

For the meeting attendees:

The recommendation could benefit from explicit recognition that, once an agency has spelled out its position in a guidance document, it doesn't have to keep reinventing the same wheel over and over again. If a private person raises only issues that the agency has previously addressed in guidance, the agency can simply refer back to the document itself. This observation may help to assuage some committee members' concerns about the resource costs of the recommendation.

I have drafted some language for the recommendation to capture this thought (potentially to be inserted between paragraphs 2 and 3 of the recommendation portion of the October 11 draft):

**An agency's obligation not to treat guidance as definitive should not foreclose the agency from using the document as a decisional tool. When a private person requests an agency to reexamine a position asserted in a guidance document, the agency may consult, rely on, and cite to the document itself (if it has been properly published) insofar as the contents thereof are responsive to the request, but the agency should give fair consideration to issues that are raised by the request and not addressed in the document.**

The accompanying preamble language could flesh out this thought, including cites to the language of 5 U.S.C. §§ 552(a)(1) and 552(a)(2) that requires publication as a condition for citing and relying on guidance.

Needless to say, this can apply equally to policy statements and interpretive rules.

Ron Levin