



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**Individualized Guidance**

**Committee on Rulemaking**

**Draft Recommendation for Committee | May 1, 2024**

1 Agencies provide written guidance to help explain their programs and policies, announce  
2 interpretations of legal materials and how they intend to exercise their discretion, and  
3 communicate other important information to regulated entities, regulatory beneficiaries, and the  
4 broader public. When used appropriately, guidance documents—including what the  
5 Administrative Procedure Act (APA) calls general statements of policy and interpretive rules<sup>1</sup>—  
6 can be important instruments of administration and of great value to agencies and the public. The  
7 Administrative Conference has adopted numerous recommendations to help agencies use and  
8 develop guidance documents effectively and appropriately, ~~and~~ to make them publicly available,  
9 and to ensure that such documents are well organized, up to date, and easily accessible.<sup>2</sup>

10 In many federal programs, individuals may request written guidance from an agency  
11 regarding how the law applies to a requestor’s specific circumstances.<sup>3</sup> Such “individualized  
12 guidance” goes by a variety of names, including advisory opinions, opinion letters, and letters of

<sup>1</sup> 5 U.S.C. § 553(b)(A). Some agencies define or use the term “guidance” to include materials that may not qualify as interpretive rules or policy statements under the APA. See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

<sup>2</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2022-3, *Automated Legal Guidance*, 87 Fed. Reg. 39,798 (July 5, 8, 2022); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014); Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

<sup>3</sup> This Recommendation does not cover guidance that is not requested by a member of the public, such as an agency warning letter explaining why the agency believes a regulated party is in violation of a law or regulation.

**Commented [BB1]:** ACUS staff have added this language in response to the committee’s request at meeting #2 to include language similar to that in Recommendation 2019-3. The relevant language from this previous recommendation is below:  
  
“Although many agencies do post guidance documents online, in recent years concerns have emerged about how well organized, up to date, and easily accessible these documents are to the public. At various times, the Office of Management and Budget (OMB) has instructed agencies on their management of guidance documents.”



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 interpretation.<sup>4</sup> The Internal Revenue Service issues private letter rulings to provide tax law  
14 advice to taxpayers,<sup>5</sup> for example, and the Securities and Exchange Commission issues no-action  
15 letters to provide advice regarding whether a product, service, or action may violate federal  
16 securities law.<sup>6</sup> In some programs, the provision of individualized guidance is authorized by  
17 statute; in others, agencies offer individualized guidance on their own initiative as a public  
18 service.

19 Agency practices vary in several key respects. Some individualized guidance is issued in  
20 a relatively formal manner (e.g., via letter), while other individual guidance may be issued in  
21 relatively informal ways (e.g., via email). (This Recommendation does not address guidance  
22 provided orally.) Some individualized guidance is reviewed and issued by agency heads or other  
23 senior officials, while other individualized guidance is prepared and issued by lower-level  
24 officials. Some individualized guidance has no legally binding effect on the agency or requestor,  
25 while other such guidance may, for example, provide the requestor with a defense to an agency  
26 enforcement action.<sup>7</sup>

27 Individualized guidance offers many benefits. It facilitates communication between an  
28 agency and requestors, reduces uncertainty, promotes compliance, spurs useful transactions, and  
29 can be faster and less costly than other agency actions. For example, agencies may provide  
30 individualized guidance to help a regulated party better understand whether its conduct may be  
31 permissible, and this may limit the need for future enforcement action. In addition, making

---

<sup>4</sup> This Recommendation does not attempt to situate individualized guidance within the APA's categories of "rule," "order," "license," "sanction," or "relief," and it does not seek to define agency processes for providing individualized guidance as "rulemaking" or "adjudication." See 5 U.S.C. § 551. Individualized guidance is distinguished from declaratory orders, which agencies may issue in the context of an adjudication to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). Unlike most individualized guidance, declaratory orders are final agency actions and legally binding. See Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 70-2, *SEC No-Action Letters Under Section 4 of the Securities Act of 1933*, 1 ACUS 34 (1970).

<sup>6</sup> See Admin. Conf. of the U.S., Recommendation 75-5, *Internal Revenue Service Procedures: Taxpayer Services and Complaints*, 41 Fed. Reg. 3986 (Jan. 27, 1976).

<sup>7</sup> See generally Shalini Bhargava Ray, *Individualized Guidance in the Federal Bureaucracy* (Apr. 4, 2024) (draft report to the Admin. Conf. of the U.S.).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

32 individualized guidance publicly available can inform other interested persons about how the  
33 agency evaluates issues that may affect them.

