

REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**INDIVIDUALIZED GUIDANCE IN THE FEDERAL
BUREAUCRACY**

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Individualized Guidance in the Federal Bureaucracy

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Introduction

From tax and workplace safety to immigration and federal criminal law, members of the public seek assistance in navigating complex statutory codes and the substantial gray areas in which agencies exercise their discretion. Inevitably, people want to know how the relevant agency would apply the law to their specific factual scenario. Some agencies respond by giving case-specific advice, or individualized guidance. This study examines individualized guidance in the federal bureaucracy—how members of the public seek it, how agencies produce and provide it, and how agency personnel, requesters, and third parties use individualized guidance. After describing its empirical findings, including an extensive survey of agency practices, this study offers best practices.

Advising the public is a vital function of the administrative state.² It helps reduce uncertainty, improve compliance, and spur useful transactions.³ It is a classic feature of “good government.”⁴ Unsurprisingly, many agencies provide advice routinely and through a variety of channels. In so doing, however, they also face a trade-off between the need to create and implement predictable, consistent, and non-arbitrary rules for conduct while also providing detailed, useful guidance that parties can rely on.⁵ As a result, agencies take different approaches to the advisory function.

The most formal individualized guidance documents go by a variety of names: advisory opinions,⁶ opinion letters,⁷ letters of interpretation,⁸ private letter rulings,⁹ business review letters,¹⁰ and no action letters,¹¹ for example. But agencies advise the public informally as well. Today, informal advice from federal agencies can take the form of oral advice over the phone, written advice in an email or letter, or oral and written feedback during an in-person conference.¹²

² MICHAEL ASIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* 13 (1973).

³ See Burnele V. Powell, *Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act*, 63 N.C. L. REV. 339, 342–43 (1985).

⁴ ASIMOW, *supra* note 2, at 11.

⁵ Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 435 (1999).

⁶ See, e.g., *Advisory Opinions*, U.S. DEP’T OF JUST., <https://www.justice.gov/nsd-fara/advisory-opinions> (last visited Mar. 12, 2024); *FCPA Opinions*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal/criminal-fraud/fcpa-opinions> (last updated Aug. 11, 2023); *Advisory Opinions*, FED. ELECTION COMM’N, <https://www.fec.gov/press/resources-journalists/advisory-opinions/> (last visited Mar. 12, 2024); *Advisory Opinions*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/advisory-opinions.html> (last visited Mar. 12, 2024).

⁷ *Final Rulings and Opinion Letters*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance#:~:text=Opinion%20letters%20serve%20as%20a,or%20a%20lower%20level%20official> (last visited Mar. 12, 2024).

⁸ *Standard Interpretations*, U.S. DEP’T OF LAB., <https://www.osha.gov/laws-regs/standardinterpretations/publicationdate> (last visited Mar. 12, 2024).

⁹ *Private Letter Rulings*, INTERNAL REVENUE SERV., <https://www.irs.gov/government-entities/indian-tribal-governments/private-letter-rulings> (last updated May 3, 2023).

¹⁰ *Business Review Letters and Request Letters*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/business-review-letters-and-request-letters> (last updated Aug. 3, 2023).

¹¹ *Staff No Action, Interpretive and Exemptive Letters*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/regulation/staff-interpretations/no-action-letters> (last visited Mar. 12, 2024); *CFTC Staff Letters*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm> (last visited Mar. 12, 2024).

¹² See, e.g., *Let Us Help You*, INTERNAL REVENUE SERV., <https://www.irs.gov/help/telephone-assistance> (last updated Jan 11, 2024); *Contact FDA*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/contact-fda> (last updated Aug. 17, 2023).

The variety and prevalence of individualized guidance raises larger normative questions. Members of the public crave individualized guidance, and some agency personnel view providing it as simply a part of their job.¹³ Other agencies, however, are skeptical of giving advice in individual cases, based on considerations of cost and the potential for unfairness. This study addresses how these concerns shape agencies' willingness to provide individualized guidance.

Defining Individualized Guidance

For purposes of this study, “individualized guidance” is “guidance” or “advice” that agencies produce in response to a query by an individual person or entity regarding how the law applies to their prospective conduct.¹⁴ “Advice” means a “recommendation regarding a decision or course of conduct.”¹⁵

A word about “guidance,” an essential tool of administration that has also prompted controversy regarding its legal effects and proper uses by agencies and regulated parties. Many forms of individualized guidance, notably advisory opinions, might properly be characterized as a kind of “guidance” under the Administrative Procedure Act (APA). Guidance is the term now generally used to describe two types of non-legislative rules (that is, rules that lack the force and effect of law) under the APA that an agency may promulgate without using notice-and comment procedures: policy statements and interpretive rules. Although case law on the topic is sparse, some courts that have considered the matter have characterized advisory opinions as “interpretive rules.”¹⁶

However, this study does not endeavor to locate advice or individualized guidance within the framework of the APA with great precision. Individualized guidance can take many forms, and it may defy easy characterization under the APA.¹⁷ This form of agency action has not received much case-law or scholarly attention. One scholar observed that agencies themselves tend to view advice-giving as a genre of rulemaking, as it predates any concrete dispute.¹⁸ In addition, the APA defines a “rule” to include “an agency statement of general or *particular* applicability and future effect...”¹⁹ But in some instances,

¹³ ASIMOW, *supra* note 2, at 3–5.

