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Stephen M. Johnnson

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Recommended Citation
Stephen M. Johnnson, Good Guidance, Good Grief, 72 Mo. L. Rev. (2007)
Available at: https://scholarship.law.missouri.edu/mlr/vol72/iss3/1

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Good Guidance, Good Grief!

Stephen M. Johnson

I. INTRODUCTION

Over the past decade, federal administrative agencies have increasingly relied on interpretive rules, policy statements and informal tools, rather than formal procedures or notice and comment rulemaking, to implement and administer federal law. The trend has exacerbated several longstanding concerns about interpretive rules and policy statements. First, critics charge that agencies often use interpretive rules and policy statements to create binding rules without following the procedures that are required for the development of binding rules. This concern was expressed most clearly by the United States Court of Appeals for the D.C. Circuit in Appalachian Power Co. v. Environmental Protection Agency, when the court wrote:

* Associate Dean and Professor, Walter F. George School of Law, Mercer University. B.S., J.D. Villanova University, LL.M. George Washington University School of Law.

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 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.²

Second, critics charge that judicial review does not provide an adequate check on agency policymaking through interpretive rules and policy statements because judicial review of those guidance documents is very limited.³ Finally, when judicial review of interpretive rules and policy statements is available, there is confusion regarding the amount of deference that courts owe to agencies’ guidance documents.⁴ This lack of clarity interferes with planning and decisionmaking by agencies and the regulated community.

In January 2007, President Bush and the White House Office of Management and Budget (OMB) asserted greater executive control over agencies’ interpretive rules and policy statements. First, on January 23, the President issued an Executive Order that requires agencies to submit “significant” guidance documents to OMB for review before the agencies adopt the guidance.⁵ Two days later, OMB issued guidelines that impose significant limits on the development of interpretive rules, policy statements and other guidance documents, including the imposition of notice and comment procedures for economically significant guidance documents.⁶ Like many reforms previously proposed by Congress, the Administrative Conference of the U.S. (ACUS) and academics,⁷ the White House actions impose significant new procedural requirements on agencies.

Unfortunately, the White House actions, like many of the failed reform proposals of Congress, ACUS, and academics, could ossify the development of interpretive rules, policy statements and other guidance documents in the

². 208 F.3d 1015, 1020 (D.C. Cir. 2000).
³. See infra Part III.C. In most cases, persons will have to wait until interpretive rules and policy statements are applied to them in an enforcement action or adjudication before they can challenge the rules or policies. Id.
⁴. See infra Part III.B.
⁷. See infra Part IV.
same way that legislative, judicial and executive branch requirements have ossified the notice and comment rulemaking process.\textsuperscript{8} The White House actions could encourage agencies to create and implement policy more frequently through adjudication, rather than notice and comment rulemaking, and could encourage agencies to withhold information that they might otherwise have made available through guidance documents.

A different approach is necessary, and it should come from Congress, rather than the White House, in the form of amendments to the Administrative Procedure Act (APA).\textsuperscript{9} Public participation and the procedures used by agencies to create guidance documents may be the most significant factors that have influenced the amount of deference courts have shown to agency guidance documents in the past.\textsuperscript{10} However, instead of establishing a bright line rule that requires agencies to adopt notice and comment rulemaking procedures for guidance documents or categories of guidance documents, as OMB has done, Congress should amend section 553 of the APA\textsuperscript{11} to impose a general requirement on agencies "to the extent practicable, necessary and in the public interest" to "provide opportunities for timely and meaningful public participation." A companion amendment to section 706 of the APA\textsuperscript{12} could clarify the level of deference due to agency guidance documents, and could tie the level of deference accorded to the agency to the procedures used by the agency to adopt the guidance. Thus, agencies that developed guidance documents through notice and comment procedures would be rewarded by receiving greater deference for the guidance if it was challenged in court. At the same time, though, agencies could choose to forego notice and comment procedures, recognizing that their guidance might be accorded less deference on review.

This article examines the problems created by the White House reforms and prior reforms proposed by Congress, ACUS and academics, and outlines the advantages and disadvantages of the alternative APA amendments outlined above. Part II of the article explores the basic differences between leg-


\textsuperscript{10} See infra Part III.B.


\textsuperscript{12} Id. § 706.

II. THE TREND TOWARDS NONLEGISLATIVE RULES

A. DIFFERENCES BETWEEN LEGISLATIVE AND NONLEGISLATIVE RULES

Interpretive rules and policy statements, referred to in the introduction as “guidance documents,” are more traditionally known as “nonlegislative rules.” There are several important differences between legislative rules,  

13. Interpretive rules and general statements of policy are not defined in the Administrative Procedure Act, but are identified as categories of “rules” that are exempt from the notice and comment rulemaking requirements of the APA. See 5 U.S.C. § 553(b)(A). A “rule” is defined broadly in the APA as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” Id. § 551(4). Nonlegislative rules can include circulars, advice letters, staff manuals, memorandums of understanding, enforcement guidance, and other guidance documents and policies. See John F. Manning, Nonlegislative Rules, 72 GEO. WASH. L. REV. 893, 914 (2004); M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. CHI. L. REV. 1383, 1391-92 (2004). Not all commentators agree that there is any significant difference between interpretive rules and general statements of policy. See William Funk, A Primer on Nonlegislative Rules, 53 ADMIN. L. REV. 1321, 1324 (2001) [hereinafter Funk, Primer]; cf. Manning, supra at 918-27 (describing the distinctions drawn by the D.C. Circuit between the types of nonlegislative rules). However, to the extent that interpretive rules are different from general statements of policy, agencies use interpretive rules to interpret statutes or regulations that they administer. Id. at 923-24; see also Robert A. Anthony, Interpretive Rules, Policy Statements, Guidelines, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L. J. 1311, 1325 (1992); Orenge Carballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993). On the other hand, they use general statements of policy to announce the manner in which they plan to exercise enforcement or adjudicatory discretion. Funk, Primer, supra, at 1332; Robert A. Anthony & David A. Codevilla, Pro-Ossification: A Harder Look at Agency Policy Statements, 31 WAKE FOREST L. REV. 667, 670 (1996). The D.C. Circuit defines “general statements of policy” to include “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citing the Attorney General’s Manual on the Administrative Procedure Act (1947)). The difference between the two types of nonlegislative rules is not significant for purposes of this Article.
the rules issued by agencies pursuant to a delegation of rulemaking authority from Congress, 14 and nonlegislative rules. 15 First, nonlegislative rules are subject to fewer procedural requirements than legislative rules. Interpretive rules and general statements of policy are exempt from the notice and comment rulemaking procedures of the APA. 16 Instead, the APA merely requires that agencies publish and make available some, but not all, nonlegislative rules. 17 Accordingly, agencies generally use very few procedures to develop nonlegislative rules 18

Another major difference between legislative rules and nonlegislative rules is that legislative rules have the force of law and bind agencies and the public, while nonlegislative rules do not bind agencies or the public. 19 Simi-

14. A legislative rule is “the product of an exercise of delegated legislative power to make law through rules.” 2 Kenneth Culp Davis, Administrative Law Treatise § 7.8, at 36 (2d ed. 1979). An agency that has been delegated rulemaking authority may issue both legislative rules as well as rules within that authority that the agency announces to be merely interpretive.

15. An agency can issue an interpretive rule even though Congress has not delegated the agency any rulemaking authority. See Funk, Primer, supra note 13, at 1347.

16. 5 U.S.C. § 553(b) (2006). While most legislative rules are adopted through the informal notice and comment procedures of the APA, Congress can require agencies to use more formal procedures to adopt legislative rules. If the statute that gives an agency legislative rulemaking authority requires agencies to issue those rules “on the record after opportunity for an agency hearing”, agencies must comply with the formal rulemaking requirements of Sections 556 and 557 of the APA. 5 U.S.C. § 553(c).

17. The APA requires agencies to “separately state and currently publish in the Federal Register . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.” 5 U.S.C. § 552(a)(1). It also provides that “[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.” Id. Finally, the APA requires agencies to “make available for public inspection and copying . . . those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register [and] administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2).


19. See Johnson, supra note 1, at 285; Anthony & Codevilla, supra note 13, at 670 n.15; see also Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency
larly, reviewing courts generally accord greater deference to agencies' legislative rules than they accord to nonlegislative rules.\(^{20}\) Finally, while judicial challenges to legislative rules are quite common, it is often very difficult to challenge nonlegislative rules in court, either because the rules are not "final agency action" or because challenges to the rules are not ripe.\(^{21}\) These differences between legislative and nonlegislative rules have played a significant role in influencing the current trend in agencies towards making policy decisions through nonlegislative rules, rather than through legislative rules or adjudication.

**B. Reasons for the Trend Towards Nonlegislative Rules**

There is a general consensus that the notice and comment rulemaking process for legislative rules has become "ossified" over the last few decades as Congress,\(^{22}\) courts\(^{23}\) and the executive branch\(^{24}\) have imposed substantial

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\(^{20}\) Policymaking, 92 CORNELL L. REV. 397, 408-10. Several commentators have advocated for, or explored, reforms that would make interpretive rules binding on agencies. See Mendelson, supra, at 427-38 (discussing proposals of Professors Strauss and Manning); William Funk, Legislating for Nonlegislative Rules, 56 ADMIN. L. REV. 1023, 1035-36 (2004) [hereinafter Funk, Legislating]. Professor Funk's proposal would bind agency employees, but not ALJs, to agency interpretive rules. Id. Even without any amendments to the APA, agencies are, to some extent, bound by their interpretive rules, as agencies cannot depart from or change policies rules without providing reasonable explanations for their actions. Id. at 1038. In addition, due process may prevent agencies from penalizing persons for relying on official agency positions announced in interpretive rules. Id.

\(^{21}\) See infra Part III.B. However, judicial review is generally available if the agency attempts to apply the interpretive rule as a binding rule in an enforcement action or adjudication.

\(^{22}\) The Regulatory Flexibility Act requires agencies to prepare a regulatory flexibility analysis (RFA) for certain rules. 5 U.S.C. § 603(a) (2006). The Information Quality Act requires agencies to respond to challenges to the "quality" of information disclosed in, or relied upon in, rulemaking. 44 U.S.C. § 3516 (2006). Congress has imposed additional requirements on agencies through various other acts. See, e.g., Paperwork Reduction Act, 44 U.S.C. § 3507 (2006) (requiring agencies to submit information collection requests to OMB for rules that require submission of information by ten or more persons); Unfunded Mandates Reform Act, 2 U.S.C. § 1532 (2006) (requiring analyses of alternatives to rules if rules would cause expenditures of more than $100 million by State, local or tribal governments); Congressional Review Act, 5 U.S.C. § 801 (2006) (requiring submission to Congress of rules that have a significant impact on the economy).

\(^{23}\) Courts have interpreted the APA requirement that agencies provide a "concise general statement of the basis and purpose" of a final rule, 5 U.S.C. § 553(c), to mean that agencies must address and rationally respond to the comments that they receive on proposed rules. See Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1566 (11th Cir. 1985); United States v. Nova Scotia Food Prods., 568 F.2d 240,
new procedural requirements on the APA notice and comment process.\textsuperscript{25} Since the process for adopting nonlegislative rules is significantly quicker and less expensive than the notice and comment rulemaking process, agencies are increasingly adopting policies and interpreting laws and regulations through nonlegislative rules.\textsuperscript{26} Agencies can also change those policies more quickly and fine tune their interpretations with more flexibility when they adopt the policies and interpretations as nonlegislative rules.\textsuperscript{27} Further, agencies are less likely to face legal challenges to their policies and interpretations when they adopt them as nonlegislative rules.\textsuperscript{28} In the past, adoption of nonlegisla-


\textsuperscript{27} 26. See Johnson, \textit{supra} note 1, at 282. See also Funk, \textit{Primer, supra} note 13, at 1332-33; Mendelson, \textit{supra} note 19, at 408; Zaring, \textit{supra} note 1, at 323-25; Funk, \textit{Legislating, supra} note 19, at 1028. Recent notice and comment rulemakings by the FCC, EPA, and Forest Service have each spawned hundreds of thousands of comments. See Cary Coglianese, \textit{Citizen Participation in Rulemaking: Past, Present and Future,} 55 \textit{DUKE L. J.} 943, 954 (2006).

\textsuperscript{28} 27. See Mendelson, \textit{supra} note 19, at 407.

\textsuperscript{29} 28. See Johnson, \textit{supra} note 1, at 287-88; Mendelson, \textit{supra} note 19, at 408. Judicial challenges to legislative rules are very common. Former EPA Administrator William Ruckelshaus has estimated that almost 80% of the agency’s major rules were challenged while he was Administrator of EPA. See Lawrence Susskind & Gerard McMahon, \textit{The Theory and Practice of Negotiated Rulemaking,} 3 \textit{YALE J. ON REG.} 133, 134 (1985) (citing William Ruckelshaus, Environmental Negotiation: A New Way of Winning, Address to Conservation Foundation’s Second National Conference on Environmental Dispute Resolution (Oct. 1, 1984)). In addition, some studies have determined that courts invalidate legislative rules adopted through notice and comment rulemaking in thirty to fifty percent of the cases in which they are challenged. See Pierce, \textit{supra} note 1, at 84. It is not surprising that agencies are reluctant to promulgate rules through notice and comment rulemaking when there may be an eighty percent chance that the rule will be challenged and a thirty to fifty percent change that a challenged rule will be invalidated.
tive rules was also subject to less Presidential and Congressional control than the notice and comment process for adoption of legislative rules. While agencies could choose to make policies and interpretations through adjudication, adoption of nonlegislative rules, like the adoption of legislative rules, enables agencies to give advance notice to the regulated community and regulatory beneficiaries about the agencies' interpretations and policies. It also enables agencies to promote consistent decisionmaking and application of the law by their employees.

