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GUIDANCE DOCUMENTS IN THE STATES: TOWARD A SAFE HARBOR

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Virtually every administrative agency produces guidance documents expressing the agency's view about the meaning of language in statutes or regulations. Nearly as often, agencies issue guidance documents explaining how the staff or agency adjudicators should exercise discretionary or enforcement powers. Guidance documents are disseminated to the agency's own staff, often in the form of manuals. Usually they are made available to members of the public in the form of bulletins, guidelines, rulings, and the like. Guidance documents of general applicability are enormously important to members of the public who seek to plan their affairs to stay out of trouble and to minimize transaction costs. Such documents also facilitate good administration by improving private compliance with the law and by helping to assure uniform and consistent staff action.

For reasons I and numerous other authors have stated at length elsewhere,¹ an agency should be permitted to adopt guidance documents without *any* pre-adoption procedures. Requiring an agency to provide

* Professor of Law Emeritus, UCLA School of Law. © Michael Asimow 2001. The author deeply appreciates the research assistance of UCLA law student Azalea Park. Many thanks to persons who have supplied comments and assistance on this article including Arthur Bonfield, Dale Goble, Charles Koch, Ron Levin, and Michael McNamer. I am grateful to my colleagues at the University of Louisville Administrative Law Discussion Forum, led by Russell L. Weaver, for their suggestions. Comments and criticisms are welcome; the author's email address is asimow@law.ucla.edu.

¹ See, e.g., Peter Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1480-87 (1992); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 402-09 (hereinafter *Asimow, Duke*); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich. L. Rev. 521, 524-30 (1977) (hereinafter *Asimow, Michigan*); Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43 (1992) (hereinafter *Underground Regulations*).

APA pre-adoption notice and comment procedures radically diminishes the quantity of guidance documents produced, a result which is bad for the public and the agency alike. Alternatively, imposing legal constraints on the adoption of guidance documents cause agencies to ignore these constraints or to engage in various forms of circumvention.

The federal Administrative Procedure Act (hereinafter "APA") contains a rulemaking exception for "interpretative rules and general statements of policy."² Historically, state APAs contained no such exception. This article documents a previously unremarked trend in state law: the states are moving steadily in the direction of federal law. A few states (notably California) have moved in exactly the opposite direction. This article recommends that states that have not eased legal constraints on the adoption of guidance documents should consider doing so. The article suggests adoption of a safe-harbor approach, both in states that constrain the adoption of guidance documents and those that do not. Paradoxically, a similar safe-harbor approach might improve federal law as well.

I Guidance documents in the states and the 1961 Model State APA

A. The 1961 MSAPA

More than half of the states draw their APAs from the 1961 Model State APA or the now-forgotten 1946 Model State APA.³ Both model acts contain a definition of "rule" and prescribe a rulemaking scheme that

² 5 U.S.C. §553(b) (B) (the federal APA will be cited herein without the prefatory 5 U.S.C.). This article uses the word "interpretive" while the APA uses the word "interpretative." Both words are in common usage. Note that guidance documents of general applicability must be published in the Federal Register. APA §552(a) (1) (D). For this reason, Peter Strauss refers to guidance documents as "publication rules." Strauss, note 1 at 1467.

³ The 1961 Act is at 15 U.L.A. 184 (2000); the 1946 Act can be found at 9C U.L.A. 174 (1957). U.L.A. lists 28 states whose APAs are based on the 1961 Act or, in a few cases, the 1946 Act.

appears to provide no exception for adoption of guidance documents.

Under section 1(7) of the 1961 Act,

"rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.⁴

The "internal management" and "intra-agency memoranda" exceptions in the 1961 Act *might* be construed in a way that would cover many guidance documents.⁵ However, the drafters of the 1961 Act did not intend this result; the drafters' comments explicitly state that the Model Act rejects the federal exception for guidance documents or procedural rules.⁶ In addition, the definition of "rule" in the 1961 Act was based largely on the definition in 1946 Model Act. The latter act was adopted almost contemporaneously with the federal act, so surely differences between the two would have been deliberate.⁷

⁴ §1(7), 15 U.L.A. at 185. The 1946 Act definition was similar, containing an internal management exception but not an intra-agency memoranda exception.

⁵ See text at notes xx.

⁶ "It should be noted that the Revised Model Act goes beyond the Federal Act by requiring notice prior to the promulgation of 'interpretative rules, general statements of policies, [and] rules of agency organization, practice or procedure.' This accords with the Hoover Commission Task Force recommendations and seems wholly desirable although it may involve a certain amount of administrative inconvenience in application in certain agencies." Comment to §3, 15 U.L.A. at 214. The Hoover Commission Task Force, referred to in the above comment, apparently recommended the abolition of all of the federal APA's rulemaking exceptions. However, the Task Force's discussion is extremely terse. It is unclear whether it advocated to repeal of the guidance document exception. See Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure* 56 (1955) (hereinafter Hoover Commission Task Force).

⁷ The rulemaking provisions of the 1946 Model Act were much less rigid than those in the federal APA, evidencing the diversity and primitive character of then-existing state administrative procedure. The 1946 Act provided that "so far as practicable," agencies should publish notice of intended rulemaking and afford interested persons opportunity to submit data or views orally or in writing." §2(3). See Albert S. Abel, *The Double Standard in Administrative Procedure Legislation*:

The "internal management" exception in the 1961 Act was drawn from a similar provision in the 1946 Act. It was probably derived from the provision in the federal APA that rules relating "solely to the internal management of an agency" need not be published. According to the Attorney General's Report on the federal APA, this exception concerns little more than an agency's personnel rules.⁸ It is unclear what was meant by the exception for "intra-agency memoranda." It hardly conceivable that the drafters intended it to cover either interpretive rules or policy statements in light of their specific statement rejecting the federal exemption. Perhaps the "intra-agency memoranda" exception is intended to refer to pre-decisional memoranda between agency personnel that concern the development of rules that have yet to be issued officially.

Nevertheless, the 1961 Act is internally inconsistent. The public information section of the Act requires each agency to "(3) make available for public inspection all rules *and all other written statements of policy or interpretations* formulated, adopted, or used by the agency in the discharge of its functions."⁹ Thus, the Model Act

Model Act and Federal Act, 33 Iowa L. Rev. 228, 233, 251 (1948) (Model Act occupies ambiguous middle ground between command and pious admonition); Ralph F. Fuchs, *The Model Act's Division of Administrative Proceedings into Rule-Making and Contested Cases*, 33 Iowa L. Rev. 210, 220-22 (1948) (need to allow further experimentation with rulemaking procedure). This formulation probably allowed agencies that wanted to adopt guidance documents to avoid notice and comment by stating that this would not be "practicable." For further information about the genesis of the 1946 Model Act, see Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 Virginia L. Rev. 297, 297-99 (1986).

⁸ U. S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 18 (1947).

⁹ 1961 Model Act §2(a)(3). The Comment indicates that the inspiration for this provision came from the Hoover Commission Task Force report. That report recommended that statements of policy and interpretations of general applicability be published in the Federal Register. Hoover Commission Task Force, note xx at 53. The Hoover Commission report, however, concerned the federal APA which contains special treatment for

does draw a difference between "rules" and "written statements of policy or interpretations," even though both the definition of "rule" and the comment to the rulemaking section disavow any such distinction. The public inspection provision of the Act could easily be the vehicle for a court to distinguish guidance documents from rules, thus creating a rulemaking exception for guidance documents. However, I encountered no cases that did so.

