



Agency Guidance

Committee on Judicial Review

Proposed Recommendation for Committee | October 2, 2017

1 Guidance consists of agency statements of general applicability, not binding on members
2 of the public, that advise the public of the manner in which the agency proposes to exercise a
3 discretionary power or of the agency's construction of the statutes and legislative rules it
4 administers. Guidance is an essential instrument of administration across numerous agencies.
5 Compared with adjudication or enforcement, guidance can make agency decisionmaking faster
6 and less costly, saving time and resources for the agency and the regulated public. It can also
7 make agency decisionmaking more predictable and uniform, shield regulated parties against
8 unequal treatment, unnecessary costs, and unnecessary risk and promote compliance with law.¹
9 Compared with legislative rulemaking, guidance is generally better for dealing with conditions
10 of uncertainty and for making agency policy comprehensible to regulated parties who lack
11 counsel. Further, the provision of guidance often takes less time and resources than legislative
12 rulemaking, freeing up the agency to address more issues within its statutory mission.

13

¹ See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* 28-30 (Sept. 18, 2017), <https://www.acus.gov/report/agency-guidance-draft-report>; see also Administrative Conference of the United States, Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973) (“Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determination in various types of agency action, either through published decisions, general rules or policy statements other than rules.”). Additional prior ACUS Recommendations regarding guidance, apart from others to be referenced specifically in this preamble, include Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78163 (Dec. 4, 2015); and Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).

Commented [GB1]: From Nick Parrillo:

As drafted, this opening sentence would make the Recommendation applicable to both policy statements and interpretive rules as those terms are used in APA § 553(b). It is possible that, instead, the Recommendation should apply only to policy statements (as Recommendation 92-2 did), and not to interpretive rules. (In that case, the word “guidance” throughout the Recommendation could be replaced with “policy statements.”) The law is clear that policy statements are to be nonbinding, meaning that this Recommendation’s focus on how agencies should handle nonbinding documents is clearly applicable to policy statements. But the law is unclear as to whether interpretive rules are to be nonbinding. On this confusion, see the Report, Introduction, Subsection B.1. Notwithstanding the unclarity of the law regarding the nonbinding status of interpretive rules, the Conference might decide that agencies should, as a matter of good government, treat interpretive rules as having the same nonbinding status—that is, entailing the same aspiration for the agency to keep an “open mind”—as policy statements have. I do not think the findings in the Report compel this view, but neither do they preclude it. (For elaboration, see the Report, Introduction, Subsection B.1.) Alternatively, the Conference could remain agnostic as to whether interpretive rules should be treated as nonbinding but suggest that each agency apply the approach set forth in this Recommendation to interpretive rules insofar as the agency itself thinks interpretive rules should be treated as nonbinding.



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14 Despite its usefulness, guidance is sometimes criticized for coercing members of the
15 public as if it were a legislative rule, notwithstanding its officially nonbinding status. Although
16 an agency issuing guidance may act with no coercive purpose, structural features of certain
17 regulatory schemes may deprive regulated parties of any practical choice but to follow the
18 guidance. These features include the following:

- 19 • The law may require regulated parties to obtain the affirmative assent of the agency (pre-
20 approval) in order to get some legal advantage, like a permit or monetary benefit. If the
21 advantage sought is important to the party, and if the agency's decision is discretionary
22 and subject to delay, the incentive to follow whatever the agency's wishes appear to be
23 (including guidance) can be overwhelming.
- 24 • The regulatory scheme may subject the regulated party to frequent monitoring and
25 evaluation by the agency. If the law is complex, regulated parties may inevitably fail to
26 comply with at least a few of its requirements. Under these circumstances, a regulated
27 party may have a strong incentive to invest in its relationship to the agency, that is, seek
28 to build up the agency's trust and confidence in its good faith and cooperativeness,
29 including by following guidance.
- 30 • A regulated party that may be subject to ex post enforcement will have an incentive to
31 follow guidance that increases with the probability of detection of guidance-
32 noncompliant behavior, the cost of an enforcement proceeding irrespective of outcome,
33 the probability of an unfavorable outcome, and the probable sanction in that event. In
34 some (though far from all) contexts, it may be that the regulated party cannot expect,
35 without prohibitive risk, to get the accusation meaningfully examined and adjudicated by
36 an official distinct from the enforcement personnel. This creates a strong incentive to
37 avoid being accused in the first place, as by following guidance.