C. Problems Created by the Trend Towards Nonlegislative Rules

Although agencies are increasingly relying on nonlegislative rules because of the benefits outlined above, the trend can have some important negative effects on the public and on agencies. The trend reduces opportunities for the public to participate in the development of an agency's policies and interpretations, and reduces opportunities for the public to challenge those policies and interpretations in court. Public participation is vital to the de-

29. See Mendelson, supra note 19, at 408. That is likely to change with the adoption of Executive Order 13,422. See supra note 24.

30. See Manning, supra note 13, at 893; Funk, Primer, supra note 13, at 1323; Mendelson, supra note 19, at 409.

31. See infra Part III.C. See also Funk, Primer, supra note 13, at 1323. As Professor Nina Mendelson points out, regulatory beneficiaries, as opposed to the regulated community, are particularly disadvantaged. See generally Mendelson, supra note 19. While regulated entities may have an opportunity to challenge an agency's interpretive rules or statements of policy when they are applied to them, regulatory beneficiaries will never have that opportunity, since they are not subject to the agencies' policies or interpretations, but may benefit from a particular policy or interpretation of a law the agency administers. See id. at 420-22. When, for instance, EPA interpreted a provision of the Clean Water Act to exempt certain wetlands from coverage under the law, environmental groups and other persons who would benefit from a broader reading of the law to protect those wetlands could not challenge the agency's policy decision. Id. at 421. In addition, even when an agency applies an interpretive rule or policy in an enforcement proceeding or adjudication involving a regulated entity, regulatory beneficiaries will normally be unable to intervene in those proceedings to challenge the agency's policy decision, or may be unaware that the proceeding is occurring. Id. at 422-24.

Professor Mendelson also notes that regulatory beneficiaries are likely to be disadvantaged in the development of interpretive rules and policies. As she notes, if agencies expand public participation in the development of nonlegislative rules, they tend to seek out input from the regulated community, rather than regulatory beneficiaries. Id. at 424-25. She suggests that agencies seek input from regulated entities because (1) they are more likely to have regular relationships with regulated entities, so it is convenient and inexpensive to seek input from them; (2) they may have a greater interest in maintaining a good long term relationship with regulated entities, since the agency is interested in ensuring their compliance with the law; and (3) regu-
Development of an agency's policies because (1) it provides oversight of agency action and prevents agencies from being captured by the regulated community or other special interest groups; (2) it provides the agency with important information about the impacts of proposed decisions that enable the agency to administer the law in a rational, defensible manner; and (3) it instills a sense of legitimacy in the public regarding the agency's decisions.

Since nonlegislative rules may be less accessible to the public than legislative rules, the trend towards greater reliance on nonlegislative rules also makes it more difficult for the public to know what the law is and to comply with it, and for agency employees to apply the law consistently. The trend also aggravates the risk, identified by the Appalchian Power court, that agencies will treat nonlegislative rules in practice like binding legislative rules, thus evading the procedural requirements of the APA. Even if agencies do not treat nonlegislative rules as binding legislative rules, nonlegislative rules may have a coercive effect, in that the regulated community may choose to "comply" with the rules, rather than to challenge them or wait for the agency to enforce the rules against them. OMB identified many of these concerns as the basis for its recent "Good Guidance Practices."

Regulatory entities are likely to have valuable information, which may be superior to the agency's information, regarding the cost and feasibility of a policy. Id. at 429-30.

Mendelson also suggests that regulatory beneficiaries are likely to be less involved in policy development because they have fewer resources to devote to finding out about policies before the policies are finalized, they lack the political clout to motivate an agency to seek their input and because they are often poorly organized or diffuse. Id. at 430.

32. See Mendelson, supra note 19, at 402.

33. See Johnson, supra note 1, at 289. See also Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 NW. U. L. REV. 173, 202 (1997). Professor Mendelson suggests that to the extent "one sees the administrative process as an important civic republican substitute for other forms of democratic dialogue, . . . regulatory beneficiaries may perceive a particular policy decision as illegitimate." See Mendelson, supra note 19, at 433.

34. See Johnson, supra note 1, at 288.

35. To the extent that agencies fail to apply policies and interpretations consistently, they risk having their actions struck down as arbitrary and capricious. See Johnson, supra note 1, at 289.


III. CONCERNS ABOUT NONLEGISLATIVE RULES AND REFORM PROPOSALS

As agencies rely more heavily on nonlegislative rules to make policy decisions, it is important to resolve several longstanding concerns about nonlegislative rules discussed above. First, critics of nonlegislative rules assert that agencies often improperly treat nonlegislative rules as binding, legislative rules. 39 Some courts and academics have responded to that concern by suggesting that whether a rule should be considered a legislative rule, which must be adopted through notice and comment rulemaking, or an interpretive rule, which does not need to be adopted through notice and comment rulemaking, should depend on the manner in which the agency applies the rule. That approach has led to significant confusion in the academic literature regarding the appropriate test for distinguishing legislative rules from nonlegislative rules, and has spawned several reform proposals to establish a bright line test.

A second concern raised by academics pertains to the deference a court owes to an agency's nonlegislative rules. 40 Recent Supreme Court decisions have created confusion about whether, and when, nonlegislative rules might be entitled to Chevron deference. That confusion has led to inconsistent judicial review of nonlegislative rules, and has prompted several reform proposals that would clarify the level of deference that courts owe to nonlegislative rules.

Finally, some critics of nonlegislative rules have raised concerns that judicial review does not provide an adequate check on agency decisionmaking through nonlegislative rules because judicial review of interpretive rules and policy statements is very limited. 41 Those concerns have spawned reform proposals that would increase opportunities for judicial review of nonlegislative rules. This section of the article outlines these labeling, deference and judicial review concerns in detail.

A. Distinguishing Between Legislative and Nonlegislative Rules

Courts are generally asked to determine whether a rule is a legislative or interpretive rule (1) when an agency is applying the rule in an enforcement action or adjudication and the regulated entity asserts that the agency failed to follow appropriate procedures to develop the rule; 42 (2) before the agency

39. See infra Part III.A.
40. See infra Part III.B.
41. See infra Part III.C.
42. See, e.g., Erringer v. Thompson, 371 F.3d 625 (9th Cir. 2004) (rejecting the claim of Medicare beneficiaries that criteria relied upon to deny their benefits should have been adopted pursuant to notice and comment rulemaking); Hemp Indus. Ass'n v. Drug Enforcement Admin., 333 F.3d 1082 (9th Cir. 2003) (finding that the DEA
applies the rule and a member of the regulated community asserts that the agency failed to follow appropriate procedures to develop the rule; or (3) when the agency is making a decision in an enforcement action or adjudication that conflicts with the rule and the regulated entity asserts that the agency is bound to follow the rule. In each of these cases, the agency generally argues that the rule is a nonlegislative rule, while the challenger is arguing that the rule is a legislative rule.

Several decades ago, many courts used a “substantial impact” test to determine whether a policy adopted by an agency was a legislative rule or nonlegislative interpretive rule. Under that test, if a rule had a substantial impact on the regulated community, the rule was not an interpretive rule and the agency, therefore, was required to adopt the rule through notice and comment rulemaking. The “substantial impact” test was strongly criticized and has been replaced by a new “legally binding effect” or “force of law” test in most courts.

rule that banned the sale of consumable products containing hemp oil, cake, or seed should have been adopted pursuant to notice and comment rulemaking). Pre-enforcement challenges are less frequent than challenges in the enforcement context for reasons discussed in Part III.C of this article.

43. See, e.g., CropLife Am. v. EPA, 329 F.3d 876 (D.C. Cir. 2003) (finding that EPA directive should have been adopted pursuant to notice and comment rulemaking); Hoctor v. U.S. Dep't of Agric., 82 F.3d 165 (7th Cir. 1996) (finding that Department of Agriculture guideline regarding the minimum height of enclosures for dangerous animals should have been adopted pursuant to notice and comment rulemaking). The CropLife case actually focused on whether an agency rule was a “policy statement”, rather than a legislative rule, as opposed to whether it was an “interpretive rule” rather than a legislative rule. See CropLife, 329 F.3d at 883. While there are some differences between the analysis that courts use to distinguish policy statements from legislative rules, on the one hand, and interpretive rules from legislative rules, on the other, the analyses generally converge as courts focus on whether the agency’s actions have the “force of law.” See id. See also Funk, Primer, supra note 13, at 1333-34 (noting that the test used by courts to distinguish policy statements and legislative rules is functionally equivalent to the test used to distinguish interpretive rules and legislative rules); William Funk, When is a “Rule” a Regulation?: Marking a Clear Line Between Nonlegislative Rules and Legislative Rules, 54 ADMIN. L. REV. 659, 662-63 (2002) [hereinafter Funk, Clear Line].

44. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986) (finding that the Secretary of Labor’s enforcement guidelines under the Federal Mine Safety and Health Act were not binding on the agency); Rivera v. Becerra, 714 F.2d 887, 891 (9th Cir. 1983) (holding that the courts would “engraft their own notions of proper procedures upon agencies” if they applied the substantial impact test) (citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 525 (1978)).

46. See Funk, Primer, supra note 13, at 1325-26.
47. Id.
48. Id. at 1326.
Under the current test, courts focus on several factors to determine whether a rule has the force of law and should be adopted through notice and comment rulemaking. A rule has the "force of law" or "legally binding effect" when (1) in the absence of the rule, there would not be an adequate legislative basis for enforcement action,\(^49\) (2) the agency has explicitly invoked its general legislative authority;\(^{50}\) or (3) the rule effectively amends a prior legislative rule.\(^{51}\) If the court determines that the rule has the "force of law,"

\(^{49}\) See Erringer v. Thompson, 371 F.3d 625, 630 (9th Cir. 2004). As the Ninth Circuit recognized in Hemp Industries, "if there is no legislative basis for enforcement action on third parties without the rule, then the rule necessarily creates new rights and imposes new obligations. This makes it legislative." Hemp Indus. Ass’n v. Drug Enforcement Admin., 333 F.3d 1082, 1088 (9th Cir. 2003). In those cases, the agency is relying on the rule, rather than the statute, to create a legal obligation that the agency is enforcing. See also Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993); Funk, Primer, supra note 13, at 1327.

\(^{50}\) If an agency asserts, at the time that the rule is adopted, that the rule is being adopted pursuant to the agency’s authority to make binding rules or pursuant to the agency’s general legislative authority, courts will generally conclude that the rule is a legislative rule. See Erringer, 371 F.3d at 631. On the contrary, however, a court is unlikely to find, that a rule that an agency applies as binding is an interpretive rule merely because the agency asserts, either at the time that the rule is adopted, or during litigation, that the rule is merely interpretive. See Funk, Primer, supra note 13, at 1330. If the agency does not treat the rule as binding, though, the fact that the agency identifies it as an interpretive rule when it issues the rule is significant for many courts. See id. The D.C. Circuit has also suggested that courts should consider whether a rule is published in the Code of Federal Regulations when determining whether the rule is legislative or interpretive, see Am. Mining Cong., 995 F.2d at 1109, but the Ninth Circuit has given less weight to that factor, recognizing that interpretive rules, as well as legislative rules, may be published in the Code of Federal Regulations. See Erringer, 371 F.3d. at 632 n.13.

\(^{51}\) See Erringer, 371 F.3d at 630 (citing Hemp Indus. Ass’n v. Drug Enforcement Admin., 333 F.3d 1082, 1088 (2003)). See also Am. Mining Cong., 995 F.2d at 1109. If the agency’s rule purports to amend a legislative rule, courts will determine that the new rule is a legislative rule, as agencies can only change a legislative rule by adopting a new legislative rule. See Funk, Primer, supra note 13, at 1329. While some courts have gone further to hold that agencies must use notice and comment rulemaking to change interpretive rules when the public has been notifed of those rules and have relied on those rules, id. at 1329-30, the Ninth Circuit has rejected that approach. See Erringer, 371 F.3d at 632. In addition, as will be noted later in this article, courts have generally been more reluctant to allow agencies to change interpretive rules without going through notice and comment rulemaking when the rule interprets a legislative rule than when the rule interprets a statute. See infra note 186. In addition to the three factors outlined in Erringer and Hemp to distinguish between legislative and interpretive rules, courts may also examine whether a rule interprets a preexisting legal standard or establishes a new standard in determining whether the rule is interpretive or legislative. See Funk, Primer, supra note 13, at 1328. Interpretive rules are supposed to interpret statutes or legislative rules, and are not supposed
it will usually find that the rule is a legislative rule and the court will invalidate the rule if it was not adopted through notice and comment rulemaking. 52

As Professor William Funk and others have noted, while courts adopt this approach, in most cases it is simply wrong. 53 Agencies are free to issue interpretive rules and general statements of policy without complying with notice and comment rulemaking procedures as long as they do not treat them as binding legislative rules. If an agency treats an interpretive rule or policy statement as a binding rule, however, courts should strike down decisions that the agency makes in reliance on that rule as arbitrary and capricious, rather than invalidating the rule itself. 54 It is black letter administrative law that courts review agency decisions based on the reasons articulated by the agency for its decisions. 55 While an agency does not have to explain the basis for a legislative rule when it applies the legislative rule in an enforcement action or adjudication, it does have to explain the basis for an interpretive rule or policy statement when it applies that rule in an enforcement action or adjudication. 56 If the agency does not explain the basis for the interpretive rule or policy statement, but simply treats it as a binding rule, the agency has not articulated any explanation for its decision, and the decision (not the rule) should be invalidated as arbitrary and capricious. 57 Thus, the error that an agency makes when it treats an interpretive rule or policy as binding is not an error in failing to follow appropriate procedures to create a binding legislative rule, but rather an error in failing to provide a rational justification for a decision based on the rule. Similarly, if the policy that the agency adopts in the nonlegislative rule is outside of its authority, courts should invalidate the rule to make new policy. Thus, if the agency is making new policy, instead of interpreting a statute or regulation, its rule will likely be held to be a legislative rule. Id.

