The Interpretive Rule Exemption: A Definitional Approach to Its Application

I. Introduction

The growth of the federal regulatory establishment and the corresponding increase in federal regulatory action are matters that affect every citizen.[1] In light of the pervasive effect of these federal regulatory actions, the procedures set forth in the Administrative Procedure Act (APA)[2] to guide and to control agency activity are important to both the agencies and the public.

One of the most significant provisions of the APA requires federal agencies, before adopting a rule, to give general notice of and to offer the public an opportunity to comment on the proposed agency action.[3] The notice and comment provision applies to agency rules, which

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[1] Staff of Senate Subcomm. on Regulatory Reform, Report on the Regulatory Reform Act, S. Rep. No. 284, 97th Cong., 1st Sess. 9-50 (1981) [hereinafter cited as Senate Report]. The degree of regulatory growth is reflected by the effect of regulations on our Gross National Product (GNP). In 1965, federal regulations affected 8.2% of the GNP; by 1975, federal regulations affected 23.7% of the GNP. *Id.* at 9 (citing P. MacAvoy, The Regulated Industries and the Economy 25 (1979)). In addition, compliance costs with federal regulations are approximately $100 billion a year—about one-fifth the size of the federal budget. Staff of Joint Economic Comm., 96th Cong., 2d Sess., Government Regulation: Achieving Social and Economic Balance, Special Study on Economic Change (Comm. Print 1980).

[2] 5 U.S.C. §§ 551-559 (1976).

[3] *Id.* Section 553 provides in part:

Rule making

. . . .

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through

are defined in the APA as agency statements designed to "implement, interpret, or prescribe law or policy."[4] In requiring an agency to act like a legislative body when the agency issues such legislative rules, Congress intended to protect the interests of the public from the arbitrary exercise of power by agencies.[5]

Despite the importance of notice and comment proceedings, Congress recognized that certain agency activities were merely administrative and that the impact of such actions was minimal. For these agency actions, Congress found that the value of imposing an opportunity for public comment was outweighed by the need for efficient and effective agency administration.[6] Therefore, Congress exempted certain agency actions from the APA notice and comment requirements[7] and required the agency only to give notice of the rule in the Federal Register.[8]

Included in the exemption from notice and comment proceedings

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submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

[4]5 U.S.C. § 551(4) (1976) provides in part:

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

[5]*See* ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 102-03 (1941) [hereinafter cited as COMMITTEE REPORT].

[6]*See* STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1946, at 18 (1947) [hereinafter cited as 1945 SENATE COMM. PRINT].

[7]5 U.S.C. § 553(b)(A) (1976). This section of the APA exempted interpretive rules, general statements of policy, rules of agency organization, procedure, or practice from rule making requirements except when notice or hearing is required by statute. This Note uses the term "rule making" to represent the notice and comment proceedings set out in 5 U.S.C. § 553 (1976).

[8]*Id.* § 552(a)(1)(D).

are interpretive rules.[9] Interpretive rules generally are considered administrative actions that merely explain to the public the agency's understanding and interpretation of relevant statutory language.[10] The APA, however, never defined the term "interpretive rule." More importantly, the APA gave no indication of what distinguishes interpretive rules from legislative rules, which also may "interpret, or prescribe law or policy."[11]

Whether a rule is interpretive or legislative determines the applicability of the notice and comment proceedings.[12] Generally, the label attached by the agency indicates what procedures the agency will follow in promulgating a rule. However, many parties adversely affected by a rule labeled interpretive have challenged the agency's failure to follow notice and comment proceedings for rules that the challenging parties claim are actually legislative.[13] In arbitrating these disputes, the courts have fashioned vague, confusing, and often conflicting criteria for distinguishing interpretive from legislative rules.[14] Criticizing this judicial reluctance to formulate consistent, precise guidelines, one distinguished judge recently stated: "this court accepts with alacrity the authoritative view that it is not profitable to explore the asserted distinction between legislative rules and interpretive rules which is 'fuzzy at best.' "[15]

The dilemma in applying the interpretive rule exemption has not gone unnoticed by Congress.[16] Currently pending is a proposed

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[9]*Id.* § 553(b)(A). This Note is limited to the exemption for interpretive rules. The APA and other sources use the term "interpretative," but for stylistic reasons this Note will use the term "interpretive."

For an excellent discussion regarding the exemption for general statements of policy, see Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976) [hereinafter cited as CHICAGO Comment].

[10]COMMITTEE REPORT, *supra* note 5, at 27.

[11]*See* 5 U.S.C. § 551 (1976).

[12]*See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:8 (2d ed. 1979 & Supp. 1982) [hereinafter cited as TREATISE].

[13]*See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Morton v. Ruiz, 415 U.S. 199 (1974); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980); Energy Consumers and Producers Ass'n v. Department of Energy, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980); Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978).

[14]*See* notes 22-53 *infra* and accompanying text.

[15]National Nutritional Foods Ass'n v. Weinberger, 376 F. Supp. 142, 146 n.6 (S.D.N.Y. 1974).

[16]Congressional concern regarding this provision of the APA is reflected in recent legislation. See The Regulatory Reform Act, S. 1080, 97th Cong., 1st Sess. (1981) [hereinafter cited as Regulatory Reform Act], which was passed by the Senate on March 24, 1982 (128 CONG. REC. 52713 (1982)) and The Regulatory Procedure Act of 1982, H.R. 746, 97th Cong., 2d Sess. (1982) [hereinafter cited as Regulatory Procedure Act] which should go to the full House of Representatives for a vote before the end of the 97th Congress.

APA amendment that would limit the interpretive rule exemption to rules that do not "directly and substantially alter or create rights or obligations of persons outside the agency."[17] Although the language of the House and Senate amendments differs slightly,[18] Congress hopes the amendment will untangle the web created by the original APA.[19] The proposed language alone, however, does not give the federal agencies or the courts the guidance necessary to apply the exemption with confidence. Furthermore, the Senate and the House seem to be at odds on how the amended exemption should be applied.[20]

Drawing upon both judicial and legislative materials, this Note advocates a definitional approach for applying the exemption.[21] To properly categorize the agency action, this Note proposes a two-step analysis for determining when an agency action is interpretive and therefore exempt from rule making procedures. The first step determines whether the agency has the delegated authority to issue legislative rules. The next step determines whether the agency has acted pursuant to this legislative power; that is, whether the agency is acting in its legislative capacity or in its administrative capacity. To make this determination, the impact of the agency's action on the legal and practical interests of the affected party must be considered.

If the agency action creates a new legal right or obligation, then it affects the party's legal interests and will be deemed to have the substantial impact of a legislative rule. By contrast, altering existing rights or obligations without creating new ones may burden or benefit a party's practical interests. When an agency action is considered

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[17]Regulatory Reform Act, *supra* note 16, § 553(a)(4) (amending 5 U.S.C. § 553(b)(A) (1976)).

[18]The Regulatory Procedure Act states that the exemption does not apply to an interpretive rule that "has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency." Regulatory Procedure Act, *supra* note 16, § 553(a)(3) (amending 5 U.S.C. § 553(b)(A) (1976)).

[19]*See* SENATE REPORT, *supra* note 1, at 110-14.

[20]*Compare* S. REP. NO. 284, 97th Cong., 1st Sess. 110-14 (1981) *with* H.R. REP. NO. 435, 97th Cong., 2d Sess. 59-63 (1982).

[21]For recent discussions on the application of the interpretive rule exemption, see TREATISE, *supra* note 12, §§ 7:1-7:20 (1979); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976); Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretative Rules*, 29 AD. L. REV. 367 (1977); Note, *Administrative Law—The Legislative-Interpretative Distinction: Semantical Feinting with an Exception to Rulemaking Procedures*, 54 N.C.L. REV. 421 (1976); CHICAGO Comment, *supra* note 9; Comment, *Revenue Rulings and the Federal Administrative Procedure Act*, 1975 WIS. L. REV. 1135.

to affect a party's practical interests, it will be deemed to have the impact of a legislative rule if the action has a significant effect on the regulated parties and the source of this effect is a dramatic change from the agency's established position or policy.

