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INTERPRETIVE RULES ARE MISSING PIECE IN REGULATORY-REFORM DEBATE

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INTRODUCTION

Regulatory reform has garnered significant attention lately, both in Congress and on the campaign trail. Republican nominees for president each have released plans to tackle regulatory overreach, while congressional Republicans have advanced a variety of reform bills.

Much of the attention to this issue is driven by research finding an increase in the overall federal regulatory burden. In arriving at this conclusion, researchers have used different measures of regulatory activity. Some have looked to the number of pages published in the *Federal Register*.[1] Others have considered the number of major rules promulgated in recent years[2] or the total costs of regulations as a monetary sum.[3] Most scholars recognize that none of these measures are perfect, given the wide disparity in effects different sorts of rules have and the disparate reasons that agencies publish in the *Federal Register*.

However, there is a more fundamental reason these numbers do not paint the full picture. Many regulatory-reform initiatives focus on the traditional rulemaking process, which includes publication in the *Federal Register*, opportunities for public comment and codification in the Code of Federal Regulations. Rules promulgated through this process often are referred to as legislative or substantive rules. For instance, legislation introduced in recent sessions of Congress as the Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act would require reviewing current regulations captured in the CFR, while the Regulations from the Executive In Need of Scrutiny (REINS) Act would raise the procedural hurdles before agencies could implement a subset of legislative rules that are shown to have significant economic impact.[4]

While these steps certainly would erect barriers to new regulations and could help cull some old ones, much federal regulatory activity happens outside the formal procedure these reforms presuppose. This other activity has gone by many names. Agencies refer to these actions as guidance documents, "no action letters" and public notices. Clyde Wayne Crews of the Competitive Enterprise Institute has labeled this kind of activity the "dark matter" of the regulatory state.[5] Regardless of the label applied, the impact of these rules comes through their classification as "interpretive" in nature.

WHAT ARE INTERPRETIVE RULES?

The distinction between "interpretive rules" and the "legislative rules" that are the focus of most reform activity is often blurry. Technically, the distinction comes down to whether an agency is simply "issu[ing] a rule interpreting its own regulations" or is issuing a rule intended to "have the force and effect of law."[6] This framework makes clear why regulatory-reform advocates focus on the latter, rather than the former. If interpretive rules are mere guidance documents intended to help agencies comply with well-formed legislative rules, it's unlikely they would be a significant source of regulatory burden.

But this is not the case. Taken together, agency guidance documents and other interpretive rules constitute a substantial body of material that regulated entities must digest as they navigate federal requirements. Moreover, courts provide these interpretations the same deference in legal proceedings that they offer to legislative rules, despite not having been subject to the same rigorous procedures. This asymmetry was noted by the recently deceased Associate Justice Antonin Scalia in a recent concurrence that took issue with the framework and highlighted the growing importance of interpretive rules to the regulatory process:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference do have the force of law.[7]

Agency interpretations receive this legal weight without the corresponding procedural requirements that accompany agency action designed to have the "force and effect of law." This inconsistency was exacerbated by the 2015 case that produced the quote above, in which the Supreme Court struck down lower-court precedent requiring that major changes to agency interpretations go through the public notice-and-comment process. Given the procedural disparity that follows from classifying regulations as either legislative or interpretive, it is unsurprising that the question is often resolved through expensive litigation, such as the recent challenge to the Obama administration's executive action on immigration.[8]

Analysts who would seek to catalogue the full impact these interpretive rules have on the regulatory state will find themselves constrained by two challenges. First, interpretive rules often are hard to find. Agencies are required by law to publish every legislative rule in the *Federal Register* and to meet a variety of other statutory requirements.[9] The public-notice processes for interpretive rules and guidance documents are not nearly as consistent. Some documents do make it into the *Federal Register*, either in full or as a notice of publication with a link to the full document. For many of these rules, however, no information is provided in the *Register* at all. [10]

The second challenge to measuring these rules is the sheer diversity of forms they may take. While some are issued as broad guidance documents, outlining requirements of an entire program, others take the form of responses to specific questions. Still others are published as a narrow rule to elaborate on some regulation or in response to a recent legal development. In each case, the form the interpretive rule takes is driven by factors specific to the particular agency or regulated industry. As demonstrated by Crews' report, these interpretive rules go by dozens of separate names, including studies, waivers, letters, notices of approval, findings of fact, decrees, advisory opinions and so on.

