

Comment from Peter Strauss (strauss@law.columbia.edu)

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I remain concerned that by addressing, simply, "agency guidance" without an effort at definition, on top of Prof. Coglianesi's report stressing how many different forms of behavior by agency officials may influence private conduct, this recommendation may be taken to address a broader range of behaviors than is desirable (and, probably, desired).

Undoubted guidance often results from actions taken at the level of bureau, not "agency," but also has the qualities suggested by Judge Leventhal's influential opinion in *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971) -- that it is written, and reflects both serious consideration at supervisory levels within an agency and presumptive finality. To be sure, agencies may -- indeed, in my judgment should -- define as guidance matters other than undoubted "interpretative rules" or "statements of general policy"; examples could include instructions to enforcement staff identifying priorities and/or thresholds for enforcement action. Nonetheless, the recommendation would, in my judgment, be strengthened by some indication of its understood floor.

In a previous comment I urged the insertion, in preamble or opening text, of a sentence along these lines:

This recommendation is addressed to agency documents that the agency or its responsible bureaus seriously intend to govern the actions of staff and/or to be understood as "soft law" which the agency may be entitled to invoke on a rebuttable basis in subsequent agency proceedings.

I again urge this be done. Alternatively, I propose these changes in the preamble

In line 1, add between "activities," and "government" the words "leadership bodies of"; and

in line 8, between "access to" and "guidance" add the word "important," deleting "important aspects" from line 9; and

in lines 58-60, substitute for the sentence beginning "For example," this sentence: "Thus, the term 'agency' as used in the recommendation embraces the presumptively final written outputs of any agency element having a responsibility to generate statements of agency policy or practice that are seriously intended to govern the actions of staff and/or to be understood as "soft law" which the agency may be entitled to invoke on a rebuttable basis in subsequent agency proceedings."

Respectfully submitted,

Peter L. Strauss

Committee Member, Senior Fellow, and Betts Professor of Law Emeritus at Columbia Law School