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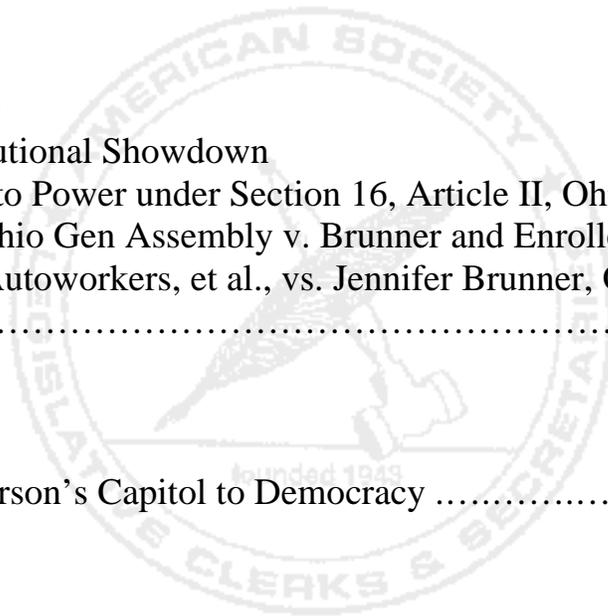
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STYLE AND FORMAT

Specialized jargon should be avoided. Readers will skip an article they do not understand.

Follow a generally accepted style manual such as the University of Chicago Press *Manual of Style*. Articles should be word processed in Word 2000 or WordPerfect 8.0, and double-spaced with one-inch margins.

Number all references as endnotes in the order in which they are cited within the text. Accuracy and adequacy of the references are the responsibility of the author.

Authors are encouraged to submit a photograph with their article, along with any charts or graphics which may assist readers in better understanding the article's content.

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Ohio's Constitutional Showdown

Governor's Veto Power under Section 16, Article II, Ohio Constitution State ex Rel. Ohio Gen Assembly v. Brunner and Enrolled Bill Case Study United Autoworkers, et al., vs. Jennifer Brunner, Ohio Secretary of State

Laura Clemens

In December 2006, the Ohio General Assembly voted in full session to pass H.B. 694, a campaign finance law that was hotly debated among the two political parties because of campaign limitations placed on union activities. Shortly after House passage, the Senate voted on the measure and it was sent to the governor for signature. Similarly, S.B. 117 was passed by both houses of the General Assembly and was sent to the governor for final action. For those in the business of preparing legislation, this is a routine procedure-- one that is done countless times during a session-- and should be routine. However, the road these bills took is as far from routine as possible and resulted in litigation that embroiled not only the House and Senate, but a retiring governor, a newly seated governor, and a newly seated secretary of state.

Several questions were raised regarding S.B. 117 and H.B. 694. Does a newly elected governor have the ability to undo the actions of a previous governor? Does the clerk, a constitutional officer, have the ability to make corrections of a clerical or staff error to an enrolled bill once it has been signed by the presiding officers and the governor, and sent to the secretary of state? What does "deliver forthwith" mean when the legislature has

adjourned sine die? Is Ohio considered an "enrolled bill" state or a "journal" state when deciding cases of legislative intent?

Lame duck session

In Ohio, the session held after the November general election and before adjournment sine die, is known as a lame duck session. In 2006, the electorate chose a governor, secretary of state, attorney general, and treasurer from a different political party (Democrat) than the existing officeholders (Republicans), an election sweep that was a direct result of a "throw the bums out" campaign and the trend for change we saw nationally as well. The House and the Senate maintained Republican majorities, but by a much slimmer margin in the House.

The lame duck session became one in which major policy initiatives were passed quickly. The two I will discuss, S.B. 117 and H.B. 694, were two of those bills.

S.B. 117 was a product liability bill which placed caps on damages. It had been languishing in committee for months before being placed on the fast track for passage. It did not have the endorsement of the executive branch.

Final legislative action occurred on December 14, 2006. The bill was enrolled and signed by the presiding officers.

H.B. 694 dealt with limitations on political campaign contributions and, again, was a controversial measure. Final legislative action occurred on December 20, 2006. The bill was enrolled, signed by the presiding officers, and was presented to the governor on December 27, 2006.

The House adjourned sine die on December 21, 2006. The Senate adjourned sine die on December 26, 2006.

Here is where it gets interesting. On January 5, 2007, S.B. 117 was filed with the Secretary of State's office without the governor's signature. H.B. 694 was filed with the secretary of state on January 3, 2007, with the governor's signature but with a key amendment left out of the enrolled bill.

S.B. 117 and the Rights of a Successor Governor

Section 16, Article II of the Ohio Constitution states:

If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in a like manner as if he had signed it, unless the General Assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such

adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

Since S.B. 117 was filed with the secretary of state's office within that ten-day period, it was presumed to have become law and the effective day was set.

On Monday, January 8, 2007, the first day of the terms of office for the governor and the secretary of state, the governor requested the secretary of state to "return" S.B. 117. The governor argued that he was requesting the return because "the 10-day presentment period for that bill had not yet concluded." The secretary of state complied with the request and returned the bill to the governor. The governor immediately vetoed the bill.

This action raised several constitutional questions. Did the new governor have the right to request the return of a bill that had already been filed with the secretary of state's office? Does the ten-day period continue in effect even though a bill has been filed; and if so, does any governor have the ability to "change his mind" at any time during this period? Or, does the filing with the secretary of state's office end the authority of the governor over the bill?

The Ohio General Assembly sued the secretary of state to compel her to treat

S.B. 117 as a duly enacted law and to fulfill her duties with respect to that law.

The Ohio Supreme Court ruled in favor of the Ohio General Assembly, stating in part:

[T]he filing of a bill with the secretary of state is the governor's performance of a constitutional obligation and the last act that the Constitution authorizes a governor to take in the process by which a bill becomes law without his signature.

Upon completing review of the legislation and filing it without signature in the office of the secretary of state, the governor's constitutional obligations are fulfilled, and, as this court stated 170 years ago... [i]t is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is functus officio, and has lost power over the subject.

It is my view that the act of filing with the secretary of state terminated the function of the office of the governor with respect to this legislation.

Pursuant to the Constitution, the office of the secretary of state has no role in the legislative process other than to serve as a depository for the filing of bills and laws.

Nothing in the Constitution, the Revised Code, or the precedent of this court suggests that a secretary of state has the authority or discretion to make any determination with respect to legislation or the actions of either the governor or the General Assembly in the legislative process.

Calculation of the Time Limit and the Definition of "Forthwith"

In both cases, the issue of the ten-day presentment period was called into question since the legislature adjourned sine die prior to the bills being delivered to the governor and the legislature was condemned for not fulfilling its obligation to deliver the bills forthwith.

S.B. 117 was presented to the governor on December 27, 2006, 13 days after the General Assembly passed the bill. The staff of the Senate clerk's office conferred with the governor's office and agreed upon that date. On the last day of his term in office, January 5, 2007, the bill was filed with the secretary of state's office without his signature. In this case, the court determined that under Section 16, Article II of the Ohio Constitution, the ten-day period for the governor to act started on the date that the General

Assembly adjourned sine die, Dec. 26th, not on the date of presentment, Dec. 27th. Therefore, the last date on which the governor could take action was January 6, 2007, not January 8, 2007, as asserted by the newly elected governor. S.B. 117 had already become law by the time the secretary of state returned the bill to the governor.

The court distinguished the ten-day time period into two distinct classes: the first pertains to when the General Assembly is in session, and the second to when the General Assembly has adjourned sine die. If the General Assembly has adjourned sine die, the governor is unable to return the bill to the General Assembly and the bill becomes law unless it is filed with the secretary of state's office with the governor's objections in writing.

