. According to the Department, they now do. And, the States say, this in turn obligates them to stop the enforcement of their own contrary laws and policies.").

[96] *See Notice and Comment, Part II: Good Cause and Other Exceptions*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

guidance documents. It therefore might behoove litigants to carefully consider whether guidance documents should have been issued via notice-and-comment and therefore might be procedurally defective under the APA.

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