¹⁴ An agency’s definitive judgment about how the facts apply to *past* conduct is probably better characterized as an adjudication. As explained below, some so-called “no-action” letters pertain to past conduct; however, these letters offer a provisional, revocable assessment which typically does not bind agency leaders, and thus may still properly qualify as advisory despite their application to past conduct.

¹⁵ *Advice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/advice> (last visited, Mar. 12, 2024).

¹⁶ *See, e.g.*, Nat’l Auto. Laundry & Cleaning Co. v. Shultz, 443 F.2d 689, 694 (2d Cir. 1971); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 819 (2001) (noting Judge Leventhal’s opinion characterizing Wage and Hour Division opinion letters as “interpretative rules”).

¹⁷ THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 132 (2022) (noting “oddball nature” of tariff classification rulings, which “do not correspond to any of the more familiar modes of administrative action, such as legislative rules, interpretative rules, opinion letters, adjudications, and so forth”).

¹⁸ Powell, *supra* note 3, at 355 (observing that *agencies* regard advice giving as a feature of rulemaking and seek to avoid an “adjudicatory posture”). *See* Strauss, *supra* note 16, at 804 (characterizing IRS advice through private letter rulings as an example of a “publication rule”). Professor Strauss has used the term “publication rules” to refer to non-legislative rules exempt from the APA’s notice-and-comment requirements that agencies must publish in the *Federal Register* or otherwise make available to the public. *See* 5 U.S.C. § 552(a).

¹⁹ 5 U.S.C. § 551(4) (*italics added*). However, Professor Levin has argued that the reference to “particular applicability” should be ignored as a drafting error. *See* Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of ‘Rule’*, 56 ADMIN. L. REV. 1077 (2004). Professor Levin regards generality rather than prospectivity as the hallmark of a “rule.”

advice regarding prospective conduct may take the form of an informal adjudication, as with jurisdictional determinations made by the Army Corps of Engineers.²⁰

Prior Works on Agencies' Advice-Giving Practices

Fifty years ago, Professor Michael Asimow studied agencies' advice-giving practices for ACUS and defined advice to mean the application of "law or policy to facts so as to assist in the planning of prospective private transactions."²¹ Asimow cabined his study to the application of law or policy to facts before a transaction occurs, which makes sense given that applying law or policy to facts *after* a transaction occurs is largely the province of adjudication. Asimow found that most agencies gave advice freely. He also documented the variety of forms that advice took—from advisory opinions and customs letters to oral advice over the phone. However, the recommendations based on his study were not ultimately adopted.

About a decade after Asimow's study, and on behalf of ACUS, Professor Burnele V. Powell studied agency advice giving as it relates to declaratory orders under APA § 554(e).²² This provision states: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."²³ Powell argued that agencies had made insufficient use of declaratory orders. In producing what he characterized as provisional, nonbinding advice instead of building a body of binding authority through declaratory orders, Powell argued that agencies were offering the public advice lacking reliability—to the public's detriment.²⁴

In a more recent ACUS study, Professor Emily Bremer renewed the call for agencies to use declaratory orders more, acknowledging their value as tools for advising the public.²⁵ As Bremer notes, courts initially interpreted Section 554(e) to authorize declaratory orders exclusively incident to a formal adjudication.²⁶ However, Bremer explains that the Supreme Court shifted away from a rigid requirement of formal adjudication, opening the door to agency declaratory orders incident to informal adjudications. Ultimately, Bremer and Powell both argue that agencies have ignored the promise of Section 554(e).²⁷ Like softer forms of advice, declaratory orders enable regulated parties to plan with greater certainty, better comply with the law, and reduce agencies' costs of enforcement. Unlike these softer forms, however, they offer a *judicially enforceable* decision that binds the government and the requesting party.

Further Note on Scope

Individualized guidance does not apply to every application of law to facts in response to a query about prospective conduct. As defined here, it excludes permits. In their foundational study of the permit power, Professors Eric Biber and J.B. Ruhl define permits as "discretionary, administrative granting of permission to do that which is otherwise prohibited by statute."²⁸ Individualized guidance refers to

²⁰ See U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590 (2016).

²¹ ASIMOW, *supra* note 2, at 2 (emphasis omitted).

²² Powell, *supra* note 3, at 346–47.

²³ 5 U.S.C. § 554(e).

²⁴ Powell, *supra* note 3, at 356–57.

²⁵ Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015). See also Emily S. Bremer, *Declaratory Orders* (Oct. 30, 2015) (report to the Admin. Conf. of the U.S.).

²⁶ Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169, 1173 (2017).

²⁷ See *id.* at 1172–74; Powell, *supra* note 3, at 339.

²⁸ See Admin. Conf. of the U.S., Recommendation 2015-4, *Designing Federal Permitting Programs*, 80 Fed. Reg. 78,164 (Dec. 16, 2015). See also Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 159 (2014).

voluntary or optional requests for guidance about how the law would apply to the requesters' conduct, whereas permits connote a mandatory regime of seeking permission before engaging in conduct. As a result, this study excludes permits.