38 In addition, guidance may operate on the beneficiaries of a regulatory statute or
39 legislative rule as if the guidance were itself a legislative rule. The guidance can operate this
40 way if it promises to treat regulated parties less stringently than the statute or legislative rule
41 would. Such guidance may cause regulated parties to take advantage of the new latitude by



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42 shifting their behavior in a direction that does harm to the beneficiaries. The guidance may thus
43 effectively deprive the beneficiaries of the protection of the governing statute or legislative rule.

44 While these legislative-rule-like effects on regulated parties and regulatory beneficiaries
45 may occur whenever guidance is operative, if the guidance remains truly tentative, in that the
46 agency affords members of the public a fair opportunity to seek modification of or departure
47 from the guidance in any given instance, then the guidance does not operate like a legislative
48 rule. Guidance may also permissibly bind some agency employees,² but it cannot bind those
49 employees in a manner that forecloses the fair opportunity to seek modification or departure
50 from the guidance.³ (For example, the guidance could bind officials at one level of the agency
51 hierarchy, with the proviso that officials at a higher but still accessible level can authorize
52 departure from the guidance.)

53 **Maintaining Flexibility in Implementing Guidance**

54 Despite the imperative to be flexible, agencies sometimes are not, and guidance can
55 therefore have a coercive, legislative-rule-like effect on members of the public. This can be
56 explained to a large degree by agencies' sensitivity to competing rule-of-law values that favor
57 consistency, by their lack of resources, and by their inertia in the face of unintended
58 organizational tendencies that foster rigidity. Agencies are often under active stakeholder
59 pressure to be inflexible (i.e., to be consistent), and these stakeholder pressures spring from
60 legitimate concerns that agencies would be remiss to ignore entirely. For one thing, if a
61 regulated party obtains a favorable departure from guidance, this may put the party's competitors
62 at a disadvantage, and they may protest. Further, they may come to lose faith in the
63 predictability of the agency and in the idea that the agency provides them a level playing field—a

² Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30103 (July 8, 1992). Cf. OMB Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) (“[A]gency employees should not depart from significant agency guidance documents without appropriate justification and supervisory concurrence.”); *id.* at 3437 (“[W]hile a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking.”).

³ Parrillo, *supra* note 1, at 26–28; see also OMB Good Guidance Practices, *supra* note 2, at 3440.



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64 shift that may cause them to withdraw from cooperation with the agency, thereby diminishing
65 compliance and making the whole regulatory program less effective. Meanwhile, individualized
66 flexibility on guidance, if it favors a particular regulated party, may seem like favoritism and
67 thereby attract negative scrutiny from the media, non-governmental organizations, and members
68 of Congress. On top of all this, some competitors of the party that received a favorable departure
69 from guidance may view it as unfair and ask why they themselves cannot get the same exception.
70 One departure may therefore invite other requests for departure, and these requests can eat up the
71 agency's resources and pose the danger that any coherent policy will unravel. To prevent all this
72 from happening, agencies sometimes have simply denied departure requests to avoid opening the
73 floodgates.

74 Agencies can maintain flexibility while addressing these legitimate pressures for
75 consistency by taking the approach of principled flexibility. That is, for each departure the
76 agency makes, it can give a written explanation that is accessible to other agency officials and to
77 the public, with the understanding that the exception then becomes generally applicable to like
78 cases prospectively. The departure explanations can then accumulate to form a body of evolving
79 precedent. Principled flexibility helps refute accusations of favoritism, cabins the rationale for
80 each departure so as to avoid opening the floodgates to more requests, promotes fairness among
81 competitors by ensuring that all exceptions become generally available on a prospective basis,
82 and aids predictability because the obligation to provide a reason for each departure will tamp
83 down the number of departures and make it easier to anticipate when departures may happen.