This two-step definition allows an agency action to be classified as interpretive or legislative and, as a result, allows the proper application of the interpretive rule exemption. If an agency has the authority to issue legislative rules and exercises that authority, then its action is legislative and subject to the requirement for notice and comment. If the agency intends merely to exercise administrative power, its action is properly classified as interpretive and exempted from rule making only if that action does not have the substantial impact of a legislative rule.

II. The Dilemma in Applying the Interpretive Rule Exemption

A. Case Law

The difficulty in distinguishing interpretive rules and legislative rules is longstanding and has a tangled history.[22] With no definition of interpretive rules provided by the APA, authorities have disagreed on what the distinguishing characteristics of an interpretive rule are.[23] As a result, the courts have devised two inconsistent methods of analysis for determining which regulations are exempt: the legal effect test objectively classifies a rule as interpretive before applying the exemption;[24] the substantial impact test exempts rules based on whether it is subjectively fair to allow the agency to act without public opportunity for notice and comment.[25]

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[22]*See* Davis, *Administrative Rules—Interpretive, Legislative and Retroactive*, 57 Yale L.J. 919 (1948); Lee, *Legislative and Interpretive Regulations*, 29 Geo. L.J. 1, 29 (1940) [hereinafter cited as Lee *Article*].

[23]Professor Davis has always maintained that the legislative authority is the only distinguishing factor between interpretive rules and legislative rules. *See* Davis, *supra* note 22. Other commentators have generally accepted the difficulty in distinguishing these two types of rules and looked for alternative solutions to the interpretive rule exemption. *See* Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich. L. Rev. 520 (1977) (this Article admits the blurring line between interpretive and legislative rules and suggests postadoption rule making procedures when the classification of the rule is challenged); Koch, *supra* note 21 (this Article suggests the use of the "good cause exemption"). *See also* note 21 *supra*.

[24]*See, e.g.*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); Chemical Specialties Mfrs. Ass'n v. EPA, 484 F. Supp. 513 (D.D.C. 1980).

[25]*See, e.g.*, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

1. Legal Effect Standard.—The objective legal effect test is the more popular method of analysis with the courts.[26] This test attempts to define the rule as legislative or interpretive before applying the exemption. To make this determination, the court relies upon the legal effect distinction set out in the Attorney General's Manual on the Administrative Procedure Act. The Manual reveals that a legislative rule is to have a definite legal effect on the regulated party by withholding a benefit or imposing a penalty for noncompliance.[27] On the other hand, an interpretive rule is to have no effect other than alerting the public to the agency's opinion on the statutory law.[28]

The leading case on the legal effect standard, *Gibson Wine Co. v. Snyder*, was handed down in 1952 by the United States Court of Appeals for the District of Columbia.[29] Gibson Wine Company challenged the rule making exemption for an Internal Revenue Service (IRS) rule that required all wine made from the boysen variety of the blackberry to be labeled boysenberry wine. Gibson Wine Company claimed that the rule was legislative because the IRS had attempted to modify or amend the statute. The IRS treated the rule as interpretive and thus exempt, because the IRS construed the rule merely as a clarification of the statutory provision regarding the labeling of fruit wines. Prior to the promulgation of this rule, however, the IRS had no consistent policy on the labeling requirement for boysenberry wine, and Gibson Wine Company had been labeling the wine as blackberry wine with IRS approval.

In finding that the agency correctly treated the rule as interpretive, the court relied upon the definition of an interpretive rule as "one which does not have the full force and effect of a substantive rule but which is in the form of an explanation of particular terms in an Act."[30] Although the court briefly mentioned the gray area where it is difficult to distinguish interpretive rules from legislative rules that interpret statutes, the court ignored this dilemma and held the agency action to be an interpretive rule exempt from notice and comment proceedings.[31] The court claimed to

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[26]*See, e.g.*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974); Chemical Specialties Mfrs. Ass'n v. EPA, 484 F. Supp. 513 (D.D.C. 1980); *see generally* Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978); National Restaurant Ass'n v. Simon, 411 F. Supp. 993 (D.D.C. 1976).

[27]UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter cited as ATT'Y GEN'S MANUAL].

[28]*Id.*

[29]194 F.2d 329 (D.C. Cir. 1952).

[30]*Id.* at 331 (quoting Reich, *Rulemaking Under the Administrative Procedure Act*, 7 N.Y.U. SCH. L. INST. PROC. 492, 516 (Feb. 1947)).

[31]*Id.* at 332.

base this conclusion on the "distinctive characteristics of interpretive rules," but the court evidently looked to the "interpretive" label attached by the agency and to the agency's treatment of the rule as interpretive.[32]

The court's approach to resolving the application of the interpretive rule exemption makes the classification of a rule as interpretive appear simple. The dissent, however, reveals other criteria for classifying a rule not addressed by the majority.[33] For example, in considering the clarity of the governing statute, the dissent found no ambiguity in the statute regarding the labeling of fruit wines. The dissent argued that the agency therefore could not be issuing a clarification because the statute was not ambiguous.[34] Further, the dissenting judge looked beyond the mere label of the rule and considered its impact: the IRS rule required compliance, and such compliance would have an economic impact on the Gibson Wine Company.[35] Weighing these additional criteria, the dissenting judge would have found that the rule was legislative and thus invalid because notice and comment proceedings were not followed.[36]

Gibson Wine Co. illustrates that the legal effect test focuses on a single criterion in determining whether a rule is interpretive. If a rule is legally binding, it affects a party's rights and is a legislative rule; if a rule has no legally binding effect, then it is an interpretive rule. This test allows some predictability in the application of the exemption; however, in classifying the rule, the court relies only upon the agency's labeling of the rule and does not consider the rule's impact.

2. The Substantial Impact Standard.—Responding to the failure of the legal effect standard to include the impact of the rule on the regulated parties, some courts have devised a substantial impact test.[37] Courts applying this test focus on the impact of the rule and give little weight to the agency's classification. The underlying rationale for this approach is that fairness requires notice and comment proceedings when the impact of the rule is substantial.

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[32]194 F.2d at 331-34.

[33]*Id.* at 334-36 (Miller, J., dissenting).

[34]*Id.* at 334. The dissenting judge examined the 1938 statute regarding the labeling of fruit wines and found "[t]his was and is a plain, straightforward, easily understood regulation providing that wine produced from the blackberry shall be called 'blackberry wine.' There is no qualification, limitation, restriction or ambiguity in it." *Id.*

[35]*Id.* at 335-36.

[36]*Id.*

[37]*See* Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Hou Ching Chow v. Attorney Gen., 362 F. Supp. 1288 (D.D.C. 1973); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

A leading case on the substantial impact test was decided by the District Court of Delaware in 1970. In *Pharmaceutical Manufacturers Association v. Finch*,[38] the drug companies challenged a regulation issued without notice and comment proceedings by the Food and Drug Administration (FDA). The regulation limited the type of evidence that the FDA would consider in determining a drug's effectiveness. The FDA had no previous uniform policy for the type of evidence to be submitted, and, prior to the rule, the agency had accepted a broad range of such information from the drug companies.[39]

To determine whether the regulation was exempt from rule making, the court rejected the definitional labels of interpretive or legislative. Instead, the court considered whether the impact of the rule was so substantial that rule making was necessary.[40] The court looked to two criteria to determine whether the impact was substantial: whether the regulations were pervasive in scope and whether the regulations had an immediate and substantial impact.[41] In concluding that the regulations had a substantial impact, the court found that the FDA regulations "apply to more than 2000 drug products . . . and place all of them in jeopardy, subject to summary removal by order of FDA."[42]

As the FDA rule met the criteria for substantial impact, the court then considered whether the impact of the rule was caused by the requirements of the underlying statute or by the agency's action.[43] The purpose for this inquiry was to determine whether the agency was merely interpreting statutory language or whether the agency was using its legislative power to enact a legislative rule. To determine the source of the impact the court considered whether the agency action was a dramatic change and whether confusion and controversy resulted from the agency action.[44]