B. Does it matter whether state APAs have a guidance document exception?

The 1961 Model Act requires a state agency that wants to adopt an interpretive rule or policy statement to first complete a full-fledged notice and comment procedure and to comply with whatever executive or legislative oversight procedures are in place in that state. As observed by Arthur Bonfield, the leading authority on state rulemaking, state agencies flout their APAs on a massive scale by ignoring these requirements.¹⁰

Agencies *must* issue guidance documents and are *not* going to adopt them as regulations except in highly unusual cases. Using notice and comment to adopt every piece of paper that interprets law or constrains discretion would be prohibitively expensive in terms of scarce staff resources. In addition, the rulemaking procedures would consume precious months or years of time before a particular document could be adopted, even though the public and the staff need guidance immediately. Indeed, in many cases, such guidance would be hopelessly outdated before it was issued.

interpretive rules and policy statements, a distinction otherwise unknown to the Model Act.

¹⁰ Arthur Earl Bonfield, *State Administrative Rule Making* 291-92 (1986).

California is a state that strongly prohibits agencies from adopting guidance documents without APA compliance.¹¹ In an earlier article,¹² I attempted to evaluate the effects of this prohibition. I found that agencies almost never adopt guidance documents by complying with the APA.

Instead, agencies generally adopt these documents, which are pejoratively known as "underground regulations," and hope that nobody will notice (or at least that nobody will challenge) them. A few of the documents were challenged, either in court or by California's oversight agency, the Office of Administrative Law, but most of the documents went unchallenged. OAL, because of its own priorities and its budgetary and staffing limitations, could consider only a handful of requests for determination each year,¹³ and court decisions considered only a very few others.

Some agencies, respectful of the law but mindful of their own resource constraints, provide no guidance documents at all or fail to revise outdated material, thus depriving regulated parties and the staff of any guidance. Most, however, have developed techniques to circumvent the law. These techniques are of borderline legality and suboptimal efficacy. Agencies employ case-by-case adjudication instead of rulemaking; adjudication operates retroactively rather than prospectively and does little to spread the word to parties beyond those involved in the adjudication. They provide individualized advice letters rather than generalized guidance. They transmit directions to staff through informal methods such as training sessions. They may state policies in voluntary form, using language like "it is suggested

¹¹ See Calif. Gov't Code §11340.5(a) and text at notes xx-xx.

¹² *Underground Regulations*, note xx at 55-62.

that" or using verbs like "may" instead of "must." They may take the position that a document is exempt from rulemaking under the "only legally tenable interpretation" exception,¹⁴ but this induces them to paper over rather than highlight legal problems. Another maneuver is to issue a notice announcing that the agency plans to issue a particular interpretation or policy in the future. Somehow, the staff never gets around to actually proposing the regulation, but everyone who needs to know gets the word. Some agencies found it was cheaper to get legislation passed than comply with rulemaking procedures. Other agencies flexed their political muscles and obtained legislative exemptions from the APA for their rulemaking.

It is commonplace for agencies in California and many other states to issue guidance documents without complying with the APA (or by using questionable approaches to avoid the APA); they may believe that the downside risks of doing so are not significant. However, an agency bears significant risks when it adopts guidance documents illegally.

- A judicial remand of a case tainted by reliance on an illegal guidance document involves a waste of resources. Moreover, it could allow a bad doctor go to on practicing, or a polluter to go on polluting, for years while the agency painstakingly starts over again and the matter winds its way back through the agency and the courts. And some courts might just vacate the agency action altogether, without permitting the agency to correct it on a remand.

¹³ In 2001, OAL issued ten underground regulation determinations up to December 1; it issued fifteen determinations in 2000. The determinations are reproduced at OAL's website. www.oal.ca.gov.

¹⁴ Calif. Gov't Code §11340.9(f).

- A court might issue a declaratory judgment that a guidance document is invalid which would seriously constrain the agency's operations.¹⁵ Following such a decision, an agency would risk contempt if it acted as though the invalidated rule still existed.
- The rule may be invalidated through the state's system of executive and legislative oversight of rulemaking. After such a determination, it would be difficult for the agency to act as though the interpretation or policy still existed.
- Courts would pay no *Skidmore*-type deference to the invalid rule.¹⁶
- A court might award the private party attorneys' fees for vindicating an important public interest if state law so permits.¹⁷
- There may be severe political costs to an agency's public support, program and budget if a court or an executive or legislative oversight body identifies the agency as a scofflaw.

C. State experimentation with guidance document exceptions

Given the apparent clarity of the 1961 Act, and the prevailing suspicion in state legislatures and in the business community of administrative agencies and government regulation, it might seem unlikely that many states would develop rulemaking exceptions for guidance documents.¹⁸ Yet the actual experience is quite different from

¹⁵ See 1961 Model Act §7 (providing for a declaratory judgment on the validity of rules); *Detroit Based Coalition for Human Rights v. Dep't of Soc. Serv.*, 428 N.W.2d 335 (Mich. 1988) (declaratory judgment invalidates policy bulletin). In other states, the invalid rule might be knocked out in an administrative rule challenge proceeding. See, e.g., Fla. Stat. Ann. §120.56.

¹⁶ See, e.g., *Tidewater Marine Western, Inc. v. Bradshaw*, 59 Cal.Rptr.2d 186, 927 P.2d 296 (1996).

¹⁷ See, e.g., Calif. Code of Civil Proc. §1021.5 (providing for award of fees in case where important public interest is served by litigation); Annot. Missouri Stats. §536.021(9) (provision for attorneys' fees in cases of rules adopted without proper procedure).

¹⁸ See Bonfield, note xx at 285 (most states have no guidance document exception).

this expectation. Approximately¹⁹ thirty states plus the District of Columbia have created legislative or judicial rulemaking exceptions that allow procedure-free adoption of some or all guidance documents. This understates the total impact of this trend since thirteen of the fifteen states with the greatest population are in the group of states that have created guidance document exceptions. A few states, however, led by California, have moved in precisely the opposite direction.

About twelve states, most of whose acts are based on the 1961 Model Act, appear to have no functioning exceptions for guidance documents. Case law in Iowa,²⁰ Louisiana,²¹ Minnesota,²² New Hampshire,²³ Ohio,²⁴ and Vermont²⁵ appears to rule out such an exception. Arkansas,²⁶ Mississippi,²⁷ Nebraska,²⁸ New Mexico,²⁹ Rhode Island,³⁰ and South Dakota³¹

¹⁹ I use the term approximately in recognition of the fact that my conclusions about some of the states may be incorrect. Often the case law is sketchy and could be construed in a way contrary to the position asserted here.

²⁰ Iowa Code Ann. §17A.2(11); *Fears v. Iowa Dep't of Human Serv.*, 382 N.W.2d 473 (App. 1985) (interpretive rule invalid). The Iowa statute appears to recognize a rulemaking exemption for some interpretive rules, but *only* from the requirement that the agency write a preamble. §17A.4(1)(b), 2d ¶. This negative pregnant makes it difficult to argue that the other rulemaking provisions should not be applied to guidance documents. Arthur Bonfield (drafter of the Iowa statute) affirms that legislative and judicial sentiment in Iowa is solidly against recognition of any guidance document exception. Telephone call from Arthur Bonfield to Michael Asimow, Oct. 15, 2001.

²¹ La. Rev. Stat. Ann. §49:951(6); *Star Enterprise v. Louisiana*, 676 So.2d 827 (La. App. 1996) (tax interpretive letter enjoined); *Liberty Mutual Ins. Co. v. LIRG*, 696 So.2d 1021, 1025-27 (La. App. 1997) (policy bulletin invalid).