Similarly, this study does not address waivers, exemptions, and most forms of prosecutorial discretion.²⁹ On Professor Aaron Nielsen's definition, waivers and exemptions amount to prospective authorization of a statutory violation, whereas prosecutorial discretion refers to nonenforcement after a violation has occurred.³⁰ Although there might be instances where individuals seek advice about eligibility for a waiver or exemption (or prosecutorial discretion), the adjudication of waivers and exemptions themselves goes beyond "advice" and more closely resembles "permission" to engage in otherwise prohibited conduct.³¹ Other forms of administrative action may also fall outside the scope of this study; those identified here are illustrative.

Legal Background

In recent years, scholars and practitioners have paid increasing attention to federal agencies' uses (and perceived abuses) of guidance documents. Exempt from the requirement of notice-and-comment rulemaking that apply to legislative rules, guidance documents are cheaper and faster tools for agencies to communicate their interpretations of the law or the way they intend to exercise their discretion. But critics have accused agencies of misusing guidance documents as tools for "practically binding" the public without the procedural safeguards of the legislative rulemaking process. Professor Robert Anthony advanced this claim in his 1992 report for ACUS, where he argued that agencies often used policy statements as a shortcut for issuing binding legal rules in violation of the Administrative Procedure Act.³²

Professor Peter L. Strauss contemporaneously challenged Anthony's contention and the implications for so-called publication rules. Such rules encompass rules of procedure, guidance documents, and administrative staff manuals, among other materials.³³ Twenty-five years later, Professor Nicholas Parrillo conducted an in-depth study for ACUS, calling Anthony's framing into question with respect to general policy statements.³⁴ Parrillo found that agencies rarely, if ever, sought to bind the public improperly or in bad faith. Instead, the legitimate pursuit of consistency and non-arbitrariness had contributed to a perceived rigidity in the use of guidance. To break the stalemate between those concerned

²⁹ In some settings, prosecutorial discretion decisions are not accompanied by a reasoned explanation for the exercise of discretion. See Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049 (2021).

³⁰ Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Exemptions and Waivers*, 82 Fed. Reg. 61,742 (Dec. 29, 2017); see Aaron L. Nielsen, *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.).

³¹ Nielsen, *supra* note 30.

³² See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

³³ Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1476 (1992) (noting that Anthony's characterization of some guidance documents as having an improper practically binding effect puts "publication rules in jeopardy," which is a "questionable outcome"). See 5 U.S.C. § 552(a) (identifying information the agency "shall make available to the public," including final opinions in adjudications, statements of policy and interpretations not published in the Federal Register, administrative staff manuals, and a host of other documents). Strauss defended the "practically binding effect" of publication rules on agencies and their personnel. See Strauss, *supra*, at 1486 ("Would it not be preferable . . . to treat publication rules as ordinarily having the force of precedent for the agency and its personnel?"). Strauss further argued that the "extent of precedential force might vary with the dignity of the document concerned." *Id.*

³⁴ Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

with overly rigid adherence to guidance and agencies' good-faith pursuit of rule of law values, Parrillo proposed a framework of "principled flexibility," according to which agencies explain deviations from standards articulated in policy statements.³⁵ Most recently, in a 2018 report, Professors Blake Emerson and Ronald Levin extended Parrillo's analysis and associated recommendations to interpretive rules.³⁶

Building on these foundational studies on guidance, this study addresses "individualized guidance," or guidance an agency provides in response to a request for advice from an individual person or entity. As noted below, generalized guidance documents are non-legislative rules under the APA. Referenced in the APA provision that governs informal rulemaking procedure, section 553, they articulate generally applicable standards that predate any specific dispute. This study, however, introduces *individualization*, a hallmark of adjudication, to the inquiry.³⁷ (Although the APA defines a rule to include particularized statements,³⁸ scholars have argued that this language should be ignored.³⁹) As a result, "individualized guidance" transcends traditional categories of the APA.

Individualized Guidance as a Subset of APA Guidance

Much of the world of agency advising consists of guidance within the meaning of APA § 553, which governs the procedures agencies must use when promulgating what the APA defines as "rules." Most importantly, that section exempts from notice-and-comment rulemaking certain categories of rules. Among them are two forms of non-legislative rules (that is, rules that lack the force of law) that together are commonly referred to as "guidance": interpretative rules and general statements of policy.⁴⁰ A general policy statement conveys how the agency intends to exercise its discretion.⁴¹ An interpretive rule elaborates on the meaning of an ambiguous statutory or regulatory provision.⁴² Although case law generally distinguishes between interpretive rules and policy statements in deciding whether the § 553 exemption applies, it can be difficult, if not impossible, to distinguish between them.⁴³

Some individualized guidance documents have many of the qualities of generally applicable guidance documents. Although they address a specific factual scenario, an advisory opinion or no-action letter in response to proposed conduct might nevertheless count as "guidance." In *Soundboard Association v. FTC*, the D.C. Circuit determined that an informal FTC staff letter written in response to a

³⁵ *Id.* at 103–07.

³⁶ Blake Emerson & Ronald M. Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* 35 (May 28, 2019) (report to the Admin. Conf. of the U.S.).

³⁷ See Michael Asimow, *Fair Procedure in Informal Adjudication* 8 (Dec. 7, 2023) (report to the Admin. Conf. of the U.S.). Asimow defines adjudication as an "agency resolution of an *individualized* dispute that has *legally binding effect* on individual persons or entities." *Id.*

³⁸ 5 U.S.C. § 551(4).