In applying these criteria the court found that the agency action created a dramatic change because "the administrative practice applying the statutory standard to drugs marketed before 1962 has not uniformly insisted on evidence produced in accordance with the . . . [new] regulations."[45] In addition, the court found that "considerable confusion and controversy" surrounded the regulations.[46] Thus, the

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[38]307 F. Supp. 858 (D. Del. 1970).
[39]*Id.* at 864.
[40]*Id.* at 863.
[41]*Id.* at 864.
[42]*Id.*
[43]*Id.* at 864-65.
[44]*Id.* at 865-68.
[45]*Id.* at 864.
[46]*Id.* at 865.

court was persuaded that the regulation was a legislative action by the agency, and held the agency rule to be invalid because notice and comment proceedings had not been followed.[47]

The substantial impact standard was broadened in 1972 when the United States Court of Appeals for the Second Circuit held that any change in existing rights and obligations was a substantial impact.[48] In *Lewis-Mota v. Secretary of Labor*,[49] aliens challenged the Secretary of Labor's decision to stop issuing lists of jobs available to alien workers without providing notice and comment proceedings. Prior to the Secretary's action, aliens could rely upon this job information when applying for a permanent visa. As a result of the Secretary's action, aliens seeking certification for permanent visas were required to submit specific evidence of a job offer. In addition, those aliens already certified but waiting for a permanent visa had to revalidate their certification; however, they could retain their priority position for a visa if they could show a job offer.

The district court held that the Secretary's action was interpretive because it did not prejudice the aliens' priority status for permanent visas, nor did it alter or create legal rights or obligations.[50] The appellate court rejected the lower court's holding and found the action invalid because there was no opportunity to comment on the action.[51] Although the rule only affected the existing rights and obligations of aliens and any prospective employers without creating new ones, the court found that this effect was substantial enough to create the need for notice and comment proceedings.[52]

Thus, the substantial impact test fills a void in the legal effect test by looking to the impact of the rule. However, this approach does not classify a rule as interpretive but utilizes the vague concept of fairness to determine whether rule making is required. As a result, the determinations under the substantial impact test are not as predictable as under the legal effect standard. In addition, many courts have rejected the substantial impact test because they do not find it supported by the congressional intent for exempting interpretive rules.[53]

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[47] *Id.*

[48] Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972). See also the opinion of the district court, Lewis-Mota v. Secretary of Labor, 337 F. Supp. 1289 (S.D.N.Y. 1972).

[49] 469 F.2d 478 (2d Cir. 1972).

[50] 337 F. Supp. at 1289.

[51] 469 F.2d at 482.

[52] *Id.*

[53] *See* Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082, 1093-98 (Temp. Emer. Ct. App. 1978). The court in discussing the substantial impact test found that "[t]he words 'substantial impact' do not appear in § 553 of the APA. They constitute an unwarranted judicial gloss on the statute misapplied in the context of these cases." *Id.* at 1094.

B. The Proposed Amendment to the Interpretive Rule Exemption

The dilemma surrounding the interpretive rule exemption has not gone unnoticed by Congress. Both the United States Senate and House of Representatives have proposed similar amendments to the interpretive rule exemption.[54] The congressional intent that the impact of the rule should be considered in applying the interpretive rule exemption is clear from the language of the amendments. However, the proposed language does not indicate how the impact of the rule should be measured or how the measured impact should be utilized in determining whether a rule is exempt.

Unfortunately, the House and Senate Reports do not offer clear interpretations of the proposed amendments.[55] The Reports also are at odds on the important questions presented by the amendment. The Senate Report seems to imply that the impact of a regulation on a party's rights and obligations should be considered in classifying a rule as interpretive;[56] however, the House Report states that the rule's impact determines whether the rule is exempt from notice and comment proceedings.[57]

1. The Senate Amendment.—The proposed Senate amendment would exempt an interpretive rule from notice and comment proceedings "unless it has general applicability and substantially alters or creates rights or obligations of persons outside the agency."[58] Interpreting the amendment, the Senate Report states that the "ultimate impact of the rule must be the basic criterion for application of the exemption."[59] This statement offers guidance in applying the exemption by directing consideration to the impact of the rule; however, it does not delineate how to measure that impact.

The Senate Report does describe circumstances where the degree of the impact is sufficient to require rule making, including "severe consequences" from the interpretive rule, and rights or obligations "substantially altered."[60] These descriptive terms indicate a fairly high threshold for the impact test. This would be consistent with the Senate Report's conclusion that, to require rule making,

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[54]*See* note 16 *supra.*

[55]*Compare* S. REP. NO. 284, 97th Cong., 1st Sess. 110-14 (1981) *with* H.R. REP. NO. 435, 97th Cong. 2d Sess. 59-63 (1982).

[56]*See* SENATE REPORT, *supra* note 1, at 110-14.

[57]*See* STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, REPORT ON THE REGULATORY PROCEDURE ACT, H.R. REP. NO. 435, 97th Cong., 2d Sess. 59-62 (1981) [hereinafter cited as HOUSE REPORT].

[58]Regulatory Reform Act, *supra* note 16, § 553(a)(4) (amending 5 U.S.C. § 553(b)(A) (1976)).

[59]SENATE REPORT, *supra* note 1, at 113.

[60]*Id.* at 112. The Report also discusses the impact of the future effect of the rule and the effect of a dramatic change. *Id.*

the impact of a rule must be more severe than simply affecting a party's expectations.[61]

Other authority relied upon by the Senate Report does not require a significant effect to find a substantial impact.[62] The substantial impact cases cited by the Senate Report[63] employ a low threshold for finding a substantial impact.[64] The most striking example is the 1967 decision by the District of Columbia District Court in *National Motor Freight Traffic Association v. United States*.[65] In that case the freight carriers objected to an optional, informal procedure announced by the ICC that would allow shippers and carriers to voluntarily settle an overcharge dispute. The court found that the effect on the regulated parties from this completely optional procedure was not "so insignificant in nature . . . as to fall outside the rule-making requirements."[66]

In addition to imposing confusing standards for measuring the impact, the Senate Report is ambiguous in explaining whether the impact of the rule is used to identify an interpretive rule or to indicate when fairness requires rule making.[67] By exempting an interpretive rule "unless . . . ," the plain language of the amendment could be construed as acknowledging two types of interpretive rules: those which are exempt and those which are not exempt.[68] Thus, a rule could be interpretive, but because it "substantially . . . alter[s] or create[s] rights or obligations," it would not be exempt from rule making.[69]

The text of the Senate Report, however, supports the conclusion that the amendment language was intended to be used as a definitional tool. The Senate Report states that "an agency 'interpretation' . . . which has the effect of creating or altering obligations or rights is not an 'interpretive rule' . . . within the meaning of this ex-

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[61]*Id.* at 114.

[62]*Id.* at 112-14 (discussing, among other cases, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Stubbs, Overbeck & Assoc. v. United States, 445 F.2d 1142 (5th Cir. 1971)).

[63]SENATE REPORT, *supra* note 1, at 113-14.

[64]*See* notes 38-53 *supra* and accompanying text.

[65]268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

[66]*Id.* at 95.

[67]*See* SENATE REPORT, *supra* note 1, at 110-14.

[68]*See* Regulatory Reform Act, *supra* note 16, § 553(a)(4).

[69]*See* SENATE REPORT, *supra* note 1, at 111. This interpretation of the proposed language is supported by the Senate Report's reference to Professor Davis, who has stated that "[t]he main occasion for judicial requirement of notice and comment procedure for rule making that is exempt from § 553 has to do with adoption of interpretative rules that have significant impact upon affected persons." *Id.* at 111 (quoting K. Davis).

emption."[70] This recognizes the distinction between agency rules that interpret and interpretive rules that explain or clarify. This statement indicates that the Senate intended one type of interpretive rule, the proper classification of which would determine the applicability of the exemption.