52 Hemp Indus. Ass’n, 333 F.3d at 1088.

53 See Funk, Primer, supra note 13, at 1324-25. Professor Funk argues that the appropriate test for determining whether a rule is a legislative rule or nonlegislative rule is whether the agency used notice and comment procedures to adopt the rule. Id. If the agency did not use notice and comment procedures when adopting a rule and did not have good cause to avoid using those procedures, the rule is an interpretive rule, rather than a legislative rule. See 5 U.S.C. § 553 (2006). See also Funk, Clear Line, supra note 43, at 663. The interpretive rule may still be invalid on the merits, but it is not procedurally invalid. See Funk, Primer, supra note 13, at 1325.

54 See Funk, Primer, supra note 13, at 1325; Funk, Clear Line, supra note 43, at 665. The agency should be entitled to continue to utilize the rule as a nonlegislative rule even though they inappropriately applied it as a legislative rule in a proceeding. See Funk, Clear Line, supra note 43, at 665.

55 "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).


on those grounds when the rule is challenged, rather than invalidating the rule as a procedurally invalid legislative rule.\textsuperscript{58}

The approach that courts have used to invalidate rules through the “force of law” test seems to be motivated by concerns about excessive policymaking by agencies.\textsuperscript{59} As Professor John Manning has observed, the requirement that agencies make the decisions through notice and comment procedures seems to be an attempt to “push the formulation of policy details upward into a more formal lawmaking process that involves greater deliberation and accountability.”\textsuperscript{60}

\textbf{B. Judicial Deference Due to Nonlegislative Rules}

A second concern that is frequently raised regarding nonlegislative rules concerns the deference that courts owe to such rules. In \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council}, the Supreme Court established a seemingly straightforward and deferential two part test for judicial review of an agency’s legal interpretations.\textsuperscript{61} The \textit{Chevron} test requires that courts first ask “whether Congress has directly spoken to the precise question at issue.”\textsuperscript{62} If Congressional intent is clear, both the agency and the court are bound by it.\textsuperscript{63} However, if a court determines that Congress has been silent or ambiguous regarding the proper interpretation of a statute, the court must only ask “whether the agency’s answer is based on a permissible construction of the statute.”\textsuperscript{64}

However, application of the test has been far from straightforward, and courts and academics have struggled with many issues surrounding the inter-

\begin{itemize}
\item \textsuperscript{58} See Strauss Remarks, supra note 18; Funk, Clear Line, supra note 43, at 665-71. Professor Funk acknowledges that it may not be possible to obtain judicial review of an agency’s decision to decline to investigate or prosecute certain violations of law, but he argues that it is inappropriate to characterize the agency’s decision as a procedurally invalid legislative rule simply to enable courts to review the decision. \textit{Id.} at 664. Professor Funk explains that the answer to the question whether the agency’s decision to not investigate or prosecute is beyond the agency’s statutory authority “does not depend on the procedural means by which the agency decides that issue. If it is beyond the agency’s authority, notice-and-comment rulemaking will not solve the problem. . . . [T]he issue is not procedural; it is substantive.” \textit{Id.} at 671.
\item \textsuperscript{59} See Manning, supra note 13, at 894.
\item \textsuperscript{60} \textit{Id.} at 895. Professor Manning suggests that similar concerns animate the nondelegation doctrine and the judicial preference for rulemaking as opposed to adjudication. \textit{Id.} at 895-97. In each case, he asserts, courts impose greater procedural requirements on agency policymaking because they cannot develop clear substantive tests to limit excessive policymaking by agencies. \textit{Id.} at 916-17.
\item \textsuperscript{61} 467 U.S. 837, 842-43 (1984).
\item \textsuperscript{62} \textit{Id.} at 842.
\item \textsuperscript{63} \textit{Id.} at 842-43.
\item \textsuperscript{64} \textit{Id.} at 843.
\end{itemize}
interpretation and application of *Chevron* deference.\(^{65}\) One of the issues that the Supreme Court did not directly address in *Chevron* was the scope of its decision. While it was clear that the two part analysis would apply to judicial review of legislative rules, it was not clear whether *Chevron* would apply to decisions made through nonlegislative rules, adjudication or other means. Over time, academics have coined the phrase "*Chevron* Step Zero" to refer to the analysis of whether the *Chevron* two step applies to judicial review of an agency's decision.\(^{66}\)

The Supreme Court has revisited the issue several times over the last decade. First, in *Christensen v. Harris County*, the Supreme Court held that the *Chevron* analysis did not apply to an opinion letter of the Acting Administrator of the Department of Labor's Wage and Hour Division that interpreted the agency's rules regarding compensatory time.\(^{67}\) The Court reasoned that interpretations in the agency's opinion letter, "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."\(^{68}\) The procedure used by the agency to make its decision also seemed to be relevant to the Court's holding. The Court distinguished opinion letters from interpretations "arrived at after, for example, a formal adjudication or notice and comment rulemaking."\(^{69}\) Instead of according *Chevron* deference to the agency's decision, the Court suggested that the agency's decision should be accorded deference under the standard that was adopted in *Skidmore v. Swift & Co.*\(^{70}\) According to *Skidmore*, the level of deference which a court accords an agency's decision depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."\(^{71}\) Most commentators agree that *Skidmore* is a less deferential standard than *Chevron*.\(^{72}\)

\(\begin{align*}
65. & \text{Professor William Andersen notes that a quick search of Westlaw in 2004 for articles that mention *Chevron* deference generated more than 3,000 hits. See William R. Andersen, *Against Chevron--A Modest Proposal*, 56 ADMIN. L. REV. 957, 960 (2004).} \\
67. & \text{529 U.S. 576, 587 (2000).} \\
68. & \text{Id. at 587.} \\
69. & \text{Id. Justice Scalia filed a concurring opinion, in which he asserted that *Chevron* should apply to agency decisions, regardless of the procedures that the agency used to make those decisions, as long as the agency's decision represents the "authoritative view" of the agency. Id. at 591.} \\
70. & \text{323 U.S. 134 (1944).} \\
71. & \text{Id. at 140.} \\
72. & \text{See infra note 108.}
\end{align*}\)
The following year, in *United States v. Mead Corporation*, the Court held that *Chevron* did not apply to review of a tariff classification by the United States Customs Service.\(^7\) The Court held that *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."\(^7\) According to the Court, a delegation of that authority "may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking or by some other indication of a comparable congressional intent."\(^7\) Those procedures, the Court noted, "foster the fairness and deliberation that should underlie a pronouncement [with the force of law]."\(^6\)

While *Mead* and *Christensen* seem to suggest that nonlegislative rules should not be accorded *Chevron* deference, the Court has not yet adopted a bright line rule to that effect. The *Mead* Court stressed that Congressional delegation of authority to an agency to make decisions with the force of law is the key trigger for *Chevron* deference, and that *Chevron* deference may be appropriate even when an agency does not use notice and comment rulemaking or adjudication.\(^7\)

One year later, the Court decided *Barnhart v. Walton*, and applied *Chevron* to review an agency’s legal interpretation that was initially adopted as an interpretive rule and eventually adopted through notice and comment rulemaking.\(^8\) Writing for the Court, Justice Breyer stated that:

> the fact that the Agency previously reached its interpretation through means less formal than “notice and comment” rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due. . . . If this Court’s opinion in *Christensen v. Harris County* . . . suggested an absolute rule to the contrary,

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73. 533 U.S. 218, 226-27 (2001). As in *Christensen*, the Court held that the agency’s decision should be reviewed under the Skidmore analysis. *Id.* at 234.

74. *Id.* at 226-27.

75. *Id.* at 227. In dissent, Justice Scalia argued for a broader application of *Chevron*, asserting that any authoritative resolution of ambiguity by an agency should be entitled to *Chevron* deference. *Id.* at 241 (Scalia, J., dissenting). Scalia viewed *Mead* as an “avulsive change” in judicial review of agency action, the consequences of which would “be enormous, and almost uniformly bad.” *Id.* at 239, 261. He complained that the *Mead* ruling would cause confusion in the lower courts regarding when *Chevron* applied, an increase in informal rulemaking by agencies, uncertainty, unpredictability and endless litigation because of the indeterminate nature of *Skidmore* deference. *Id.* at 250. He also raised concerns that the decision would ossify statutory law. *Id.* However, those concerns should be eliminated by the Supreme Court’s subsequent ruling in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

76. *Mead Corp.*, 533 U.S. at 230.

77. *Id.* at 229-31.

our later opinion in United States v. Mead Corp. . . . denied the suggestion. . . . Indeed, Mead pointed to instances in which the Court has applied Chevron deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. 79

In light of Mead, Justice Breyer reasoned that whether Chevron applies to judicial review of an agency’s decision depends on “the interpretive method used and the nature of the question at issue.” 80 Adding confusion to the Chevron Step Zero analysis, Breyer wrote that “[t]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time” were all factors that were relevant in determining whether Chevron deference applied. 81

While lower courts are more likely to accord Chevron deference to nonlegislative rules after Barnhart than they were before the decision, there is a tension between the Supreme Court’s opinions in Mead and Barnhart which lower courts are struggling to reconcile. 82 Professor Lisa Schultz Bressman suggests that there is a split among the lower courts regarding whether Chevron deference applies to nonlegislative rules and policies, with some courts focusing on whether the agency’s interpretation has a binding effect (the Mead focus) and others focusing on whether the agency’s interpretation reflects careful consideration and involves issues associated with agency expertise (the Barnhart focus). 83 Consequently, there is some confusion in the lower courts regarding when Chevron applies to nonlegislative rules.

79. Id. at 221-22 (citations omitted).
80. Id. at 222.
81. Id.
82. See Sunstein, supra note 66, at 219-20. See also Amy J. Wildermuth, Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?, 74 Fordham L. Rev. 1877, 1885-86 (2006); Lisa Schultz Bressman, How Mead Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1445 (2005); Thomas W. Merrill, The Mead Doctrine: Rules and Standards, Meta Rules and Meta Standards, 54 Admin. L. Rev. 807, 814 (2004). Some courts have suggested that Chevron deference should not apply unless formal procedures are used. See Aeroquip Vickers, Inc. v. Comm’r, 347 F.3d 173, 181 (6th Cir. 2003) (refusing to accord Chevron deference to IRS Revenue Rulings); Krzalic v. Republic Title Co., 314 F.3d 875, 879, 881 (7th Cir. 2002) (refusing to accord Chevron deference to HUD policy statements). However, many courts have applied Chevron when agencies have not used formal procedures. See Mylan Labs, Inc. v. Thompson, 389 F.3d 1271, 1279 (D.C. Cir. 2004) (according Chevron deference to an FDA “decision letter”); Davis v. EPA, 336 F.3d 965, 973-74 (9th Cir. 2003) (according Chevron deference to an informal EPA adjudication); Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1012 (9th Cir. 2002) (according Chevron deference to a HUD policy statement).
83. See Bressman, supra note 82, at 1459. Professor Bressman identifies the Ninth Circuit’s Schuetz decision and the Seventh Circuit’s Krzalic decision as opin-
C. Reviewability of Nonlegislative Rules

In addition to concerns about distinguishing between legislative and nonlegislative rules and determining the level of deference owed to nonlegislative rules, critics of nonlegislative rules are troubled by the limited availability of judicial review for those rules.

Businesses or persons that are impacted by nonlegislative rules often find it difficult to challenge those rules. While they may be able to challenge the rule if it is ultimately applied to them in an enforcement action or adjudication, they will often be unable to challenge the rule before that time. This creates uncertainty and anxiety for the regulated community, and interferes with planning and development. For example, businesses will be reluctant to make major changes to their activities that might conflict with the position taken by the agency in the rule, even though they may want to do so, and even though they believe that the rule is inconsistent with the law. With legislative rules, on the other hand, pre-enforcement challenges are often available, and are sometimes the only means of challenges that are available.84

There are two major reasons why it is often difficult to challenge an agency’s nonlegislative rules. First, under the Administrative Procedure Act, an agency action is presumed to be reviewable in court if the action is a “final agency action.”85 According to the two part test adopted by the Supreme Court, an agency action will be final if (1) it is the consummation of the agency’s decisionmaking process; and (2) it is an action by “which ‘rights or obligations have been determined’ or from which ‘legal consequences will


flow." The Court has often indicated that in order to meet the second prong of this test, the agency action must have a "sufficiently direct and immediate" effect or a "direct effect on . . . day-to-day business." An agency's nonlegislative rule may fail the first part of the test because the rule may outline the agency's tentative position. More often, though, an agency's nonlegislative rule will fail the second part of the test, because it is not binding and, therefore, does not have a direct and immediate effect on the challengers.