THE NEED FOR BETTER INFORMATION

There are many good reasons for agencies to provide interpretations of their regulations or the statutes they administer. In fact, it is likely that many regulated businesses or program beneficiaries prefer clear instructions which lay out a path to compliance. Agency interpretations often provide information needed for successful grant applications, to avoid an enforcement action or to understand the impact of a new statute. Nonetheless, because these rules often lack standardized formats and because there is no central public source for all of these documents, it is difficult both to study their regulatory impact and to advocate appropriate reforms.

The silver lining is that it would be relatively easy to improve public data on the frequency and structure of interpretive rules, and proposals to do so should garner bipartisan support.[11] The federal government already has made great progress in standardizing a host of other agency practices and created a number of robust platforms to share information with the public. The FOIA.gov website aggregates agency practices under the Freedom of Information Act (FOIA) and streamlines data to allow reporting across time and agencies. USASpending.gov, created by Congress in 2006, provides standardized and searchable data on federal grants, loans and contracts. Even less standardized federal databases, such as those hosted at Data.gov, allow searches by broad topics that cut across agencies.[12]

Neither of the federal websites devoted to agency rulemaking offer similar functionality for interpretive rules. FederalRegister.gov provides aggregate reports of regulatory activity, but does not provide for comparative analysis. Regulations.gov greatly simplifies the process to make public comments on individual regulations, but not all agencies accept public comment through it.[13] Neither site is a repository for all agency-issued interpretive rules.

A few reforms would move the rulemaking process toward the model that has proven successful in other areas of government information. Publication to Regulations.gov should be a prerequisite for any guidance an agency wishes to employ in enforcement actions. The public should enjoy opportunities to comment on all federal documents, even if submitted subsequent to a rule taking effect.[14] Federal agencies also should be required to standardize the types of guidance they issue, possibly through coordinated leadership by the White House Office of Management and Budget or the U.S. Department of Justice.[15] These changes would not alter the authority of any particular agency or the substantive rights of impacted industries and communities. These modest changes would, however, provide individuals and firms with a single place to look when researching compliance requirements. They also would offer policymakers and other researchers ways to measure regulatory burdens and a framework to codify best practices.

These efforts might simply demonstrate that agency regulatory practices do not lend themselves to standardization, perhaps because they simply are more diverse than FOIA practices or financial expenditures. But it's also possible they would provide Congress the data it needs to push more substantive legislation, such as a bill to restore the requirement that major changes in agency interpretation be subject to notice-and-comment rulemaking. Either way, improving

Regulations.gov would simplify public participation in federal policymaking. It further would offer advocacy organizations a single source to inspect publications for legislative rules buried under the heading of "agency guidance."

WHY IT MATTERS: LESSONS FROM FEMA

An example of the interplay between regulatory requirements and the circumvention of traditional rulemaking can be found in administrative actions taken by the Federal Emergency Management Agency (FEMA) in late 2015 to streamline administration of public assistance (PA) program grants. FEMA administers the PA program to help states and local communities remove debris, rebuild infrastructure and provide emergency services following natural and manmade disasters. This program, which accounts for roughly $4 billion in federal expenditures annually,[16] is administered under authority provided by the Stafford Act.[17] For many years, FEMA has taken steps to move the PA program away from an actual cost-basis, which involves continuous re-estimation throughout the life of a grant and an expensive reconciliation process, and toward a grant process that pushes resources to communities faster.

FEMA's first framework to make this change nationwide came from an expert panel the agency convened pursuant to the Disaster Mitigation Act of 2000 (DMA2K).[18] That panel endorsed a new approach, known as a cost-estimating formula (CEF), which provides money to grant recipients as an upfront sum. This model enables more rapid disbursement of federal funds. It also concludes the fund-disbursement process more promptly than the actual cost approach. (CEF prevents a grantee from requesting more funds for cost-overruns down the line and allows grantees who are under-budget to redirect excess funds to other purposes, such as hazard-mitigation activities.) After making this recommendation, DMA2K required FEMA to promulgate regulations informed by the panel's report, with additional review and reporting requirements in subsequent years.[19] More than a decade after the expert panel submitted the recommendations, FEMA had taken no rulemaking action.