²² Minn. Stat. Ann. §14.02. If there is more than one possible interpretation of a regulation or statute, an agency interpretation must be adopted as a rule. *Mapleton Community Home, Inc. v. Minn. Dep't of Human Serv.*, 391 N.W.2d 798, 801 (Minn. 1986).

²³ N.H. Rev. Stat. Ann. §541-A:1 (XV); *Petition of Pelletier*, 484 A.2d 1119 (N.H. 1984) (interpretive bulletin invalid); *Petition of Daly*, 523 A.2d 52 (N.H. 1986) (personnel policy invalid).

²⁴ See e.g. *Livisay v. Ohio Bd. of Dietetics*, 596 N.E.2d 1129 (Ohio App. 1991) (interpretive rule invalid).

²⁵ Vt. Stat. Ann. tit. 3, §800(4), 801(9); *In re Diel*, 614 A.2d 1223 (Vt. 1992) (welfare policy which changed prior policy invalid).

²⁶ Ark. Code Ann. §25-15-202(4)(A).

²⁷ Miss. Code Ann. §25-43-3(g).

²⁸ Neb. Rev. St. §84-901(2).

are 1961 Act states and appear to lack case law on the subject. One must therefore assume that no guidance document exception exists in those states.

1. State judicial innovations. State courts that appreciate the disutility of requiring advance procedure for the adoption of guidance documents can employ the tools of common law adjudication to change this outcome. The premise would be that the legislature did not seek to require agencies to provide procedures that would be costly but useless in most cases, or to invalidate tens of thousands of useful agency documents, or to deter agencies from giving needed advice to the public and to its staff. Therefore, the court could interpret state law in order to create a guidance document exception, leaving it to the legislature to correct the court if so inclined. In fact, state courts in about fourteen states have done exactly that. This is, I believe, a tribute to the sometimes scorned³² common law system in the field of administrative law.

Courts have used various interpretive techniques to hew a guidance document exception from statutes (usually based on the 1961 Model Act) that apparently provide for no such exception. First, a court might note that the typical policy statement, manual provision, or guideline is intended to guide discretionary behavior of agency staff and thus might be considered "a statement affecting only the internal management of an agency and not affecting private rights or procedures available to the public."³³ But, private parties would

²⁹ N.M. Stat. Ann. §12-8-2(G); Albert B. Utton, *How to Stand Still Without Really Trying: A Critique of the New APA*, 10 Nat. Res. J. 840-, 843-44 (1970).

³⁰ R.I. Gen. Laws §42-35-1(h).

³¹ S.D. Codified Laws §1-26-1(8).

³² *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1975).

³³ 1961 Model Act §1(7)(A).

argue, such documents have a practical effect on the public and therefore affect "private rights or procedures available to the public."

A court might respond by saying that directions to agency staff about how to exercise discretionary powers never affect private "rights"; only subsequent agency action can actually alter someone's legal status. For example, if a guideline results in agency investigators targeting A and ignoring B, A's and B's legal rights and procedures remain exactly the same as they were before the guideline was adopted. The agency still has to proceed against A who will have an opportunity to persuade the agency of the merits of his case before his legal rights are actually affected. Nothing will happen to B, which might disappoint B's victims, but the "rights" of the victims to have the agency proceed against B are not affected (they never had any such rights). Hawaii,³⁴ Massachusetts,³⁵ Oregon,³⁶ Texas,³⁷ and perhaps Kansas³⁸ have applied the internal management exception to cover guidance documents.

³⁴ Haw. Rev. Stat. §91-1(4); *Doe v. Chang*, 564 P.2d 1271 (Haw. 1977) (manual for welfare fraud investigators is internal management statement since does not affect the rights of the public); *State v. Fedak*, 825 P.2d 1068 (Haw. App. 1992) (directions to police about how to set up sobriety roadblocks are internal management).

³⁵ Mass. Gen. Laws Ann. C. 30A, §1(5). See *Commonwealth v. Trumble*, 483 N.E.2d 1102, 1106-07 (Mass. 1985) (guidelines setting up roadblocks to catch drunk drivers are within internal management exception and do not affect private rights).

³⁶ Ore. Rev. Stats. §183.310(8); *Rogue Flyfishers v. Water Policy Rev. Bd.*, 660 P.2d 1089 (Ore. App. 1983) (staff memorandum is internal management because not self-executing but requires further agency action to alter public's rights); *United Parcel Service Inc. v. Oregon Transportation Comm'n*, 555 P.2d 778, 780-81 (Ore. App. 1976) (same).

³⁷ Tex. Gov't Code Ann. §2001.003(6); *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764 (Tex. App. 1999) (agencies could not function unless they could provide advisory materials to regulated parties).

³⁸ Kan. Stat. Ann. §77-415(4); *In re Alsop Sand Co.*, 962 P.2d 222 (Kan. 1998) (informational tax guide valid); *Vinson v. McKune*, 960 P.2d 222 (Kan. 1998) (policies relating to an incentive system for prisoners fall under internal management exception--could be limited to prisoner cases).

Second, a court might apply the 1961 APA's exception for "intra-agency memoranda" so that it would serve as an exception for interpretive rules. After all, such interpretations are generally staff-produced documents intended mostly for other staff members and do Illinois³⁹ and Hawaii⁴⁰ have taken this tack.

A third approach is to construe the definition of "rule" so that it covers only quasi-legislative action, meaning rules that exercise delegated legislative power and thus have the force of law.

Massachusetts falls into this category; the Supreme Judicial Court has stated clearly that the legislature could not possibly have intended that rulemaking procedure apply to every guidance document.⁴¹

Connecticut,⁴² the District of Columbia⁴³ Florida,⁴⁴ Maryland,⁴⁵

³⁹ Ill. Stat. Ch. 5 §100/1-70; *Mobil Oil Corp. v. Johnson*, 442 N.E.2d 846, 852 (Ill. 1982) (memo to staff explaining mechanics of computing tax is intra-agency memorandum--a contrary view would immobilize department).

⁴⁰ Haw. Rev. Stat. §91-1(4); *Crosby v. State Dep't of Budget & Finance*, 876 P.2d 1300 (Haw. 1994) (interpretive guideline is an intra-agency memorandum because it does not bind any member of the public).

⁴¹ Mass. Gen'l Laws Ann. C. 30A §1(5); *Massachusetts General Hospital v. Rate Setting Comm'n*, 359 N.E.2d 41, 43-46 (Mass. 1977) (informational bulletin of rate setting commission--formal notice and comment would be wasteful where agency is only filling up details or clarifying ambiguity).

⁴² Conn. Gen. Stat. Ann. §4-166(13); *Walker v. Dep't of Income Maintenance*, 446 A.2d 822 (Ct. 1982) (policy is invalid because it had substantial impact on aid recipients but would have been valid if it had lacked such impact); *Cheshire Convalescent Center v. Comm'n on Hospitals*, 386 A.2d 264 (Ct. 1977) (guideline invalid because treated as legally binding in adjudication, relying on federal cases defining policy statements).

⁴³ The D.C. statute lacks even the internal management and intra-agency memorandum exceptions. D.C. Code Ann. §1-1502(6). Nevertheless, its courts, possibly influenced by the looming presence of the federal APA, have distinguished between legislative and non-legislative rules. See *Wolston v. DC Dep't of Human Resources*, 291 A.2d 85 (D.C. App. 1972) (food stamp manual is without legal effect); *District of Columbia v. North Washington Neighbors*, 367 A.2d 143 (D.C. App. 1977) (statute intended to cover only quasi-legislative agency action).