Another roadblock to challenging an agency's nonlegislative rules is the issue of ripeness. The ripeness analysis in cases involving challenges to nonlegislative rules is very similar to the final agency action analysis, in part because the ripeness test established by the Supreme Court incorporates a final agency action analysis. In Abbott Laboratories v. Gardner, the Supreme Court held that courts should examine the fitness of the issue to be resolved and the hardship on the parties of withholding decision in order to determine whether a claim is ripe. The Court directed lower courts to consider the finality of the agency's action in determining the "fitness" of the issue to be resolved. Once again, to the extent that nonlegislative rules are nonbinding and may be tentative, pre-enforcement challenges to those rules are often dismissed as unripe.

IV. REFORM PROPOSALS

In response to the concerns outlined in the preceding section, several reform proposals have been introduced over time by the Administrative Conference of the United States, academics, and, most recently, the Office of Management and Budget in its Good Guidance Practices.

88. See Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 957, 959 (5th Cir. 1991) (refusing to find that letter of Administrator of Wage and Hour Division was a final agency action). But see Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971) (letter from head of the agency held to be final agency action, although the interpretation in the letter could be changed in the future).
89. However, while the rule may not bind the regulated community, a court may find that the rule does have a direct and immediate effect on businesses when they comply with the requirements of the rule in order to avoid anticipated prosecution. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000); W. Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659, 663 (7th Cir. 1998).
91. Id. at 149-50.
92. See, e.g., ACLU v. FCC, 823 F.2d 1554, 1577 (D.C. Cir. 1987).
A. ACUS Proposals

Some of the earliest reform proposals addressing nonlegislative rules were introduced by the Administrative Conference of the United States (ACUS). Recommendation 76-5, issued in 1976,93 suggested that agencies should comply with the notice and comment rulemaking requirements of the APA when they issue, amend or repeal an “interpretive rule of general applicability or a statement of general policy which is likely to have a substantial impact on the public.”94

Recommendation 92-2, issued in 1992, would have required agencies to determine when they announce a rule whether the rule is a legislative rule or nonbinding policy statement and to publicly announce, at that time, what their determination is.95 ACUS stressed, in the Recommendation, that agencies “should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures.”96 In addition, the Recommendation suggested that agencies should “establish informal and flexible procedures that allow an opportunity to challenge policy statements,” including the underlying validity of the policy statements.97 ACUS felt that such requirements were necessary because agencies could otherwise treat interpretive rules or policy statements as binding rules, without following notice and comment procedures, and it was difficult for persons to challenge those rules.98 It felt that its proposal would give the public notice of whether the

94. Id. The Recommendation provided that “[i]f it is impracticable, unnecessary, or contrary to the public interest to use such procedures the agency should so state in the interpretive rule or policy statement, with a brief statement of the reasons therefor.” Id. For interpretive rules and policy statements that were not likely to have a substantial impact on the public, or were otherwise exempted from the pre-publication notice and comment process, ACUS recommended that agencies provide an opportunity for comments on the rules and policy statements after publication in the Federal Register. Id. ACUS recommended that agencies respond as appropriate to significant comments and indicate in the Federal Register at the end of the comment period whether the agency planned to adhere to the published rule or policy or alter it in light of the comments received. Id.
95. Id. Section I.B. of the Recommendation provided that “When an agency publishes a legislative rule . . . the preamble to the rule should state that it is a legislative rule intended to bind affected persons.” Id. Section II.A. of the Recommendation provided that “Policy statements of general applicability should make clear that they are not binding.” Id. “Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.” Id.
96. Id.
97. Id.
98. Id.
agency intended rules to be legally binding or not. Congress did not adopt either of those reform proposals, but, in the Food and Drug Administration Modernization Act of 1997, it imposed a requirement on the Food and Drug Administration (FDA) to increase public participation in development of FDA guidance documents and to issue “Good Guidance Practices.”

B. Academic Proposals

1. Distinguishing Between Legislative and Nonlegislative Rules

There has been no shortage of proposals by academics to address several of the concerns regarding nonlegislative rules. First, regarding the distinction between legislative and nonlegislative rules, Professor William Funk argues that courts should simply adopt a “notice and comment” test to distinguish between legislative and nonlegislative rules.101 Under that test, when a rule is adopted through notice and comment rulemaking, it is a legislative rule and when it is not, it is an interpretive rule.102 Professor Funk has also suggested an alternative test for distinguishing legislative and nonlegislative rules.103 Modeling his proposal on the ACUS Recommendation, Professor Funk suggests that Congress should amend the APA to require agencies to label interpretive rules and policy statements as interpretive rules and policy statements at the time that they are adopted.104 This would create a clear test for determining whether a rule is an interpretive rule and would more clearly signal to

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99. Congress has, however, considered and rejected proposals to impose notice and comment requirements on agency guidance documents. See S. 1080, 97th Cong., 128 CONG. REC. S2713 (1982); H.R. 746, 97th Cong., H.R. REP. NO. 435, at 1 (1982).
101. See supra note 53.
102. Id. Obviously, though, if an agency lacks legislative rulemaking authority, a rule that it adopts through notice and comment rulemaking will not be a legislative rule merely because the agency used those procedures.
103. See Funk, Legislating, supra note 19.
104. See id. at 1032. He proposes that Congress create a new definition of “interpretive rule” in the APA as “any rule which an agency identifies at the time of its adoption as being an interpretive rule issued for guidance purposes and not having binding effect on any person outside the agency.” Id. at 1025. Similarly, he proposes that Congress create a new definition of “general statement of policy” as “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.” Id. For both interpretive rules and general statements of policy, Funk suggests that the terms should be defined to provide that the rules may bind persons inside the agency other than agency adjudicators, even though they may not bind persons outside the agency. Id.
the public that the rules are not binding. Unlike the ACUS Recommendation, however, he does not think that it is necessary to require agencies to label legislative rules as legislative rules when they adopt them. Instead, compliance with the APA notice and comment rulemaking procedures would be sufficient.

2. Deference Due to Nonlegislative Rules

The academic literature is rife with articles examining the scope of Chevron deference, whether application of Chevron results in greater deference to agency decisions, and the applicability of Chevron to nonlegisla-

105. Id. at 1035. In addition, Professor Funk suggests that requiring the agency to label interpretive rules and policy statements “makes the agency focus on what it is doing and why,” rather than merely rationalizing why it did not follow notice and comment procedures when challenged after the fact. Id.

106. Id. at 1032-33. Professor Funk notes that the ACUS requirement to label legislative rules could increase the potential for challenges to legislative rules and increase the likelihood that a legislative rule that was adopted through notice and comment rulemaking procedures could be struck down on the technicality that the agency failed to identify the rule as a legislative rule when it promulgated the rule. Id. Funk asserts that such a result would not address the underlying criticism of nonlegislative rules that agencies are attempting to create binding rules without following notice and comment rulemaking procedures. Id.

107. Id.

108. See, e.g., Elizabeth Garrett, Legislating Chevron, 101 Mich. L. Rev. 2637, 2645 (2003); Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 Yale J. on Reg. 1, 59 (1998); Peter H. Schuck & E. Donald Elliot, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1061. Most commentators agree, though, that courts are more likely to uphold agency decisions under the Chevron analysis than under Skidmore. A few recent studies have found that courts uphold agencies’ interpretations under the Skidmore test only about 1/3 of the time. In an empirical study of federal cases decided in the six months after the Supreme Court issued the Mead decision, Eric Womack found that courts upheld the agency’s decision when applying the Skidmore test only 31% of the time. See Eric Womack, Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead, 107 Dick. L. Rev. 289, 327-28 (2002). In contrast, Womack found that in cases that he examined that were decided prior to the Supreme Court’s Christensen decision, courts upheld the agency’s decision when applying the Skidmore test 75% of the time. Id. at 327. In a recent article, Professor Amy Wildermuth suggested that the post Mead gap between Chevron deference and Skidmore deference may be less pronounced than Womack found, but that the gap does exist. See Wildermuth, supra note 82, at 1899. In the cases that she examined that arose after the cases analyzed by Womack, the courts upheld the agency’s decision under the Skidmore test only 39% of the time. Id.
Professor Funk proposes amending the APA to explicitly identify the Skidmore test as the standard for judicial review of agencies’ nonlegislative rules. Funk believes that there is a clear difference between Chevron deference and Skidmore deference, and that rules adopted without notice and comment procedures generally should not be accorded Chevron deference. Many commentators, however, fear that applying Skidmore to nonlegislative rules will drive agencies to rely more heavily on adopting broadly worded rules through notice and comment rulemaking.

Professor Cass Sunstein asserts that there is often very little difference between the judicial application of Chevron deference or Skidmore deference to an agency’s decision. Accordingly, he argues that courts should spend less time trying to determine whether Chevron or Skidmore applies to review an agency’s action, and that courts should, wherever possible, apply the


110. See Funk, Legislating, supra note 19, at 1026. His proposal would also subject review of an agency’s interpretation of its own regulations to the same degree of deference as review of an agency’s interpretation of a statute. Id. Currently, there is some confusion regarding the amount of deference due to an agency’s interpretive rule when the rule interprets an agency regulation, rather than a statute. Prior to Mead and Christensen, the Supreme Court had held that an agency’s interpretive rule “may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation.” Auer v. Robbins, 519 U.S. 452, 461-63 (1984). The Auer standard is perhaps even more deferential than the Chevron standard, and academics have frequently criticized the decision. See Funk, Legislating, supra note 19, at 1034. While Christensen, Mead and other cases could be read to suggest that interpretive rules, in general, may not be entitled to Chevron deference, the Supreme Court seemed to suggest that Auer remains valid when the Court created an exception to the Auer rule last term in Gonzales v. Oregon, 126 S. Ct. 904, 914 (2006). Funk’s proposal would eliminate Auer deference for an agency’s interpretive rules.

111. See Funk, Legislating, supra note 19, at 1034.

112. See, e.g., Bressman, supra note 82, at 1447, 1468. Justice Scalia raised this concern in his dissent in Mead. See infra note 218. Professor Sunstein expresses skepticism that notice and comment rulemaking produces more sensible and well reasoned rules than the alternative decisionmaking methods. See Sunstein, supra note 66, at 227. See also infra note 218.

113. See Sunstein, supra note 66, at 229.
Chevron analysis when the agency has authoritatively interpreted a statute. He suggests that this simplifies the analysis and, in cases where the Skidmore test would be less generous towards agencies, strengthens the policymaking authority for institutions that have “specialized competence and political accountability.” Contrary to suggestions in some of the recent Supreme Court decisions, he does not believe that the nature or importance of the policy decision adopted by the agency should influence the standard of review for the decision. Professor Lisa Schultz Bressman believes that while application of the Chevron and Skidmore tests might result in similar outcomes in many cases, the choice of a standard is important because adoption of the Skidmore standard delegates greater interpretive authority to courts and reduces an agency’s ability to change its policies over time. Consequently, she does not agree that courts should avoid choosing between Chevron and Skidmore deference.

Professor Russell Weaver also suggests that there is little difference between the standard of review under Chevron and Skidmore, so he proposes an amendment to the APA that encourages courts to “respect” an agency’s nonlegislative rule if (1) the rule is authoritative; (2) the rule was published in the Federal Register or was otherwise made publicly known and available; and (3) the rule is not being applied retroactively to cause undue hardship. Under his approach, rules would be entitled to deference regardless of the procedures used to adopt the rules.

To the extent that Weaver’s and Sunstein’s proposals limit deference to “authoritative” rules, they are consistent with Justice Scalia’s frequent assertions that Chevron deference should be limited to “authoritative” rules.

114. Id. at 191-92.
115. Id. at 194.
116. Id. at 193, 200. Sunstein states that in several recent decisions, the Supreme Court has suggested that deference to agencies will be reduced when a “fundamental issue” or “important question,” as opposed to a question of agency expertise, is being resolved by the agency. Id. He argues, on the other hand, that “considerations that underlie Chevron apply with more, not less, force when major questions are involved.” Id. at 194.
117. See Bressman, supra note 82, at 1466-68.
118. Id.
119. See Weaver, supra note 109, at 1186.
120. By authoritative, Professor Weaver is referring to “official” or “agency” pronouncements, as opposed to focusing on whether the rule is binding. Id. at 1187.
121. Id. at 1187-94.
122. Id. at 1194.
123. See, e.g., United States v. Mead, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (arguing that Chevron creates a comprehensive presumption, “which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.”); Christensen v. Harris County,
Professor Bressman notes that Justice Scalia's approach "promotes political accountability" because it strengthens executive branch control over policy-making by providing deference to agency decisions that are "authoritative" regardless of the procedures used by the agency to make those decisions.\textsuperscript{124}

At the same time, however, she notes that focusing simply on whether the agency's position is authoritative diminishes the importance of public participation and deliberation in the decisionmaking process.\textsuperscript{125} As she asserts, procedural formality is "necessary to guard against . . . even the 'authoritative' production of unfair, inconsistent or arbitrary law[, and,] whether imposed under constitutional law or administrative law, [it] always has been a necessary feature of governmental legitimacy."\textsuperscript{126}

Like Professor Weaver, Professor William Andersen suggests that the \textit{Chevron} doctrine should be replaced by a regime that accords deference to agency decisions regardless of whether the decisions are made through adjudication, legislative rules or nonlegislative rules, as long as certain factors are met.\textsuperscript{127} Professor Andersen suggests that the APA should be amended to provide that a court, in carrying out its "law interpretive function,"\textsuperscript{128}

may defer to a contemporaneous agency legal interpretation to the extent that the interpretation (a) is authoritative, (b) significantly reflects relevant agency technical, political or other resources, (c) was formulated through a careful process, including providing those specifically affected with an appropriate opportunity to participate in its formulation and (d) does not require the special weight of a judicial pronouncement and determine the meaning and applicability of the terms of an agency action.\textsuperscript{129}

\textsuperscript{529} U.S. 576, 591 (2000) (Scalia, J., concurring) (arguing that Chevron should apply as long as the interpretation at issue in the case "represents the authoritative view of the Department of Labor").