2. The House Amendment.—The amendment proposed by the House states that the notice and comment proceedings will not apply to "any interpretative rule . . . other than an interpretative rule . . . that has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency."[71]

The House Report[72] interpreting this amendment is straightforward on how the impact of an agency action should be measured and how that substantial impact should be utilized in applying the exemption. The test set out by the House Report for determining substantial impact is composed of three essential elements: the impact must be substantial, the impact must be upon substantive rights or obligations, and the impact must affect persons outside the agency.[73] This test alone is little more illuminating than the proposed statutory amendment. Thus, the House Report attempts to draw boundaries by limiting a substantial impact to an impact which "cannot be incidental or trivial but instead must be palpable and significant."[74] Because substantial is a measurement that is relevant only in relation to the degree of other impacts, by defining substantial with other relative words, the House Report's definition makes it difficult to determine what constitutes a substantial impact.

The cases relied upon by the House Report to illustrate substantial impact create more confusion than clarity. The House Report endorses the finding of substantial impact in *Pharmaceutical Manufacturers Association v. Finch*[75] where the FDA acted to limit, for the first time, the nature of the evidence required to provide substantial evidence of a drug's effectiveness. However, the House Report states that "Revenue Rulings . . . are classic examples of interpretative rules"[76] and cites *National Restaurant Association v. Simon*[77] as an illustration. In *National Restaurant*, the IRS imposed a new and costly reporting requirement compelling employers to

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[70]SENATE REPORT, *supra* note 1, at 112.

[71]Regulatory Procedure Act of 1982, HOUSE REPORT, *supra* note 57, at 90-91.

[72]*See* HOUSE REPORT, *supra* note 57, at 59-62.

[73]*Id.* at 61.

[74]*Id.*

[75]307 F. Supp. 858 (D. Del. 1970). *See also* notes 38-47 *supra* and accompanying text.

[76]HOUSE REPORT, *supra* note 57, at 62.

[77]411 F. Supp. 993 (D.D.C. 1976).

keep records of the charge tips paid to employees and to report them to the IRS. The court found that these requirements were within the IRS's authority and that the Revenue Ruling did not have a substantial impact.[78]

The IRS rule in *National Restaurant* appears to have an impact that is greater than incidental or trivial; thus, it is difficult to rationalize why the impact of the FDA's action in *Pharmaceutical Manufacturers* was substantial, but the impact of the IRS reporting requirement in *National Restaurant* was not.[79] If the Revenue Ruling cases fairly illustrate the type of impact the House considered to be insignificant, then the House intended the substantial impact to be a very strict test. However, in comparing the impact of these Revenue Ruling cases with *Pharmaceutical Manufacturers*, it is difficult to discern what effect is sufficient to make a rule's impact substantial.

Although it is difficult to determine how the House intends to measure the rule's impact, the House Report expressly states how the substantial impact should be applied. According to the House Report, "it is only after an agency action is classified as an interpretive rule . . . that new subparagraph 553(a)(3) imposes a new statutory obligation."[80] Thus, the new language would give a statutory basis for requiring certain interpretive rules to be subject to notice and comment proceedings.[81] This indicates that the House recognizes two different types of interpretive rules: those that have an insignificant impact and therefore are exempt from notice and comment proceedings, and those that have a substantial impact and must be subject to formal rule making proceedings.

In rejecting the consideration of the rule's impact in classifying the rule, the House Report states that "the fundamental differences between the legal status of legislative rules and interpretive rules . . . should not always dictate the applicability of procedural requirements."[82] This rationale ignores the policy reasons for exempting interpretive rules. Congress originally exempted rules that were properly classified as interpretive because the effect of these rules

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[78]*Id.* at 999.

[79]*See also* Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974). In this case, certain poor people challenged an IRS Revenue Ruling that changed the long-standing definition of the word charitable, so that a hospital could now qualify as a tax-exempt organization without providing free or below-cost service to those unable to pay. The court found that this action was merely an interpretation of the statutory law and did not have a substantial impact. In his dissent, Judge Wright pointed out that the effect of the agency's action was a substantial change in the availability of hospital services for the poor.

[80]HOUSE REPORT, *supra* note 57, at 61.

[81]*See id.* at 60.

[82]*Id.* at 59.

was not substantial enough to trigger the need for notice and comment proceedings.[83]

The House Report also states that Congress does not intend the proposed amendment to the interpretive rule exemption to "otherwise overrule, change or in any [way] affect the current practices of courts in determining whether a particular agency action is a legislative rule, [or] an interpretive rule . . . ."[84] Yet, at the same time, the House Report rejects the use of the substantial impact test to determine whether the rule is legislative.[85] Thus, it appears that the House Report relies upon the cases which employ the legal effect test to determine whether a rule is legislative or interpretive.

The application of the exemption as set forth in the House Report does not solve the original problem with the interpretive rule exemption; that is, determining whether the agency has promulgated an interpretive or legislative rule. The House Report accepts the definition of an interpretive rule as one that " 'advise[s] the public of the agency's construction of the statutes and rules which it administers.' "[86] This definition, however, is the original definition from the 1941 Attorney General's Manual and does not untangle the problem created by the courts in trying to define an interpretive rule.[87]

III. The Definitional Approach to the Interpretive Rule Exemption

The proposed amendment to the APA could mark a new beginning for the interpretive rule exemption. This will occur, however, only if the ambiguities and conflicts surrounding the interpretive rule exemption are resolved and the application of the exemption produces clear, consistent results. To achieve these objectives, this Note advocates a definitional approach to the application of the exemption. A definitional approach would preclude a court from imposing notice and comment proceedings based on a fairness analysis. Rule making procedures would be determined by classifying an agency action as legislative or interpretive.

The definitional approach is superior to the fairness analysis because it is more likely to produce the results that Congress intended when it created the exemption for interpretive rules. Congress exempted interpretive rules from notice and comment proceedings after weighing the public's need to know the agency's posi-

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[83]*See* notes 88-96 *infra* and accompanying text.

[84]House Report, *supra* note 57, at 61-62.

[85]*Id.* at 61.

[86]*Id.* at 60 (quoting Atty Gen's Manual, *supra* note 27, at 30 n.3).

[87]*See* notes 22-25 *supra* and accompanying text.

tion on substantive matters and the public's need for procedural safeguards against agency action.[88] Because interpretive rules have no binding effect on the regulated parties or the courts,[89] Congress concluded that notice and comment proceeduings were not a necessary precaution for interpretive rules.[90] In addition, a party affected by an interpretive rule was protected by other procedures in the APA, including "an opportunity for private persons to secure a reconsideration of such rules . . . and plenary judicial review."[91]

More importantly, Congress exempted interpretive rules because it "desired to encourage the making [public] of such rules."[92] Congress was aware that agencies issue many interpretive rules that directly and indirectly affect the public.[93] The rules, however, are inside information and, unless the agency willingly reveals its views or interpretations, such information will remain unknown.[94] If

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[88]1945 SENATE COMM. PRINT, *supra* note 6, at 18. The report stated three reasons for exempting interpretive rules from rule making procedures:

> First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

Id.

[89]*See* COMMITTEE REPORT, *supra* note 5, at 99-100. The Committee Report looks to the consequences of the rule to find it has no immediate legal effect. It states that interpretive rules "do not receive statutory force and their validity is subject to challenge in any court proceeding. . . . The statutes themselves and not the regulation remain in theory the sole criterion of what the law authorizes or compels."*Id.*

[90]*See* 1945 SENATE COMM. PRINT, *supra* note 6, at 18. It is important to realize that in reaching this conclusion Congress not only considered the inherent distinctions between the rules but also looked to the consequences that flow from these rules. See also CHICAGO Comment, *supra* note 9, at 439-55, for an interesting discussion of the relationship between the purpose of rule making and the function of the exemption.

[91]1945 SENATE COMM. PRINT, *supra* note 6, at 18. The report is making reference to other provisions in the APA which are intended to protect the public's interest. 5 U.S.C. § 553(e) (1976) provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 706 (1976) provides for de novo review for rules which have not followed formal rule making procedures.

[92]1945 SENATE COMM. PRINT, *supra* note 6, at 18.

[93]*Id.* This is still true today. In a recent article, M. Asimow found that "interpretive rules and policy statements are of great importance to the public in alerting them to the agency's position on substantive matters. They frequently have a substantial impact on the affairs of large segments of the public because they definitely affect the behavior of agencies and interested persons or groups." Asimow, *supra* note 23, at 528-29.