The court did caution the legislature that it does "not have constitutional free rein to withhold a bill that it has enacted from timely presentment to the governor...." This court has noted that the ordinary meaning of "forthwith" is "immediately" or "promptly" or "without delay."

"Accordingly, counting the Constitution's ten-day period from the General Assembly's adjournment sine die rather than from the date the General Assembly presented the bill to the Governor does not sanction deliberate delay in presentment of legislation for the purpose of impeding a governor's ability to review bills."

Similarly, the plaintiffs for H.B. 694 claim that the bill did not become law because it was not presented to the governor before the General Assembly adjourned sine die. The common pleas court did not address this issue in its decision.

H.B. 694 and the Right to Correct an Enrolled Bill

The decision of the Supreme Court with respect to S.B. 117 spilled over into the decision delivered as it relates to the ability of the clerk to make corrections of a clerical or staff error to an enrolled bill once it has been signed by the presiding officers and the governor and sent to the secretary of state.

As mentioned, H.B. 694 was passed during the last week of the lame duck session, enrolled, signed by the presiding officers and the governor, and filed with the secretary of state. A couple of weeks later, the clerk's office was notified that a crucial amendment was not included in the enrolled bill, although both the Senate and House Journals show that the amendment received more than the required number of votes and that both chambers agreed to the bill as amended. Sub. H.B. 694 was enrolled, not Am. Sub. H.B. 694.

Timeline for H.B. 694

Nov. 29, 2006 – Introduced in the House of Representatives and referred to committee
Dec. 7, 2006 – Committee reports the bill to the full House and a substitute bill
Dec. 12, 2006 – House passes Sub. H.B. 694
Dec. 19, 2006 – Senate Rules Committee reports the bill to full Senate

Dec. 19, 2006 – Senate passes Sub. H.B. 694

Dec. 19, 2006 – Senate reconsiders the bill, adopts an amendment, and passes Am. Sub. H.B. 694

Dec. 20, 2006 – House concurs in Senate amendments to Am. Sub. H.B. 694

Once notified of the error, the clerk of the House called the secretary of state's office and informed them of the situation and was granted permission to substitute the correct language. The basis for doing so is found in Ohio Revised Code section 101.53, "*[b]ills shall be printed in the exact language in which they were passed, under the supervision of the clerk of the house in which they were originated*" and Ohio Constitution Article II, Section 15, paragraph (A) "*[t]he General Assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each house.*" In order to fulfill the statutory and constitutional obligations as clerk to file the bill as passed by both houses of the legislature, a substitution was not only necessary but appropriate. They agreed. Such substitutions have occurred at least 14 times in the last 30 years.

A lawsuit was quickly filed with the Court of Common Pleas. The plaintiffs challenged that the bill as passed by the General Assembly was never signed by the presiding officers and was never presented to the governor – in fact a completely different bill was presented. Additionally, they contend that since the bill was delivered to the governor after the legislature adjourned sine die, the legislature did not meet its obligation to deliver the bill "forthwith" to the governor.

The Plaintiffs argue that they have identified three procedural deficiencies related to the way the mistake was corrected (substituting the correct language for the incorrect language) that render the bill void.

First, the Plaintiffs contend that the president of the Senate and the speaker of the House signed the wrong bill.

Secondly, the Plaintiffs contend that the governor was not presented with, and did not sign, the bill as passed by both chambers of the legislature.

Finally, the Plaintiffs argue that H.B. 694 was invalid based on the fact that it was filed with the secretary of state's office before the mistake was discovered and corrected.

Stated in general terms, these counts allege that the procedures set forth in the Ohio Constitution to enact laws were not followed and that as a result H.B. 694 is void, i.e., that it is not a law at all.

The attorney general, in arguing for the state, contended that what is of primary importance, and what nobody disputes, is that H.B. 694 received the required constitutional three readings and a majority of both houses of the General Assembly passed the bill. Further, the attorney general argues that "the court should reject the invitation to rule that a clerk's error is sufficient to veto constitutionally enacted legislation and that long-held presumptions in favor of the validity of the acts of these public officers should be disregarded."

In *Ritzman v. Campbell* (1915), 93 Ohio St. 246. it was decided:

A duly enrolled bill, [although it complies with the procedure mandated by the constitution] may be impeached on the ground that it has not received a constitutional majority of the members elect of both branches of the general assembly, and upon this question the legislative journals must provide the appropriate as well as the conclusive evidence.

The Journals of both the Senate and the House recorded that a sufficient number of votes was received for the amendments and the bill and that the General Assembly specifically intended to enact these amendments. The attorney general continued in his argument that “barring some other constitutional procedural infirmity, having been duly passed by the General Assembly in the exercise of its constitutional law-making power, Am. Sub. H.B. 694 must be declared to be constitutionally enrolled and entitled to be given legal effect.”

How did it happen?

How could such a mistake, which has wide-spread consequences, happen? Very easily. It was a simple print error, choosing the wrong drop-down box on a computer program, and the lax proofing that occurred during a very busy lame duck session.

Most legislatures have a legislative application that makes what used to be a very lengthy engrossing process a rather simple computer program. In Ohio, our program is designed as such that when a bill has been engrossed, it is stored in a repository. The enrolling clerk then goes into the repository, chooses the final engrossed version, and then chooses the print function.

In this case, the Senate engrossing clerk placed into the repository the “As Passed by the Senate” version of the Sub. H.B. 694. However, as indicated in the timeline above, the Senate then reconsidered the bill and added the disputed amendment. The Senate engrossing clerk then placed into the repository the “As Reconsidered by the Senate” version of Am. Sub. H.B. 694.

The House enrolling clerk, in the haste of the end of session logjam, simply chose the wrong version. She chose the “As Passed by the Senate” version, the one without the amendment. This is the version that was presented to the presiding officers and the governor for signature, and the one that ultimately got filed with the secretary of state’s office.

Proofing is what clerks do. It is one of the most important functions of the office since every document produced is the official record of the chamber. It is something that principal clerks drill into staff and one taken very seriously. However, with the advance of technology, the need to proof becomes less of a necessity, although no less a priority. In this case, the bill was proofed; but again, the wrong *version* was proofed.

The court decision on H.B. 694, the “enrolled bill” case

The Court of Common Pleas ruled in favor of the Plaintiffs. In its decision, the Court stated that since only one chamber approved Sub. H.B. 694, the version that was attested to, signed by the governor, and filed with the secretary of state, Sub. H.B. 694 cannot be law.

Since both houses of the General Assembly approved Am. Sub. S.B. 694, but it was not enrolled and attested to by the presiding officers, it too does not become law.

The court relied heavily on the *Ritzman v. Campbell* (1915), 93 Ohio St. 246 case in rendering its decision. (Interestingly, this is the case the attorney general was using to defend the actions of the clerk.) The court stated:

As was the case in Ritzman, the only evidence before the court is that this case is the result of a clerical error that was brought to the Secretary of State’s attention as soon as it was discovered. The fact that it occurred at the close of a biennial legislative session further parallels Ritzman, where it was noted then and is even more true today: “It is really a tribute to the efficiency of the clerical forces of the General Assembly that so much of certainty and correctness is had.”

...One could even argue that to declare H.B. 694 unconstitutional on procedural grounds would elevate form over substance because there is no real dispute that the language now on file with the Secretary of State accurately reflects the language that the General Assembly approved. The Ritzman court considered and rejected a similar argument nearly a century ago, and Ohio jurisprudence on this subject has not changed in the interim.