Perhaps this experience explains Congress' approach toward rulemaking when the issue was revisited in the Sandy Recovery and Improvement Act of 2013 (SRIA). In SRIA, Congress once again endorsed a movement toward cost-estimation, now under the heading of public assistance Alternative Procedures (PAAP). This time, however, Congress provided FEMA with an explicit path around the APA rulemaking process. The legislation allowed FEMA to operate the PAAP as a pilot program, stating that "the Administrator may... waive notice and comment rulemaking, if the Administrator determines the waiver is necessary to expeditiously implement this section."[20]

While FEMA did publish a notice of proposed rulemaking outlining the cost-estimation procedures in 2013, there currently is no timetable to finalize the rules through regulation.[21] Until the rules are finalized, provisions of the "pilot program" will continue to govern all recipients of federal PA grants. On Dec. 1, 2015, FEMA released the PA Program and Policy Guide (PAPPG), which combines all PA guidance into a single document and supersedes previous FEMA procedures.[22] The PAPPG includes provisions that outline the pilot program for permanent reconstruction projects, including eligibility requirements and review procedures, and provides users with a link to a separate FEMA webpage that maintains additional guidance specific to the program.[23]

This introduction to the PAPPG includes many of the features commonly associated with legislative rulemaking, including procedures for regular updates and public notice. Moreover, FEMA states that the document "provides PA policy language to guide eligibility determinations." Later in the document, FEMA once again reiterates the importance of FEMA policy guidance, putting it on par with the publications made in the *Federal Register*:

> FEMA issues policy to articulate the Agency's intent and direction in applying statutory and regulatory authority to guide decision-making, achieve desired outcomes, and ensure consistent implementation of programs across the Nation. FEMA generally publishes proposed PA policy language in the *Federal Register* for public comment prior to publishing in this document. PA policy is included in Chapter 2 of this document. This document also references other FEMA policies that apply to both the PA Program and other FEMA programs.

When combined with the explicit waiver provided by DMA2K, this guidance means the cost-estimation procedures long sought by Congress are available on a voluntary basis nationwide, and will be managed through this guidance indefinitely. While this clearly represents progress for the many emergency managers and policy advocates who support cost-estimation, it is notable that none of these stakeholders could look either to the *Federal Register* or Regulations.gov for information on the program. Further, both the PAPPG and the PAAP-specific guidance can be updated at any time without the public notice-and-comment procedures required for typical legislative rulemaking.

CONCLUSION

As Congress moves forward with regulatory-reform legislation, it should not forget interpretive rules. They are an important component of the modern administrative state. The guidance documents, "no action letters" and similar proclamations have the effect of law, but do not comport with

the Administrative Procedure Act's principles of openness and public participation. As the example of FEMA's Public Assistance grants program shows, interpretive rules are used to enact fundamental policy changes. Regardless how one feels about this phenomenon, it undoubtedly creates an oversight issue.

Congress should take steps to move interpretive rules out of the realm of regulatory dark matter. This can be done by setting government-wide standards for the formats of interpretive rules and by requiring such rules be deposited in a central, searchable online repository. Individuals and firms regulated by such guidance should be able to locate such rules, and to comment on them.

Additionally, policymakers looking to reform the regulatory process should bear in mind that the realms of legislative rulemaking and interpretive rulemaking are connected; any changes to the former could affect the latter. For example, amending the APA to make the standard regulatory process more arduous for all agencies could increase the odds that a future, frustrated Congress will create additional program-specific waivers or exceptions to speed up the pace of policy change. Such was done with FEMA's public assistance program.

Furthermore, mandating additional legislative rulemaking requirements will give agencies incentives to do more of their work outside the bounds of legislative rules, using guidance documents like the PAPPG to create obligations that are effectively binding for those who choose to participate in the program. Such developments could have the unfortunate and counterproductive effects of expanding the universe of regulatory dark matter.

ABOUT THE AUTHORS

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ENDNOTES

1. Ryan Young, "Reforming Regulation in 2016," RealClearPolicy, Jan. 7, 2016, http://www.realclearpolicy.com/blog/2016/01/07/reforming_regulation_in_2016_1512.html

2. Kevin R. Kosar, "Three Steps for Reasserting Congress in the Regulatory Policy," Policy Study No. 34, R Street Institute, March 2015. http://www.rstreet.org/wp-content/uploads/2015/03/RSTREET34.pdf.
3. W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing, and Small Business: Executive Summary," National Association of Manufacturing, Sept. 10, 2014. http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf

4. H.R. 1155, the SCRUB Act of 2016. https://www.congress.gov/bill/114th-congress/house-bill/1155; and H.R. 427, REINS Act of 2015. https://www.congress.gov/bill/114th-congress/house-bill/427

5. Clyde Wayne Crews, "Mapping Washington's Lawlessness 2016: A Preliminary Inventory of 'Regulatory Dark Matter'," Issue Analysis 2015 No. 6, Competitive Enterprise Institute, December 2015. https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf

6. *Perez v. Mortgage Banker's Ass'n*, 575 U.S. (2015).