\textsuperscript{124} See Bressman, supra note 82, at 1449.

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} See Andersen, supra note 65, at 964-66.

\textsuperscript{128} Andersen limits his proposal to review of agency decisions regarding "questions of law." Id. at 965.

\textsuperscript{129} Id. at 964. In regard to authoritativeness, Andersen suggests that courts should accord greater weight to agency decisions that are more fully considered and issued with higher levels of agency approval. Id. at 967. Andersen also suggests that the final factor reflects that there may be circumstances "where the question involved is of special importance; is beyond the usual responsibility or expertise of the agency involved; or where agency uncertainty or vacillation make the objectivity, clarity and dependability of a judicial ruling especially valuable." Id. at 968.
Andersen’s approach tries to incorporate all of the factors identified by courts and academics, focusing on the “authoritative” nature of the agency’s decisions, the opportunity for public participation in the decisionmaking process, and the importance of the issues addressed by the agency.  

The opportunity for public participation seems to be an important factor for many commentators. Professor Sunstein did not suggest that courts should choose a review standard based on the procedures used by the agency to make the decision subject to review. However, he noted that Mead and other recent Supreme Court decisions imply that agencies should receive Chevron deference when they avail themselves of procedures that promote “fairness and deliberation by, for example, [providing persons] an opportunity to be heard and offering a reasoned response” to the concerns that they raise. The procedural safeguards are, in essence, a surrogate for accountability.

Similarly, Professor Bressman argues that Mead and Barnhart imply that Chevron deference should be given to agency policies that are transparent and rational and have binding effect. She recognizes that agencies promote transparent and rational decisionmaking when they utilize notice and comment procedures, but argues that Chevron deference should not be limited to situations in which agencies employ those procedures.

3. Reviewability of Nonlegislative Rules

Just as academics have proposed changes to the standard of review for nonlegislative rules, they have proposed reforms to make it easier to challenge those rules. Professor Funk, for instance, proposes an amendment to Section 701 of the APA to define the term “final agency action” to include “any interpretive rule or general statement of policy.” As noted previously, courts often find that nonlegislative rules are not reviewable as “final agency actions,” because the rules do not have a “direct and immediate ef-

130. Andersen notes that courts could adjust the level of deference under his test up or down depending on consideration of all of the factors. Id. at 966. He also stresses that courts would not be required to give any deference to the agency’s interpretation under his test. Id.

131. See infra Part VI.A.

132. See Sunstein, supra note 66, at 225.

133. Id. Sunstein suggests that under Mead, “agencies may proceed expeditiously and informally, in which case they can invoke Skidmore . . . or they may act more formally, in which case Chevron applies. In either case, the legal system, considered as a whole, will provide an ample check on agency discretion . . . in one case, through relatively formal procedures and in another, through a relatively careful judicial check on agency interpretations of law.” Id. at 225-26.

134. See Bressman, supra note 82, at 1450, 1488-92.

135. Id. at 1450.

136. See Funk, Legislating, supra note 19, at 1025.
fect” on the challengers. Professor Funk also proposes an amendment to the APA to address the ripeness issue that often prevents persons from being able to challenge nonlegislative rules. He proposes an amendment to Section 704 of the APA to provide that “[a]n 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 of policy.” That amendment would clarify that challenges to nonlegislative rules could be ripe even though the rules are not binding. Funk cautions, though, that his proposal would not replace the normal ripeness analysis and that challenges to some nonlegislative rule would not be ripe for review, even with his proposed amendment.

Professor John Manning, on the other hand, asserts that judicial review of nonlegislative rules should be limited, at least to the extent that courts are ruling on whether nonlegislative rules have been adopted using the appropriate procedures. Manning argues that the current vague standards that distinguish legislative from nonlegislative rules give courts too much discretion by making it too easy for the courts to overturn agencies’ decisions. He also argues that it is anomalous that courts will strike down a nonlegislative rule as procedurally invalid, when the agency could make the same policy decision adopted in the nonlegislative rule without providing any notice to the public, apply it in an adjudication and have the rule upheld.

C. Executive Branch Initiatives

While ACUS and academics have proposed, and Congress has considered, reforms to address concerns about nonlegislative rules, few of those proposals have been adopted. The executive branch, through the Office of Management and Budget, has also expressed concerns about nonlegislative rules and has recently adopted practices that agencies must follow when formulating and applying interpretive rules and general statements of policy. In addition, as noted above, the President has also issued an Executive Order that imposes limits on agencies’ nonlegislative rules. Both documents address the executive branch’s concern that agencies are avoiding notice and comment procedures by making policy through nonlegislative rules, but giving those rules binding effect. Neither addresses the degree of deference due to nonlegislative rules or judicial review of nonlegislative rules, although the

137. See supra note 89 and accompanying text. See also Funk, Legislating, supra note 19, at 1039.
138. See Funk, Legislating, supra note 19, at 1026.
139. Id. at 1040. If, for instance, further factual development is necessary and the challenge does not involve a “purely legal question,” the challenge would not be ripe. Id.
140. See Manning, supra note 13, at 929-31.
141. Id. at 929.
142. Id. at 930.
OMB guidance provides opportunities for increased challenges to guidance documents in administrative forums.

1. OMB’s Good Guidance Practices

On January 27, 2007, OMB issued its “Final Bulletin for Agency Good Guidance Practices.” OMB explained that the Bulletin was necessary to ensure that guidance documents are “[d]eveloped with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements.” The OMB Bulletin is based, to some extent, on “good guidance practices” developed by the Food and Drug Administration (FDA).

OMB’s Bulletin applies to guidance documents, including interpretive rules and general statements of policy, adopted by most federal agencies. It creates increasingly stringent requirements for “significant guidance documents” and “economically significant guidance documents,” which are a subcategory of “significant guidance documents.” Significant guidance documents are documents that “may reasonably be anticipated to:”

144. Id. at 3433 n.12.
145. Id. at 3433. The Food and Drug Administration Modernization Act of 1997 required FDA to publish regulations that specified procedures for the development, issuance and use of guidance documents consistent with several requirements imposed by the law. 21 U.S.C. § 371(h)(5) (2006). The law requires FDA to develop guidance documents with public participation and to ensure that information about the documents and the documents themselves are available to the public. Id. § 371(h)(1)(A). The law provides that FDA guidance documents are not binding, but that FDA employees should follow the guidance documents unless they have appropriate justification and supervisory concurrence for departing from the guidance. Id. § 371(h)(1)(B). It also requires that guidance documents should indicate that they are not binding. Id. § 371(h)(2). Significantly, it also requires the agency to ensure that an “effective appeals mechanism is in place to address complaints that the Food and Drug Administration is not developing and using guidance documents” in accordance with the law. Id. § 371(h)(4). The law does not, however, apply to any other agencies or impose any general requirements on the development of guidance by federal agencies.

146. A guidance document is defined as an “agency statement of general applicability and future effect . . . that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.” Good Guidance Practices, 72 Fed. Reg. 3432, 3439 § 1.3 (Jan. 25, 2007). The term doesn’t include legislative rules or actions in the development of legislative rules, like notices of proposed rulemaking or advance notices of proposed rulemaking. Id.
147. Id. at 3439 § 1.2. The bulletin adopts the definition of agency in the Paperwork Reduction Act. Id.
148. Id. at 3439-40 § II-IV. There is, however, an “emergency” exemption provision that allows agencies “[i]n emergency situations or when . . . obligated by law to
(i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety . . . ; (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues . . . .

"Economically significant guidance documents" are those significant guidance documents that "may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy." Although guidance documents are not legally binding on the public or the agency, the Bulletin provides that agency employees "should not depart from significant guidance documents without appropriate justification and supervisory concurrence." The Bulletin also requires agencies to develop written procedures for the approval of significant guidance documents and to guarantee that those documents are approved by senior agency officials. Further, it requires agencies to label significant guidance documents as guidance and prohibits agencies from using mandatory language, such as "shall" or "must" in the guidance in most cases. Along the same lines, the preamble to the Bulletin encouragesagen-

act more quickly than normal review procedures allow [to] . . . notify OIRA as soon as possible and, to the extent practicable, comply with [the] Bulletin." Id. at 3440 § V.

149. Id. at 3439 § I.4. Thus, opinion letters and similar agency responses to informal requests for guidance will generally not be "significant guidance documents," as they are not statements of "general applicability." Id. at 3435. Accordingly, most of the requirements of the Bulletin will not apply to them.

150. Id. at 3435, § I.5.

151. Id. at 3440 § III.1.

152. Id. at 3440 § II.1.b.

153. Id. at 3440 § II.1.a.

154. Id. at 3440 § II.a.

155. Id. at 3440 § II.h. Agencies can use mandatory language "to describe a statutory or regulatory requirement, or [if] the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties." Id.
cies to stress, in any communications with the public, that guidance documents are not binding.\textsuperscript{156}

Public participation is another important requirement of the Bulletin. Agencies are required to establish and clearly advertise on their websites a means for the public to submit comments on significant guidance documents, to petition the agency to issue, reconsider, modify or rescind significant guidance documents,\textsuperscript{157} and to complain if an agency is not following the requirements of the Bulletin or if the agency is applying significant guidance documents as though they are binding.\textsuperscript{158}

In addition to those procedures, the Bulletin requires agencies to use notice and comment procedures to develop "economically significant guidance documents."\textsuperscript{159} Agencies must publish a notice in the Federal Register when such guidance is available, post the guidance on their website for comments, and prepare and post a “response-to-comments” document after they have

\textsuperscript{156} Id. at 3437. The Bulletin even includes a model disclaimer that agencies could include for guidance, which provides: This [draft] guidance, [when finalized, will] represent[s] the [Agency’s] current thinking on this topic. It does not create or confer any rights for or on any person or operate to bind the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach (you are not required to do so), you may contact the [Agency] staff responsible for implementing this guidance.

\textsuperscript{157} Id. at 3440 § III.2.a. The Bulletin does not, however, require agencies to respond to those comments. Professor Nina Mendelson notes that a petition process would confer several benefits to regulatory beneficiaries. See Mendelson, supra note 19, at 434. She points out that it would enable a citizen to directly engage an agency on the substance of a guidance document and would require the agency to explain the reasons for the guidance and support those reasons with data. Id. This would make judicial review more effective and might prompt agencies to reform their guidance development processes to involve the public more fully at an early stage in the process. Id. As a counterpoint, though, she notes that if the petition and review process is costly, agencies might decide to cut back on developing guidance. Id. at 436. Further, she recognizes that agencies might not be open-minded when responding to petitions because the petitions will frequently be filed after the agency has already completed its decisionmaking. Id. at 437. Finally, she recognizes that a petition process could benefit regulated entities as well as regulatory beneficiaries, and that regulated entities may have more time and resources to devote to petitions and could, thus, make more effective use of the procedures than regulatory beneficiaries. Id.

\textsuperscript{158} Good Guidance Practices, 72 Fed. Reg. at 3440 § III.2.b. Although the Bulletin requires agencies to provide additional opportunities for persons to have input in, or challenge, guidance documents administratively, the Bulletin does not create any "right or benefit . . . enforceable at law or in equity." Id. at 3440 § VI.

\textsuperscript{159} Id. at 3440 § IV. 1.
reviewed the comments and made any changes to the guidance in light of those comments.¹⁶⁰

2. Executive Order 13422

About the same time that OMB issued its Good Guidance Practices, President Bush issued Executive Order 13422, which amends Executive Order 12866.¹⁶¹ The new Executive Order imposes several new substantive and procedural limits on agencies when they issue guidance documents.¹⁶² Substantively, the Order requires agencies to (1) base guidance documents on the "best reasonably obtainable scientific, technical, economic and other information,"¹⁶³ (2) tailor the guidance documents to impose the least burden on society, taking into account the costs of cumulative regulations;¹⁶⁴ and (3) draft guidance to be "simple and easy to understand."¹⁶⁵ More significantly, though, the Order requires agencies to provide OMB with advance notice of significant guidance documents¹⁶⁶ and provides for OMB review of those documents before the agency finalizes them.¹⁶⁷ The Order also seems to encourage agencies to increase the use of formal rulemaking procedures.¹⁶⁸ Like the OMB Bulletin, the Order attempts to impose greater executive

¹⁶⁰. Id. The preamble also suggests that agencies could hold public meetings or workshops on draft guidance documents or solicit input on the documents from advisory committees or peer review committees. Id. at 3438. Agencies could also seek public input before they draft a guidance document. Id. The preamble to the Bulletin also recommends that agencies establish a public docket prior to announcing the availability of a draft guidance document, and to make the comments sent to agencies on significant guidance documents available on the Internet when feasible. Id.

¹⁶¹. See supra note 5 and accompanying text.


¹⁶⁴. Id. at § 1(b)(11) (as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2763, § 1(d)).