While arguing that the two journals accurately reflect the intent of the legislature, the court clearly defines the enrolled bill as the final authority of a bill’s validity. In this case, a clerk’s error overrode the legislature’s constitutional right to pass laws.

The effects of the court decisions on S.B. 117 and H.B. 694

Both cases argue that the bills were not delivered “forthwith” during a lame duck session, since both houses of the General Assembly adjourned sine die prior to the delivery of the acts to the governor for his signature. The practice of how bills are delivered to the governor has been changed. In the past, the clerks were respectful of the governor’s schedule and would work with his office to determine a convenient time for the delivery of the bills. Now, the bills are delivered immediately upon the signatures of the presiding officers,

thus starting the ten-day clock for the governor to sign the bill. Responding to the warning of the Supreme Court that the legislature does not have “free rein” to hold legislation unduly, the legislative leaders have pledged to work on language that would more clearly define “forthwith.”

The secretary of state, when learning of the decision regarding S.B. 117, publicly stated that she would no longer “return” any bills once filed in her office, either in whole or in part, regardless of the reasons. Since the court ruled she did not have the authority to return the unsigned bill to the governor, then she would no longer allow the clerk to make corrections to any bills once filed.

The process in this office has slowed dramatically. An additional staff person has been hired whose sole responsibility

is to do a final proof on all documents that leave the office. Without their sign-off, nothing is authorized to move forward. This includes resolutions, committee schedules and reports, as well as engrossed and enrolled bills. This slows down the process considerably, but this office has witnessed first hand the effects human error can have on legislation.

Although the courts have ruled, the ripple effects are still being felt. Since H.B. 694 has been ruled invalid, it questions the validity of other legislation that referenced those sections of the revised code. Unfortunately, that court case is still being debated.

Making an error in an enrolled bill is a clerk’s worst nightmare, and for good reason.

Restoring Jefferson's Temple to Democracy

Jim Wootton

When Governor Thomas Jefferson and the General Assembly removed Virginia's seat of government from Williamsburg to Richmond in 1780, Jefferson took on the task of designing a new statehouse. Dissatisfied with the traditional English colonial public buildings in Williamsburg, Jefferson sought a building design that would have a timeless quality. He looked to ancient Greece and Rome for models and finally settled on the Maison Carée, a first-century Roman temple in Nîmes, France, for his inspiration. Jefferson's design for the Virginia Capitol re-introduced the Classical temple style to the modern world, and the Capitol has remained a model for civic architecture for over 200 years.

As the Capitol was being built, Jefferson's original designs were modified to create more work space. Maintaining adequate space in the Capitol for the operations of government has been a concern almost since the General Assembly first began meeting there in 1788. In the 1890s, a new state office building was constructed for the state library and archives, the state supreme court of appeals, and additional state offices. Between 1904 and 1906 new chambers for the House of Delegates and Senate were built, and further space modifications were made in the early 1960s.

As the 21st century opened, available work space in the Capitol was again proving inadequate. Next to the Maryland statehouse in Annapolis, Virginia had the second smallest working capitol in the nation. Many of the Capitol's aging systems required replacement, and Jefferson's original building and its now century-old wings warranted repair and restoration.

The Capitol closed at the end of the 2004 legislative session. When it re-opened on May 1, 2007, visitors saw the results of the most extensive restoration in the building's history, as well as the addition of over 25,000 square feet of new space for educational exhibits, meeting rooms, and such visitor services as a café and gift shop.

The restoration returned the Capitol's interior, exterior, and surrounding landscape to the appearance they had *ca.* 1910. On the interior, original chimney flues were used to carry ductwork, wiring, and other utilities, minimizing intrusion into the original building fabric. New climate control systems were installed both for visitor comfort and for protection of the many works of art housed in the Capitol. Motion-activated light fixtures and compact fluorescent bulbs increase the building's energy efficiency.

Three major surprises emerged during the restoration. As a 1960s elevator was dismantled, the shaft walls were removed, and a decorative metal cage from an 1880s steam elevator was discovered virtually intact. The cage was repaired and incorporated into the restoration as part of the building's history.

The second surprise came to light as artisans carefully removed layers of paint from the walls of the chambers in the Senate and House of Delegates. Patterns began to emerge on the walls, and a painted damask pattern fragment was discovered behind a wall-mounted plaque. Archival research showed that in 1908, shortly after the completion of the 1906 Senate and House wings, the General Assembly authorized Lizzie Swanson, wife of Governor Claude Swanson, to adorn the Capitol's interior with painted wall and ceiling treatments. Mrs. Swanson hired local commercial painter R.L. Peters, who created an elaborate scheme for the Capitol.

By the 1930s, most of this decorative work had been painted over, and much of the original work, including tromp-l'oeil damask panels, could not be restored without loss of original fabric. Instead, the original panels were encapsulated, and reproductions of the decorative panels were installed over them. If future technology enables a more thorough restoration of the original panels, the original panels remain in place, intact, and unharmed.

The greatest surprise during the restoration began with the discovery of the 22-page blueprints from the work done in 1904-06 when the Capitol's wings were added. Although much of the interior was dismantled, architect John Kevan Peebles indicated on his drawings that original woodwork was to be re-installed. Examination of the woodwork confirmed Peebles's notations and revealed that whole areas of woodwork on load-bearing walls had never been disturbed. Grant funding allowed full documentation and conservation of the Capitol's original woodwork.

On the exterior, the Capitol's 20th-century stucco had created an impervious seal that was forcing moisture to saturate the building's exterior walls and migrate to the interior. The stucco was completely removed from the building in stages, and a traditional "breathable" stucco was installed in its place. The Capitol's bright white exterior reflects its appearance after the completion of the 1906 additions, as do the reconfigured walkways and landscape surrounding the building. Developed in 2004, the Capitol Square Landscape Master Plan, documented the historic landscape features still extant on Capitol Square, the twelve-acre park that forms the setting for the Virginia Capitol.

The Capitol Extension is hidden under the South Lawn, with its entrance at the edge of Capitol Square on Bank Street at Tenth. The entrance pavilion is modeled after a Greek Revival springhouse at Bremono, a nineteenth-century plantation in Fluvanna County, Virginia. The springhouse was designed by 19th-century American architect, Alexander Jackson Davis, who based his design on an ancient Greek temple portal on the Acropolis. Sited at the base of Capitol Square, the pavilion draws the eye to Jefferson's Capitol at the crest of the hill. The pavilion's Greek Revival details create a subtle

contrast to the Capitol's Roman Classicism, and its warm limestone tones distinguish it from the Capitol's cool white stucco.

In addition to creating two new meeting rooms for legislators, the Extension enabled the removal of food service from the original Capitol and created enhanced amenities for visitors. Perhaps the greatest contribution of the Extension is that it offers all visitors the magnificent view of Jefferson's temple on a hill, which reinforces Jefferson's stated desire that the Capitol's architecture "ennoble" his fellow citizens for generations to come.

The True Force of Guidance Documents in Virginia's Administrative Agencies

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I. Introduction

The United States Constitution vests lawmaking power in the Congress of the United States.¹ Congress has further delegated that authority to the administrative agencies by creating a rulemaking process outlined in the Administrative Procedures Act (APA), and that power brings with it the power to bind not only the agency itself, but also the public.² However, the rulemaking process that is proscribed by the legislature can be time consuming and inefficient.³ As a result, administrative agencies have been permitted to create non-legislative rules. These non-legislative rules can take many forms, but this comment will focus on the non-legislative rules known as guidance documents. Non-legislative rules are not required to be promulgated by the notice and comment procedures outlined by the APA because they are only interpretative rules or statements of policy and therefore do not have a binding effect on the public. However, administrative agencies, worn down by the tedious process of rulemaking procedures, have begun to treat guidance documents with the same binding effect that Congress has only given to legislative rules. This paper will look to the Psychiatric Services Provider Manual which was published by the Virginia Department of Medical Assistance Services in order to evaluate

the guidance document problem in Virginia.

