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*A Primer on Nonlegislative Rules*

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Abstract by Janet C. Goldberg

Legislative rules, which are subject to notice and comment with limited exceptions, have binding legal effect. In contrast, nonlegislative rules, including interpretive rules and general statements of policy, are not subject to notice and comment and lack the force of law. Courts have derived different tests for determining whether interpretive rules and general policy statements are nonlegislative rules exempt from notice and comment requirements.

Interpretive rules interpret law, but this trait is not determinative of whether a particular rule is an interpretive rule. An additional assessment is required. The author proposes a “simple test” for determining if a rule is an interpretive rule: whether the rule has been through notice and comment (*i.e.*, “any substantive rule adopted without notice and comment must, by necessity, be a nonlegislative rule”). However, courts have not adopted this test. The judiciary initially devised a “substantial impact” test for assessing interpretive rules, which considered whether the rule had a substantial impact on the community. However, this test has been replaced by the “legally binding” test, which is based on the premise that a legally binding rule cannot be an interpretive rule. In assessing whether a rule is legally binding and, thus, an interpretive rule, courts consider whether (1) the agency can enforce duties or confer benefits in the absence of the rule; (2) the rule interprets a preexisting legal standard or articulates a new standard; (3) the interpretive rule is consistent with a prior rule; and (4) the agency explicitly stated, when it issued the rule, that it was an interpretive rule.

General statements of policy are most often used when an agency wants to communicate its plans to take enforcement or investigative action, and when an agency wants to indicate how it will likely rule in future adjudications relating to a certain subject matter. The test for determining whether a rule is a legislative rule, as opposed to a general statement of policy, considers whether the rule creates a legally binding norm. General statements of policy must be tentative and cannot be used to decide future cases.

Nonlegislative and legislative rules differ with regards to the availability and scope of judicial review. To obtain judicial review, an agency’s action must be final and the issue must be ripe. When an agency adopts a legislative rule after notice and comment, the agency’s action is final and, thus, reviewable prior to enforcement. In contrast, an agency’s adoption of a nonlegislative rule may not be a final action. Moreover, it is difficult to demonstrate ripeness for pre-enforcement review of policy statements because policy issues are rarely purely legal. The scope of judicial review is also different for nonlegislative, compared with legislative rules. Legislative rules are generally entitled to

“strong” *Chevron* deference, whereas nonlegislative rules are typically only entitled to “weak” *Skidmore* deference.