



Agency Guidance

Committee on Judicial Review

Proposed Recommendation for Committee | October 17, 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 Despite its usefulness, guidance is sometimes criticized for coercing members of the
14 public as if it were a legislative rule, notwithstanding its officially nonbinding status. Although

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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15 an agency issuing guidance may act with no coercive purpose, structural features of certain
16 regulatory schemes may deprive regulated parties of any practical choice but to follow the
17 guidance. These features include the following:

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

37 In addition, guidance may operate on the beneficiaries of a regulatory statute or
38 legislative rule as if the guidance were itself a legislative rule. The guidance can operate this
39 way if it promises to treat regulated parties less stringently than the statute or legislative rule
40 would. Such guidance may cause regulated parties to take advantage of the new latitude by
41 shifting their behavior in a direction that does harm to the beneficiaries. The guidance may thus
42 effectively deprive the beneficiaries of the protection of the governing statute or legislative rule.



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

Maintaining Flexibility in Implementing Guidance

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

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

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

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



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

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

107 **Public Participation in Adopting Guidance**

108 Agencies can also promote flexibility and impart legitimacy on their use of guidance by
109 asking for input when guidance is formulated and issued. It is often appropriate for agencies to
110 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 “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



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

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

128 Given the complexity of these potential costs and benefits and their tendency to vary with
129 context, it is appropriate to make decisions about whether and how to seek public participation
130 on guidance on a document-by-document or agency-by-agency basis.⁹ A government-wide
131 requirement for notice and comment on guidance documents, unless confined to the very most

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.

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.



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

140 * * *

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

RECOMMENDATION

Guidance Documents Should Not Bind the Public

- 144 1. An agency should not use a guidance document as a standard binding on the public, that
145 is, as a standard with which noncompliance may form an independent basis for action in
146 matters that determine the rights and obligations of any member of the public.
- 147 2. An agency should afford members of the public a fair opportunity to argue for lawful
148 approaches other than those put forward by the guidance document.
- 149 3. An agency may, as an internal agency management matter, require some of its employees
150 to act in conformity with a guidance document, but the agency should ensure that this
151 does not interfere with the fair opportunity called for in Recommendation 2. For
152 example, an agency may require officials at one level to follow the approach described in

Commented [GB2]: Note from Nick Parrillo:

At the meeting on 10/2, the conversation focused mainly on the original version’s Recommendations 1-5, with brief discussion at the end on original Recommendation 6. Here, I have made revisions to original Recommendations 1-5 (which, after revision, number 1-6). I have made revisions beyond original Recommendations 1-5 only (a) to take account of the general suggestion to avoid language about guidance that sounds regulatory and (b) to scale back original Recommendation 6(a) in a way that I hope provides a more realistic starting point for discussion at the upcoming committee meeting. I have not yet incorporated the committee’s suggestion for a general acknowledgement of resource limitations, because I’d like to discuss where it should go.

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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153 a guidance document while authorizing officials at a higher level to act in ways different
154 from that described in the document when appropriate.

Minimum Measures to Avoid Binding the Public

- 155 4. A guidance document should prominently state that it is not binding on members of the
156 public and explain that a member of the public may take a lawful approach, or argue that
157 the agency should take a lawful approach, that is different from that suggested in the
158 guidance document. This explanation should include the identity and contact information
159 of officials authorized by the agency to approach the subject to which the guidance
160 document pertains in a manner different than that suggested in the guidance document.
- 161 5. A guidance document should not include mandatory language unless the agency is using
162 that language to describe a statutory or regulatory requirement, or the language is
163 addressed to agency employees and will not interfere with the fair opportunity called for
164 in Recommendation 2.
- 165 6. The agency should instruct all employees engaged in activity to which a guidance
166 document pertains to refrain from making any statements suggesting that a guidance
167 document is binding on the public. Insofar as some employees are required, as an
168 internal agency management matter, to act in conformity with a guidance document, they
169 should be instructed as to the difference between such an internal agency management
170 requirement and law that is binding on the public.