¹⁶⁵. Id. at § 1(b)(12) (as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2763, § 1(e)). The Order also requires agencies to avoid guidance documents that are "inconsistent, incompatible, or duplicative with . . . other regulations" and guidance documents, "or those of other Federal agencies." Id. at § 1(b)(10) (as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2763, § 1(c)).

¹⁶⁶. Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764 § 7. The Order adopts the same definition of "significant guidance document" as the OMB's Good Guidance Practices Bulletin. Id. at 2763-64 § 3(h).

¹⁶⁷. Id. at 2764-65 § 7,

¹⁶⁸. Id. at 2764 § 5(a).
branch control on nonlegislative rules, primarily through requiring additional procedures for the development of nonlegislative rules. ¹⁶⁹

V. PROBLEMS WITH REFORM PROPOSALS

Many of the reform proposals, as well as the recent executive branch initiatives, attempt to prevent agencies from making binding policy through guidance by imposing significant procedural requirements on the development of interpretive rules and policy statements. In addition, many of the academic reform proposals attempt to broaden judicial review of interpretive rules and policy statements and change the amount of deference owed to those rules and policies. These proposals will likely ossify the process for developing nonlegislative rules and increase judicial challenges to those rules, which will make adoption of nonlegislative rules less attractive to agencies. Consequently, the reforms are likely to discourage agencies from issuing guidance at all, to slow the release of guidance or to encourage agencies to rely more heavily on adjudication as a means of announcing new policies. Each of those outcomes is unfortunate. Elimination of guidance or heavier reliance on adjudication to make policy reduces the opportunities for public participation in the development of policy, as well as the breadth of information that agencies consider when they make policy decisions and public access to information about agencies’ interpretation and potential application of laws. It also increases the potential for inconsistent application of the law by agencies. OMB’s Bulletin on Good Guidance Practices raises additional concerns, as there does not seem to be any legal authority for many of the requirements of the Bulletin and the uniform approach adopted in the Bulletin is very inefficient.

A. Reforms Will Discourage Agencies from Adopting Guidance Documents or Delay the Release of Guidance

Agencies have increasingly relied on nonlegislative rules to make policy because the notice and comment process for adopting legislative rules has become ossified. ¹⁷⁰ Instead of taking steps to streamline the process for adopting legislative rules, the OMB Bulletin and many academic proposals layer additional procedural requirements on the process for adopting nonleg-

¹⁶⁹. The Order also requires each agency to designate a Presidential Appointee within the agency to be the agency’s “Regulatory Policy Officer,” who is “involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in [the] Executive Order.” Exec. Order No. 12,866, 72 Fed. Reg. 2763, § 6(a)(2).
¹⁷⁰. See supra Part II.B.
islative rules.\textsuperscript{171} Several academics propose that nonlegislative rules should be subjected to notice and comment rulemaking.\textsuperscript{172} In the legislative rulemaking context, some rules have drawn hundreds of thousands of comments, significantly increasing the time and resources necessary to finalize the rules.\textsuperscript{173}

In addition, several of the reform proposals attempt to increase the ability of persons to challenge agency guidance, either in court or before the agency. Some of the proposals achieve those goals by requiring agencies to establish a process whereby persons could petition the agency to issue, change or revoke guidance. Other proposals increase judicial review by amending the APA to recognize nonlegislative rules as final agency action.\textsuperscript{174}

As noted at the beginning of this article, agencies often adopt policy through nonlegislative rules because (1) adoption of nonlegislative rules is significantly quicker and less expensive than notice and comment rulemaking; (2) agencies can respond more quickly and flexibly to change their policies when the policies are adopted as nonlegislative rules than when they are adopted as legislative rules or through adjudication; and (3) agencies are less likely to face legal challenges to their policies when they adopt them as nonlegislative rules.\textsuperscript{168} When the procedural requirements and the potential for legal challenges are increased, these benefits are significantly decreased.\textsuperscript{169} One way that agencies can avoid the time and costs of developing nonlegislative or legislative rules and avoid legal challenges to such rules is to simply avoid announcing any policy interpretations to the public or agency staff prospectively unless it is absolutely necessary to do so. There will be cases where agencies will still find that it is necessary or important to announce policy decisions to the public and agency staff prospectively, despite

\begin{itemize}
  \item \textsuperscript{171}This was one of the major concerns raised by Citizens for Sensible Safeguards, a coalition of labor, consumer and public interest groups, in their comments on the OMB’s Bulletin on Good Guidance Practices. See Citizens for Sensible Safeguards, \textit{Comments on OMB’s Proposed Bulletin on “Good Guidance Practices,”} Jan. 9, 2006, \textit{available at} http://www.ombwatch.org/regs/2006/cssreguidancebulletin.pdf [hereinafter CSS Comments].
  \item \textsuperscript{172}See supra Part IV.B.1.
  \item \textsuperscript{173}See, e.g., Kim Diana Connolly, \textit{Keeping Wetlands Wet: Are Existing Protections Enough?}, 6 \textit{Vt. J. ENVTL. L.} 5 (2004/2005) (noting that, in 2003, EPA and the U.S. Army Corps of Engineers withdrew a proposal to amend the definition of “waters of the United States” under the Clean Water Act after they received more than 135,000 comments on the proposal).
  \item \textsuperscript{176}See supra Part IV.B.3.
  \item \textsuperscript{177}See supra Part II.B.
  \item Professor Nina Mendelson also notes that to the extent that a notice and comment requirement is only imposed on some defined category of guidance documents, there would be new burdens imposed on judges to determine which guidance documents fit within the categories that are subject to notice and comment procedures. See Mendelson, \textit{supra} note 19, at 438.
\end{itemize}
the costs and litigation risks, but the overall volume of guidance issued by agencies is likely to decrease.

This is unfortunate because, even without a notice and comment requirement, there are opportunities for public involvement in the development of guidance, which benefit the public and agencies. Those opportunities will be eliminated if agencies adopt policy interpretations of laws without issuing interpretive rules or policy statements. In addition, as agencies reduce the amount of guidance that they provide through interpretive rules or policy statements, it becomes more difficult for the public to know what the law is or how to comply with the law. Finally, as agencies reduce the amount of guidance that they provide through interpretive rules or policy statements, it becomes more difficult for agency staff to adopt consistent interpretations of the laws that they administer.

Not all commentators agree that increased procedural requirements for nonlegislative rules or increased judicial or administrative review of those rules will lead to a decrease in agencies' use of those tools. Professor Nina Mendelson argues that agencies have several incentives to continue to issue guidance despite increased costs and opportunities for increased judicial and administrative challenges. She notes that agencies may continue to issue guidance prospectively because they wish to treat, or be perceived as treating, regulated entities fairly, or they prefer to maintain good relations with regulated entities and foster compliance by them. More importantly, though, she suggests that in some cases, an agency may be unable to impose penalties, deny licenses or otherwise deprive someone of property if the agency attempts to enforce an ambiguous provision in a law, as the court might determine that the violator did not have sufficient notice that it was violating the law. If the agency issued prospective guidance in those cases, courts would be more likely to find that the violators had notice that their actions were prohibited and to impose penalties or uphold the agency's denial of licenses, permits or other deprivations of property. While she is correct that the increased costs and opportunities for increased judicial and administrative review may not eliminate the use of guidance by agencies, they will reduce the use of guidance. There are many cases where agencies will not feel compelled to issue guidance by the factors that she identifies, where they may have issued guidance before reforms were implemented.

Like Professor Mendelson, Professor Matthew Stephenson has explored the impacts of procedural requirements on an agency's choice of policymaking tools. He posits that agencies may often choose to make decisions through more formal procedures because courts will be more willing to defer

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177. Id. at 435-37.
178. Id. at 435.
179. Id.
to the agencies' interpretations when they use more formal procedures.\textsuperscript{180} Professor Stephenson asserts that:

\textit{[F]rom the perspective of an agency subject to judicial review, textual plausibility and procedural formality function as strategic substitutes: greater procedural formality will be associated with less textual plausibility, and vice versa. . . . The court may view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the interpretive issue to the agency's policy agenda. . . . The strategic substitution argument proceeds from the observation . . . that courts often give an agency more substantive latitude when the agency promulgates an interpretive decision via an elaborate formal proceeding than when it announces its interpretation in a more informal context.}\textsuperscript{181}

Even if Professor Stephenson is correct, agencies may rationally decide to withhold issuing guidance in many cases because they can avoid the costs associated with increased procedures for developing guidance and they can delay judicial review by withholding any announcement of their policy interpretations until they apply them in adjudication. While the policy interpreta-

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\textsuperscript{180} Matthew C. Stephenson, \textit{The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations}, 120 HARV. L. REV. 528, 529 (2006). Alternatively, he asserts that if agencies do not choose to use formal procedures to adopt interpretations, they will be less likely to adopt aggressive interpretations of laws and more likely to adopt what he refers to as "textually plausible" interpretations. \textit{Id.} at 552-54. Ultimately, therefore, he concludes that increasing the procedural requirements for agency decisionmaking will lead, overall, to more conservative and less aggressive agency interpretations. \textit{Id.} at 555-56.

\textsuperscript{181} \textit{Id.} at 529-31. Stephenson suggests that courts usually have two objectives when reviewing agency interpretations of law. \textit{Id.} at 541. First, he argues, judges prefer to "maximize textual plausibility," by upholding an interpretation that most closely corresponds to the judges' own view of the best reading of the statute. \textit{Id.} Second, he argues that judges may "attach intrinsic significance to the agency's policy objectives because of the belief that agencies have superior expertise, are more politically accountable, or have implicitly been delegated discretionary authority by Congress" so that judges may prefer to maximize "intrinsic deference" to the agency. \textit{Id.} at 552, 539-40. It is difficult to quantify "intrinsic deference," so he suggests that the procedures used by agencies to make decisions serve as a proxy for "intrinsic deference." \textit{Id.} at 529. Starting from those assumptions, he argues that as agencies use more procedures to interpret the law, courts are more willing to uphold the agencies' interpretations even though their interpretations may be less "textually plausible" (i.e., less consistent with the court's own best reading of the law). \textit{Id.} at 552-53. Conversely, he argues that as agencies use less procedures to interpret the law, courts will insist on greater "textual plausibility" in the interpretations. \textit{Id.}
tion may be accorded less deference when announced in the adjudication than it may have been accorded if the agency had used detailed procedures to develop guidance that announced that interpretation, the costs of complying with those procedures and potentially facing earlier judicial challenges to the guidance may outweigh the benefit to the agency of a small increase in deference on judicial review.

Even if additional procedural requirements and increased opportunities for administrative and judicial review do not reduce the amount of guidance that agencies provide to the public, they will surely slow the process for development and release of guidance. To the extent that the guidance aims to reduce or avert health and environmental risks, the public will be subjected to those risks for longer periods of time while the guidance is being developed.\(^\text{182}\)

### B. Reforms Will Encourage Agencies to Rely More Heavily on Adjudication

While the reform proposals and the executive branch initiatives may discourage agencies from adopting guidance at all or delay the adoption of guidance, the cumbersome procedures and increased opportunities for review imposed by those proposals and initiatives may also encourage agencies to adopt policy decisions through adjudication, as opposed to legislative or nonlegislative rules. More than a half century ago, the Supreme Court, in *SEC v. Chenery Corp.*, made it clear that as long as a statute authorizes an agency to administer and enforce the statute through adjudication, the agency has broad discretion to choose to announce policies through adjudication as opposed to rulemaking.\(^\text{183}\) While there are certain advantages to announcing a new policy prospectively in a rule,\(^\text{184}\) the Court has refused to require agencies to rely solely on rulemaking to announce interpretations of law that will be given prospective effect.\(^\text{185}\) The *Chenery* Court even recognized that adjudication may be preferable in many cases.\(^\text{186}\)

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184. Notice and comment rulemaking improves the quality of agency decision-making by increasing access to information that the agency will rely on to formulate policy. See *supra* notes 32-33 and accompanying text. See also Manning, *supra* note 13, at 904. It is a more open and democratic process than adjudication and enhances the legitimacy of the agency’s decisionmaking. *Id.* It reduces the potential that the agency will apply the law inconsistently or apply the law in an unfair retroactive manner, and it provides more notice to the public to facilitate planning. *Id.* at 904-05.
185. The *Chenery* Court suggested that the SEC should fill in the interstices of the statute at issue in that case “as much as possible,” through adoption of legislative rules, but that a “rigid requirement to that effect would make the administrative proc-
GOOD GUIDANCE, GOOD GRIEF!

Although the Supreme Court precedent makes it clear that agencies can choose to make policy through rulemaking or adjudication, this does not mean that courts will not review an agency’s choice of rulemaking or adjudication. The Supreme Court has made it clear that courts retain authority to overturn an agency’s decision to make policy through adjudication as opposed to rulemaking or vice versa when the court determines that the agency’s choice of the process was arbitrary and capricious. However, courts rarely overturn the agency’s choice. Consequently, agencies have

ess inflexible and incapable of dealing with many of the specialized problems which arise.” 332 U.S. at 202.

186. Id. at 202-03. The Court noted that problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.

Id. Rulemaking may also take too long to respond to a specific problem. See Magill, supra note 13, at 1396. In addition, when an agency adopts a policy as a legislative rule, they can only change that policy by adopting another legislative rule. See, e.g., SBC Inc. v. FCC, 414 F.3d 486, 497 (3d Cir. 2005); Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992); Alaniz v. Office of Pers. Mgmt., 728 F.2d 1460, 1468 (Fed. Cir. 1984); Detroit Edison Co. v. EPA, 496 F.2d 244, 248-49 (6th Cir. 1974). That makes it harder for agencies to respond flexibly in the future. See Magill, supra note 13, at 1396-97.