84 All that said, principled flexibility can be challenging to implement. The need for reason-
85 giving means that every request for departure requires time and money to evaluate, and the
86 giving of reasons must be reconciled with legitimate needs for confidentiality. On top of these
87 organizational and resource-based obstacles to principled flexibility, there are additional
88 obstacles that can stand in the way of flexibility of any kind, principled or not: the antagonism of
89 some officials toward being challenged; the institutional motives of higher-level officials to back
90 their subordinates; the counter-intuitive nature of the rule/guidance distinction for many people;



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91 and the fact that some agency offices, by reason of their principal day-to-day business, may be
92 socialized to be less receptive to stakeholder requests than others.

93 That said, there are some instances in which agencies refuse to entertain requests for
94 departures from guidance not because of legitimate external pressures for consistency, nor
95 because of inertia or resource poverty, but instead because agency personnel just think the
96 guidance is right. That is, they are committed to the substantive content of the guidance, and
97 they therefore are not open to reconsideration or departure. Of the many reasons why agencies
98 are inflexible, this one is particularly problematic. If an agency wants to shut off the possibility
99 of departing from a policy simply because it thinks the policy's substantive content is right, that
100 is the archetypal scenario for legislative rulemaking.

101 Because being flexible often requires agency resources and managerial initiative,
102 agencies cannot, as a practical matter, be flexible on everything all the time. Priorities must be
103 set. In deciding which guidance documents deserve the most active exertions in favor of
104 flexibility, assignment of higher priority is warranted (a) the more the guidance is likely to alter
105 regulated-party behavior when operative;⁴ (b) the more the value of the guidance document to
106 the agency lies in its commitment to the guidance's substantive content;⁵ and (c) the less the
107 guidance is subject to legitimate stakeholder pressures for consistency.⁶

108 **Public Participation in Adopting Guidance**

109 Agencies can also promote flexibility and impart legitimacy on their use of guidance by
110 asking for input when guidance is formulated and issued. It is often appropriate for agencies to
111 invite public participation when considering whether to adopt guidance,⁷ through means such as

⁴ On structural features of certain regulatory schemes that tend to cause guidance to alter regulated-party behavior, see Parrillo Report, *supra* note 1, at 37–90. On how deregulatory guidance can alter regulated-party behavior in a way that affects regulatory beneficiaries, see Parrillo, *supra* note 1, at 131–37.

⁵ *Id.* at 127–31.

⁶ On these legitimate stakeholder pressures for consistency, see Parrillo Report, *supra* note 1, at 92–103.

⁷ Recommendation 76-5 states that agencies should undertake pre-adoption notice and comment on a guidance document when the document is “likely to have substantial impact on the public” and when it would not be



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112 outreach to selected stakeholders, stakeholder meetings and webinars, advisory committee
113 proceedings, or voluntary use of notice-and-comment procedures.⁸ Broad participatory measures
114 at the time of a guidance document’s adoption may be of value to the agency, to regulated
115 parties, and especially to regulatory beneficiaries and organizations representing them, for
116 beneficiaries often lack the opportunity and resources to participate in the individual adjudicatory
117 or enforcement proceedings in which a guidance document will be applied.

118 Choosing a level of public participation that is appropriate to a guidance document’s
119 likely impact and is practicable requires consideration of several factors. Broader participation is
120 more appropriate the greater the guidance’s likely impact. Broader participation may increase
121 the agency’s access to useful technical or political information, though it may reach the point of
122 diminishing returns. It may increase stakeholders’ willingness to accept the policy of the
123 guidance and their sense of “buy-in,” although relatively more formalized means of participation
124 (such as notice-and-comment) may cause the agency to become invested in a formal proposal,
125 which may sometimes diminish opportunities for agency learning. Broader forms of
126 participation also have costs that may reduce agencies’ resources for other tasks, including
127 provision of guidance on other subjects, and may even slow agency policymaking processes to
128 the point of alienating part of the stakeholder community.