34 At the same time, individualized guidance may raise concerns. Even if an agency does  
35 not intend to use individualized guidance to bind the public, requestors or others may  
36 nevertheless choose to follow the guidance strictly to limit the risk of sanction in a future agency  
37 proceeding. Agencies risk providing inconsistent guidance if they lack appropriate procedures  
38 for developing and reviewing it. Members of the public may lack equal access to processes for  
39 requesting individualized guidance or have limited opportunities to participate in processes for  
40 developing individualized guidance that affects them.

41 These benefits can be increased, and these concerns addressed, through the best practices  
42 identified in this Recommendation. It encourages agencies, when appropriate, to establish  
43 procedures for providing individualized guidance to members of the public. It identifies  
44 procedures agencies should use to process requests for individualized guidance fairly, efficiently,  
45 and accurately, and it encourages agencies to make individualized guidance available to agency  
46 personnel and the public. It recommends that agencies not treat individualized guidance as  
47 creating binding standards on the public but identifies circumstances in which agencies should  
48 consider allowing the public to rely on such guidance (that is, circumstances in which agencies  
49 should consider adhering to guidance that is favorable to a person in a subsequent agency  
50 proceeding despite the nonbinding character of the guidance). Finally, it addresses circumstances  
51 in which agencies should use individualized guidance to support other forms of agency action.

52 This Recommendation recognizes the wide variation in the programs that agencies  
53 administer, the resources available to agencies, and the needs and preferences of persons with  
54 whom they interact. Agencies should account for these differences when implementing the best  
55 practices below and tailor their individualized guidance procedures accordingly.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**RECOMMENDATION**

**Individualized Guidance Generally**

- 56 1. In response to requests from members of the public for written guidance, agencies  
57 should, consistent with their resources, priorities, and missions, provide individualized  
58 guidance—that is, written guidance regarding how the law applies to requestors’ specific  
59 circumstances.
- 60 2. Agencies should not treat individualized guidance as creating standards with which  
61 noncompliance may form an independent basis for action in matters that determine the  
62 rights and obligations of any member of the public.
- 63 3. Agencies should develop policies regarding whether and when it is appropriate to allow a  
64 requestor or other individual to rely on individualized guidance and, in so doing, consider  
65 factors including:
- 66 a. The certainty of the relevant facts and law at the time the agency issued the  
67 guidance;
  - 68 b. Changes in facts or law after initial issuance of the guidance;
  - 69 c. The formality of the agency’s individualized guidance procedure, including the  
70 position and authority of the agency officials involved in developing and issuing  
71 the guidance;
  - 72 d. The accuracy and completeness of the information the requestor provided at the  
73 time it sought the guidance;
  - 74 e. Whether a person other than the requestor of individualized guidance may rely on  
75 it, which might depend on the similarity of the person’s circumstances to the  
76 requestor’s circumstances;
  - 77 f. Whether allowing reliance is necessary to prevent significant hardship; and
  - 78 g. The applicability of constitutional, statutory, or other authorities mandating or  
79 prohibiting a party’s entitlement to rely on such guidance.
- 80 4. Agencies should explain in individualized guidance provided to requestors the extent to  
81 which requestors or others can rely on that guidance.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

82 5. Even if agencies do not provide for persons to rely on individualized guidance, agencies  
83 should, when appropriate and lawful, minimize hardships on persons who nevertheless  
84 acted in conformity with the guidance, such as by reducing or waiving penalties for past  
85 non-compliance or issuing an order solely with prospective effect.

86 ~~5-6.~~ Agencies should provide opportunities for members of the public to seek assistance from  
87 existing ombuds offices to resolve issues related to individualized guidance, and agencies  
88 should involve such ombuds offices in efforts to improve agency policies and procedures  
89 related to individualized guidance.

**Individualized Guidance Procedures**

90 ~~6-7.~~ Agencies should develop written procedures for requesting and issuing individualized  
91 guidance. Agencies should publish such procedures in the *Federal Register* and, as  
92 appropriate, codify them in the *Code of Federal Regulations*. Agencies should at least  
93 also make the procedures publicly available on their websites and, if applicable, in other  
94 agency publications. The procedures should describe:

- a. How members of the public may submit requests for individualized guidance, including the office(s) or official(s) responsible for receiving requests;
- b. The type(s) of individualized guidance members of the public may request;
- c. Any matters that the agency will not address through individualized guidance, including the rationale for not providing guidance as to such matters;

100 d. The information that the requestor should include with the request for  
101 individualized guidance;

102 ~~d.e.~~ Whether the agency will make individualized guidance and any related  
103 information (including the identity of the requestor and information from the  
104 request) publicly available as described in paragraphs 10 through 12;

105 —  
106 e. Any fees the agency charges for providing individualized guidance, as well as any  
107 provisions for waivers of, exemptions from, or reduced rates for such fees;

108 f.