While there have been some signs of ways to curtail the guidance document issue, the real solution should focus on the very purpose of the rulemaking process in order to reach a solution. The rulemaking process affords the public notice and comment because only the legislature is permitted to make law and that legislature is elected by the public. The power to make law can only be stretched as far as Congress has permitted under the APA. If the rulemaking power, delegated by the legislature, has been abused by an administrative agency, then the courts must step in and curtail that abuse.

II. Background

A. Notice and Comment Rulemaking

The Federal Administrative Procedure Act creates two forms of rulemaking. Under the Federal APA there is formal rulemaking and informal rulemaking. Formal rulemaking involves a trial type hearing where parties present arguments before the administrative agency, offering evidence and witnesses. However, formal rulemaking is only required where it is triggered by another statute requiring "a hearing on the record."⁴ The procedures that govern formal rulemaking

proceedings are detailed in APA §§ 556 and 557.

The Virginia Administrative Process Act only recognizes informal rulemaking.⁵ Informal rulemaking attaches a notice and comment period to the rulemaking process in order to ensure public participation in the administrative agency's action. This notice and comment period was created because the legislature has delegated its authority to create law to an agency, and therefore must ensure that the agency is constrained in some manner similar to the constraints put on the legislature by the Constitution.⁶ In some situations, the legislature has also imposed additional procedural requirements in addition to notice and comment on a particular agency. This is known as hybrid rulemaking.⁷ These requirements are imposed in order to ensure that an administrative agency is restrained by the same public scrutiny and political accountability that is put on the legislature.⁸

Notice and comment are the minimum requirements for the rulemaking process under Virginia law. The Va. Code requires that the state agency publish the intended regulatory action in the Virginia Register, including a basis for the rule, statement of purpose, substance and issues, along with an economic impact analysis prepared by the Department of Planning and Budget (DPB); the agency's response to the impact analysis prepared by the DPB; a summary of the rule; notice giving the public an opportunity to comment on the proposal, and the text of the proposed legislation.⁹ Once the public has been given notice of the proposed rule, the agency must afford the public the

opportunity to comment on the proposed rule "through submission of written data, views, or arguments with or without opportunity for oral presentation."¹⁰ In response to these comments by the public, the agency shall incorporate in the adopted rule a concise general statement of their basis and purpose.¹¹ Virginia requires its administrative agencies to receive public comment for a minimum of 60 days after the publishing of notice in the Virginia Register.¹² The governor is required to review the "proposed regulation and determine if it is necessary to protect the public health, safety and welfare and if it is clear and understandably written."¹³ The governor is not required to comment on the proposed regulation; however, if he chooses to do so "his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60 day public comment period."¹⁴

The notice and comment requirement is an important piece of the rulemaking equation. Rulemaking affords parties adequate due process protections against agency action.¹⁵ Administrative agencies in Virginia derive their power to make rules directly from the General Assembly which outlined the scope of that power in the Va. Code. When administrative agencies create rules that have a binding effect, they must do so while following the appropriate notice and comment requirements.¹⁶ Without these protections, the statement by the administrative agency will not have the same force of law that is given to legislative rules promulgated under the notice and comment requirements.

B. *Legislative v. Non-legislative Rules*

Earlier the distinctions between formal and informal rulemaking were briefly discussed to illustrate that the informal rulemaking process is centered on a notice and comment requirement. Within the informal rulemaking process there is further distinction. Informal rulemaking is made up of legislative and non-legislative rules. “Legislative rules are adopted pursuant to a delegation of power from the legislature and are themselves law; by their own force, they affect legal rights and obligations of those subject to them.”¹⁷ The Supreme Court has held for some time that legislative rules created by an administrative agency are to be given the force of law as if they had come from Congress itself.¹⁸ Congress has also acknowledged the need for legislative rules to have a binding effect because it is “impracticable to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly it has found it necessary to delegate power... .”¹⁹ Legislative rules not only have a binding effect on the public, but also on the agency that created them.²⁰ However, the binding effect of legislative rules is limited to the boundaries that Congress or the General Assembly gave to the administrative agency.²¹ The power of the administrative agency to bind the public through legislative rules is limited by the Va. Code because these rules are capable of imposing obligations on the public and the legislature needs to be able to curtail that power.²²

Non-legislative rules do not have the same force of law as legislative rules

because they are not based on an authority delegated to the administrative agency by Congress.²³ Since non-legislative rules are not given the same binding effect as legislative rules, they are exempt from the notice and comment requirements of the rulemaking process.²⁴

Non-legislative rules can be divided into two categories: interpretive statements and statements of policy. “Interpretive rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties. In contrast, a substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights or duties.”²⁵ An interpretive rule is “an agency statement that was not issued legislatively and that interprets language of a statute (or of an existing legislative rule) that has some tangible meaning,” whereas “a policy statement is an agency statement of substantive law or policy, of general or particular applicability and future effect, that was not issued legislatively and is not an interpretative rule.”²⁶ Non-legislative rules, whether interpretive or statements of policy, come in several different forms; for purposes of this paper the non-legislative rules known as guidance documents will be evaluated.

Va. Code § 2.2-4001 defines guidance documents as “any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations, excluding agency minutes or documents that pertain only to the internal management of agencies.” Professor

Asimow gives a brief overview of guidance documents.

Virtually every administrative agency produces guidance documents expressing its view about the meaning of language in statutes or regulations. Nearly as often, agencies issue guidance documents explaining how the staff or agency adjudicators should exercise discretionary or enforcement powers. Guidance documents are disseminated to the agency's own staff, often in the form of manuals, and they are usually made available to members of the public in the form of bulletins, guidelines, rulings, and the like. Guidance documents of general applicability are enormously important to members of the public who seek to plan their affairs to stay out of trouble and minimize transaction costs. Such documents also facilitate good administration by improving private compliance with the law and by helping to assure uniform and consistent staff action.²⁷

The Va. Code does not require guidance documents to go through the notice and comment procedures. Instead, they must be published in the Virginia Register of Regulations but are not required to be labeled as guidance documents when the actual manuals are published.²⁸ However, not all guidance documents are only used as suggestions and guidelines for an administrative agency's staff. "Many policy statements--and manuals, guidance memoranda and the like fall within the category of policy statements--manifestly are 'designed to control'."²⁹ This is where the problem with guidance

documents arises. Here it is appropriate to look at a specific example of a guidance document published by a state agency in order to analyze the larger guidance document problem.

III. Psychiatric Services Provider Manual

The Psychiatric Services Provider Manual (PSPM) is published by the Department of Medical Assistance Services (DMAS). The manual states that the Medicaid program was created in 1965 as part of "Title XIX of the Social Security Act, which provides for federal grants to the states for their individual Medical Assistance programs."³⁰ It goes on to specifically state that "the purpose of Title XIX is to enable the states to provide medical assistance to eligible indigent persons and to help these individuals if their income and resources are insufficient to meet the costs of necessary medical services."³¹ Within the state of Virginia the Medicaid program is run by the Department of Medical Assistance Services.