Additional Measures to Avoid Binding the Public

- 171 7. In order to avoid using guidance documents to bind the public and in order to provide a
172 fair opportunity for other lawful approaches, an agency should, subject to considerations
173 of practicability and resource limitations and the priorities described in Recommendation
174 8 below, consider additional measures, including the following:
- 175 a. promoting the flexible use of guidance in a manner that still takes due account of
176 needs for consistency and predictability. In particular, when the agency accepts a
177 novel argument by a member of the public for a lawful approach other than that



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- 178 put forward in a guidance document and said argument seems likely applicable to
179 other situations, the agency may disseminate its decision and the reasons therefor
180 to other persons who might make the argument, to other affected stakeholders,
181 and to officials likely to hear the argument (consistent with the need to protect
182 confidential business or personal information).
- 183 b. assigning the task of considering arguments for approaches other than that in a
184 guidance document to a component of the agency that is likely to engage in open
185 and productive dialogue with persons who make such arguments, such as a
186 program office that is accustomed to dealing cooperatively with regulated parties
187 and regulatory beneficiaries.
- 188 c. in cases where frontline officials are authorized to take an approach different from
189 that in a guidance document but refuse to do so, directing appeals of such a
190 refusal to a higher-level official who is not the direct superior of those frontline
191 officials, in order to diminish the role played by a superior's institutional
192 motivation to back his/her subordinates.
- 193 d. investing in training and monitoring of frontline personnel to ensure that they (i)
194 understand the difference between legislative rules and guidance; (ii) treat parties'
195 ideas for lawful approaches different from that in the guidance in an open and
196 welcoming manner; (iii) understand that approaches other than that in the
197 guidance, if undertaken according to the proper internal agency procedures for
198 approval and justification, are appropriate and will not have adverse employment
199 consequences for them; and (iv) are not to take personally, or retaliate against, a
200 party's argument for an approach different from guidance or a party's decision to
201 appeal to a higher level of the agency when such an argument is rejected.
- 202 e. setting up channels for anonymous arguments in favor of approaches different
203 from a guidance document based on stated facts.
- 204 f. setting up channels for anonymous feedback from members of the public on
205 whether they perceive that arguments for approaches different from that in a
206 guidance document are given reasonable consideration.



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Priorities in Deciding When to Take Additional Measures

- 208 8. Because the additional measures in Recommendation 7 are likely to take up agency
209 resources, it will be necessary to set priorities for which guidance documents are most in
210 need of such additional measures. In deciding when to take additional measures, an
211 agency should assign a higher priority to a guidance document—
- 212 a. the more likely the guidance is to alter the behavior of regulated parties, either
213 because they have strong incentives to comply with guidance or because the
214 guidance practically reduces the stringency of the regulatory scheme compared to
215 the status quo;
 - 216 b. the more the value of the guidance to the agency lies in its adoption of one
217 substantive approach instead of other substantive approaches that have been
218 recently tried or seriously urged upon the agency; or
 - 219 c. the less the value of the guidance to the agency or to stakeholders lies in
220 consistency or predictability per se, irrespective of its substantive content.

Public Participation in Adoption of Guidance Documents

- 221 9. When an agency is contemplating adopting a guidance document, it should solicit an
222 appropriate level of public participation before adopting the document, which may
223 include nothing at all or outreach to selected stakeholder representatives, stakeholder
224 meetings or webinars, advisory committee proceedings, or notice-and-comment with or
225 without a response to comments. In deciding what level is appropriate, the agency should
226 consider:
- 227 a. the factors listed in Recommendation 8(a) through (c);
 - 228 b. the likely increase in useful information available to the agency from broadening
229 participation, keeping in mind that non-regulated parties may offer different
230 information than regulated parties and that non-regulated parties will often have
231 no opportunity to provide input regarding guidance other than at the time of
232 adoption;



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- 233 c. the likely increase in policy acceptance from broadening participation, keeping in
234 mind that non-regulated parties will often have no opportunity to provide input
235 regarding guidance other than at the time of adoption, and that policy acceptance
236 may be less likely if the agency is not responsive to stakeholder input;
- 237 d. whether the agency is likely to learn more useful information by having a specific
238 agency proposal as a focal point for discussion, or instead having a more free-
239 ranging and less formal discussion; and
- 240 e. the practicability of broader forms of participation, including notice and comment,
241 keeping in mind that broader participation may slow the adoption of guidance and
242 may diminish resources for other agency tasks, including the provision of
243 guidance on other matters.
- 244 10. An agency may make decisions about the appropriate level of participation document-by-
245 document or by rules assigning certain participatory procedures to general categories of
246 documents. If an agency opts for the latter, it should consider whether resource
247 limitations may cause some documents to remain in draft for substantial periods of time
248 and, if so, should either (a) make clear to stakeholders which draft guidance documents,
249 if any, should be understood to reflect current agency thinking or (b) provide in each draft
250 guidance document that, at a certain time after publication, the document will
251 automatically either be adopted or withdrawn.