129 Given the complexity of these potential costs and benefits and their tendency to vary with
130 context, it is appropriate to make decisions about whether and how to seek public participation

“impracticable, unnecessary, or contrary to the public interest to use such procedures.” Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56769 (Dec. 30, 1976). It also provides that agencies not undertaking notice and comment for adoption of a guidance document prior to adoption should undertake it soon after adoption, though an agency “may omit these post-adoption comment procedures when it incorporates in the interpretive rule or policy statement a declaration, with a brief statement of reasons, that such procedures would serve no public interest or would be so burdensome as to outweigh any foreseeable gain.” *Id.*

⁸ On the variety of forms of participation, see Parrillo, *supra* note 1, at 138–43. Voluntary notice and comment on a guidance document generally does not involve nearly the same costs as notice-and-comment on legislative rulemaking. *See id.* at 143–50.



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131 on guidance on a document-by-document or agency-by-agency basis.⁹ A government-wide
132 requirement for notice and comment on guidance documents, unless confined to the very most
133 extraordinary guidance documents,¹⁰ is not recommended. This is a function both of the
134 complex cost-benefit considerations discussed above and the fact that broad mandates for notice-
135 and-comment on guidance risk two additional unintended consequences. First, a broad mandate
136 applied to a resource-strapped agency may cause the agency to fail to process and incorporate
137 comments and instead leave many guidance documents in published “draft” form indefinitely,
138 which may at least partly defeat the purpose of notice and comment and cause stakeholder
139 confusion. Second, a broad mandate may so legitimize guidance in the eyes of the agency that
140 guidance could end up largely supplanting legislative rulemaking.

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142 The Administrative Conference recognizes that many agencies consider guidance to be a
143 useful tool to be employed in appropriate circumstances. This recommendation provides best
144 practices to agencies as they evaluate how to use guidance.

RECOMMENDATION

Guidance Documents Should Not Bind the Public

- 145 1. An agency should not treat a guidance document as if it were a legislative rule binding on
146 the public. Instead the agency should afford the public a fair opportunity to seek
147 a. modification of the guidance document in general, including rescission, and
148 b. departure from the guidance document as applied in a particular proceeding or to
149 particular conduct in the case of a request from (i) a regulated party subject to the

⁹ Some agencies have adopted procedural rules requiring notice-and-comment for large and well-defined categories of their guidance documents, whereas others have undertaken notice-and-comment for a large number of guidance documents but selected those documents on a decentralized, ad hoc basis. Parrillo, *supra* note 1, at 167–71.

¹⁰ The Office of Management and Budget’s Good Guidance Practices calls for pre-adoption public comment on “economically significant” guidance documents, but this appears to cover only a very small number of documents. See Parrillo, *supra* note 1, at 650–58.



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150 proceeding or contemplating the particular conduct or (ii) any other interested
151 person participating in the proceeding.

152 2. An agency may treat a guidance document as binding on some of its own employees (for
153 example, on officials at one level, assuming officials at a higher level can still authorize
154 departure from guidance) but should ensure that this does not interfere with the fair
155 opportunity called for in Recommendation 1.

Minimum Measures to Avoid Binding the Public

156 3. A guidance document should prominently state that it is not binding on members of the
157 public and explain how members of the public can seek modification of or departure from
158 the guidance document, including the identity and contact information of officials
159 authorized to decide such requests.

160 4. A guidance document should not include mandatory language unless the agency is using
161 that language to describe a statutory or regulatory requirement, or the language is
162 addressed to agency employees and will not foreclose agency consideration of positions
163 advanced by members of the public.

164 5. The agency should instruct all employees applying guidance documents or advising on
165 the basis of them not to give any indications to members of the public inconsistent with
166 Recommendations 1–4.

Additional Measures to Avoid Binding the Public

167 6. In order to avoid binding the public and to provide a fair opportunity for modification or
168 departure, an agency should, subject to considerations of practicability and resource
169 limitations and the priorities described in Recommendation 7 below, consider additional
170 measures, including the following:

171 a. Agencies may promote flexibility in a principled fashion, taking due account of
172 needs for consistency and predictability, by ensuring that each departure from a
173 guidance document in a particular situation is accompanied by a written
174 explanation, accessible to other agency personnel and to the public (consistent