Virginia's Medical Assistance Program was authorized by the General Assembly in 1966 and is administered by the Virginia Department of Medical Assistance Services (DMAS). The Code of Federal Regulations allows states flexibility in designing their own medical assistance programs within established guidelines. Virginia Medicaid's goal is to provide health and medical care for the Commonwealth's poor and needy citizens using the health care delivery system already in place within the state.³²

Although the name of Medicaid has changed within the state to FAMIS and FAMIS Plus, its role within DMAS and its ability to assist low-income families within the Commonwealth of Virginia has not changed. DMAS claims that the department does not alter the state's plan for administering healthcare benefits to Virginia residents on its own.³³ The true plan of the Medicaid program is maintained by several groups in union with DMAS.

The State Plan for Medical Assistance for administering the Medicaid Program was developed under the guidance of the Advisory Committee on Medicare and Medicaid appointed by the Governor of the Commonwealth of Virginia. The State Plan is maintained through continued guidance from the Board of Medical Assistance Services, which approves amendments to the *State Plan for Medical Assistance* with policy support from the Governor's Advisory Committee on Medicare and Medicaid.³⁴

In pertinent part, the scope of the program "is designed to assist eligible recipients in securing medical care within the guidelines of specified State and federal regulations.

Medicaid provides access to medically necessary services or procedures for eligible recipients."³⁵

As stated previously, all guidance documents are not required to undergo rulemaking notice and comment requirements in Virginia, but they all must be listed annually in the State Register.³⁶ While at no point in the PSPM does the manual refer to itself as a

guidance document, the Information Office at the Department of Medical Assistance Services has specifically stated that "DMAS treats all of its provider manuals, including the Psychiatric Service Manual, as guidance documents. As such it is included in DMAS' annual list of guidance documents that will be published by the Virginia Register."³⁷ The Psychiatric Services Provider Manual is listed within the Virginia Register as an ongoing manual with continuous revisions which was first published on April 28, 2000.³⁸

IV. Binding Effect

A. The Binding Effect of Legislative Rules

The Va. Code defines a rule or regulation as "any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws."³⁹

Virginia case law enforces the notion that rules promulgated through the rulemaking process will be given the binding effect of law, and only rules that are substantive must be promulgated according to the VAPA. The Virginia Court of Appeals determined that a hearing loss chart utilized by the Norfolk Redevelopment and Housing Authority when determining a former employee's disability benefits was not a rule under Va. Code because it was not binding, having the force of law, affecting the rights or conduct of any person.⁴⁰ The court stated that because the hearing chart was not binding, it did not need to be adopted pursuant to the Industrial Commission's rulemaking authority, and

therefore was not a rule.⁴¹ The court also stated that “the chart is merely a guideline which the commission may use in determining the percentage of compensable hearing loss according to ANSI standard.”⁴² The court held that the hearing loss chart was not binding because it had not been promulgated through the proper rulemaking procedures afforded to it under Va. Code § 65.1-18.⁴³ Instead it was to be merely treated as a guideline; and if the chart had been used as a standard with the force and effect of a substantive rule, then it would have been required to go through the proper notice and comment requirement of section 2 of the Va. Code.⁴⁴ The Industrial Commission that awarded Richard Bader his workmen’s compensation benefits successfully argued that they were permitted to use the ANSI guideline when evaluating his claim because it was not a substantive rule subject to Section 2 of the Va. Code.⁴⁵ However, the court stated that since the commission chose not to utilize its delegated legislative power to promulgate rules, the guideline would be given less deference and weight on review because only those rules promulgated through the rulemaking process would be given the binding effect of law.⁴⁶ Ultimately, the court agreed with the commission and said the “commission’s utilization of the chart as a guideline is therefore subject to less deference and weight on review than a ‘legislative rule’,” but still permitted the chart’s use in evaluating claims as long as it was not given the same deference as a legislative rule.⁴⁷

While reaching its decision in Bader, the Virginia Court of Appeals recognized that there was limited case law in its own jurisdiction for this topic

and reviewed cases of West Virginia and the 4th Circuit. The West Virginia court found that a schedule established by the Workers’ Compensation Commissioner, which fixed maximum amounts payable to health care providers and determined the type and amount of medical services which are required, was a rule under the Administrative Procedures Act of West Virginia, W. Va. Code 29A-1-1, *et seq.*, and was subject to rulemaking procedures.⁴⁸ The court found that the schedule had the force of law and was determinative of an issue affecting private rights because it had economic significance to chiropractors, to the Workers’ Compensation Fund, and to all employers, and other insurers under the workers’ compensation law and would regulate the type and amount of treatment individuals could receive from chiropractors under the plan.⁴⁹ Thus it was a rule because it was a rule of “general application and future effect...affecting private rights, privileges or interest, which is one of the definitions of a rule found in W.Va. Code, 29A-1-2(i) (1982).”⁵⁰ As a result, the court affirmed the decision of the lower court and invalidated the schedule because it was created without affording the public an opportunity for participation in the rulemaking process.⁵¹

In Federal Farm Credit Banks Funding Corporation v. Farm Credit Administration, 731 F. Supp. 217 (E.D. VA 1990), the Federal Credit Administration (FCA) created a bulletin which claimed to interpret generally accepted accounting principles (GAAP).⁵² “GAAP is a compilation of standards developed by the accounting profession,” and the FCA recognizes GAAP through its own regulations.⁵³

However, the FCA's creation of this bulletin was intended to have a binding effect, requiring institutions to abandon previous accounting practices and follow new ones outlined in the bulletin.⁵⁴ The court held that these rules were substantive and thus were not exempt from the notice and comment procedures of rulemaking because the FCA indicated that its rule would have the effect of a regulation and could be enforced by the FCA through regulatory enforcement.⁵⁵ As a result, the court ordered the reversal of the FCA's actions against the Federal Farm Credit Banks Funding Corporation.⁵⁶

B. The Binding Effect of Non-Legislative Rules

The purpose of this paper is to explore what should happen when "interpretative rules and general statements of policy (collectively, 'non-legislative rules') have the look and feel of rules promulgated through notice-and-comment procedures" and the agency treats them with the binding effect of a legislative rule.⁵⁷ Professor Anthony addressed the problem that is found in the creation of non-legislative rules.

In such cases, affected persons and the public generally will not have been accorded a regularized notice of the agencies' actions or an assured opportunity to participate in their development. Citizens or lawyers in Pocatello, or even in Washington, sometimes do not have ready access to the guidances or manuals that agencies are using to bind them. And when they do, they can be confused about the legal import of documents like these, and frustrated at their inability to escape the practical

obligations or standards the documents impose. Often, in order to win a needed approval, they must accept the conditions demanded by the nonlegislative rule, and thereby as a practical matter surrender the opportunity to obtain court review of the offending conditions. The agencies, for their part, might not have issued these pronouncements so freely if legislative rulemaking procedures had had to be followed.⁵⁸

However, as Professor Anthony has discussed, non-legislative rules have sometimes been treated with the same binding effect as legislative rules.⁵⁹ "A document will have practical binding effect before it is actually applied if the affected parties are reasonably led to believe that failure to conform will bring adverse consequences, such as enforcement action or denial of an application."⁶⁰