⁴⁴ Fla. Stat. Ann. §120.52(15); *McDonald v. Dep't of Banking and Finance*, 346 So.2d 569, 579-83 (Fla. App. 1977) (policy statement will not be treated as rule because not intended to create rights or require compliance or otherwise to have the direct and consistent effect of law--contrary result would be "folly").

Missouri,⁴⁶ Nevada,⁴⁷ and New Jersey,⁴⁸ have apparently all embraced variations on this theme.

2. State legislative innovations

Approximately seventeen states have enacted legislation that creates explicit rulemaking exceptions for some guidance documents. It seems quite surprising that one-third of the states could overcome inertia and enact legislation to solve this problem, given probable opposition from the private sector and legislative disinterest in issues that have little resonance with the general public.

These legislative modifications take the form of

- Adopting the federal exception for interpretive rules and policy statements, as in Georgia⁴⁹ and Wyoming.⁵⁰
- Providing exceptions which exclude some or all interpretive rules and policy statements, as in Alabama,⁵¹ Arizona,⁵² Colorado,⁵³ Idaho,⁵⁴

⁴⁵ Md. State Gov't Code, §10-101(g); 75 Ops. Att'y Gen. 37 (1990) (statute has no guidance document exception but should be amended to create one). However, see *Dep't of Health and Mental Hygiene v. Chimes, Inc.*, 681 A.2d 484, 488-90 (Md. 1996) (policy statement concerning new hospital cost containment measures is valid).

⁴⁶ Missouri might recognize a distinction between legislative and nonlegislative rules, but it is not certain. See *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. 1994) (apparently drawing distinction between legal effect and practical effect of agency interpretation).

⁴⁷ Nev. Rev. Stat. §233B.038(1) and (2); *State Farm Mutual Auto. Ins. v. Comm'r of Insurance*, 958 P.2d 733, 738 (Nev. 1998) (drawing legislative/interpretive distinction, relying on federal case).

⁴⁸ N.J. Stat. Ann. 52:14B-2. New Jersey uses a multi-factor test in determining whether a particular statement is a rule that must be adopted under the APA; the legal and practical impact on the public and the degree to which the statement is a sharp change in policy are among the factors. See *State v Garthe*, 678 A.2d 153 (N.J. 1996) (standards for operation of breathalyzer machine do not compel public to do anything and are inferable from prior court decisions); *Doe v. Poritz*, 662 A.2d 367, 415-17 (N.J. 1995) (sex offender guidelines do not represent fundamental policy decision so need not be adopted as rules). It would be fair to say that the New Jersey standard is almost completely indeterminate. See *Bullet Hole, Inc. v. Dunbar*, 763 A.2d 295 (App. Div. 2000) (determination of hours that gun dealers can call for background checks is invalid without complying with APA).

⁴⁹ Ga. Code Ann. §§50-13-2(6), 50-13-4(a).

Michigan,⁵⁵ Nevada,⁵⁶ New York,⁵⁷ North Carolina,⁵⁸ North Dakota,⁵⁹
Pennsylvania,⁶⁰ South Carolina,⁶¹ Tennessee,⁶² and Utah.⁶³

⁵⁰ Wyo. Stat. §§16-3-101, -103; Matter of GP, 679 P.2d 976, 996-97 (Wyo. 1984) (manual provision is non-legislative, citing federal cases).

⁵¹ Alabama allows issuance of "memoranda, directives, manuals or other communications which do not substantially affect the legal rights or procedures available to the public." Ala. Code §41-22-3(9).

⁵² Arizona makes an exception for "substantive policy statements" broad enough to cover interpretations as well as policies. Ariz. Rev. Stat. Ann. §41-1001(17), (20); Phoenix Children's Hosp. v. Ariz. Health Care Cost Containment System., 987 P.2d 763 (1999) (policy statement cannot be challenged in court without exhausting remedies).

⁵³ Colo. Rev. Stat. §§24-4-102(15), 24-4-103(1) (exception for interpretive rules of policy statements "which are not meant to be binding as rules"). See AMAX v. Grand County Bd. of Equalization, 892 P.2d 409 (Colo. App. 1994) (assessors' manual is interpretive rule); Meyer v. Colo. Dep't of Social Serv., 758 P.2d 192 (Colo. App. 1988) (upholding a policy statement).

⁵⁴ Idaho allows interpretive statements that interpret rules (but not statutes) and conceivably might intend an exception for "standards." Idaho Code §67-5201(19), (21). See Tomorrow's Hope v. Idaho Dep't of Health, 864 P.2d 1130 (Ida. 1993) (interpretation of regulation exempt from rulemaking).

⁵⁵ Michigan law contains exceptions for interpretive statements, guidelines, informational pamphlets and other material that in itself does not have force of law. See Clonlara, Inc. v. State Bd. of Ed., 501 N.W.2d 88 (Mich. 1993) (agency lacked power to adopt legislative rules so its rules were necessarily interpretive); Faircloth v Family Independence Agency, 591 N.W.2d 314 (Mich. App 1998) (interpretive rule valid even though it had substantial impact on public).

⁵⁶ Nevada's statute contains several exemptions covering some non-legislative rules. Nev. Rev. Stat. §233B.038(2)(d), (f), (h), (m).

⁵⁷ N.Y. State Administrative Procedure Act §102(2)(a), (b)(i) & (iv) (interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory); Patrick J. Borchers & David L. Markell, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE 114-22 (1998) (exemption goes too far by exempting guidance documents from publication requirements).

⁵⁸ N.C. Gen. Stat. §§150B-2(8a)(c) and (g); North Carolina Comm'r of Ins. v. North Carolina Rate Bureau, 269 S.E.2d 547, 568 (N.C. 1980) (recognizing difference between interpretive and substantive rules); Ford v. State, 445 S.E.2d 425 (N.C.App.1994) (memorandum is interpretive rule or policy statement).

⁵⁹ North Dakota exempts interpretive or policy material that "is explanatory and not intended to have the force and effect of law." N.D. Central Code §28-32-01(k).

⁶⁰ 45 Penn. Stat. §§1102(12), (13), 1204(1). The Pennsylvania statute, which provides special treatment for both interpretive rules and policy statements, is nearly incoherent. However, Pennsylvania courts have managed to interpret it in a way broadly consistent with the federal guidance document exception. See Robert C. Power, *Rulemaking Developments*, 8 Widener J. Pub. L. 419, 425-29, 434-35 (1999); Success Against All Odds v. Dep't of Pub. Welf., 700 A.2d 1340, 1351 (Pa. 1997).

- Providing that the rules must have the "effect of law" in order to be covered by the APA as in Indiana,⁶⁴ or be "judicially enforceable" as in Maine.⁶⁵
- defining "guidance documents" and "rules" and making them mutually exclusive as in Washington⁶⁶ and Virginia.⁶⁷

These legislative and judicial innovations in thirty-one states are certainly improvements over the ill-considered failure to provide any exemption in the 1961 Model Act, they share many of the problems that underlie the federal exemption.⁶⁸ Most of all, they are quite vague--in some cases, nearly totally indeterminate. This fuzziness invites well-funded private parties to litigate the issue and, potentially, disrupt the regulatory process. Meanwhile, agencies can seldom be sure whether they have actually complied with the state test;

⁶¹ South Carolina provides that "policy or guidance issued by an agency other than in a regulation does not have the force or effect of law;" it also excepts "advisory opinions of agencies" from the definition of rule. S.C. Code §1-23-10(4).

⁶² Tennessee excepts "general policy statements which are substantially repetitious of existing law." Tenn. Code Ann. §4-5-102(10)(D); *State Bd. of Regents v. Gray*, 561 S.W.2d 140 (Tenn. 1978) (provision in student handbook is valid under this exception).