³⁹ See Levin, *supra* note 19, at 1079 (2004) ("A proper definition of 'rule' would turn on *generality*, not *prospectivity*").

⁴⁰ 5 U.S.C. § 553.

⁴¹ Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 *YALE J. ON REG.* 165, 165 (2019).

⁴² See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) (defining interpretive rules in contrast to substantive rules to mean "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers").

⁴³ See, e.g., John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893 (2004) (noting growing murkiness of distinction between interpretation and policymaking); Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 *ADMIN. L. REV.* 263, 290 (2018) (arguing for unified treatment of policy statements and interpretive rules).

query by a regulated entity was not final agency action.⁴⁴ In reaching this conclusion, the court observed that *the district court* had deemed the staff letter an interpretive rule exempt from notice and comment rulemaking.⁴⁵ The D.C. Circuit neither endorsed nor rejected that characterization. Other courts have also characterized staff opinion letters as interpretive rules rather than orders resulting from informal adjudications.⁴⁶

Agency advice letters lack the force of law, but in some settings, they appear to have a binding effect associated with adjudicatory orders. For example, advisory opinions in several regulatory areas offer the requesting party a shield against enforcement action regarding the transaction described in the request for advice.⁴⁷ Similarly, some advice letters, like customs ruling letters, establish the agency’s “official position” as to the transaction at issue—despite lacking precedential effect or the force of law.

The APA defines “adjudication” to mean an “agency process for the formulation of an order,”⁴⁸ and an “order” means “the whole or part of a final disposition...in a matter other than rulemaking...”⁴⁹ Rulemaking is an “agency process for formulating...a rule,” and a “rule” is “the whole or part of an agency statement of general or particular applicability and future effect...”⁵⁰ Put differently, an agency (adjudicatory) order refers to “an agency action with the force of law that resolves a claim or dispute between specific individuals in a specific case.”⁵¹ Thus, adjudications produce final dispositions in processes outside of rulemaking. Rulemakings, on the other hand, produce generally applicable standards for future effect (with the caveat that APA § 551(4) currently includes statements of particular applicability as well). As previously noted, individualized guidance has features of both guidance and informal adjudication.

Individualized Guidance and Declaratory Orders

Individualized guidance and declaratory orders are both tools to advise the public, and they bear a resemblance.⁵² Like declaratory orders, individualized guidance offers valuable information about how private parties can avoid enforcement by conforming their conduct to the agency’s view of the law. This increases consistency and reduces costs of uncertainty and error.⁵³ Both can also serve as shields to

⁴⁴ See *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1266 (D.C. Cir. 2018). The D.C. Circuit has emphasized that whether a document is a rule or a guidance document is a distinct question from whether the agency action is final for purposes of judicial review. *Cal. Cmty. v. EPA*, 934 F.3d 627 (D.C. Cir. 2019).

⁴⁵ *Soundboard Ass’n*, 888 F.3d at 1266 (discussing district court’s characterization of staff letter as interpretive rule exempt from notice and comment rulemaking).

⁴⁶ See, e.g., *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004) (noting the lack of adjudicatory fact-finding by the agency in producing the interpretive letter).

⁴⁷ See, e.g., 29 U.S.C. § 258; Noam Schreiber, *Labor Department Says Workers at a Gig Company are Independent Contractors*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/business/economy/gig-economy-workers-contractors.html> (discussing opinion letters issued by the Department of Labor’s Wage & Hour Division). Cf. *Bremer*, *supra* note 26, at 1172 (“[G]uidance has no legal effect: an agency cannot enforce it against regulated parties, and a regulated party cannot use it to shield itself from an enforcement action if the agency later changes its view.”) (emphasis added).

⁴⁸ 5 U.S.C. § 551(7).

⁴⁹ *Id.* § 551(6).

⁵⁰ *Id.* § 551(4).

⁵¹ BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 2 (2021).

⁵² See 5 U.S.C. § 554(e).

⁵³ Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

enforcement, but unlike some individualized guidance, declaratory orders are undoubtedly binding adjudicatory orders.⁵⁴

Binding Effect

Guidance is not supposed to “bind,” and so the question arises whether “binding” advisory opinions are properly classified as “guidance” or are instead orders produced by informal adjudications. To some extent, the bindingness issue is a red herring. Members of the public are typically not complaining that the government improperly holds them to a legal standard articulated in a mere advice letter that failed to follow the proper procedural safeguards. More often, a member of the public wishes the government to follow such letters.⁵⁵ They *want* the government to honor the advice given to them and to others.

However, the issue could become more contentious and consequential when parties disagree with the advice an agency gives, or where the agency changes position, and a party wishes to hold the agency to its prior interpretation. Accordingly, the question of what it means for individualized guidance documents to “bind” warrants some consideration.⁵⁶

The quality of “bindingness” often refers to the force of law. In *Kisor v. Wilkie*, Justice Kagan, writing for the plurality, characterized a binding agency pronouncement as one that could serve as “the basis for an enforcement action.”⁵⁷ Like guidance documents generally, however, individualized guidance documents clearly lack the force of law. In *United States v. Mead Corp.*, the Supreme Court expressly considered this quality of customs ruling letters, affording them only *Skidmore* deference because they lacked the force of law, were issued in high volume annually, and had no precedential effect.⁵⁸ In *Christensen v. Harris County*,⁵⁹ the Court again regarded an opinion letter, this time from the Department of Labor’s Wage and Hour Division, as lacking the force of law.⁶⁰ Thus, in these foundational deference cases, the Supreme Court has characterized individualized guidance as lacking the force of law.