Guidance documents are not permitted to be treated with the force of law by an administrative agency if they have not been promulgated according to notice and comment. The courts of Virginia have dealt with several cases where the binding effect of guidance documents has been an issue. In Jackson v. W., 419 S.E.2d 385, a parent appealed a decision by the Department of Social Services that a complaint of child abuse was "founded."⁶¹ The parent had been accused of mental abuse of his child and upon receiving a report of abuse, the department evaluated the claim based on guidelines created by the commissioner of the department.⁶² These guidelines set forth a detailed description of how an agency employee was to evaluate a claim and ultimately reach a conclusion

on a report of abuse as either being “founded” or “unfounded.”⁶³ Upon a determination that the claim is “founded” the Department of Social Services notifies the accused abuser that their name and the names of their children will be registered with the central registry of the state and will remain there for 10 years past their childrens’ 18th birthday.⁶⁴ The accused is afforded a right to appeal to the local director within 30 days.⁶⁵ The Court of Appeals of Virginia held that the rulemaking authority delegated by the legislature went to the state board and not to the commissioner who created the guidelines.⁶⁶ However, the court said that the guidelines were not regulations as outlined in the statute and they had been created pursuant to the commissioner’s authority to administer the statute.⁶⁷ DSS’s Protective Services Manual provides that “the guidelines are intended to be used as tools for the worker in investigating situations of abuse or neglect.”⁶⁸ Following its own decision in Bader, the court stated that “a rule or regulation is...any statement of general application, having the force of law, *affecting the rights or conduct* of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws.”⁶⁹ The court determined that the guidelines only help a case worker identify abusive conduct, and that they do not affect any right of W; therefore, they do not have the force of law. Since the guidelines do not have the force of law, they are not regulations; and the commissioner was permitted to create them without a statutory delegation of authority from the General Assembly.⁷⁰ The court additionally restated that “a state agency, in addition to its statutorily granted powers... has incidental powers which

are reasonably implied as a necessary incident to its expressly granted powers for accomplishing [its] purposes.”⁷¹

The Federal Circuit Court in Virginia has also handled cases and made determinations on the binding effect of guidance documents. In United States v. Mitchell, 39 F.3d 465, the defendant was convicted of importing merchandise that violated 18 U.S.C.A. § 545 (West 1976). Mitchell argued that his felony conviction under § 545 was improperly based on administrative regulations for which Congress had provided misdemeanor penalties.⁷² The court stated that in order for a regulation to have the force and effect of a binding law, it must either be substantive or legislative; must have been promulgated through a congressional grant of quasi-legislative authority; and the regulation must have been promulgated through procedural requirements such as notice and comment provisions of the APA.⁷³ The court looked to Morton v. Ruiz, 415 U.S. 199, 232 (1974) to determine that a substantive rule is one that “affects individual rights and obligations.”⁷⁴ The court held that the regulations Mitchell was charged with violating affected individual rights and obligations and were therefore substantive.⁷⁵ The court also held that the regulations were properly promulgated by quasi-legislative authority through the Endangered Species Act of 1973. The Act delegated the authority to promulgate rules and regulations to the Fish and Wildlife Service, which had created the regulation Mitchell violated.⁷⁶ The court said that the regulations were promulgated in accordance with all applicable procedural requirements.⁷⁷ Because the regulations were substantive, created by

an agency which had been given quasi-legislative authority, and were promulgated according to procedural requirements, they had the force and effect of binding law.⁷⁸

It is important to recognize why administrative agencies should not be able to treat guidance documents with the same binding effect that legislative rules are given. First, administrative agencies only have the power to make rules as delegated by the legislative body that created the agency and the statute that the agency has been charged to enforce. This gives the agency quasi-legislative authority to create rules. The Virginia Constitution will only permit the General Assembly to use as much power as has been delegated to it. Therefore, the legislature may not delegate more authority than it possesses. Second, administrative agencies have the capability of infringing upon the rights of the public. While these rights may not rise to the level of a liberty or property interest in some situations, they are still rights that should be protected, especially when they are being infringed upon by an agency that may be led by an unelected or unappointed person. An agency “may not tell people what they can and cannot do except through procedures that Congress by delegation has empowered them to use for making law. It may not enforce or apply a non-legislative policy document in just the same way it may enforce or apply a legislative rule.”⁷⁹

It is not unrealistic to believe that an administrative agency would create a guidance document and give it the same binding effect on the public that is only reserved for a legislative rule. In Morton v. Ruiz, 415 U.S. 199 (1974), the Bureau

of Indian Affairs denied benefits to the plaintiffs because they were not eligible under the statute because they were not actually living on the reservation. The Supreme Court invalidated that policy statement because “the Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures... .”⁸⁰ In Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986), healthcare providers were denied reimbursement for portions of Medicare treatment given to patients because of provisions in the carrier’s manual that made determinations by Health and Human Services (HHS) binding on the providers. Hospitals that sought reimbursement for transportation costs by ambulance or helicopter for Medicare plan B patients appealed the decision by the court which denied them reimbursement because they did not follow proper procedures as outlined in the carrier’s manual. Although the manual was exempt from the notice and comment requirements under 5 U.S.C. § 553(a)(2) because HHS had waived the exemption in 1971, the court invalidated it.⁸¹ The court found that the manual was treated as a substantive policy, and not an interpretive guideline as HHS argued because the manual withdrew coverage previously provided for and therefore “effected a change in existing law or policy.”⁸² While interpretive rules were not subject to the notice and comment requirements of the APA, substantive rules were; and substantive rules were defined as “those which effect a change in existing law or policy or remove previously existing rights.”⁸³

B. *Binding Intent or Effect of the PSPM*

Professor Anthony puts forth a simple test for determining whether an administrative agency has created a guidance document that should have been promulgated through the rulemaking process. “If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA’s legislative rulemaking procedures.”⁸⁴ This test lays out a simple method for analyzing a guidance document and should be applied here because it addresses all possible reasons why a guidance document would not be able to bind the public.

The PSPM provides a list of covered services for which health care providers will be reimbursed and lists those services for which they will not receive reimbursement.⁸⁵ If the health care providers do not follow the lists of approved or non-approved procedures and treatments that Virginia Medicaid will pay for, “Virginia Medicaid will not reimburse providers for these non-covered services.”⁸⁶ This will lead to several results. Either a health care provider will treat a patient using a procedure that is not on the list of covered procedures provided for under the PSPM and will be forced to cover the cost of the procedure themselves, or they will refuse treatment to a patient because the patient is unable to cover the expense.

It appears that there is a very apparent effect on the public,

specifically on the health care providers and the Medicaid recipients that are denied treatment. While the purpose of notice and comment is to allow public participation, the term “public” does not necessarily mean the general public at large. Here the two most interested parties in the policy created by this manual-- health care providers and Medicaid recipients-- were potentially adversely affected and did not have any say in the creation of the policy because they were not provided adequate notice. Someone may argue that the notice requirement was in essence fulfilled because under the Va. Code all guidance documents must be published; however, the very definition of a guidance document requires that it not be binding on the public. That binding effect is what calls for the need to have notice and comment. Here the notice occurred after the guidance document had been published in the Virginia Register; and under the Code of Virginia there is no requirement for the administrative agency to hear comment by the public. Va. Code § 2.2-4008 only requires that guidance documents be published annually in the Virginia Register, be available for inspection by the public, and that copies be provided as requested.⁸⁷

The binding effect of the PSPM is apparent from the language of the manual. The manual lists which forms of Medicaid programs will be reimbursed, how health care providers must file for reimbursement, and how health care providers must ensure that patients are Medicaid recipients.⁸⁸ The binding effect that the PSPM creates is analogous to the same binding effect that other courts have found to invalidate in other non-legislative documents created

by administrative agencies. In American Trucking Ass'n v. ICC, 659 F.2d 452, 463 (5th Cir. 1981), the court found that “an agency contention that its guidelines ‘are not intended to prejudge any individual application’ was rejected with the observation that ‘there are sinews of command beneath the velvet words of the subsequent sections of the guidelines’.”⁸⁹ “Statements in which language, context, and application suggest an intent to bind agency discretion and private party conduct... will have that effect if valid; interpretive rules or policy statements will not, regardless of their validity. A binding policy is an oxymoron.”⁹⁰ Even if the PSPM is not found to have been created with the intent to bind, it may still have a binding effect.