**Commented [BB2]:** As the committee directed at meeting #2, ACUS staff have added a recommendation here related to the use of agency ombuds offices.

Below is a quote from the draft report related to this topic:

“Finally, existing agency ombudspersons might help agencies develop protocols for advising the regulated community and the public more generally. Agency ombudspersons interact deeply with the regulated community to address grievances, and the resulting insights and relationships could benefit agencies’ efforts to provide high-quality advice and customer service.”

**Commented [BB3]:** At meeting #2, the committee added the language “at least” to this sentence to convey that agencies should publish the procedures both on their websites and, if applicable, in other agency publications. ACUS staff have made style edits to this sentence to make this point more clear.

**Commented [BB4]:** Per the committee’s direction at meeting #2, ACUS staff have added a paragraph regarding agency notification to requestors that their information may be made public.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 109 g. Any opportunities for public participation in the preparation of individualized  
110 guidance;
- 111 h. The manner in which a response to a request for individualized guidance will be  
112 provided to the requestor ~~and, if appropriate, made available to the general public;~~
- 113 i. To the extent practicable, the expected timeframe for responding to requests for  
114 individualized guidance;
- 115 j. Whether requestors may seek review of individualized guidance by a higher-level  
116 official; and
- 117 k. ~~The agency's policy, developed as described in paragraph 3, regarding whether~~  
118 ~~and when it is appropriate for a requestor or other individual to rely on~~  
119 ~~individualized guidance. Whether requestors and others may rely on~~  
120 ~~individualized guidance in subsequent proceedings.~~

**Commented [BB5]:** ACUS staff have deleted this language, which is now covered in new paragraph e above.

**Commented [BB6]:** ACUS staff have made style edits to the committee's revision of this paragraph at meeting #2. The committee's revision originally read: "Any policy regarding reliance on individualized guidance developed as described in paragraph 3."

- 121 ~~7-8.~~ Agencies should develop procedures for agency personnel to manage and process  
122 requests for individualized guidance, including:
- 123 a. Allowing for electronic submission of, and response to, requests;
- 124 b. Creating methods for identifying and tracking requests;
- 125 c. Maintaining past responses to requests in a manner that allows agency personnel  
126 to identify and consider them when developing responses to new requests that  
127 present similar or related issues; and
- 128 d. Ensuring that relevant personnel receive training in the agencies' individualized  
129 guidance procedures.

130 ~~8-9.~~ In cases in which members of the public other than the requestor are likely to have  
131 information relevant to the request or are likely to be significantly affected by the  
132 agency's action, agencies should consider soliciting public participation before issuing  
133 individualized guidance.

### **Public Availability of Individualized Guidance**

134 ~~9-10.~~ Absent substantial countervailing considerations, agencies should make publicly  
135 available on their websites any individualized guidance that affects, or may be of interest



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

136 to, persons other than the requestor, including regulated persons and regulatory  
137 beneficiaries.

138 ~~10~~11. When making individualized guidance available on their websites, agencies  
139 should, as appropriate:

- 140 a. Identify the date, requestor, and subject matter of the guidance;
- 141 b. Identify the legal authority under which the guidance was issued and under what  
142 circumstances other parties may rely on the guidance; and
- 143 c. Use other techniques to help the public find relevant information, such as  
144 indexing or tagging individualized guidance by general topic area.

145 ~~11~~12. When making individualized guidance publicly available, agencies should redact  
146 any information that is sensitive or otherwise protected from disclosure and redact  
147 identifying details to the extent required to prevent an unwarranted invasion of privacy  
148 interests.

149 13. Agencies should keep individualized guidance on their websites current. If an agency  
150 modifies or rescinds a publicly available individualized guidance document, it should  
151 indicate on the face of the document that it has been modified or rescinded and provide  
152 access to any explanation for the modification or rescission or successor guidance.

153

Centralized Accessibility of Individualized Guidance Materials

154 14. Agencies that provide individualized guidance should maintain a page on their websites  
155 that provides easy access to the procedures described in Paragraph 7, all individualized  
156 guidance that they make publicly available as described in paragraphs 10 through 12, and  
157 information about electronically submitting a request for individualized guidance.

**Relationship to Other Agency Processes**

158 ~~12~~15. Agencies should periodically review individualized guidance to identify matters  
159 that may warrant the development of a general rule.

Commented [BB7]: ACUS staff have added this section in response to the committee's direction at meeting #2. Similar language (which was deleted during meeting #2) previously appeared at the beginning of the previous section on public availability.