Professor Blake Emerson has explained what it means for guidance to “bind” without having the force of law.⁶¹ On his view, the key question is whether guidance “leaves the agency free to exercise discretion or instead impermissibly determines the agency’s final disposition of all the cases to which it applies.”⁶² The danger contemplated here is that a guidance document establishes a fixed rule, even inadvertently. But individualized guidance does not raise the specter of improper binding effect in this way. The whole point of seeking the advice is to obtain the agency’s buy-in as to a proposed course of conduct. If the requesting party is then aggrieved, it would usually be because the agency has not honored the advice it gave (or the requesting party disagrees with the advice provided).⁶³

⁵⁴ See Bremer, *supra* note 26.

⁵⁵ See ASIMOW, *supra* note 2, at 29–30.

⁵⁶ For a discussion of how “publication rules” might nevertheless properly bind agencies and their personnel, see Strauss, *supra* note 33.

⁵⁷ 139 S. Ct. 2400, 2420 (2019). For an analysis of force of law concepts in administrative law, see Beau Baumann, *The Force of Law After Kisor*, 42 PACE L. REV. 24, 26 (2021).

⁵⁸ 533 U.S. 218 (2001).

⁵⁹ 529 U.S. 576 (2000).

⁶⁰ In a case involving generally applicable, rather than individualized, guidance, the Court suggested that guidance documents could properly have binding effect. See *Barnhart v. Walton*, 535 U.S. 212 (2002).

⁶¹ Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, YALE L.J. 2122, 2138 (2019).

⁶² *Id.* at 2135.

⁶³ See Strauss, *supra* note 33 at 1464–65 (discussing the benefits of agencies being bound by their own guidance).

Bindingness in individualized guidance generally refers to a commitment the agency makes to follow the advice it has provided to a requester (as to that requester only, in many cases). An agency is free to change its position going forward as to other conduct or other requesters, but as to a specific requester and the proposed conduct described in the request, an agency may be “bound” to follow the advice given. In some cases, the requester or another party can use the advice as a shield against an enforcement action later for the same underlying conduct.⁶⁴ In those cases, the impact of the advice resembles that of a declaratory judgment.⁶⁵ Such advice might properly be characterized as consisting of orders produced by informal adjudication, to the extent the advice constitutes a “final disposition.”

On the other hand, one could understand the limited binding effect of individualized guidance as the product of a custom or practice of the agency rather than as a result of the advice having a legally binding effect.⁶⁶ As Professor Asimow noted in his study of advice-giving practice, agency personnel “indicated that it was almost unthinkable that anyone who relied in good faith on staff advice, especially from the highest available level, would suffer any detriment from such reliance by reason of adverse agency action.”⁶⁷ When agencies devote resources to answering a specific question about how the law applies to facts presented by the requesting party, agencies understandably set out to honor and uphold that analysis. It might be bound in that sense, even if an aggrieved party could not obtain a court order forcing the agency to follow its advice.⁶⁸

Reliance

The reliability of agency advice varies tremendously. Agencies label some advice tentative and not eligible for reliance. In other instances, agencies expressly indicate that the advice can be relied upon, though often *only* by the requesting party. Finally, some agencies publish advice letters that third parties can rely on.

Finality

Individualized guidance documents also vary as to their finality. Part of this stems from the Supreme Court’s opaque finality jurisprudence. Courts generally consider two factors to determine whether an agency’s action is “final” for purposes of the APA, which provides that only final agency action is reviewable.⁶⁹ First, does the action reflect the consummation of the agency’s thinking on the issue? Or is the view expressed “tentative or interlocutory”? Second, does the action determine rights or trigger legal consequences?

Courts have traditionally considered staff letters and opinions from agency personnel short of the agency head – whether interpreting the law or predicting enforcement⁷⁰ – as nonfinal agency action, thus immune from judicial review.⁷¹ For example, courts have regarded SEC no-action letters as lacking

⁶⁴ See, e.g., 52 U.S.C. § 30108(c)(2) (describing protection from any sanction under the Federal Election Campaign Act [“Act”] for any person who relies on an advisory opinion in good faith, as specified in the Act).

⁶⁵ See Bremer, *supra* note 26, at 1172 (noting that “guidance” cannot be used as a shield to enforcement).

⁶⁶ For a discussion of bindingness as a custom rather than a legal characteristic of advice, see ASIMOW, *supra* note 2, at 7.

⁶⁷ *Id.*

⁶⁸ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (characterizing interpretive rules as non-binding even if given *Auer* deference because they do not serve as the basis for enforcement, which instead must rely on a legislative rule).

⁶⁹ 5 U.S.C. § 704. See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

⁷⁰ ASIMOW, *supra* note 2, at 6–7.