[94]*See* COMMITTEE REPORT, *supra* note 5, at 27. Because an interpretive rule is the

an agency were forced to go through notice and comment proceedings for all interpretive rules, Congress feared that the burden on the agency would be too great[95] and that the agency would "go underground" with all its inside information rather than comply with notice and comment proceedings.[96] Thus, because of the interpretive rule's minimal impact on a regulated party and the importance of making such rules public, Congress exempted interpretive rules from notice and comment proceedings as an incentive for the agencies to promulgate their opinions and clarifications of statutes, rules, and policies.

Some courts and commentators argue that a fairness analysis of an agency action allows the courts to apply the procedural requirements of the APA in a manner that most clearly achieves the results intended by Congress.[97] Although an approach which considers whether it is fair for the agency to proceed without notice and comment proceedings does provide flexibility to the system, this benefit may undermine the purpose for the exemption. The flexibility in this approach is based on the court's application of the vague and subjective standard of fairness. As a result, it is likely that decisions based on a fairness analysis would create inconsistent determinations and would not clearly indicate to the agencies the type of rules that are exempt from notice and comment proceedings.[98]

A definitional approach would force courts to grapple with the classification of a rule. This task would be difficult and would certainly involve an impact test that weighs the fairness of exempting an agency action which has an impact on the regulated party's interests. The courts, however, would focus on the more precise determination of when an agency action is an interpretive rule, rather than whether it is fair to exempt the agency action from notice and comment proceedings. This approach should eventually produce clearer guidelines for the agencies regarding the characteristics of an interpretive rule. Thus, the agencies would have some indication of what actions are interpretive rules and fall within the inter-

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agencys' belief or opinion regarding a statute, other law, or rule, the agency may simply send such information to its employees and agents, without making such information public. No present provision in the APA requires that such inside information be made public. *See* 5 U.S.C. § 553 (1976).

[95]*See* 1945 SENATE COMM. PRINT, *supra* note 6, at 18.

[96]The phrase "go underground" refers to the possibility that agencies could operate according to secret, undisclosed policies in order to avoid the rule making requirements. *See* Bonfield, *supra* note 21, at 113.

[97]*See* TREATISE, *supra* note 12, § 7:18.

[98]*See* notes 37-52 *supra* and accompanying text. The results in the cases following the substantial impact test indicate that a fairness analysis does not produce a consistent standard.

pretive rule exemption. The definitional approach, and not the fairness analysis, will create an atmosphere that encourages agencies to publish their policies and opinions on the statutory law.

In addition to furthering the basic policy behind the interpretive rule exemption, a definitional approach would avoid a conflict with the recent Supreme Court decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[99] In reviewing the appellate court's finding that the agency's rule making procedures were inadequate, the Supreme Court held that courts cannot impose on agency actions any procedural requirements greater than those imposed by section 553 of the APA.[100] The Supreme Court found that the legislative history of the APA "leaves little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."[101]

If notice and comment proceedings are required for an interpretive rule on the basis of fairness, the court would be substituting its judgment for the agency's discretionary decision regarding the best procedure for promulgating an agency action. Although the proposed amendment to the interpretive rule exemption may be construed as giving courts the statutory authority to impose notice and comment proceedings, this approach would contradict the rationale for the decision in *Vermont Yankee*. In *Vermont Yankee*, the Supreme Court realized that if courts were allowed to continually review the adequacy of agency proceedings, the results would be unpredictable, and, as a direct consequence, agencies would impose strict procedures in order to avoid reversal by the courts.[102] An analogous result would occur if the proposed APA amendment were interpreted as giving the courts the statutory authority to order an agency to proceed with notice and comment proceedings for an interpretive rule. The incentive for issuing interpretive rules would evaporate. Agencies would go underground with their interpretations to avoid the burden of notice and comment proceedings, a result in clear contravention of congressional intent.

A definitional approach also avoids problems resulting from having two types of interpretive rules: interpretive rules subject to notice and comment proceedings and interpretive rules that are exempt. Under the original APA, distinct consequences flow from the valid classification of the agency's action. A valid legislative rule is given the force and effect of law and is subject to limited review by the

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[99]435 U.S. 519 (1978).

[100]*Id.* at 544-46.

[101]*Id.* at 546.

[102]*Id.* at 546-47.

courts; a valid interpretive rule has no legally binding effect and is subject to full review by a court.[103] These different consequences are keyed to the requirement for rule making procedures.

If the application of the interpretive rule exemption allowed a rule to be classified as interpretive but treated as a legislative rule for rule making procedures, all the consequences flowing from a proper classification would be upset. If all interpretive rules are considered to have no legally binding effect regardless of the promulgation procedure, then the time and energy an agency employs in holding notice and comment proceedings for a nonbinding interpretive rule will be an inefficient use of time. However, if an interpretive rule is treated as a legislative rule only because it is issued after notice and comment proceedings, then an agency action that is interpretive could be legally binding and subject to a limited review by the court.

In the original APA, the consequences of agency actions were inherently related to the classification of the action as interpretive or legislative. The new language in the proposed interpretive rule exemption does not indicate that Congress intended this amendment to create such radical changes in the treatment of interpretive rules.[104]

IV. Analysis for Classifying an Interpretive Rule

Under the definitional approach, a party's claim that an exempted rule is void because proper rule making procedures were not followed is a direct challenge to the classification of the rule itself. In determining whether the interpretive rule exemption is applicable, the court must consider whether the rule is interpretive or legislative. To make this determination properly, the court must look to the inherent characteristics of the rule.

Before the APA, legislative and interpretive rules were distinguished on the basis of the delegated authority of the agency.[105] When agencies were first created, they had the authority to administer the statute.[106] However, agencies had no inherent power to make law through their rules and regulations, because law-making

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[103]*See* Committee Report, *supra* note 5, at 27; Treatise, *supra* note 12, §§ 7:8, 7:11, 7:13.

[104]*Compare* 5 U.S.C. §§ 551-559 (1976) *with* Regulatory Reform Act, *supra* note 16 *and* Regulatory Procedure Act, *supra* note 16. The proposed Regulatory Reform Act does not contain any provisions that would alter the scope of review or the legal effect of an interpretive rule under the original APA.

[105]*See* Lee, *supra* note 22.

[106]*Id.* at 1-3.

power is a function that belongs to a legislative body.[107] When Congress began delegating law-making power to agencies, a distinction arose between the regulations the agency issued under this statutorily delegated legislative power, and the regulations that were issued by the agencies under their general powers to administer the statutory law.[108] When an agency exercised its delegated legislative power to make law through rules, the rule was legislative with the force and effect of law.[109] When an agency action merely sought to construe the terms of a statute, the rule was interpretive and had no legally binding force or authority.[110]

When Congress passed the APA, these concepts regarding interpretive rules and legislative rules were incorporated into the rule making provisions.[111] According to the legislative history of the APA, notice and comment proceedings were for substantive rules that resulted from the agency's exercise of legislative powers.[112] The exemption from notice and comment was for rules issued under the agency's general administrative power which merely clarified the language of the statute.[113]

Thus, upon careful review of the historical distinctions between these rules, two distinguishing characteristics are discernable: the authority exercised by the agency when it issues the rule and the substantive impact of the rule on the regulated party.

The courts have had a difficult time utilizing these inherent characteristics to classify rules. The substantial impact test, relied upon by some courts, is inadequate for determining the proper classification of a rule. This test does set out useful criteria for determining the impact of the agency action on the regulated party.[114] However, by focusing only on impact, those courts fail to consider the other characteristic of a rule—the source of the agency's authority for its promulgation.

The legal effect test also fails to provide an adequate standard for classifying a rule as interpretive. Courts relying on this test consider only whether the agency action has any legal effect upon the

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[107]Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672 (1975).

[108]*See* TREATISE, *supra* note 12, §§ 7:8, 7:9.

[109]Lee, *supra* note 22, at 3.

[110]*Id.*

[111]The language in the Attorney General's Committee Report and the Attorney General's Manual is very similar to the language in Lee's 1940 law review article. *Compare* COMMITTEE REPORT, *supra* note 5, at 27, 99-100 *and* ATT'Y GEN'S MANUAL, *supra* note 27, at 30 n.3 *with* Lee, *supra* note 22, at 3.