⁶³ Utah Code Ann. §§63-46a-2(13), (17), -3(3), (4); *CP v. Office of Crime Victims Reparation*, 966 P.2d 1226 (Utah App. 1998) (unwritten policy had to be adopted as rule because of binding effect). Utah appears to allow agencies to adopt policy statements and interpretations of rules (but not of statutes) that are "advisory, informative, or descriptive."

⁶⁴ Ind. Code Ann. §4-21.5-1(14). See *Chicagoland Christian Village, Inc. v. Sullivan*, 671 N.E.2d 174 (Ind. App. 1996) (moratorium on adding health providers "had the effect of law" so notice and comment required); *Gorka v. Sullivan*, 671 N.E.2d 122 (App. 1996) (new reimbursement rates could be issued by bulletins, not formal rules, because interpretive of existing law).

⁶⁵ Maine Rev. Stat. Ann. tit. 5, §8002(9)(A), (B)(4). See *Downeast Energy Corp. v. Insurance Review Bd.*, 756 A.2d 948, 953-54 (Maine 2000) (guidance for staff and public valid because not intended to have force of law or be judicially enforceable).

⁶⁶ See text at notes xx

⁶⁷ Va. Code §§2.2-4001, 4008, further discussed in text at notes xx.

⁶⁸ See text at notes xx.

therefore, they will either waste resources providing notice and comment or continue to employ suboptimal mechanisms to avoid scrutiny.

III. States that require pre-adoption procedures

As we have seen,⁶⁹ of the 51 states and the District of Columbia, only about twelve apparently adhere to the 1961 Model Act by providing no guidance document exception. Of the top 15 states in population, only Ohio falls into this group.⁷⁰ Most of the remaining states--about thirty-one--have moved in the direction of federal law by providing partial or complete exceptions for guidance documents. Thirteen of the top fifteen states in population are in this group. But about eight states have gone in precisely the opposite direction: their statutes and case law explicitly prohibit the adoption of guidance documents except by complying with APA rulemaking procedures. California is the most prominent of these states (and the only one in the top fifteen in population).

A. Guidance documents in California

More than any other state, California prohibits the adoption of guidance documents without APA compliance and strongly enforces this prohibition both through court decisions and an administrative determination mechanism. Yet, in my view, all this has accomplished nothing of value and done considerable harm.⁷¹ To administrative law reformers, California's story is a cautionary tale of how good things, like notice and comment rulemaking, can be carried to counterproductive extremes.

1. California's rulemaking APA and guidance documents

⁶⁹ text accompany notes

⁷⁰ State population figures are derived from Statistical Abstract of the United States 24 (120th ed. 2000).

⁷¹ See text at notes xx

The rulemaking procedure required by California's APA is unusually demanding.⁷² The notice of proposed rulemaking must include multiple impact statements and explanatory documents for every rule (not just significant or major ones). The agency must assemble a record containing evidentiary support for every part of every rule. It must hold an oral hearing in the case of every rule and respond to each outside comment (not just material ones).

All this is prelude to the main event: scrutiny of every rule by the Office of Administrative Law (OAL). OAL, an independent agency responsible directly to the Governor, tests virtually every rule adopted by every agency covered by the APA for legality, procedural compliance, and clarity. In addition, the rule must pass the test of "necessity," meaning that every part of the rule must be factually supported by the rulemaking record. In effect, OAL scrutiny replicates the function of reviewing courts, with the difference that OAL staff scrutinizes every rule but very few are ever challenged in court.

The California statute pays lavish attention to guidance documents. When adopted without compliance with the APA, guidance documents are pejoratively known as "underground regulations" and are invalid. The APA provides:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11342.600,⁷³ unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted

⁷² See Calif. Gov't Code §§11340 et. seq. For more detailed treatment of the California rulemaking process, see *Underground Regulations*, note xx supra; Herbert F. Bolz and Michael McNamer, *Agency Rules and Rulemaking*, in 1 CALIFORNIA PUBLIC AGENCY PRACTICE ch. 20 (Gregory Ogden, ed., 1991 and current supplements); Michael Asimow and Marsha N. Cohen, CALIFORNIA ADMINISTRATIVE LAW ch. 2 (West Pub. Co., forthcoming, 2002).

⁷³ This definition is all-encompassing and easily broad enough to cover guidance documents of general applicability.

as a regulation and filed with the Secretary of State pursuant to this chapter.⁷⁴

The history of this provision begins with California's adoption of a rulemaking scheme in 1947 that resembled the federal Act but contained no exception for guidance documents.⁷⁵ The issue remained mostly dormant until the Supreme Court's 1978 decision in *Armistead v. State Personnel Board*,⁷⁶ which held that an interpretive provision in a personnel manual could legally be adopted only in accordance with the APA.⁷⁷ Consequently, the Court refused to accord any deference to the interpretation. The court seemed indifferent to the fact that its ruling would apply to a vast quantity of existing and future guidance documents, even though its author, a former administrative law professor, could not have been unaware of it.⁷⁸

At the time *Armistead* was decided, California's rulemaking APA was relatively undemanding, calling only for simple notice and comment along the lines of the federal model. Thus the Supreme Court probably assumed that its ruling would not cause serious practical problems for agencies.

The following year, however, the legislature rewrote the rulemaking provisions of the APA, making the pre-adoption procedure far more onerous and establishing OAL. As a result, *Armistead* required agencies to satisfy a list of costly and time-consuming procedures before they could legally adopt any guidance document, however trivial

⁷⁴ Calif. Gov't Code §11340.5(a).

⁷⁵ See *Underground Regulations*, note xx at 46. Indeed, an alternate bill which contained an exception for interpretive and procedural rules was rejected. Id. at 46, n. 20.

⁷⁶ 149 Cal.Rptr. 1, 583 P.2d 744 (1978).

⁷⁷ *Armistead* also construed California's APA exception for regulations relating to "internal management" so narrowly that it nearly vanished. Gov't Code §11340.9(d).

⁷⁸ The author of the opinion was Justice Frank Newman, formerly a professor and dean at Univ. of California, Berkeley School of Law (Boalt Hall) whose lifelong specialty was administrative law.

in impact. In 1982, the legislature adopted section 11340.5⁷⁹ which codified *Armistead*. The section also empowers OAL to issue a determination that a guidance document adopted without APA compliance is a regulation and thus is invalid.⁸⁰ This provision applies to any guidance document, whether adopted before or after the enactment of section 11340.5.

2. Practical effects of subjecting guidance documents to the APA

In the wake of *Armistead* and the enactment of section 11340.5, numerous judicial decisions invalidated underground regulations⁸¹ and OAL determinations invalidated many others. In a previous article on this subject, I attempted to ascertain the practical effect of California's crusade against guidance documents adopted without APA compliance. As already discussed,⁸² I concluded that the effects were strongly negative. The law has produced few, if any, benefits, because agencies seldom adopt guidance documents under the APA. Rulemaking is slow and costly, OAL demands that the rulemaking files be perfect, and underbudgeted agencies simply have more important priorities.⁸³ Often the guidance document is needed because of a new legal or business development, yet by the time rulemaking is completed, the document is outdated. I concluded that California's costly rulemaking procedure and OAL review are not justifiable in the case of guidance documents that, by definition, need not be followed by anyone, which receive independent judgment review by courts, and which are often quite trivial in impact. Instead, agencies either keep their legal interpretations and policies secret, flout the law and issue guidance

⁷⁹ See text at note xx.

⁸⁰ Gov't Code §11340.5(b) and (c). Such determinations are judicially reviewable. Gov't Code §11340.5(d). See OAL's regulations on the issuance of determinations. 1 C.C.R. §§121-28.

