

William Funk

*Legislating for Nonlegislative Rules*

56 Admin. L. Rev. 1023 (2004)

Abstract by Raymond R. Janairo

Pointing to the opportunity of holistically addressing the issue through legislation, the author provides a draft of a bill and committee report that would comprehensively address the problems he perceives regarding nonlegislative rules: the courts' inability to differentiate legislative rules from interpretive rules and general statements of policy; the difficulty in determining when courts should be able to review nonlegislative rules; and the challenging assessment of how much deference courts should give agency interpretations found in nonlegislative rules. The piece attempts to give guidance to agencies, regulated entities, the public and the courts on when agencies do not have to use notice-and-comment procedures to adopt interpretive rules and statements of policy. The piece further offers guidance on when persons aggrieved by interpretive rules and policy statements can challenge them in federal courts. In drafting the bill and the associated report, the author also endeavors to help courts determine what influence these rules and statements should have in determining the meaning of statutes or agency rules.

For a number of reasons, the piece calls for agencies to expressly identify whether an agency statement is an interpretive rule or general statement of policy. The draft bill contains definitions for these two agency statements and the report explains the scope of these definitions. The bill also subjects interpretive rules and general policy to judicial review, classifies them as final agency action, and makes clear that these statements may be ripe for review. Under these proposed amendments to the APA, courts do not need to defer to an agency's interpretation of law contained in an interpretive rule or general statement of policy. The author codifies the Supreme Court's holding in *Christensen v. Harris County* that interpretive rules and general statements of policy should not qualify for *Chevron* deference. The statute goes further, however, by stating that these nonlegislative rules also do not qualify for *Seminole Rock* deference. Finally, the report states that interpretations made in agency adjudications that are not conducted pursuant to § 554 are also not entitled to "strong deference," but may qualify for *Skidmore* deference.