As discussed earlier, there are several examples where the courts were forced to invalidate a policy statement by an administrative agency because it was treated with the binding force of law. It is quite possible to believe that the Department of Medical Assistance Services may treat this document with that same binding effect. If a health care provider sought reimbursement for services, which they are rightfully entitled to under the Virginia Medical Assistance Program, and they did not follow all procedures listed in the manual, the provider would be denied finances that they were rightfully entitled to. The PSPM is treated by DMAS as a binding rule because healthcare providers are not permitted to receive reimbursement any other way. Specifically, if a claim is denied even for simple clerical errors, it must be resubmitted by the provider following proper PSPM procedures.⁹¹ Further, if the claim is not amended according to

the PSPM within one year, it will no longer be honored.⁹² This deprives the healthcare providers of money they are owed for services rendered under the promise by the state that when a Medicaid recipient is treated in one of their facilities, it will be reimbursed for those services. Their only avenue for reimbursement is through the procedures listed in the PSPM.

V. Recommendation

Courts have invalidated guidance documents in the past for having a binding effect on the public without going through the proper notice and comment requirements; however, invalidating the PSPM would not be a proper solution for the problem presented. If the PSPM was invalidated by a court, no providers participating in the Medicaid program would be entitled to reimbursement. Courts have previously invalidated guidance documents that were treated with binding effect because the guidance document imposed some detriment to the plaintiff; however, here the guidance document provides a benefit to the potential plaintiff. It is just the process by which that benefit can be denied that should be invalidated, and a new avenue for reimbursement should be provided.

In order to ensure that the public is given adequate notice and comment protections against agency rulemaking that can have a binding effect, administrative agencies must be forced to follow rulemaking procedures when dealing with rules that have a binding effect. Specifically, notice and comment must be required for any statement by an administrative agency that is not interpretive or a statement of policy, and

which has a binding effect on the public. By requiring notice and comment for binding rules, an administrative agency will have to take into account the affected parties' opinions and suggestions in order to ensure that the purpose of the manual is fulfilled. By having healthcare providers participate in the process, they may be able to help DMAS create a more appropriate list of covered and non-covered services, and could potentially set up a reimbursement process that is more efficient and accommodating for all parties involved.

Additionally, administrative agencies in Virginia should be required to publish all portions of their guidance documents and label them as guidance documents with an explanation that they are not to be given the full binding effect of a legislative rule. This way there is no question as to the binding weight of authority they can have on the public. Publishing the PSPM as only a guidance document, with a statement that it can only be used as a guide by the administrative agency, will afford the health care providers notice that they may challenge the validity of the manual and the agency's power to enforce it. I recognize that this will greatly disturb administrative agencies since it will fill the courts with claims that an administrative agency's guidance document did not follow the proper rulemaking procedures or that it is being treated with a binding effect. That is the purpose though. Administrative agencies should not be able to create their own policy without notice to the public and reflection on the comments the public offers. An administrative agency is not an autonomous agency that is free to accomplish the goal it was created for by any means. The General

Assembly delegated its authority to the administrative agencies because it was too time-consuming and burdensome for its members to handle the logistics of the administrative process by itself. However, they did not give a free pass to the directors of those agencies to do what they wished with that power. That power is limited by the statutes which created the agency and the statutes that agency has been charged with enforcing.

Forcing administrative agencies to put a clause at the top of every guidance document, stating that it is only a guide that the agency follows, will ensure that agencies only create guidance documents for those matters that will not have binding effect. If an agency knows the proposed guidance document they want to treat with a binding effect will be labeled as just a guide and can be challenged in the courts, the agency will be more likely to choose to go through the rulemaking process instead because it will be able to create rules that will only be subject to public comment, rather than be left to a decision by the courts.⁹³ This will most likely create a balancing within the agency, deciding whether to create a guidance document and treat it with a binding effect and risk suit by the public, or take the time-consuming path to create a legislative rule, which will be upheld by the courts because the courts will give discretion to the agency's power through the rulemaking process. In essence, the goal would be to make guidance documents so difficult to create and such a hassle for administrative agencies that they will only create them when they are truly only acting as guides for the personnel of the administrative agency.

There have been several other suggestions about how to encourage the rulemaking process in order to prevent administrative agencies from treating guidance documents with a binding effect. Professor Pierce suggested that the courts should encourage agencies to use rulemaking by not invalidating rules that go through the proper rulemaking process unless they are inconsistent with the statute they are enforcing.⁹⁴ Professor Anthony recommends that we not rely on judicial review because it is too sporadic.⁹⁵ Instead, he suggests that the agencies adhere strictly to requirements of APA § 553 and follow the notice and comment requirements.⁹⁶ He even suggests that those requirements should be extended to agency non-legislative rules, specifically “any substantive non-legislative statement that does not interpret specific statutory or regulatory language.”⁹⁷ Even the American Bar Association has tried to address the guidance document problem. The ABA and the Administrative Conference recommended in a 1993 resolution that “when an agency proposes to apply a nonlegislative rule in an enforcement or other proceeding, it should provide affected private parties an opportunity to challenge the wisdom or legality of the

rule, either in the instant proceeding or in a separate proceeding established for that purpose.”⁹⁸

VI. Conclusion

Despite the differences in the many solutions proposed, they all focus on the central goal of imposing the importance of the notice and comment period on administrative agencies and making the rulemaking process more appealing to the agencies. I feel that while these proposals may be effective eventually in obtaining that goal, forcing administrative agencies to put a clause on all guidance documents will have an immediate effect on the creation of guidance documents. Making guidance documents unattractive to the administrative agencies will force them to go through the rulemaking process. In the end the goal is to continue to give the public the notice and comment it is owed when an administrative agency promulgates a rule. Therefore, the courts should ensure that administrative agencies only treat legislative rules with a binding effect; and if an agency treats a guidance document with binding effect, it should be required to rewrite the rule with public participation.

¹ U.S. Const. art. I, § 1.

² Vitarelli v. Seaton, 359 U.S. 535 (1959) (administrative agencies are bound by procedural rules once adopted by the agency); *see* Arizona Grocery Co. v. Santa Fe Railway, 284 U.S. 370 (1932) (agencies are also bound by legislative rules until they change them); *but see* Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988) (an agency may not be bound by its interpretive rules or policy statements).

³ Many administrative agencies are run by people who have expertise in their field and wish to keep control of their agency, however the rulemaking process subjects them to criticism from outsiders, especially influential members of Congress or the White House; *see* 1 Richard J. Pierce, Jr., Administrative Law Treatise 511, 513 (Aspen Law and Business 2002) (1994); Administrative agencies are also undercut by the judiciary and in order to prevent agency rules from being invalidated by a court, the administrative agency must provide a well detailed and planned out explanation of the rule making process that was used for the rule and the basis behind the rule. These general statements must address all possible alternatives and

issues raised by the comments in response to the rule during the public participation component in order to avoid a court holding that the rule is capricious in nature.

⁴ Jeffrey S. Lubbers, *A Federal Guide to Agency Rulemaking* 5-6 (American Bar Association 2006).

⁵ Va. Code Ann. § 2.2-4001 (West 2006); see *Chocolate Manufacturer's Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985) (“The notice and comment period encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking...”).

⁶ See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”)

⁷ Under the Occupational Safety and Health Act, an agency is required to hold a public hearing if an interested person files an objection to a proposed rule and requests a public hearing; 29 U.S.C.A. § 655 (West 2006).