Agencies can generally change policies adopted through adjudication or nonlegislative rulemaking through informal means, although several recent decisions of the United States Court of Appeals for the D.C. Circuit have held that an agency that has interpreted one of its regulations, as opposed to a statute, in an interpretive rule, can only change that interpretation of its regulation through legislative rulemaking. See Alaska Prof’l Hunters Ass’n. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993); Sullivan, 979 F.2d 235.

187. See Chenery, 332 U.S. at 203; see also Bell Aerospace Co., 416 U.S. at 294.

188. See Magill, supra note 13, at 1409-10. Professor Magill speculates that courts do not generally directly overturn agencies’ choices of policymaking tools (e.g., adjudication, legislative rules, nonlegislative rules) because courts have so many indirect opportunities to shape the consequences of the agencies’ choice of forum, by changing the standard of review that applies when agencies use different tools, limiting access to review depending on the tool that the agencies use, denying retroactive effect to decisions made by agencies using certain tools, and imposing additional procedures on the use of particular tools. Id. at 1385, 1405, 1435. Many commentators have raised concerns about requiring agencies to make decisions through legislative rulemaking, as they fear that such a requirement would encourage agencies to adopt broadly worded rules which would then be interpreted and fleshed out through adjudication or nonlegislative rules. See, e.g., Manning, supra note 13, at 896.
broad discretion to choose to make policy through adjudication and are likely to exercise that discretion more frequently if the procedures for developing nonlegislative rules are ossified, or if those rules are more likely to be challenged and overturned.

To the extent that reforms encourage agencies to announce interpretations of law more frequently through adjudication than through nonlegislative rules, the reforms will have several unfortunate effects. First, when agencies make and announce policies through adjudication, they exclude many affected parties from the development of those policies. While the affected parties are adversely affected, the agency also suffers, because it cannot access the information that those parties could have provided. This information might be useful to the agency in determining the broader implications of its decision. An agency could gather broader information through a rulemaking process, even a process for developing nonlegislative rules that lacks the full panoply of notice and comment rulemaking. Second, when the agency announces the new policy, it usually applies it retroactively to parties. Formulation of the policy as a nonlegislative rule to be applied prospectively would be much fairer to the affected parties. Third, while policies adopted through adjudication may, but do not have to be announced in the Federal Register, it may be difficult for the regulated community to learn about the adjudicative decisions. Finally, as adopting policies through adjudication addresses issues narrowly, it decreases predictability and opportunities for planning.

C. Specific Problems with the OMB Bulletin on Good Guidance Practices

While the OMB Bulletin on Good Guidance Practices may encourage agencies to make policy more frequently through adjudication, to delay guidance or to avoid announcing new policies as guidance, the OMB Bulletin suffers from additional problems. First, there is no statutory authority for the OMB to require agencies to use notice and comment procedures when adopting guidance documents. OMB cites the Information Quality Act, the Paperwork Reduction Act, and Executive Orders 12866 and 13422 as authority for its Bulletin on Good Guidance Practices. However, none of those provide legal authority for OMB to require agencies to use notice and comment pro-

190. Id.
191. Id.
192. Id.
193. Id.
cedures. The Food and Drug Administration Modernization Act of 1997 required the FDA to adopt good guidance practice regulations and many of the requirements that OMB includes in its Bulletin are based on the FDA’s regulations. However, that law only applies to the FDA and cannot be the authority for applying any requirements to other agencies.

In addition, during the comment period on the Bulletin, several groups expressed concern that the new OMB review process for guidance documents would create opportunities for regulated entities to influence the development of agency policies in a forum that is not very transparent. The Bulletin does not outline a procedure for disclosure of contacts between regulated entities or interest groups and OMB during OMB’s review of guidance documents. Commenters also expressed concern that the vague language in the Bulletin provides OMB with significant influence over the content of agency guidance documents and opportunities to delay the issuance of guidance. OMB has frequently been criticized for using its review process to influence agencies to relax burdens on regulated entities.

VI. PRINCIPLES FOR REFORM

Clearly, as agencies increasingly rely on nonlegislative rules to make policy, legislative reforms are necessary to clarify the distinction between legislative and nonlegislative rules and the standard of review for nonlegislative rules. However, it is not clear that any changes are necessary to increase opportunities to challenge nonlegislative rules. For reasons discussed in the following section, increased and informed public participation should be the centerpiece of any reforms, and Congress should require increased public participation for the entire range of agency activities, and not simply nonlegislative rules. However, it does not make sense, as some reformers suggest, to adopt a bright line requirement that agencies must use notice and comment procedures when adopting nonlegislative rules. Instead, as described more fully below, Congress should adopt an amendment to the APA that requires agencies to provide opportunities for “timely and meaningful” public participation in all of their activities, but leaves discretion to the agencies to determine the level of public participation that is appropriate for a particular action.

195. Interpretive rules and general statements of policy are exempt from the notice and comment procedures of the APA. 5 U.S.C. § 553(b) (2006).
196. See supra note 145.
197. See CSS Comments, supra note 171, at 14-16.
198. Id.
Regarding the deference owed to nonlegislative rules, as most courts and many commentators have suggested, since nonlegislative rules are not binding, it does not seem to be appropriate to accord *Chevron* deference to those rules. Professor Funk’s suggestion that the APA should be amended to codify *Skidmore* deference for nonlegislative rules seems to make the most sense, with one important addition. Courts applying *Skidmore* often do not give significant weight to the procedures used by an agency in its decision-making when determining how much deference to accord to the agency’s decision. The procedures used by the agency to make a nonlegislative rule *should* be an important factor in the analysis. The Supreme Court precedent suggests that whether an agency makes a decision using a process that fosters fairness and deliberation is an important factor to consider in determining whether *Chevron* deference should be accorded to the agency action.200

Thus, rather than simply adopting the *Skidmore* test as the standard for judicial deference to nonlegislative rules, Congress should amend the APA to provide that the degree of deference owed to an agency’s nonlegislative rule depends on the factors identified in *Skidmore*, with a special focus on the procedures used by the agency to develop the rule. Nonlegislative rules that are adopted through procedures that provide greater opportunities for public participation should be accorded greater deference than rules that are adopted without such input. Agencies would then have an incentive to use greater procedures in developing nonlegislative rules, but would be left with the discretion to determine how much additional procedure was necessary.

Regarding reviewability, as discussed further in the next section, it is not necessary to implement reforms to increase opportunities for judicial review of nonlegislative rules. Since nonlegislative rules are not binding, agencies should be given the discretion to sacrifice some of the deference that will be accorded to their policy decisions when they are eventually enforced in exchange for reduced likelihood of pre-enforcement litigation regarding those policy decisions.

A. The Importance of Public Participation

Public participation is a vital component of agency decisionmaking, whether the agency is proceeding through adjudication, adopting legislative rules or adopting nonlegislative rules.201 First, public participation improves

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200. *See supra* notes 74-76 and accompanying text.

201. The recognition of the significance of public participation to government decisionmaking is not limited to the United States. One of the most important international environmental treaties that has been adopted over the last decade is the United Nations Economic Commission for Europe’s Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (1999), *available at* http://www.unece.org/env/pp/documents/cep43e.pdf (commonly known as the Aarhus Convention). The Convention requires governments to ensure that the public is in-
the quality of agency decisionmaking. Agencies are more likely to make rational, defensible decisions when they solicit input from a broad array of stakeholders, who can identify facts and issues that the agency might otherwise fail to consider adequately. Second, the public is more likely to accept an agency’s decisions and less likely to challenge them when it has been heavily involved in the decisionmaking process and feels that the agency has listened to, and addressed, its concerns. 202 Third, increased public participation in agency decisionmaking is more democratic 203 and increases the legitimacy of agency decisions and public trust in the agencies. 204

Despite those benefits of public participation, there are barriers to informed and effective public participation even in cases where it is currently mandated, such as the notice and comment procedures for adoption of most legislative rules. 205 Commenters often lack information about the agencies’ proposals or the issues surrounding the agencies’ proposals that they need to make informed comments on the proposals. In addition, commenters often lack the financial resources, technical resources or time to provide input on the agencies’ proposals. Increased use of the Internet to make information accessible to the public could address some of these obstacles, but might exacerbate others. 206 Consultation with advisory committees that include involved early in environmental decisionmaking and that it is provided information and procedures to facilitate informed and effective participation in decisionmaking. Id. arts. 6-8.


203. See Mathew D. McCubbins & Daniel B. Rodriguez, Positive Political Theory and Law: When Does Deliberating Improve Democracy, 15 J. CONTEMP. LEGAL ISSUES 9, 13-14 (2006). Professors McCubbins and Rodriguez also explore the assertion that deliberation enhances social welfare. Id. at 14. Ultimately, they conclude that “deliberation in practice is unlikely to improve social welfare because it is improbable that groups of people will be willing to speak, listen, and learn from one another.” Id. at 12.

204. See Mendelson, supra note 19, at 417-20. Professor Mendelson points out that “[s]ome civic republican scholars have argued that agency deliberations are legitimate because they are intrinsically democratic, supplying an opportunity for a truly deliberative decision-making process in which all viewpoints are effectively represented.” Id. at 418.

205. A study of significant EPA hazardous waste rules from 1989 to 1991 found that industry filed 60% of the comments on the rules, while individual citizens only filed about 6% of the comments. See Cary Coglianese, supra note 26, at 951-52. Other studies have found similar lack of participation by individual citizens. Id. See also William West, Professor, Texas A&M, Remarks at the Center for the Study of Rulemaking, Conference on the State of Rulemaking in the Federal Government, Panel on Participation in Rulemaking (March 16, 2005), available at http://www.american.edu/rulemaking/panel4_05.pdf.

206. See Johnson, supra note 1, at 297-304. By providing information about the background of regulatory proposals and the issues surrounding the regulatory propos-
perts and a representative cross section of the affected stakeholders could also address some of those obstacles. 207

The EPA, in its recent Public Involvement Policy, outlined several important principles for improving public participation in the agency’s decisionmaking, and identified many concrete actions that the agency could take to address the obstacles to effective public participation. 208 The Policy en-

als, agencies could educate the public about the issues involved in the agency’s proposal and could facilitate more informed commenting from the public. Id. at 304. This could also reduce the cost of accessing this information for many people, and reduce the obstacles to collective action regarding the agency’s proposal. Id. at 299-300. Agencies could use the Internet creatively and proactively to solicit public input in their decisionmaking process, instead of merely reacting to comments that they receive from citizens over the Internet. Id. at 299. At the same time, though, to the extent that there is a digital divide, whereby segments of society effectively lack access to the Internet, relying on the Internet as a public participation tool exacerbates the inequity created by that divide and disadvantages those persons who effectively lack access to the Internet. Id. at 305-10. In addition, several commentators have noted that the advent of e-mail commenting on agency actions has spawned the proliferation of electronic advocacy businesses that specialize in generating bulk comments on agency actions. In many cases, this has increased the volume, but not the quality, of public comment. See, e.g., Coglianese, supra note 26, at 955-58 (noting that the volume of comments received by the Department of Transportation when it began accepting electronic comments jumped from 4,341 comments on 137 rules in 1998 to 62,944 comments on 99 rules in 2000); Stuart Shulman, Professor, Remarks at the Center for the Study of Rulemaking, Conference on the State of Rulemaking in the Federal Government, Panel on Participation in Rulemaking (March 16, 2005), available at http://www.american.edu/rulemaking/panel4_05.pdf.

207. Professor Mariano-Florentino Cuellar has even explored the creation of a “specialized-participation agency” to constitute small groups of people for consultation on government decisionmaking, instead of relying on organized interest groups to provide input on behalf of the public at large. See Mariano-Florentino Cuellar, Rethinking Regulatory Democracy, 57 ADMIN. L. REV. 411, 416 (2005). The new agency could “select participants by lot from among the entire population, or perhaps from among special constituencies likely to be especially impacted by certain rules, but not effectively represented in the current process.” Id. at 416-17. An additional advantage of the process would be that it would serve “like a jury, as a device for educating clumps of citizens about the institutions, laws and regulatory choices that pervasively affect their lives and yet are so dimly understood by most citizens.” Id. at 417.

208. See U.S. ENVTL. PROT. AGENCY, EPA 223-B-03-002, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003), available at http://www.epa.gov/pubinvol/policy2003/finalpolicy.pdf. The policy applies to “all EPA programs and activities.” Id. at 3. It supplements, but does not amend, existing EPA regulations regarding public participation. Id. at 1. While it encourages agencies to take various steps to increase public participation, the policy is not a rule, and is not legally enforceable. Id. at 4. Explaining some of the reasons for the Policy, EPA stated,
GOOD GUIDANCE, GOOD GRIEF!

courages EPA staff to develop and budget public participation plans for their activities and to consider providing technical and financial assistance to the public to facilitate involvement. The Policy also encourages EPA staff to involve the public early in the decisionmaking process, develop strategies to expand public notice regarding proposed actions and to reduce language barriers to participation, schedule public meetings and hearings at convenient times and locations, and provide background information to the public to educate the public and facilitate informed input. In order to improve public participation in all agency decisionmaking, and not merely in the development of nonlegislative rules, Congress could amend the APA to encourage, but not require, more agencies to adopt the measures outlined in the EPA’s guidance.