7. *Id*. (Justice Antonin Scalia, concurring).

8. A recent post on the SCOTUSBlog website provides a concise explanation of this issue. "A third question before the Court is whether a federal law that governs how federal agencies issue regulations required the Department of Homeland Security (the section of the government that actually issued the policy) to notify the public about the proposed policy and provide an opportunity for members of the public to weigh in on it." Amy Howe, "Court will review Obama Administration's Immigration Policy: In Plain English," SCOTUSBlog, Jan. 19, 2016. http://www.scotusblog.com/2016/01/court-will-review-obama-administrations-immigration-policy-in-plain-english/

9. The Federal Register Act requires that "documents having general applicability and legal effect" be published in the Federal Register, along with proclamations, executive orders, and other documents required by Congress. 44 U.S.C. § 1505.

10. Regulations.gov is another centralized source of these documents. Agency participation in the website is currently voluntary, meaning its contents are still incomplete.

11. There is nothing inherently left or right about ensuring that the rules that are to be followed are easily accessible and produced in consistent formats to make them more cognizable to anyone who is to obey them.

12. Additionally, the federal government has moved to standardize the various marking (e.g., "for official use only") used to limit access to different types of information. Previously, agencies had idiosyncratic document systems. See the Information Security Oversight Office's policies and guidance at https://www.archives.gov/cui/registry/policy-guidance/cui-policy-guidance.html

13. The current list of non-participating agencies includes a number of large independent regulatory agencies, such as the Securities and Exchange Commission, the Federal Election Commission, the Federal Housing Finance Agency, and the Federal Communications Commission. "Non-Participating Agencies," Regulations.gov, July 2015. http://www.regulations.gov/docs/Non_Participating_Agencies.pdf

14. Many interpretive rules and guidance documents are regularly updated. For instance, the Consumer Financial Protection Bureau updated its Supervision and Examination Manual, which compiles various regulatory and statutory obligations, ten times in 2015 alone. Additional information on this publication can be found at http://www.consumerfinance.gov/guidance/supervision/manual/. Comments on previously issued rules could provide agencies with useful information for future iterations of the guidance.

15. While there are many federal agencies that have expertise in standardizing this process, OMB, or OIRA more specifically, has traditionally taken the lead in providing rulemaking guidance to the federal government, such as the requirements of Circular A-4 and EO 12866. Likewise, the Department of Justice has provided government-wide guidance related to universal obligations under the Administrative Procedures Act (APA) and the Freedom of Information Act (FOIA).

16. Jared T. Brown and Daniel J. Richardson, "FEMA's Public Assistance Grant Program: Background and Considerations for Congress," Congressional Research Service, report R43990, p. 30, April 16, 2015. https://www.fas.org/sgp/crs/homesec/R43990.pdf

17. 42 U.S.C. § 5121 et. seq.

18. 42 U.S.C. § 5172(e)(3).

19. Federal Emergency Management Agency, "Public Assistance: Expert Panel on Cost Estimating," Recommendation Report of Federal Advisory Committee 10733, October 2002. http://www.fema.gov/media-library-data/20130726-1836-25045-8450/cefrep.pdf

20. 42 U.S.C. § 5189f(f).

21. Federal Emergency Management Agency, "Public Assistance Cost Estimating Format for Large Projects," 78 *Federal Register* 61227, Oct. 3, 2013. https://www.federalregister.gov/articles/2013/10/03/2013-23258/public-assistance-cost-estimating-format-for-large-projects

22. Federal Emergency Management Agency Recovery Directorate, "Public Assistance Program and Policy Guide: FP 104-009-2," Federal Emergency Management Agency, January 2016. http://www.fema.gov/media-library-data/1450731692803-0f8b5acf29b7812b46d342b168f5be68/PA_Program_and_Policy_Guide_12-21_Update.pdf

23. Federal Emergency Management Agency, "Alternative Procedures," updated Jan. 15, 2016. https://www.fema.gov/alternative-procedures