



Administrative Conference Recommendation 2024-2

Individualized Guidance

Committee on Rulemaking

Adopted June 13, 2024

Agencies provide written guidance to help explain their programs and policies, announce interpretations of legal materials and how they intend to exercise their discretion, and communicate other important information to regulated entities, regulatory beneficiaries, and the broader public. When used appropriately, guidance documents—including what the Administrative Procedure Act (APA) calls general statements of policy and interpretive rules¹—can be important instruments of administration and of great value to agencies and the public. The Administrative Conference has adopted numerous recommendations to help agencies use and develop guidance documents effectively and appropriately, to make them publicly available, and to ensure that such documents are well organized, up to date, and easily accessible.²

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

¹ 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).

² *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2022-3, *Automated Legal Guidance*, 87 Fed. Reg. 39,798 (July 5, 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).

³ 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.



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

Agency practices vary in several key respects. Some individualized guidance is issued in a relatively formal manner (such as a signed letter on agency letterhead), while other individual guidance may be issued in relatively informal ways (such as in the body of an email).⁷ Some individualized guidance is reviewed and issued by agency heads or other senior officials, while other individualized guidance is prepared and issued by lower-level officials. Some individualized guidance has no legally binding effect on the agency or requester, while other such guidance may, for example, provide the requester with a defense to an agency enforcement action.⁸

Individualized guidance offers many benefits. It facilitates communication between an agency and requester, reduces uncertainty, promotes compliance, spurs useful transactions, and can be faster and less costly than other agency actions. For example, agencies may provide individualized guidance to help a regulated party better understand whether its conduct may be

⁴ 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).

⁵ 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).

⁶ 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).

⁷ This Recommendation does not address guidance provided orally.

⁸ See generally Shalini Bhargava Ray, *Individualized Guidance in the Federal Bureaucracy* (June 4, 2024) (report to the Admin. Conf. of the U.S.).



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permissible, and this may limit the need for future enforcement action. In addition, making individualized guidance publicly available can inform other interested persons about how the agency evaluates issues that may affect them.

At the same time, individualized guidance may raise concerns. Even if an agency does not intend to use individualized guidance to bind the public, requesters or others may nevertheless choose to follow the guidance strictly to limit the perceived risk of sanction in a future agency proceeding. Agencies also risk providing inconsistent guidance if they lack appropriate procedures for developing and reviewing it. In addition, some members of the public may lack equal access to processes for requesting individualized guidance or have limited opportunities to participate in processes for developing individualized guidance that affects them.

These benefits can be increased, and these concerns addressed, through the best practices identified in this Recommendation. The Recommendation encourages agencies, when appropriate, to establish procedures for providing individualized guidance to members of the public. It identifies procedures agencies should use to process requests for such guidance fairly, efficiently, and accurately,⁹ and it encourages agencies to make the guidance available to agency personnel and the public. It cautions agencies not to treat individualized guidance as creating binding standards on the public but identifies circumstances in which agencies should consider allowing the public to rely on such guidance (that is, circumstances in which agencies should consider adhering to guidance that is favorable to a person in a subsequent agency proceeding despite the nonbinding character of the guidance). It also urges agencies to involve their ombuds offices in supplementing or improving guidance to the public.¹⁰ Finally, it addresses

⁹ Paragraph 7(f) of this Recommendation urges agencies to describe any fees they charge for individualized guidance, including circumstances where they will waive or reduce such fees. Agencies should avoid charging fees for such guidance that would impose undue burdens on people of limited means. *See* Admin. Conf. of the U.S., Recommendation 2023-8, *User Fees*, ¶ 3, 89 Fed. Reg. 1516 (Jan. 10, 2024) (recommending that agencies, as appropriate, should “set forth procedures for waiving or reducing user fees that would cause undue hardship for low-income individuals, members of historically underserved communities, small businesses, and other small entities”).

¹⁰ *See also* Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).



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circumstances in which agencies should use individualized guidance to support development of general rules.