VII. THE PROPOSAL

Based on the principles for reform outlined in the preceding section, this final Part of the article outlines the specific proposals for reforms, and their advantages and disadvantages, addressing (1) the procedures for adopting nonlegislative rules; (2) the deference owed to nonlegislative rules; and (3) the reviewability of nonlegislative rules.

A. Procedures

The APA should be amended to include a new public participation requirement in Section 553(f) that applies to agencies’ formulation of legislative and nonlegislative rules. The proposed language, which includes the ACUS labeling requirement for nonlegislative rules, would be as follows:

Section 553(f): Each agency shall, to the extent practicable, necessary and in the public interest, provide opportunities for timely and meaningful public participation in rule making, including the formulation of interpretive rules and general statements of policy.

Experience throughout government has shown that a lack of adequate participation or of effective means for participation can result in decisions that do not appropriately consider the interests or needs of those that will be most affected by them. Furthermore, early involvement can ultimately reduce delay, by avoiding time-consuming review, public debate or litigation. Finally, decisions based on meaningful public involvement are likely to be better in substance and stand the test of time, avoiding the need to reopen controversial issues.

Id. at 4.
209. Id. at 6.
210. Id. at 2-3.
(1) Opportunities for timely and meaningful public participation should include notice of proposed actions, including disclosure of information that would facilitate meaningful public participation at a time that would facilitate meaningful public participation, and an explanation of the manner in which the agency utilized information that it received through public participation. To the extent feasible, agencies should make information available in a variety of formats, including by computer telecommunications or electronic means.

(2) Opportunities for timely and meaningful public participation could include provision of technical or financial assistance to the public to facilitate involvement, where authorized by law, or the use of advisory committees where authorized by law.

(3) For the formulation of interpretive rules and general statements of policy, opportunities for timely and meaningful public participation could also include public meetings or hearings and an opportunity for comment.

(4) At the time that an agency adopts an interpretive rule or general statement of policy, it should identify it as an interpretive rule or general statement of policy.

The proposed amendment recognizes the vital importance of public participation to the development of nonlegislative rules, but avoids imposing a bright line rule on agencies that would require notice and comment procedures for all nonlegislative rules or some class of nonlegislative rules identified by Congress. As noted earlier, mandatory procedural requirements for nonlegislative rules could ossify the development of nonlegislative rules and encourage agencies to offer less guidance or to make policy through adjudication.211 This proposal attempts to offer a compromise, by requiring agencies to provide “opportunities for timely and meaningful public participation” in the adoption of legislative and nonlegislative rules, but (1) limiting the application of the requirement by providing that agencies should provide those opportunities “to the extent necessary, practicable and in the public interest” and (2) leaving discretion to agencies to determine what procedures are required as “opportunities for timely and meaningful public participation” in a given proceeding. The proposal is also broader than many of the reform proposals identified earlier in this article because the “public participation” requirement would apply to the adoption of legislative and nonlegislative rules.

Although the requirement that agencies provide “opportunities for timely and meaningful public participation” includes caveats, adoption of this requirement would create a bias in favor of adoption of additional procedures

211. See supra Part V.A.
and send a signal that public participation should be an important part of an agency’s decisionmaking process, regardless of whether the agency is issuing legislative or nonlegislative rules. This would have several effects. Most importantly, the Supreme Court has held that courts cannot impose additional procedural requirements on agency rulemaking beyond the procedures required by the Constitution or statutes. Inclusion of a general public participation requirement in the APA would empower courts to impose additional procedural requirements on agencies as courts fleshed out the meaning of “to the extent practicable, necessary and in the public interest,” and “timely and meaningful public participation.” To the extent that the proposal identifies various ways that agencies might provide opportunities for timely and meaningful public participation, such as public meetings, public hearings, opportunity for comment, use of advisory committees, provision of information to the public to facilitate participation, and provision of technical and financial assistance, courts might conclude that one or more of those tools, or others, should be used for a particular type of agency decisionmaking process. Those tools are valuable in both the legislative and nonlegislative rulemaking context. As a consequence of the increased judicial power, agencies, in response, might decide to use procedures like those identified in the proposal, or others, to make legislative and nonlegislative rules in order to avoid having courts overturn their rules on the ground that the agencies did not “provide opportunities for timely and meaningful public participation” in developing the rules.

When it comes to the procedures required for development of rules, one size should not fit all. Full blown notice and comment procedures may be appropriate in some cases, but unnecessary in others. Instead of mandating that agencies use notice and comment procedures for all rules or some class of rules, the proposal allows agencies, in their expertise, to determine what procedures are “practicable, necessary and in the public interest.”

The proposal also includes the requirement, suggested by ACUS and Professor Funk, that agencies identify interpretive rules or general statements of policy as interpretive rules or general statements of policy. This addresses the concern raised by many of the reformers that an agency should not treat nonlegislative rules as binding rules, because the proposal stresses that agen-


213. Courts are, however, often reluctant to interfere with agencies decisions regarding the manner in which to use limited resources when laws provide them with discretion to determine how to allocate those resources. See, e.g., Heckler v. Chaney, 470 U.S. 821, 831-32, 837-38 (1985) (refusing to overturn agency’s choice to not bring an enforcement action).

214. Since nonlegislative rules are not binding, the proposed amendment would likely have a greater impact on the procedures for adopting legislative rules, as the ramifications of judicial invalidation of a binding legislative rule are far more significant than judicial invalidation of a nonlegislative rule.
cies must determine, at the time that they are adopting a rule, the effect that the rule will have, and must announce that to the public when they adopt the rule.

The flexibility that the proposed amendment offers to agencies in framing appropriate procedures is also the major weakness of the proposal. The requirement that agencies provide "opportunities for timely and meaningful public participation" is intentionally vague, as is the limitation that agencies must provide those opportunities when "practicable, necessary and in the public interest." The use of such vague language gives courts broad power to impose additional requirements on agency rulemaking procedures. This creates significant uncertainty for agencies, and may motivate them to implement the full panoply of notice and comment procedures for rulemaking in order to avoid having their rules struck down on the grounds that the agency did not provide "opportunities for timely and meaningful public participation" in the formulation of the rule.

However, at least with regard to nonlegislative rules, the proposal is less onerous than reform proposals that would adopt bright line rules requiring notice and comment procedures. Under the proposal, agencies retain discretion to offer fewer procedures to adopt nonlegislative rules and, since nonlegislative rules are not binding, judicial invalidation of the nonlegislative rule for failure to provide appropriate opportunities for public participation may have limited impacts on the agency's day-to-day operations.

B. Deference

Regarding the deference owed to nonlegislative rules, the following sentence should be added to the end of Section 706 of the APA:

The level of deference that a court accords an agency's interpretive rule or general statement of policy depends on the thoroughness evident in its consideration, including a consideration of the opportunities for public participation, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In this way, the proposal adopts the Skidmore test as the appropriate test for reviewing an agency's interpretive rules or general statements of policy, but suggests that the level of deference accorded to an agency's nonlegislative rules will vary based on the level of public participation afforded by the agency. This is consistent with judicial precedent and the spirit of many of the reform proposals that recognize that the level of deference

215. See supra notes 70-72 and accompanying test for discussion of the Skidmore test.
accorded to an agency’s decision should be based, in part, on the procedures used to make the decision. Like the proposal in the last section, this proposal gives agencies the discretion to determine what level of public participation to include in the development of nonlegislative rules, but would provide a strong incentive to agencies to include additional opportunities for public participation. Agencies that provided greater opportunities for public participation would be more likely to receive deference from a court reviewing the policy adopted in the nonlegislative rules, just as agencies that provided greater opportunities for public participation would be less likely to have nonlegislative rules struck down for failing to provide “opportunities for timely and meaningful public participation” under the proposal in the last section.

Without a codification of the standard for judicial review of nonlegislative rules, courts have adopted varying standards of review. This inconsistency has made it difficult for agencies to plan and administer laws and for the public to plan and comply with laws. To the extent that this proposal clarifies that Skidmore is the appropriate test for deference to an agency’s nonlegislative rules, it will provide consistency and certainty for agencies and the public. Even though there will still be some uncertainty regarding whether a court will defer to agencies’ interpretive rules under Skidmore, at least all courts will be using that same test. Codification of Skidmore deference for nonlegislative rules should also soften the impact of those rules on the public.

Since the Skidmore standard is less deferential than Chevron, it is possible that amending the APA to explicitly recognize the Skidmore standard as the appropriate level of deference for nonlegislative rules may create additional incentives for agencies to adopt rules as legislative rules, so as to be assured of Chevron deference. Although this proposal may create some slight additional incentive for adoption of legislative rules, there remain significant disincentives to the adoption of legislative rules. Furthermore,

216. See supra Part IV.B.2.
217. See supra Part III.B.
218. Justice Scalia and others fear that application of Skidmore to interpretive rules, coupled with the continued vitality of Auer deference to agency interpretations of their own regulations, will provide an incentive to agencies to promulgate broadly worded legislative rules that they clarify through interpretive rules that are entitled to Auer deference, which is more deferential than Chevron, instead of Skidmore deference. See United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) (emphasizing that, after Mead, “agencies will . . . have [a] high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect”). See also Manning, supra note 13, at 243-44. Perhaps, therefore, an amendment to the APA that adopts Skidmore deference for nonlegislative rules should also explicitly eliminate Auer deference for interpretive rules that interpret an agency’s regulations.
219. See supra Part II.B.
since it is likely that Skidmore is the appropriate standard for review of nonlegislative rules under existing law, regardless of any amendment to the APA, the proposed amendment is unlikely to effect any significant change to the existing law. In practice, therefore, it is unlikely to encourage agencies to make policy more frequently through the adoption of legislative rules.

C. Reviewability

Although some of the reform proposals suggested that the APA should be amended to make it easier to challenge nonlegislative rules by providing that those rules are final agency action and that challenges to those rules are ripe even though the rules do not have a direct and immediate effect on the challengers, expansion of reviewability is not necessary. Any changes to the APA that would increase reviewability of nonlegislative rules would decrease the attractiveness of those rules as tools to announce agency policies. Agencies would need to spend more time and money to adopt nonlegislative rules as they would need to develop a record that could support the agencies’ rules when challenged in court. Agencies could rationally decide that the potential costs of litigation, coupled with the increased costs of developing rules and the likelihood that the rules would be invalidated in court, would outweigh the benefits of announcing their policy interpretations through nonlegislative rules. Consequently, increased reviewability of nonlegislative rules might drive agencies to withhold issuing guidance to announce policy decisions or to announce policy interpretations through adjudication.

Ideally, as noted above, as agencies adopt more procedures to facilitate timely and meaningful public participation, citizens should become more aware of the law and more content with agency decisions. This should reduce citizens’ incentives to challenge those decisions in court as they feel a greater sense of ownership of the rules. Furthermore, if the APA is amended to require the labeling of nonlegislative rules and to clarify that the rules are only entitled to Skidmore deference, agencies should be less likely to attempt to treat nonlegislative rules as binding. As agencies are less likely to treat nonlegislative rules as binding, citizens will be less likely to seek to

220. See supra Part III.B.
221. See supra Part III.C.
222. Some commentators suggest that agencies may be more likely to adopt legislative rules if it is easier to challenge nonlegislative rules, since one of the benefits of announcing rules as nonlegislative rules instead of legislative rules would be eliminated. Id. However, nonlegislative rules would still have all of the other benefits that have encouraged agencies to rely more heavily on them in recent years, so increased reviewability of nonlegislative rules will probably not lead to increased reliance on legislative rules.
223. See supra notes 202-04 and accompanying text.
224. See supra Parts VII.A-B.
challenge nonlegislative rules in court. Consequently, it would not be necessary to increase opportunities for judicial review of nonlegislative rules.

Finally, it is not necessary to amend the APA to increase reviewability of nonlegislative rules because there is already a process in place whereby persons can seek judicial review of an agency’s interpretive rule. Section 553(e) of the APA requires that each agency give interested persons “the right to petition for the issuance, amendment or repeal of a rule.” A rule, under the APA, includes the “whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” Since the definition does not exempt interpretive rules, the APA requires agencies to give interested persons the right to petition for the issuance, amendment or repeal of an interpretive rule. The APA also requires agencies to give prompt notice of the denial of petitions and to provide “a brief statement of the grounds for denial” when agencies deny a petition. An agency’s denial of a petition to issue, amend or repeal a nonlegislative rule would most likely be held to be reviewable as a final agency action.

VIII. CONCLUSION

While OMB and the executive branch have imposed notice and comment requirements on many types of agency guidance documents and subjected them to OMB review, and academics have proposed increasing reviewability of agencies’ nonlegislative rules and adopting Chevron deference for such rules, more modest action is necessary. The suggested APA amendments outlined in this section would encourage agencies to increase public participation in the development of nonlegislative rules. At the same time, these changes would not ossify the process for developing nonlegislative rules, discourage agencies from adopting those rules, nor encourage agencies to announce policies through adjudication instead of through nonlegislative rules. A broad, but flexible, public participation requirement for all rulemaking and a labeling requirement for nonlegislative rules, coupled with an adoption of a modified Skidmore test as the judicial review standard for nonlegislative rules, should address many of the concerns that the OMB proposals and other reform proposals are trying to address without discouraging agencies from issuing nonlegislative rules or encouraging agencies to announce policies through adjudication instead of rulemaking.

226. Id. § 551(4).
227. Id. § 555(e).