⁸ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices...”); but see *Mistretta v. United States*, 488 U.S. 361, 415-16 (1989) (“...the debate over unconstitutional delegation becomes a debate not over a point of principle, but over a question of degree....[I]t is small wonder that we have almost never felt qualified to second guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”)

⁹ Va. Code Ann. § 2.2-4006 et seq. (2006).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448-49 (9th Cir. 1994) (Department of Housing and Urban Development determined that the State of Washington’s eviction procedure provided sufficient procedural safeguards to tenants because it was a rule which was prospective in nature and had a definitive effect on individuals).

¹⁶ The Va. Code lists exemptions to the notice and comment requirements for an administrative agency to promulgate rules; see Va. Code Ann. § 9-6.14:4.1(A) (2006); see also Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311, 1327-28 (1992); The Federal APA has 6 specific exemptions to the rulemaking process. The APA does not require an agency to fulfill all of the rulemaking requirement for rules that perform a military or foreign affairs function; agency management or personnel; public property, loans, grants, benefits, or contracts; procedural rules; good cause exceptions; and interpretive rules or policy statements; see 5 U.S.C. 553(a) (2000); see also *Humana of South Carolina v. Califano*, 590 F.2d 1070 (D.C. Cir. 1978) (regulation limiting amount hospital can charge Medicare patients relates to benefits and is therefore exempt from rulemaking process).

¹⁷ Michael Asimow, *California Underground Regulations*, 44 Admin L. Rev. 43, 44 (1992).

¹⁸ *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920); *Brewster v. Gage*, 280 U.S. 327, 336 (1930).

¹⁹ Sen. Rep. No. 960, 70th Cong., 1st Sess. 15 (1928).

²⁰ 1 Richard J. Pierce, *Administrative Law Treatise*, 324-25 (Aspen Law and Business 2002) (1994); *Arizona Grocery Co. v. Santa Fe Railway*, 284 U.S. 370 (1932) (the agency was bound by the railway rates that it had previously set); see, e.g. *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

²¹ 1 Richard J. Pierce, *Administrative Law Treatise*, 325 (Aspen Law and Business 2002) (1994); see, e.g. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

²² 1 Richard J. Pierce, *Administrative Law Treatise*, 325 (Aspen Law and Business 2002) (1994); cf. Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 Am. J. Comp. L. 615, 638 (2006) (“Interpretative rules and policy statements...are not subject to the notice-and-comment requirement. As they interpret the applicable law or articulate how the agency will wield its discretion,

they provide guidelines to which voluntary compliance is expected. To be successful in the resort to such a strategy, agencies must formulate and apply these non-legislative rules in a non-binding fashion.”).

²³ See Vietnam Veterans of America v. Secretary of Navy, 843 F.2d 528, 536-38 (D.C. Cir. 1988).

²⁴ 5 U.S.C.A. §§ 553(b)(A), 553(d)(2) (West 2006).

²⁵ Federal Farm Credit Banks Funding Corporation v. Farm Credit Administration, 731 F. Supp. 217, 223 (E.D. VA 1990).

²⁶ Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311, 1324 (1992).

²⁷ Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin. L. Rev. 631, 632 (2002).

²⁸ Va. Code Ann. § 2.2-4008, 4103 (West 2006).

²⁹ Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311, 1327 (1992).

³⁰ Department of Medical Assistance Services, *Psychiatric Services Provider Manual*, 3 (2000).

³¹ Id.

³² Id. at 4.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin. L. Rev. 631, 654-55 (2002).

³⁷ Email from Victoria Simmons, DMAS Information Office, to Author, Student, T.C. Williams School of Law (Oct. 12, 2006, 17:34:12 EST).

³⁸ 12 Va. Code 30-50, available at <http://legis.state.va.us/codecomm/guidance/gd0653.html>. (last visited 11/3/06).

³⁹ Va. Code Ann. § 2.2-4001 (West 2006).

⁴⁰ Bader v. Norfolk Redevelopment and Housing Authority, 396 S.E.2d 141 (Va. Ct. App. 1990).

⁴¹ Id.

⁴² Id.

⁴³ Id. at 143.

⁴⁴ Id.

⁴⁵ Id. at 144.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ W. VA. Chiropractic Society, Inc. v. Merritt, 178 W. Va. 173, 178 (1987).

⁴⁹ Id.

⁵⁰ Id. at 176.

⁵¹ Id. at 177.

⁵² Federal Farm Credit Banks Funding Corporation v. Farm Credit Administration, 731 F. Supp. 217, 223 (E.D. VA 1990).

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id. at 223-24.

⁵⁶ Id. at 224.

⁵⁷ John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893 (2004).

⁵⁸ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1372 (1992).

⁵⁹ Id. at 1328.

⁶⁰ Id.

⁶¹ Jackson v. W., 419 S.E.2d 385, 387 (Va. Ct. App.).

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id. at 389.

⁶⁷ Id.
⁶⁸ Id.
⁶⁹ Id.
⁷⁰ Id.
⁷¹ Id. at 390; Bader v. Norfolk Redevelopment and Housing Authority, 396 S.E.2d 141, 144 (Va. Ct. App. 1990).
⁷² United States v. Mitchell, 39 F.3d 465, 467 (4th Cir. 1994).
⁷³ Id. at 470.
⁷⁴ Id.
⁷⁵ Id.
⁷⁶ Id. at 470-71.
⁷⁷ Id. at 471.
⁷⁸ Id.
⁷⁹ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1356 (1992).
⁸⁰ Morton v. Ruiz, 415 U.S. 199, 232 (1974); *but see* Kenneth Culp Davis, *Administrative Law Surprises in the Ruiz Case*, 75 Colum. L. Rev. 823, 843-44 (1975) (“The Court’s Ruiz requirement went too far in the right direction. Courts should require rulemaking, but not abruptly or in absolute terms; the requirement should be gradual and either finely tailored to fit each context or coupled with recognition of administrative discretion to determine how far rulemaking is feasible in each set of circumstances....[and] invalidating an administrative decision because it rests on an interpretive rule found to be ineffective for lack of publication is probably sound...”).
⁸¹ Linoz v. Heckler, 800 F.2d 871, 874 (9th Cir. 1986).
⁸² Id. at 877.
⁸³ Id.; *see* Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983).
⁸⁴ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1355 (1992).
⁸⁵ Department of Medical Assistance Services, *Psychiatric Services Provider Manual*, Ch. 1, 5-12 (2000).
⁸⁶ Id. at 10.
⁸⁷ Va. Code Ann. § 2.2-4008 (West 2006).
⁸⁸ Department of Medical Assistance Services, *Psychiatric Services Provider Manual*, ch. 1, 16-22 (2000) (“All claims submitted with dates of service after October 15, 2003 will be denied if local codes are used.”).
⁸⁹ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1357 (1992).
⁹⁰ Id. at 1358.
⁹¹ Email from Victoria Simmons, DMAS Information Office, to Author, Student, T.C. Williams School of Law (Oct. 12, 2006, 17:34:12 EST).
⁹² Id.
⁹³ 3 Richard J. Pierce, *Administrative Law Treatise*, 1237 (Aspen Law and Business 2002) (1994) (“Scholars have demonstrated the existence of similar widespread inconsistencies in the decisionmaking patterns of federal courts...[sources of the problem are] severe limits on the ability of both the Supreme Court and the en banc circuit courts to maintain interjudge, interpanel, and intercircuit consistency.”).
⁹⁴ 1 Richard J. Pierce, *Administrative Law Treatise*, 514-17 (Aspen Law and Business 2002) (1994).
⁹⁵ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1372 (1992).
⁹⁶ Id. at 1373.
⁹⁷ Id. at 1374.
⁹⁸ Summary of Actions of ABA House Delegates, August 1993, at 23-24, *see also* ACUS Recommendation 92-2, 57 Fed.Reg. 30103 (1992).

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