⁸¹ *Underground Regulations*, note xx at 53-55.

⁸² See text at notes xx.

documents without any procedures, or employ various techniques of dubious legality to circumvent the legal proscription.

3. *The Tidewater decision*

In *Tidewater Marine Western, Inc. v. Bradshaw*⁸⁴ the California Supreme Court was asked to rule that guidance documents could be adopted without compliance with APA rulemaking procedure.⁸⁵ The argument, made in an amicus brief, was based on the fact that the APA rulemaking provisions apply only to "the exercise of any *quasi-legislative* power conferred by any statute."⁸⁶ The amicus brief argued that guidance documents are not quasi-legislative because they do not exercise delegated legislative power. The court rejected this argument, saying that guidance documents are quasi-legislative in nature. In addition, they have some legal effect because reviewing courts sometimes accord them *Skidmore*-type deference. Finally, the Court stated that even if guidance documents are not quasi-legislative, section 11340.5 makes the legislature's intent to apply the APA to interpretive regulations too clear for the Court to ignore.

The Court acknowledged that the existing law was deeply problematic. It recognized that the costs and delays inherent in pre-adoption APA rulemaking procedure discourage agencies from adopting

⁸³ Id. at 56-57.

⁸⁴ 59 Cal.Rptr.2d 186, 927 P.2d 296 (1996). The author filed an amicus brief in the *Tidewater* case.

⁸⁵ *Tidewater* considered a written "enforcement policy" incorporated into an "Operations and Procedures Manual." The policy was adopted without public input by the Department of Labor Standards Enforcement (DLSE), an agency that enforces state labor laws such as the minimum wage and overtime provisions. The Court held that the policy was illegally adopted without compliance with the APA and thus was invalid. As a result, it refused to give deference to the policy. Nevertheless, the Court held that the policy was substantively correct. This was quite significant, because the Court overruled lower court authority suggesting that agency enforcement action based on an underground regulation is automatically invalid regardless of the substantive correctness of the underground regulation. See 59 Cal. Rptr.2d at 198, overruling *Grier v. Kizer*, 268 Cal. Rptr. 244 (Cal. App. 1990).

guidance documents, to the detriment of the public. Nevertheless, "we decline to carve out an exception for interpretive regulations that we do not believe the language of the APA adequately supports."⁸⁷

In my view, the Supreme Court was too modest about exercising its power to construe the APA to achieve desirable public policy results. Given the Court's explicit recognition that present California law is dysfunctional, why didn't the Court do something about the problem⁸⁸ rather than deferring to the legislature? The Court *could* have accepted the argument that guidance documents are not quasi-legislative since they do not exercise delegated legislative power, a distinction it frequently draws when deciding scope of review issues. And it *could* have construed section 11340.5 to refer only to guidelines, manuals, standards etc. that exercise delegated legislative power as distinguished from those that merely interpret a statute or prior regulations. In the past, the California Supreme Court has often stepped up to solve public policy problems that the legislature has ignored. To speak only of administrative law, the court has frequently endorsed common law approaches to problems not adequately solved by statutes.⁸⁹ But the present court has a modest conception of its role and, in my view, leans too far in the direction of judicial restraint.

4. *Legislative reform--the A. B. 486 fiasco*

⁸⁶ Calif. Gov't Code §11346(a) (emphasis added).

⁸⁷ 59 Cal.Rptr.2d at 197-98.

⁸⁸ In fact, the Court did try to partially remedy the problem by inventing a new rulemaking exception: agencies can issue restatements or summaries of prior individualized advice letters without complying with the APA. OAL had often contended that a pattern of similar individualized advice letters constituted an underground regulation.

⁸⁹ See, e.g., *Topanga Ass'n for a Scenic Community v. County of L. A.*, 113 Cal.Rptr. 836 (1974) (local agency must make findings of fact to permit adequate judicial review); *Fascination, Inc. v. Hoover*, 246 P.2d 656 (1952) (implying hearing requirement into statute).

After *Tidewater*, the California Law Revision Commission tackled the subject of rulemaking reform, including consideration of a carefully tailored safe-harbor provision for interpretive rules.⁹⁰ I was the Commission's consultant for its APA revision project.

This proposal was met by intense skepticism from the private sector. Private sector players cherish their opportunity to challenge before OAL and in court those underground regulations with which they disagree. These players are legitimately concerned by the practical and legal effect of interpretive rulings; in most cases agency staff will adhere inflexibly to the rulings and most private parties will follow them rather than get into a fight. Moreover, the private sector objected to the idea that courts might give deference to agency interpretive rulings adopted without public participation.⁹¹ In addition, OAL was dubious about any change in its power to review guidance documents. I believe this opposition was grounded in an understandable concern about loss of turf. In reality, however, OAL does not have the resources to do much about underground regulations anyway,⁹² so the loss of turf seemed relatively insignificant.

There followed a long process of public hearings, negotiation and compromise, drafting and redrafting. The resulting product went to the legislature in the form of A.B. 486. All factions, including the agencies, OAL, and private sector representatives, appeared to be

⁹⁰ The Commission is a small, independent state agency that studies a broad range of problems relating to California law and recommends legislative solutions. The Commission has plenty of prestige but no political power. See Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 Widener J. of Pub. L. 229, 232-35 (1999).

⁹¹ *Yamaha Corp. of America v. State Bd. of Equalization*, 960 P.2d 1031 (1998). *Yamaha* ruled that courts should defer to an advisory opinion about business tax legally issued by the State Board of Equalization without advance public comment. The Board enjoys one of the few statutory exceptions to California's strict ban on adoption of underground regulations.

⁹² See note xx [71].

satisfied with it, and A. B. 486 passed both houses. Unexpectedly, on October 8, 1999, Governor Gray Davis vetoed the Bill.

A. B. 486 would have allowed an agency to adopt an advisory interpretation, meaning an expression of its opinion as to the meaning of a statute, regulation or other provision of law the agency administers. The statute would have required advisory interpretations to be clearly labelled as such, thus making it easy to distinguish interpretive rulings from legislative rules. The interpretation could not compel any action nor could it be accorded *any* judicial deference.⁹³ In an important sweetener for the private sector, the law provided that those who comply with an interpretation would have been protected from any retroactive change by the agency. Thus the Commission attempted to win over all factions by proposing a something-for-everybody provision. At the same time, the provision would deliver a significant piece of law reform.

The Governor's veto was unexpected and a sobering reminder of the hazards of the political process. His veto message⁹⁴ seemed to reflect no understanding of the problem that AB 486 was designed to solve. It took no account of the massive effort by the Law Revision Commission to

⁹³ A. B. 486 also called for a simplified notice and comment procedure. An agency would be required to publish a proposed advisory interpretation and the public would have 45 days to comment. Following the end of the comment period, the agency could adopt the interpretation without further ado. OAL review was not mandatory but any party could request OAL to review the interpretation to see whether it was consistent with statute. I did not support the provision for pre-adoption notice and comment procedure. However, this was a compromise with the private sector that the Law Revision Commission felt compelled to agree to.

⁹⁴ Letter from Gray Davis, Governor of California, to Members of the California Assembly (October 8, 1999) (on file with the author). After hearing about the possibility of a veto, I peppered the Governor's office with faxes; Assemblyman Howard Wayne, who ably carried the bill in the Legislature, also lobbied the Governor's office. It was to no avail.

study the problem and to draft compromise legislation apparently satisfactory to all.