⁷¹ E.g., *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018) (finding that a staff opinion letter was not final agency action and thus not subject to judicial review).

finality because they are provisional and revocable rather than definitive and final.⁷² As to the second prong, these pronouncements typically have only a limited binding effect, one that extends only to the requesting party and the agency, and only with respect to the facts specified in the request and the opinion.⁷³ Accordingly, courts often do not view them as triggering legal consequences.⁷⁴

Important policy reasons support this result. The D.C. Circuit noted that permitting judicial enforcement of “mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportion to the average citizen than any possible gain which would accrue.”⁷⁵ Similarly, the Ninth Circuit characterized as nonfinal an interpretive letter from the Federal Aviation Administration’s Chief Counsel because the letter “was neither a definitive statement of the agency’s position nor a document with the status of law.”⁷⁶

The Fifth Circuit, however, has recently rejected this conclusion. In *Clarke v. CFTC*, the Fifth Circuit broke with precedent and held that the rescission of a CFTC no-action letter was final agency action subject to judicial review.⁷⁷ In so doing, the court characterized the no-action letter as a “license” under APA § 551. Similarly, in *Data Marketing Partnership LP v. Department of Labor*, the court held that the Department of Labor’s ERISA opinion letters constitute final agency action.⁷⁸ The court concluded that they reflected a consummation of the agency’s thinking on a topic and “legal consequences flowed” from it. The extent to which these innovations represent the unique workings of the Fifth Circuit remains to be seen, but these decisions have cast doubt on the immunity of staff advice letters from judicial review. In turn, this could influence agencies’ willingness to supply advice.

Summary of Findings

The principal finding of this study is that the form and function of individualized guidance in the federal bureaucracy varies on several axes: the format and formality of advice, its reliability (whether it is provisional or binding on the agency to a limited extent), the degree of supervision or centralization involved in the production of the advice, and the publicity and usability of the advice. This study endeavors to document and explain the variety observed and further recommends a set of best practices for individualized guidance.

As a threshold matter, agencies differ in their willingness to advise the public on a case-by-case basis. As Asimow found 50 years ago, many agencies are willing to advise the public; some enthusiastically so. But this study finds that other agencies are reluctant to do so. Some agencies formally

⁷² See, e.g., *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989).

⁷³ See, e.g., *U.S. Def. Comm’n v. FEC*, 861 F.2d 765, 772 (2d Cir. 1988). Similarly, federal courts have deemed “no-action letters” “tentative” and therefore not “final.” See *Board of Trade v. SEC*, 883 F.2d 525, 529–30 (7th Cir. 1989).

⁷⁴ However, in a case pre-dating *Bennett v. Spear*, the D.C. Circuit held that an opinion letter reflecting the views of the agency head satisfied the requirements for finality when the letter was a “deliberative determination of the agency’s position at the highest available level on a question of importance” to an entire industry group. See *Nat’l Auto. Laundry and Cleaning Co. v. Shultz*, 443 F.2d 689, 702 (D.C. Cir. 1971) (noting “feature of ‘expected conformity’” of a published initial interpretation approved by a Commission or agency head).

⁷⁵ *Id.* at 699; see also Strauss, *supra* note 33, at 1487 (noting the court’s care “to assure itself that the advising function would not be interfered with” despite finding Wage & Hour Division opinion letters reviewable).

⁷⁶ *Air Cal. v. U.S. Dep’t of Transp.*, 654 F.2d 616, 620 (9th Cir. 1981).

⁷⁷ *Clarke v. Commodity Futures Trading Comm’n*, 74 F.4th 627, 639 (5th Cir. 2023).

⁷⁸ *Data Mktg. P’ship, LP v. U.S. Dep’t of Lab.*, 45 F.4th 846 (5th 2022).

disavow provision of legal advice specifically, while remaining willing to provide customer service and advice about agency procedures.⁷⁹

A variety of factors shape agencies' willingness to advise the public. Agencies hesitate to advise out of concern for the proper role of the agency vis-à-vis would-be requesters, the potential volume of requests, resource constraints, and fairness within a regulated community. For example, several benefits adjudication agencies noted that agency personnel might provide legal advice to internal stakeholders, but they did not see their role as providing legal advice to applicants. One former agency official observed that a willingness to advise depends on who the client is. If one takes a narrow view of the client as simply the agency, for example, individualized guidance to the public is not a part of that mission. But if one takes a broader view emphasizing service to the public, then individualized guidance fits squarely within the job. One agency experimented with individualized guidance but stopped providing it out of concern that the agency was "putting a thumb on the scale" in favor of some market participants. Thus, many factors influence agencies' willingness to advise.

This study offers reason to believe that concerns for volume, cost, and equity can be mitigated through program design, as discussed below, at least partially. Some agencies might have good reasons to decline to offer written individualized guidance, but the inevitable demand for advice suggests that members of the public will call, email, or write letters seeking it regardless.

Empirical Findings

Method

This study draws on publicly available documents and thirty-two (32) interviews conducted over Zoom or phone from September 2023 to January 2024 with agency personnel and members of the private sector.⁸⁰ For government interviewees, I began with ACUS government members and proceeded through "snowball sampling." This means that I asked each interviewee for suggestions of additional persons whom I could contact for this study. For the private sector, I contacted people I knew in different industries, and they either agreed to speak with me or referred me to a colleague or someone they knew in the industry. Ultimately, I set out to interview people from a wide range of regulatory areas and agency personnel from agencies varying in size and structure.