[112]*See* ATT'Y GEN'S MANUAL, *supra* note 27, at 30 n.3.

[113]*Id.*

[114]*See* notes 37-52 *supra* and accompanying text.

regulated party and the courts.[115] The legal effect of an agency action, however, is distinct from the characteristic impact of the agency's action. The legal effect of a rule is the independent force that allows the agency action to be enforced as a binding rule of law by the agency or the courts.[116] This legally binding force is not an inherent characteristic of any agency action; it is a *consequence* that flows only from a rule that has been properly classified as legislative and issued according to notice and comment proceedings.[117] Thus, an agency action cannot have any legally binding effect *until* it is determined to be a valid legislative rule.[118]

Courts that apply the legal effect standard and follow the reasoning set forth in *Gibson Wine*[119] are caught in an analytical circle. If an agency labels a rule as interpretive and does not hold notice and comment proceedings, then the court applying the legal effect test would find that the rule had no legal effect; if the rule had no legal effect, then the court would concur in the agency's interpretive label. As a result, this method of analysis never steps beyond the consequence of the rule's legal effect to consider the distinguishing characteristics of an agency action.

Because the current methods of analysis are inadequate in classifying a rule as interpretive, this Note proposes a two-step process for classifying an agency action that considers the source of the agency's authority and the impact of the agency's action. In suggesting this approach, this Note recognizes that to encourage agencies to disclose their policies, the impact of the agency action must be measured with a scale that is sensitive both to the interests of the regulated parties and to the purpose of the interpretive rule exemption.

A. Source of Authority

To determine whether an agency is acting with legislative authority in issuing a rule, it must first be ascertained that the agency has been delegated legislative authority. Because of the perceived benefits from notice and comment proceedings, courts have been eager to find delegated legislative authority.[120] Therefore, most

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[115]*See* notes 26-36 *supra* and accompanying text.

[116]*See* COMMITTEE REPORT, *supra* note 5, at 27; ATT'Y GEN'S MANUAL, *supra* note 27, at 30 n.3.

[117]*See* COMMITTEE REPORT, *supra* note 5, at 27; TREATISE, *supra* note 12, §§ 7:8, 7:11, 7:13.

[118]*See* COMMITTEE REPORT, *supra* note 5, at 99-100; Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1152-54 n.26 (D.C. Cir. 1977); *see generally* TREATISE, *supra* note 12, § 7:8.

[119]*See* notes 26-36 *supra* and accompanying text.

[120]*See, e.g.*, Chamber of Commerce of the United States v. OSHA, 636 F.2d 464

courts will not require specific language granting authority to issue legislative rules[121] but will construe the relevant statutory language as granting legislative authority to the agency.[122] The Supreme Court in *Chrysler Corporation v. Brown* found that legislative authority exists if "the reviewing court [may] reasonably be able to conclude that the grant of authority contemplates the regulations issued."[123] This liberal standard allows a court to find legislative authority in most general statutory language unless legislative authority is explicitly denied.

Certain agencies do not have the power to issue legislative rules because they have not been delegated rule making power.[124] In *General Electric Co. v. Gilbert*,[125] the Supreme Court interpreted the authoritative weight of a 1972 guideline issued by the Equal Employment Opportunity Commission (EEOC) and relied upon by a group of employees claiming discrimination under General Electric's disability plan. The Court first looked to the legislative authority of the EEOC and found that Congress had never conferred legislative authority upon the EEOC to issue rules and regulations.[126] The Court concluded that the agency's action could only be interpretive; therefore, no further inquiry was necessary to classify the EEOC guideline.[127]

In reviewing agency actions, courts which focus only on the impact of the rule have failed to consider the source of the agency's authority. In 1974, the Court of Appeals for the District of Columbia

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(D.C. Cir. 1980); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *See also* SEC v. Chenery Corp., 332 U.S. 194 (1947).

[121]*See, e.g.*, Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 653 (1973) (that the agency's power to determine "new drug" status in its own administrative proceedings was implicit in the regulatory scheme though "not spelled out *in haec verba*"); CIBA Corp. v. Weinberger, 412 U.S. 640, 643 (1973) (the construction was powerfully influenced by the recognition that a different view would seriously impair FDA's ability to discharge the responsibilities placed on it by Congress); CIBA-Geigy Corp. v. Richardson, 446 F.2d 466, 468 (2d Cir. 1971) (in finding that the agency has the power to issue legislative rules, the court observed that "the particularization of a statute by rule-making is not only acceptable in lieu of protracted piecemeal litigation . . . but it is the preferred procedure").

[122]*See, e.g.*, FTC v. Dean Foods Co., 384 U.S. 597 (1966); FPC v. Texaco, Inc., 377 U.S. 33 (1964); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966).

[123]441 U.S. at 308.

[124]An example of an agency that has no express or implied legislative power is the Equal Employment Opportunity Commission (EEOC). The rules issued by the EEOC are only of an advisory nature and are not legally binding. 42 U.S.C. § 2000e-12.

[125]429 U.S. 125 (1976).

[126]*Id.* at 140-46.

[127]*Id.*

reviewed a regulation adopted without notice and comment by the parole board in *Pickus v. United States Board of Parole*.[128] In *Pickus*, a prisoner objected to the parole board regulation, claiming that the rule, which set forth certain factors for determining parole eligibility, had a substantial impact upon his parole determination. The court held that the impact of the regulation was substantial, and thus notice and comment proceedings were required.[129] The agency's action, however, could not be legislative because the parole board had no delegated authority to issue legislative rules.[130]

The *Pickus* case illustrates the importance of the initial determination regarding the source of the agency's rule making authority. The lack of legislative authority, however, is the exception to the general rule that agencies have the authority to issue both legislative and interpretive rules.[131] Thus, the source of an agency's authority for issuing a rule is an essential, but generally nondeterminative, characteristic of interpretive or legislative rules.[132]

If an agency has legislative authority, the next step in defining a rule as interpretive or legislative is to determine whether the agency intended to promulgate the rule pursuant to that legislative authority. This is accomplished by measuring the effect of the agency's action on the affected party's legal and practical interests.

B. Impact of Agency Action

1. Impact on Legal Interests.—Notice and comment proceedings are intended to protect the regulated party from the arbitrary actions of the unrepresentative agencies.[133] This protection is necessary whenever agencies issue "regulations which in form or effect are like the statutes of Congress."[134] An agency action which affects a party's legal interests is "in form or effect" like the laws promulgated by Congress.[135] Furthermore, such agency action creates the type of effect Congress considered to be characteristic of a legis-

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[128]507 F.2d 1107 (D.C. Cir. 1974).

[129]*Id.*

[130]This decision has been criticized for the court's failure to consider the rule making power of the agency. *See* TREATISE, *supra* note 12, § 7; Asimow, *supra* note 23.

[131]*See* notes 120-22 *supra* and accompanying text.

[132]*See* Davis, *supra* note 22. Davis recognized that distinguishing interpretive rules on the basis of the delegation of authority is "weak in the borderland." *Id.* at 928.

[133]*See* S. REP. No. 752, 79th Cong., 1st Sess. 12-13 (1945); H.R. REP. No. 1980, 79th Cong., 2d Sess. 21-23 (1946).

[134]*See* Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 686-87 (9th Cir. 1949) ("[t]he definitions of 'Rule' or 'Rule-making' apply whenever agencies *are exercising legislative functions and powers*, i.e., when issuing general or particular regulations which in form or effect are like the statutes of Congress").

[135]*See* COMMITTEE REPORT, *supra* note 5, at 100-03.

lative rule.[136] If an agency action affects the party's legal interests, that impact is indicative of the agency's intent to act in its legislative capacity and to issue a legislative rule. Thus, agency action that affects the legal interests of the regulated party produces a substantial impact.

To apply this measuring test for impact, it must be determined whether the agency action affects legal interests. It seems clear that whenever an agency implements a statute and creates a new duty for the regulated party, it affects the party's legal interests.[137] However, the majority of courts which apply the interpretive rule exemption, quite understandably have had a difficult time determining whether the rule creates a new duty or simply alters an existing duty.