The real reasons behind the Governor's veto are unknown. Rumor has it that the staff of one agency vehemently opposed the bill; it mobilized half a dozen other agencies to write the governor and urge a veto. But why any agency would oppose the bill is mysterious. An agency that objected to the advisory interpretation procedure would not be required to use it. Supposedly, the agencies were afraid they would be deluged with requests for advisory opinions that they lacked the staff to keep up with. Therefore, they felt it would be better that they not have the power to furnish interpretations at all. Other agencies thought that the provision might imply that some methods of furnishing advice that they currently employed would be rendered illegal. Others objected to the fact that agencies would be bound by the advisory interpretation but the public would not be. But the answer to all of these concerns is that no agency was required to issue advisory interpretations if it chose not to. Nevertheless, the Governor's staff swallowed these specious arguments and ignored all input to the contrary. Perhaps the veto was a product of staff incompetence during a time when the Governor's staff was overwhelmed by more high priority problems. Or perhaps there were some political reasons for the veto that had nothing to do with the merits at all.

B. Other states that require guidance documents to be adopted under the APA

I have identified seven other states with statutes that seem similar to the California provision. These include Alaska,⁹⁵ Delaware,⁹⁶

⁹⁵ Alaska Stat. §44.62.640(3).

⁹⁶ Del. Code Ann. Tit. 29, §10102(7).

Kentucky,⁹⁷ Montana,⁹⁸ Oklahoma,⁹⁹ West Virginia¹⁰⁰ and Wisconsin.¹⁰¹

Alaska's provision is noteworthy. It provides that the term regulation includes manuals, policies, instructions, guides to enforcement, interpretive bulletins, interpretations, and the like that have the effect of rules, orders, regulations or standards of general application. Whether a regulation, regardless of name, is covered by the APA depends in part on whether it affects the public or is used by the agency in dealing with the public.

The Alaska court has recognized that this provision was inspired by California law.¹⁰² Some cases appear to have aggressively enforced the statute by invalidating interpretive rules or policy statements.¹⁰³ On the whole, however, the Alaska cases seem rather confused on the application of this statute and the legal effect, if any, of an invalid guidance document.¹⁰⁴ With the exception of Wisconsin, the case law of which also seems confused,¹⁰⁵ I found no explanatory case law in the

⁹⁷ Ky. Rev. Stat. §§13A.010(2), 13A.130.

⁹⁸ Mont. Stat. Ann. §§2-4-102(11), (13), 2-4-308(a).

⁹⁹ Okla. St. Ann. tit. 75 §§250.3(15), 302(D), (E), (F).

¹⁰⁰ W. Va. Code §§29A-1-2(c), (d), (i), 29A-3-8 (providing that interpretive rules can be adopted after notice and comment but legislative rules can only be adopted after approval by the legislature!)

¹⁰¹ Wisc. Stat. Ann. §227.01(13), 227.10(1), 227.11(2).

¹⁰² Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897 (Alas. 1981).

¹⁰³ Jerrel v. State Dep't of Nat. Res., 999 P.2d 138 (Alas. 2000) (interpretation of regulation requiring that a livestock brand show "distinctly"); Gilbert v. Dep't of Fish and Game, 803 P.2d 391 (Alas. 1990) (policy setting forth appropriate balance to be struck in fishery limitations).

¹⁰⁴ See, e.g., Flanigin v. State Dep't of Revenue, 946 P.2d 446 (Alas. 1997) (court gives deference to interpretation contained in invalid policy statement); Gilbert v. Dep't of Fish and Game, *supra* note xx (properly adopted regulation based on invalid policy statement is valid); State v. Northern Bus Co., 693 AP.2d 319 (Alaska 1984) (agency's interpretation of its own regulation is not itself a regulation).

¹⁰⁵ See Wisconsin Telephone Co. v. Dep't of Industry, 228 N.W.2d 649 (Wisc. 1975) (guidelines invalid); Milwaukee Area Jt. Plumbing Appr. Comm. v. Dep't of Industry, 493 N.W.2d 744 (Wisc. App. 1992) (manual invalid); Barry Laboratories, Inc. v. State Bd. of Pharmacy, 132 N.W.2d

other states whose statutes mandate rulemaking procedure for adoption of guidance documents.

IV Innovative approaches to the guidance document problem

Many jurisdictions have a broad guidance document exception (like the federal government and a majority of the states). Others prohibits the issuance of guidance documents without pre-adoption notice and comment, like a minority of the states. This article contends that *both* kinds of jurisdictions could benefit from adoption of a safe-harbor procedure that defines precisely how a guidance document can be adopted without pre-adoption procedure, providing for post-adoption procedure, defining the legal effect of the document, and answering questions about judicial reviewability of the document. This proposal was inspired by several innovative approaches to the problem: ACUS Recommendation 76-5, section 3-109 of the Model State Administrative Procedure Act of 1981, the vetoed California legislation,¹⁰⁶ and the statutory provisions adopted in Washington and Virginia. Before sketching the contours of the safe harbor provision, I briefly survey these innovations.

A. ACUS Recommendation 76-5

In Recommendation 76-5,¹⁰⁷ the dearly departed Administrative Conference of the United States (ACUS) proposed that agencies provide pre-adoption notice and comment before adopting guidance documents that might have a substantial impact on the public. It also recommended that agencies provide *post-adoption* notice and comment procedure for

833 (Wis. 1964) (explanatory letter valid); *Frankenthal v. Wisc. Real Estate Brokers' Bd.*, 88 N.W.2d 352 (1958) (policy invalid).

¹⁰⁶ text at notes xx

¹⁰⁷ 41 Fed. Reg. 56769 (Dec. 30, 1976). The author was the ACUS consultant on the study that led to adoption of Recommendation 76-5.

guidance documents that lacked this kind of substantial impact.¹⁰⁸ ACUS did not recommend legislative action, only that agencies should voluntarily provide these procedural protections.

This recommendation had little practical effect on agency behavior. Nevertheless, since 1975, the idea of post-adoption public comment has become well accepted. The federal APA allows agencies to dispense with all pre-adoption rulemaking procedures under the good cause exception when it would be impracticable or contrary to the public interest to provide such procedures.¹⁰⁹ Yet almost all such rules (other than those of merely transient application) are now adopted as so-called interim-final rules.¹¹⁰ An interim-final rule invites post-adoption public comment and promises that the rule will be reconsidered and readopted in light of those comments. This now well-established practice has established the utility of post-adoption comment when pre-adoption procedures are not practical or cost-effective.

B. The 1981 Model Act

Section 3-109 of the 1981 Model State APA allows the adoption of interpretive rules without prior notice and comment, but only where "the agency does not possess delegated authority to bind the courts to any extent with its definition."¹¹¹ Moreover, courts are required to "determine wholly de novo the validity" of such interpretive rules.

This provision was an attempt to improve upon the failings of the 1961 Act and was an obvious compromise between the views of those who favored the federal exemption and those who favored no

¹⁰⁸ See defenses of this proposal in Asimow, *Michigan*, note xx at 573-84; Asimow, *Duke*, note xx at 421-24.

¹⁰⁹ APA §553(b) (B).

