

ABSTRACT

Robert A. Anthony

Three Settings in Which Nonlegislative Rules Should Not Bind

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Abstract by Michele Hinerman

The author addresses the binding force of agency guidance documents not promulgated through the Administrative Procedure Act's (APA) notice-and-comment procedures or other procedures established by Congress for making rules with the force of law. If these guidances can bind persons outside the agency, not legally, but in a practical sense, the documents will inappropriately have a binding effect that violates congressional intent. The author examines whether the guidance is both substantively and procedurally valid.

These questions are examined in the context of three situations. First, when the guidance interprets a statute that the agency administers. Second, when an agency official issues a guidance that interprets a regulation and not a statute. Both the first and second situations address substantive validity. The author then shifts to procedural validity with the third situation. The third situation occurs when agency personnel issue a guidance that does not interpret a statute, an existing regulation, or any other law.

The author concludes that objectionable guidances not promulgated by the legislative channels are invalidated under the APA by the courts. As a remedy, the author suggests agencies comply with the APA or other relevant legislative rulemaking procedures. To determine whether a particular guidance violates these procedures, the author suggests guidances be categorized as: interpretive rules, exempt policy statements, or non-interpretive documents.