The courts following the substantial impact test have been more concerned with the degree of impact than with the interests affected by the rule.[138] In *National Motor Freight Traffic Association*,[139] the court did not consider whether the optional, voluntary procedure to settle overcharges created a new duty for shippers and carriers. Regardless of the interests affected, the court concluded that "the Commission took a significant step" which required notice and comment proceedings.[140] The appellate court in *Lewis-Mota*[141] overruled the lower court's finding that the agency action did not affect a party's legal interests.[142] It is unclear from the appellate court's opinion, however, whether the court rejected the district court's conclusion because the agency action did create a new obligation or duty, or whether the appellate court accepted the district court's finding but required notice and comment due to the substantial impact of the rule on practical interests.[143]

The courts applying a legal effect standard have also had difficulty determining whether agency action creates a new duty that affects a party's legal interest. An erroneous conclusion that the rule has no legally binding effect precludes the court's analysis of the interests affected by the agency action.[144] In the recent decision

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[136]*See id.*

[137]*See generally* TREATISE, *supra* note 12, § 7:8.

[138]*See, e.g.*, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

[139]268 F. Supp. 90 (D.D.C. 1967) (three judge court), *aff'd mem.*, 393 U.S. 18 (1968).

[140]*Id.* at 97.

[141]469 F.2d 478 (2d Cir. 1972).

[142]*Id.* at 482.

[143]Compare the district court's opinion at 337 F. Supp. 1289 (S.D.N.Y. 1972) with that of the court of appeals at 469 F.2d 478 (2d Cir. 1972).

[144]*See* notes 115-19 *supra* and accompanying text.

of *Chemical Specialties Manufacturers Association v. EPA*,[145] the court was explicit in explaining its evasion of this issue. In reviewing a rule that required pesticide companies to provide certain information on EPA-approved pesticides, the court found that the rule did not create any new substantive obligations because it had "no independent legal effect."[146]

Although most cases following the legal effect test or a substantial impact analysis do not properly consider this criterion, in two recent cases the Court of Appeals for the District of Columbia has set out certain guidelines to distinguish when an agency action creates a new duty and when an agency action is truly an interpretation of an existing duty. In *Citizens to Save Spencer County v. EPA*,[147] the court reviewed rules issued by the EPA that sought to reconcile inconsistent provisions of the Clean Air Act and found that the rules created new rights and obligations.[148] The court found that the agency action created law because the result of the agency action "by no stretch of the imagination could have been derived by mere 'interpretation' of the instructions of Congress."[149] The next year, the court emphasized this test in *Chamber of Commerce of the United States v. OSHA*[150] when it found that an OSHA requirement for employees' walkaround pay created a new duty. The court reviewed the statutory language regarding employee compensation for time spent with OSHA inspectors and found that it neither prohibited nor compelled walkaround pay.[151] Thus, the court concluded that the agency action must be more than an effect on an existing duty.[152] When Congress has not "legislated and indicated its will" on the issue, then the agency action creates a new duty by implementing the statute.[153]

2. Impact on Practical Interests.—If an agency's interpretation of the statutory language creates no new duties and does not affect a party's legal interests, it may nonetheless affect a party's practical interests by altering a party's existing rights and obligations.[154] When measuring the impact of the agency action, many courts have

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[145]484 F. Supp. 513 (D.D.C. 1980).

[146]*Id.* at 519.

[147]600 F.2d 844 (D.C. Cir. 1979).

[148]*Id.* at 879.

[149]*Id.*

[150]636 F.2d 464 (D.C. Cir. 1980).

[151]*Id.* at 469.

[152]*Id.*

[153]*Id.*

[154]*See* COMMITTEE REPORT, *supra* note 5, at 27, 99-100; ATT'Y GEN'S MANUAL, *supra* note 27, at 30.

ignored this practical effect on the regulated party's interests;[155] if a rule did not create a new duty, the impact was not sufficient to require notice and comment proceedings.[156] The intent of Congress, however, was to require notice and comment when rules which interpreted statutes had a substantial impact.[157] This is evident from the original APA definition which includes an agency action that "interprets" as a rule subject to notice and comment proceedings.[158] This intent is also evident in the proposed amendments to the APA which require notice and comment proceedings for rules that have a substantial impact on a party's practical interests.[159]

To determine whether an agency interpretation has a substantial impact on a party's practical interests, the agency action must have a significant, demonstrable effect on the regulated party as a result of a dramatic change in the agency's practices or policies. It is the dramatic change in the agency's established policy that indicates that the agency intends to act in its legislative capacity. Moreover, the significant effect of a dramatic change in the agency's established policy is the type of agency action that Congress intended to be subject to notice and comment proceedings.

The cause of the practical impact must be precisely the agency's departure from established policy. When the change is not caused by the agency action, the impact of the agency action itself is not substantial enough for the rule to be considered legislative and subject to notice and comment proceedings.[160] An example of this situation would be where Congress issues a new statute and an agency issues a contemporaneous interpretation of the new statute that had some significant conjoint effect. If such an interpretation creates any significant impact, the proximate cause of the impact is not the agency but Congress itself. Therefore, the agency's action is not a result of a dramatic change in its position and there is no indication that the agency is acting beyond its general powers to interpret statutory language.

A dramatic change in the agency's policy has traditionally been

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[155]*See, e.g.*, Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970).

[156]*See* British Caledonian Airways, Ltd. v. CAB, 584 F.2d 982, 989 (D.C. Cir. 1978) (for a rule to have the requisite substantial impact, it must have created new rights and obligations); American President Lines, Ltd. v. Federal Maritime Comm'n, 316 F.2d 419, 422 (D.C. Cir. 1963) (regardless of the practical effect of the rule, if it is only an interpretation, it does not have a substantial impact).

[157]*See* notes 88-96 *supra* and accompanying text.

[158]5 U.S.C. § 551(4) (1976).

[159]*See* Regulatory Reform Act, *supra* note 16, § 553(b)(1)(C); Regulatory Procedure Act, *supra* note 16, § 553(a)(3).

[160]*See* TREATISE, *supra* note 12, § 7:14.

considered a factor that will trigger the protective function for rule making.[161] In *Chamber of Commerce*, the court stated that "[c]harting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation."[162] The need for notice and comment proceedings when a dramatic change occurs was emphasized in the Senate Report accompanying the proposed amendments to the APA. The Report found that "rule making . . . is appropriate when an agency changes its past practice."[163]

To determine whether a dramatic change has occurred, the prior position of the agency must be examined. A dramatic change does not occur if the interpretation makes clear the agency's position on a statute or agency policy that was, within narrow limits, ambiguous, inconsistent, or in need of clarification. A Revenue Ruling illustrates the type of agency policy that is generally ambiguous and in need of clarification. Revenue Rulings are considered to be "merely the opinion of a lawyer in the agency" on specific questions regarding the tax laws.[164] Parties affected by a Revenue Ruling are not to rely upon the Ruling but to accept it only as the agency's interpretation which is subject to change.[165] Therefore, if an agency re-interprets its position on a policy, the change is generally not considered to be dramatic, despite its degree of departure. Under certain circumstances, however, a Revenue Ruling may become so firmly established over a period of time that it is no longer considered ambiguous or unreliable.[166] In that instance, if the IRS were to change its position, the result could be a dramatic change.[167]

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[161]*See* Lee, *supra* note 22, at 1-4; Davis, *supra* note 22.

[162]636 F.2d at 470.

[163]SENATE REPORT, *supra* note 1, at 112.

[164]Stubbs, Overbeck & Assoc. v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971).

[165]*See* Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941); Krane, Levin & Javaras, *Public Hearings for Private Rulings: A Dissent*, 50 TAXES 160 (1972); Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756 (1965); Comment, *Revenue Rulings and the Federal Administrative Procedure Act*, 1975 WIS. L. REV. 1135 (1976). Generally, the agency will issue a Revenue Ruling when it finds there are many requests for a letter ruling on similar areas of the tax law and therefore the agency's action interprets the statute. Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756 (1965).

[166]*See* Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1291 (D. C. Cir. 1974) (Wright, J., dissenting). *See also* note 79 *supra*.