The vast majority (87.5%) of interviewees were current or former employees of a federal agency. The remaining interviewees were representatives of regulated firms.⁸¹ After completing interviews, I informally coded the interview notes to discern common themes or points of distinction across agencies.

⁷⁹ "Customer service" in this study refers to mundane advice that does not involve agency personnel's judgment or discretion.

⁸⁰ I have preserved the confidentiality of interviewees, identifying them only by the agency at which they currently or formerly worked. For interviewees in private firms, I identified them only by their industry.

⁸¹ I did not speak to regulatory beneficiaries because they do not typically request individualized guidance. Although regulatory beneficiaries might wish to obtain information about how the law would apply to a regulated firm's proposed course of conduct, agencies generally do not allow parties to request individualized guidance about a third party's conduct. However, further research on the impact of individualized guidance on regulatory beneficiaries is warranted.

Taxonomy

Format & Formality

The examples of individualized guidance uncovered by this study suggest at least three tiers of advice—formal, less formal, and informal. “Formality” is a function of several factors—whether the advice is written or oral; if written, whether Congress has established the procedure for requesting and receiving advice by statute or whether the agency has done so by regulation or guidance; and whether the highest levels of agency leadership review the advice before issuing it.

“Formal” advice is usually written in accordance with procedures established in the law and reviewed by high-level agency leadership, such as the Secretary of the relevant department or the agency’s Solicitor’s Office. Less formal advice may have some of these qualities, but not all. The advice might not undergo full vetting by the highest levels of agency leadership. The agency might produce the advice in adherence to internal protocols or publicly available guidance instead of through processes codified in statutes and regulations. The informal tier of advice is not provided pursuant to procedures established by statute or regulation. It includes three kinds of advice: specific legal advice, which applies law to the facts; general legal advice, which directs requesters to statutory or regulatory authority to answer their question; and advice best characterized as customer service.

Many agencies offer formal, written responses to legal questions from the public. These take the form of advisory opinions, opinion letters, and a host of other forms of written individualized guidance. Formal advice giving is often statutorily grounded. Statutes ranging from the Portal-to-Portal Act, the Foreign Corrupt Practices Act, and the Federal Election Campaign Act all contemplate that the implementing agency will provide formal advice letters.⁸²

In contrast, some agencies offer advice letters purely as a discretionary service to the public, and where it does not involve review by high-level agency leadership, it can be regarded as less formal. For example, the SEC’s and CFTC’s no-action letters are discretionary advice letters that explain how the agency views the legality of a proposed transaction, or if a transaction has already occurred, whether the letter’s author will advise the agency to take enforcement action. These are generally staff letters that do not necessarily reflect the views of agency leadership.

Finally, some agencies provide advice informally by email or over the phone, not according to prescribed procedures in statutes or regulations. For example, a division of the Consumer Product Safety Commission answers questions by email about how safety standards apply to consumer products. Agencies such as the Social Security Administration and the Federal Emergency Management Agency’s Office of Flood Insurance Advocate staff phone lines to field queries by the populations they serve. At times, the content of phone consultations is reduced to a writing and maintained in a log, but not often.⁸³ The informality of the advice does not necessarily mean the agency has discretion *not* to provide it. For example, the Department of Education’s Civil Rights Division is statutorily mandated to provide technical assistance, which it does by phone.⁸⁴

⁸² These will be discussed *infra*.

⁸³ For example, staff providing “technical assistance” through the Department of Education’s Civil Rights Division maintain a log of calls received and topic discussed. *See* Interview 17.

⁸⁴ Interview 17; *see, e.g.*, 20 U.S.C. § 1416(e); 34 C.F.R. pt. 104, app. A, subpart C (2023) (noting that the Department of Education is establishing a special technical assistance unit to provide staff advice and guidance over the phone).

Centralization and Supervision

The degree of centralization and supervision involved in the production of advice also influences its relative formality. Informal advice is least subject to review by high-level agency personnel, whereas formal advice is most likely to receive sign-off from the head of the agency or Chief Counsel.

Different forms of individualized guidance involve different degrees of centralization and supervision. In some subunits of the Department of Labor, such as the Wage & Hour Division, or OSHA, the head of those subunits signs off on advice letters.

Other agencies issue letters or recommendations by staff members rather than agency leadership. For example, the Federal Trade Commission issues informal opinion letters written by agency staff, without review or ratification by the Commission.⁸⁵ Similarly, EPA staff issue a range of letters making recommendations.⁸⁶ So do the CFTC and the SEC. These advice letters typically do not undergo extensive review by agency leadership. These less-formal channels allow the agency to provide quicker and less expensive advice. Involving senior agency leadership adds to the time and cost involved in producing advice. Many agencies also administer advice through regional offices rather than headquarters.

Apart from top-down supervision, some agencies have also implemented horizontal measures to promote consistency. For example, several agencies, including the IRS and OSHA, hold roundtables or group calls among agency personnel to pool knowledge.

Reliability and Binding Effect

Generally, agencies expect persons who ask for advice to rely on it, but as a legal matter, recourse against the government for not following advice may be limited.⁸⁷ When it comes to written advice, agencies often protect the requester's reliance interest, but they frequently specify that no one *other than* the requester may rely on the advice. This necessarily means that the agency is free to deviate from an advisory opinion in a new case. Often, these questions turn on whether the advice represents the views of the agency or simply a lone staff person.