¹¹⁰ Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 712-15 (1999). ACUS recommended that agencies use this procedure when adopting rules under the impracticability or public interest prongs of the good cause exception. ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (Aug. 18, 1995).

exemption at all. The provision had at least one good idea: an interpretive rule must "include a statement that it was adopted under this subsection" when published in the state's administrative bulletin. In a previous article, I criticized other aspects of the 1981 Act provision, but space limitations preclude further discussion of these criticisms.¹¹²

C. Washington and Virginia

The Washington statute, adopted in 1988, is, in my view, the best approach to the guidance document problem yet enacted in any American jurisdiction. The statute makes a serious effort to define legislative rules.¹¹³ It creates a safe harbor for certain guidance documents which enables agencies to adopt them with confidence that they will not be invalidated for failure to follow the APA's rulemaking procedures. This provision defines "interpretive statements"¹¹⁴ and "policy statements,"¹¹⁵ effectively creating a safe harbor for each of

¹¹¹ Model State APA §3-109, 15 U.L.A. 45 (2000)

¹¹² Asimow, Duke, note xx at 410-17. The Duke article criticized the Model Act proposal because agencies should have power to adopt interpretive rules even if they have power to adopt a legislative rule on the same subject. It also contended that §3-109 would be difficult to apply, given that it is often unclear whether agencies have legislative rulemaking power.

¹¹³ Rev. Code of Wash. Ann. §34.05.010(16) (West 1990, and 2001 Supp.). This part of the Washington reform was, in my view, not successful. The definition of "rule" is extremely detailed and has triggered litigation about whether particular documents fall within the definition. See, e.g., *State v. Straka*, 810 P.2d 888 (Wash. 1991) (state toxicologist's protocols for alcohol breath testing machines are not "rules" and thus need not be published in the Administrative Code-4-3 opinion). I believe that an inclusive definition of "rule," together with a specific exceptions for guidance documents, is less likely to generate disputes.

¹¹⁴ "'Interpretive statement' means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order." Rev. Code of Wash Ann. §34.05.010(8) (West 1990 and 2001 Supp.).

¹¹⁵ "'Policy statement' means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach." Id. §34.05.010(14).

them. These are distinguished from "rules" and declared to be "advisory only."¹¹⁶

The Virginia statute is also well considered. It defines "guidance documents" as "any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules and regulations..."¹¹⁷ In contrast, it defines rules as "any statement of general application, having the force of law, affecting the rights or conduct of any person..."¹¹⁸ Guidance documents need not be adopted with notice and comment, but they must be filed with Registrar for publication in the Virginia Register of Regulations.¹¹⁹ While I found no Virginia cases implementing these provisions, they appear well drafted and strike just the right note. Unlike the Washington statute, however, they do not require that guidance documents be explicitly labelled as such.

V. A guidance document safe harbor proposal

If the choice is a broad guidance document exception (like the provision in the federal APA and statutes or case law in a majority of the states) or no exception at all (as in a minority of the states), I definitely favor the broad exception.¹²⁰ However, I believe there are numerous profound problems with broad, vague guidance document

¹¹⁶ "An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules." Id. §34.05.230. See William Andersen, *The 1988 Washington Administrative Procedure Act--An Introduction*, 64 WASH. L. REV. 781, 799 (1989); *Western Telepage, Inc. v. City of Tacoma*, 998 P.2d 884, 891-92 (Wash. 2000) (suggesting *Skidmore*-type deference would be given to an interpretive or policy statement but not to short article in agency bulletin).

¹¹⁷ Code of Virginia §2.2-4001.

¹¹⁸ Ibid.

¹¹⁹ Id. §2.2-4008, 4103.

exceptions (as in the federal Act). Indeed, I believe the federal rule is quite dysfunctional.

The federal exception has been the source of incessant litigation since the boundaries between legislative and non-legislative rules are hopelessly fuzzy.¹²¹ As a result, well-funded private interests are encouraged to litigate the issue endlessly. Such litigation is very costly yet it concerns an issue entirely peripheral to the merits of the particular guidance document. Agencies often lose these cases, with serious impact on regulatory programs.

A different problem is that agencies take advantage of the power to issue guidance documents without any pre-adoption procedures even though the documents have enormous practical impact, especially when published on the agency's web site. In practice, these rules are binding and the agency treats them as such, yet they are adopted without any public participation.¹²² In addition, guidance documents may not be binding on the agency, which can change them with retroactive effect despite having created private reliance interests.¹²³ Whether guidance documents are subject to pre-enforcement review is an unsettled question and depends on a difficult multi-factor analysis.¹²⁴

¹²⁰ See text at notes xx.

¹²¹ Space limitations preclude more detailed treatment of the various vague, result-oriented, and conflicting tests for drawing this distinction. See, e.g., Asimow, *Duke*, note xx at 389-401; Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 812-17, 842-43 (2001); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547 (2000).

¹²² See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311, 1332-55 (1992) (giving many examples); Randolph J. May, *Ruling Without Real Rules--Or How to Influence Private Conduct Without Really Binding*, 53 Admin. L. Rev. 781 (2001) (OSHA advice letter published on web site).

¹²³ See Strauss, note xx, 53 Admin. L. Rev. at 843-49.

¹²⁴ See Strauss, *Publication Rules*, 53 Admin L. Rev at 817-22.

Finally, guidance documents are frequently given *Skidmore*-type judicial deference without having been exposed to public input.¹²⁵

Hence I propose the enactment of a safe harbor system at both the state and federal levels. At the federal level and in states that currently follow some version of the federal model, the safe harbor would not supplant the existing legislative or judicial exceptions for guidance documents. Agencies could continue to issue the vast bulk of their guidance documents with no formalities at all. The safe harbor would be intended for guidance documents that are expected to have a significant practical impact and that might be vulnerable to challenge as a disguised legislative rule. In states that now prohibit the adoption of guidance documents without advance public participation, the safe harbor would provide a vehicle by which agencies could furnish guidance to the public immediately and remain in compliance with state law rather than flout or circumvent it.

Space limitations preclude a detailed treatment or defense of this proposal, but I will sketch its outlines here. The safe harbor would allow an agency to adopt, without any prior notice and comment procedure, a guidance document that interprets language in a statute or prior regulation or that states the manner in which the staff or agency adjudicators should exercise a discretionary power.

- The document must identify itself as having been published under authority of the safe-harbor provision. It must state that it is not binding on any person outside the agency. It must also state that in the event the document becomes relevant in any agency adjudication or in any judicial proceeding, the adjudicator must not treat the guidance document as legally binding on the private party. Instead, private parties must have an opportunity to argue that the

¹²⁵ See Strauss, note xx, 53 Admin. L. Rev. at 843-49.

agency or the court should render a different interpretation, or exercise a discretionary power differently, than the position taken by the guidance document.

- The agency must publish the safe-harbor guidance document in the *Federal Register* or state equivalent and invite public comments on the document to be submitted within a period of no less than 60 days after publication. If no comments are received, the agency may publish notice of same and the guidance document will be treated as final.
- The agency must consider any comments on the safe-harbor guidance document and republish the document in final form within one year after its initial publication. It must respond to material comments that it received.
- A safe-harbor guidance document adopted in final form, pursuant to the preceding paragraphs, will be presumptively ripe for judicial review. Prior to adoption in final form, it will be presumptively unripe for review.
- No court can give *Skidmore*-type deference to a safe-harbor guidance document until it is published in final form.
- With respect to any person who relied in good faith on a safe-harbor guidance document published in final form, the agency can revoke or modify such document only with prospective effect. Otherwise, an agency is free to depart from the position taken in a guidance document but must explain its decision to do so.

VI. Conclusion

There will never be a perfect solution to the dilemmas posed by guidance documents: agencies need to promulgate them quickly and cheaply, but members of the public should have the ability to influence

guidance documents of concern to them. If guidance documents are to be given special consideration, there should be a hard-edge rule to make it possible to identify them and to determine their legal effect and reviewability. Finally, any compromise needs to be politically acceptable both to agencies and to the private sector. This article has suggested that a mixture of some of the good ideas proposed in the states and by ACUS could form the basis of a safe-harbor provision, usable at both the state and federal levels, that would bring us closer to achieving these goals.