[167]*See* SENATE REPORT, *supra* note 1, at 113. "It is conceivable that a rule, of a type usually considered interpretive, may in certain circumstances have the kind of substantial impact on rights or obligations which remove it from the ambit of this modified exemption for interpretive rules." *Id.*

When the agency's well-established position is changed, the interests of those who have complied with the old policy as well as those who must comply with the new policy must be considered in determining whether a dramatic change has occurred. In *Burroughs Wellcome Co. v. Schweiker*,[168] a recent Fourth Circuit case, the court of appeals reviewed a challenge to an FDA regulation that allowed a new drug applicant to demonstrate the drug's safety and effectiveness with scientific literature compiled by manufacturers of previously approved and marketed drugs. In determining that the change was not dramatic, the court considered the impact of the agency action on only future applicants.[169] The court failed to consider the effect of this change on the competitive position of past applicants who had published scientific material on approved drugs because of their reliance on the past method that required each applicant to do its own scientific research.[170]

In addition to creating a dramatic change in a party's practical interests, an agency interpretation must have a demonstrable effect on the regulated parties to create a substantial impact. How to measure the effect of an agency's action on a party's practical interests is difficult to determine because, as the Senate Report notes, "[a]ctual impact obviously varies from case to case."[171] However, certain boundaries premised on the purpose of the exemption have been established by case law.

The impact of a rule that necessitates notice and comment proceedings must not be so great that adversely affected parties are left with no protection from agency action. The Court of Appeals for the District of Columbia noted in *Chamber of Commerce of the United States v. OSHA*, that the rule making requirements of the APA should not be treated as meaningless ritual because rule making procedures "as a practical matter, may constitute an affected party's only defense mechanism."[172] On the other hand, the impact of an interpretive rule should not be restricted to the effect of "an internal agency housekeeping arrangement."[173]

The balance achieved by an optimal test must not only serve the public's needs but also be sensitive to the agency's situation. In *Batterton v. Marshall*,[174] a recent District of Columbia Circuit case, the Department of Labor claimed that if the impact of any routine agen-

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[168]649 F.2d 221 (4th Cir. 1981).

[169]*Id.* at 224-25.

[170]*Id.*

[171]SENATE REPORT, *supra* note 1, at 113.

[172]636 F.2d 464, 470 (D.C. Cir. 1980).

[173]Energy Consumers v. Department of Energy, 632 F.2d 129, 139 (Temp. Emer. Ct. App. 1980).

[174]648 F.2d 694 (D.C. Cir. 1980).

cy correction or refinement of agency technique were sufficient to require notice and comment proceedings, the burden on the agencies would be overwhelming.[175] Thus, to achieve a proper balance between these conflicting needs, the scale must be able to determine when the impact of a rule on a party's practical interests is substantial enough to require notice and comment proceedings; yet, the test should not destroy the incentive to disclose agency opinions by requiring notice and comment for every agency action.

Although the degree of impact that amounts to a significant effect will always vary, some of the factors that should be considered in measuring the impact of an agency's interpretation can be isolated. One factor is the agency's treatment of the rule. While the label the agency gives a rule is not dispositive in classifying a rule, it does indicate what type of rule the agency intended to issue.[176] Other agency actions may give more concrete indications of the effect the agency intended the rule to have on the regulated parties. For example, if the agency enforces the rule by withholding a benefit or imposing a penalty on the regulated party, that would indicate that the agency intended to issue a rule with the consequences of a legislative rule.[177]

Another factor to be considered is the competitive pressure to comply with the agency ruling. As agency regulations pervade the marketplace and the cost of litigation continues to climb, many affected parties may not be able to afford to resist compliance. In addition to the pressure to comply, the cost of compliance should be considered. This cost may not always be monetary because of the variety of agencies and the diverse areas of regulation. In *Joseph v. United States Civil Service Commission*,[178] the Court of Appeals for the District of Columbia considered the cost to federal employees of nonparticipation in partisan elections caused by a Civil Service rule that excluded those federal employees from an exemption to the Hatch Act.[179] The cost of the agency action may not be explicit, but whatever cost is imposed on affected parties should be considered in determining whether the agency action has a substantial impact.

There are certain factors that many courts have weighed in an erroneous assessment of the impact created by an agency's interpretation.[180] The most prominent error is to look to the legal effect

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[175]*Id.* at 710 n.91 (citing Brief for Appellee at 28).

[176]*See Chamber of Commerce*, 636 F.2d at 468.

[177]*See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 312-16 (1979); Morton v. Ruiz, 415 U.S. 199 (1974).

[178]554 F.2d 1140 (D.C. Cir. 1977).

[179]*Id.* at 1152-53.

[180]*See, e.g., Chemical Specialties Mfrs. Ass'n*, 484 F. Supp. 513 (considering the

of a rule as an indication of the impact of the agency action.[181] The legal effect of a rule is a consequence of a rule that only follows after the classification has been made.[182] Therefore, if a court weighs the legal effect when determining the impact of the agency action, the court is only considering the consequence of a valid legislative rule and not reaching the primary question of the characteristic of the rule.

Another error in analysis, resulting from the confusion of characteristics with consequences, occurs when the court considers the weight given the rule in adjudicatory proceedings. A legislative rule is traditionally accorded the same deference as a statute,[183] while an interpretive rule is given certain weight as authority but is not considered binding on the court.[184] With the difficulty in distinguishing an interpretive rule from a legislative rule, some courts have given the same deference to interpretive rules as to legislative rules.[185] As a result, certain courts see this trend as giving interpretive rules a certain "legal effect" and creating a need for notice and comment proceedings.[186] This conclusion, like the legal effect test, is erroneous because the weight a court should give a rule can be measured only after a court determines whether the rule is interpretive or legislative.

V. Conclusion

The proposed amendments to the interpretive rule exemption offer an opportunity to reevaluate this exemption and to clear the confusion that has existed since the creation of the interpretive rule exemption. This Note advocates a definitional approach to the application of the exemption. To achieve a definitional application, this Note proposes a series of analytical steps based on the two fun-

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correctness of the agency's interpretation rather than the impact of the rule); *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (looking to the legal effect as the impact of the rule).

[181] *See* notes 115-19 *supra* and accompanying text.

[182] *See id.*

[183] *See* Committee Report, *supra* note 5, at 99-100.

[184] *Id.* The weight to be given an interpretive rule was set out in the leading case of Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Court in *Skidmore* held that the weight to be given to the agency's interpretive rule will depend upon the thoroughness of the agency's consideration of the issues, the validity of the agency's reasoning, the consistency of the results with prior and subsequent pronouncements, and other factors which make the agency's opinion persuasive, even if not controlling. *Id.*

[185] *See* Asimow, *supra* note 23, at 561-64.

[186] *See, e.g.*, American Bancorporation v. Federal Reserve System, 509 F.2d 29 (8th Cir. 1974); Shell Oil Co. v. FPC, 491 F.2d 82 (5th Cir. 1974); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952).

damental distinctions between an interpretive rule and a legislative rule: the source of the agency's authority in issuing the rule, and the impact of the rule on the party's interests. Following the proposed analysis will result in the classification of an agency action as an interpretive rule or as a legislative rule. Once this classification is made, the interpretive rule exemption is then applied to those rules which are defined as interpretive. The definitional approach outlined in this Note would create a stable atmosphere for the application of the interpretive rule exemption and achieve the purposes for the creation of the interpretive rule exemption.

Because the ambiguity in a statute is often disproportionately related to the confusion it may cause, it is also advisable that the proposed amendment to the interpretive rule exemption be further clarified by including a definition for interpretive rule under section 551 of the APA. An interpretive rule could be defined as "an agency interpretation, promulgated under the agency's general powers, which does not create legal rights or substantially alter the existing rights or obligations of persons outside the agency." This language could more clearly convey the congressional intent to require notice and comment proceedings for agency action that has a substantial impact, yet to exempt agency action that is actually interpretive. Furthermore, it would provide a clear guideline to the agencies and courts in determining when the exemption from notice and comment proceedings is available for interpretations issued by the agencies.

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