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

RECOMMENDATION

Individualized Guidance Policies

1. To the extent of, and in a manner consistent with, their resources, priorities, and missions, agencies should respond to requests from members of the public for written guidance by providing individualized written guidance regarding how the law applies to requesters' specific circumstances.
2. Agencies should not treat individualized guidance as creating standards with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.
3. Agencies should develop policies regarding whether and when it is appropriate to allow a requester or other individual to rely on individualized guidance. In so doing, agencies should consider factors including:
 - a. The applicability of constitutional, statutory, or other authorities mandating or prohibiting a party's entitlement to rely on such guidance;
 - b. The accuracy and completeness of the information the requester provided at the time it sought the guidance;
 - c. The certainty of the relevant facts and law at the time the agency issued the guidance;
 - d. Changes in facts or law after initial issuance of the guidance;



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- e. The formality of the agency's individualized guidance procedure, including the position and authority of the agency officials involved in developing and issuing the guidance;
 - f. Whether a person other than the requester of individualized guidance may rely on it, which might depend on the similarity of the person's circumstances to the requester's circumstances; and
 - g. Whether allowing reliance is necessary to prevent significant hardship.
4. Agencies should explain in individualized guidance provided to requesters the extent to which requesters or others can rely on that guidance.
 5. Even if agencies do not recognize a right for persons to rely on individualized guidance or encourage them to do so, agencies should, when appropriate and lawful, minimize hardships on persons who nevertheless acted in conformity with the guidance, such as by reducing or waiving any penalty for past noncompliance or taking enforcement action with solely prospective effect.
 6. Agencies with ombuds offices should provide opportunities for members of the public to seek assistance from such offices to supplement individualized guidance or to resolve issues related to individualized guidance. Agencies should also involve such offices in efforts to improve agency policies and procedures related to individualized guidance.

Individualized Guidance Procedures

7. Agencies should develop written procedures for requesting and issuing individualized guidance. Agencies should publish such procedures in the *Federal Register* and, as appropriate, codify them in the *Code of Federal Regulations*. Agencies should also make the procedures publicly available on their websites and, if applicable, in other 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;



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- c. Any matters that the agency will not address through individualized guidance, including the rationale for not providing guidance as to such matters;
 - d. The information that the requester should include with the request for individualized guidance;
 - e. Whether the agency will make individualized guidance and any related information (including the identity of the requester and information from the request) publicly available as described in paragraphs 10 through 13;
 - f. Any fees the agency charges for providing individualized guidance, as well as any provisions for waivers of, exemptions from, or reduced rates for such fees;
 - g. Any opportunities for public participation in the preparation of individualized guidance;
 - h. The manner in which a response to a request for individualized guidance will be provided to the requester;
 - i. To the extent practicable, the expected timeframe for responding to requests for individualized guidance;
 - j. Whether requesters may seek review of individualized guidance by a higher-level official; and
 - k. The agency's policy, developed as described in paragraph 3, regarding whether and when it is appropriate for a requester or other individual to rely on individualized guidance.
8. Agencies should develop procedures for agency personnel to manage and process requests for individualized guidance, including:
 - a. Allowing for electronic submission of, and response to, requests;
 - b. Creating methods for identifying and tracking requests;
 - c. Maintaining past responses to requests in a manner that allows agency personnel to identify and consider them when developing responses to new requests that present similar or related issues; and
 - d. Ensuring that relevant personnel receive training in the agencies' individualized guidance procedures.



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

Public Availability of Individualized Guidance

10. Absent substantial countervailing considerations, agencies should make publicly available on their websites any individualized guidance that affects, or may be of interest to, persons other than the requester, including regulated persons and regulatory beneficiaries.
11. When making individualized guidance available on their websites, agencies should, as appropriate:
 - a. Identify the date, requester, and subject matter of the guidance;
 - b. Identify the legal authority under which the guidance was issued and under what circumstances other parties may rely on the guidance; and
 - c. Use other techniques to help the public find relevant information, such as indexing or tagging individualized guidance by general topic area.
12. When making individualized guidance publicly available, agencies should redact any information that is sensitive or otherwise protected from disclosure consistent with the Freedom of Information Act or other relevant information laws.
13. Agencies should keep individualized guidance on their websites current. If an agency modifies or rescinds a publicly available individualized guidance document, it should indicate on the face of the document that it has been modified or rescinded and direct readers to any successor guidance and any explanation for the modification or rescission.

Accessibility of Individualized Guidance Materials

14. Agencies that provide individualized guidance should maintain a page on their websites that provides easy access to the procedures described in Paragraph 7, all individualized



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guidance that they make publicly available as described in paragraphs 10 through 13, and information about electronically submitting a request for individualized guidance.

Use of Individualized Guidance in Aid of General Rulemaking

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