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- 175 with needs for confidentiality), which shall become the default policy for all like
176 situations under that guidance document in the future.
- 177 b. Agencies may assign the authority to grant departures from a guidance document
178 to a component of the agency that is likely to engage in open and productive
179 dialogue with persons who may seek modifications or departures, such as a
180 program office that is accustomed to dealing cooperatively with regulated parties
181 and regulatory beneficiaries.
- 182 c. Agencies, when authorizing frontline officials to make departures from a
183 guidance document, may direct appeals of adverse decisions by such officials to a
184 higher-level official who is not the direct superior of those frontline officials, in
185 order to diminish the role played by a superior's institutional motivation to back
186 his/her subordinates.
- 187 d. Agencies may invest in training and monitoring of frontline personnel to ensure
188 that they (i) understand the difference between legislative rules and guidance; (ii)
189 treat parties' requests for departures in an open and welcoming manner; (iii)
190 understand that departures from guidance, if undertaken according to the proper
191 procedures for approval and justification, are appropriate and will not have
192 adverse employment consequences for them; and (iv) are not to take personally,
193 or retaliate against, a party's decision to seek departure from guidance or to
194 appeal to a higher level of the agency when denied such a departure.
- 195 e. Agencies may set up channels for anonymous requests for approvals of departures
196 from a guidance document based on stated facts.
- 197 f. Agencies may set up channels for anonymous feedback from members of the
198 public on whether they perceive that requests for departures from a guidance
199 document are given reasonable consideration.

200 **Priorities in Deciding When to Take Additional Measures**

- 201 7. Because the additional measures in Recommendation 6 are likely to take up agency
202 resources, it will be necessary to set priorities for which guidance documents are most in



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- 203 need of such additional measures. In deciding when to take additional measures, an
204 agency should assign a higher priority to a guidance document—
- 205 a. the more likely the guidance is to alter the behavior of regulated parties, either
206 because they have strong incentives to comply with guidance or because the
207 guidance practically reduces the stringency of the regulatory scheme compared to
208 the status quo;
 - 209 b. the more the value of the guidance to the agency lies in its adoption of one
210 substantive approach instead of other substantive approaches that have been
211 recently tried or seriously urged upon the agency; or
 - 212 c. the less the value of the guidance to the agency or to stakeholders lies in
213 consistency or predictability per se, irrespective of its substantive content.

Public Participation in Adoption of Guidance Documents

- 214 8. When an agency is contemplating adopting a guidance document, it should solicit an
215 appropriate level of public participation before adopting the document, which may
216 include nothing at all or outreach to selected stakeholder representatives, stakeholder
217 meetings or webinars, advisory committee proceedings, or notice-and-comment with or
218 without a response to comments. In deciding what level is appropriate, the agency should
219 consider:
- 220 a. the factors listed in Recommendation 7(a) through (c);
 - 221 b. the likely increase in useful information available to the agency from broadening
222 participation, keeping in mind that non-regulated parties may offer different
223 information than regulated parties and that non-regulated parties will often have
224 no opportunity to provide input regarding guidance other than at the time of
225 adoption;
 - 226 c. the likely increase in policy acceptance from broadening participation, keeping in
227 mind that non-regulated parties will often have no opportunity to provide input
228 regarding guidance other than at the time of adoption, and that policy acceptance
229 may be less likely if the agency is not responsive to stakeholder input;



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- 230 d. whether the agency is likely to learn more useful information by having a specific
231 agency proposal as a focal point for discussion, or instead having a more free-
232 ranging and less formal discussion; and
- 233 e. the practicability of broader forms of participation, including notice and comment,
234 keeping in mind that broader participation may slow the adoption of guidance and
235 may diminish resources for other agency tasks, including the provision of
236 guidance on other matters.
- 237 9. An agency may make decisions about the appropriate level of participation document-by-
238 document or by rules assigning certain participatory procedures to general categories of
239 documents. If an agency opts for the latter, it should consider whether resource
240 limitations may cause some documents to remain in draft for substantial periods of time
241 and, if so, should either (a) make clear to stakeholders which draft guidance documents,
242 if any, should be understood to reflect current agency thinking or (b) provide in each draft
243 guidance document that, at a certain time after publication, the document will
244 automatically either be adopted or withdrawn.