Like generally applicable guidance, written individualized guidance is not supposed to create new obligations or bind the public. Instead of binding the *public*, agencies issuing written advice typically do so with the intent to bind the agency in that one case, insofar as the ultimate facts track the same or similar facts assumed in the advice.

For example, the IRS website indicates that private letter rulings are “binding” on the agency as to that individual case. This means that “a taxpayer may ordinarily rely on a letter ruling received from

⁸⁵ *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1268 (D.C. Cir. 2018).

⁸⁶ *See, e.g., Gen. Motors Corp. v. EPA*, 363 F.3d 442 (D.C. Cir. 2004) (considering letters EPA issued informing a party of the agency's interpretation of the law on the cusp of enforcement); *Ariz. Mining Ass'n v. Jackson*, 708 F. Supp. 2d 33 (D.D.C. 2010) (discussing letters, sought by regulated party, clarifying legal requirements); *National Advisory Committee: Letters of Advice and Response*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/faca/national-advisory-committee-letters-advice-and-response> (last updated Sept. 5, 2023).

⁸⁷ *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 64 (1984); *Fletcher v. United States*, 14 Cl. Ct. 776, 782 (1988) (noting that the Supreme Court “has indicated that it will not tolerate estoppel claims that threaten the public fisc or are predicated upon oral advice”).

the Associate office subject to the conditions and limitations [described in the statute].”⁸⁸ Such letters can be revoked if found to be in error, but subject to limitations. Retroactive revocation is possible, but the IRS limits this to “rare or unusual circumstances,” and the agency requires personnel to provide a reasoned explanation for the retroactive revocation.⁸⁹

The FEC’s advisory opinions are similarly binding on the agency and serve as a shield to enforcement for the conduct considered in the advisory opinions or substantially similar conduct.⁹⁰ The same goes for DOL WHD opinion letters.

Some agency advice is not regarded as binding on the agency. For example, no-action letters are generally revocable, issued by lower level officials, and do not bind the agency at all.⁹¹ Similarly, the Supreme Court has limited estoppel claims against the government by individuals who rely on erroneous oral advice.⁹² Thus, individuals incur some risk in relying on informal advice.

Publicity of Process and Product

Advice also varies with respect to publicity, as Asimow noted fifty years ago. The Freedom of Information Act (FOIA) amended the APA to impose affirmative obligations of disclosure on federal agencies with regard to substantive rules and other specified materials.⁹³ It further created a “request-driven system of disclosure,”⁹⁴ subject to specific exemptions.⁹⁵ Today, with the widespread availability of guidance and related documents in digital form, much advice is widely available.

Agencies typically publish formal advice on their website. Advice provided over email, however, may be harder to come by. Although the IRS makes its email advice public, and the compendium known as Tax Notes publishes it, other agencies, such as the Consumer Product Safety Commission, do not publish their email advice. In contrast, most advisory opinions or comparable documents are not only available, but typically collected in an indexed repository or searchable database.

Relationship of Advice Giving to Other Agency Processes

Several interviewees at agencies described individualized guidance as serving an important role in connection with agency processes other than those involving the provision of advice. For example, agencies described the development of a body of advice letters as a useful precursor to issuing generally applicable guidance or even a regulation on a topic. Although agencies varied in their use of advice letters

⁸⁸ *Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts#:~:text=A%20private%20letter%20ruling%2C%20or,taxpayers%20or%20by%20IRS%20personnel> (last updated Aug. 7, 2023).

⁸⁹ *Id.*

⁹⁰ See 52 U.S.C. § 30108(c)(2).

⁹¹ See *supra* notes 58–59 and accompanying text; *but see* *Clarke v. Commodity Future Trading Comm’n*, 74 F.4th 627, 639 (5th Cir. 2023).

⁹² *Heckler*, 467 U.S. at 64; *Fletcher*, 14 Cl. Ct. 776, 782 (1988) (noting that the Supreme Court “has indicated that it will not tolerate estoppel claims that threaten the public fisc or are predicated upon oral advice”). For a discussion of the evolution of estoppel claims against the government more generally, see *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990) (“[L]eav[ing] for another day whether an estoppel claim could ever succeed against the Government.”). *Richmond* ultimately held that estoppel was unavailable when involving “a claim for money from the Public Treasury contrary to a statutory appropriation.” *Id.* at 424.

⁹³ 5 U.S.C. § 552(a). See DANIEL J. SHEFFNER, CONG. RES. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW (2020).

⁹⁴ SHEFFNER, *supra* note 93, at 1.

⁹⁵ See 5 U.S.C. § 552(b) (listing exemptions); Bernard W. Bell et al., *Disclosure of Agency Legal Materials* (June 2, 2023) (report to the Admin. Conf. of the U.S.).

to explore or “work out” novel issues, several interviewees noted that agency personnel consulted and consumed prior advice letters to avoid reinventing the wheel and to promote consistency. Finally, some noted that a robust program for providing advice was thought to reduce the need for enforcement downstream.

Factors Shaping the Supply of and Demand for Individualized Guidance

An agency’s willingness to provide individualized guidance depends on several factors. First, the public’s demand for advice matters. Some regulated parties are desperate for a clue to avoid violating the law and facing an enforcement action, resulting in penalties or other consequences. Others seeking pre-market approval of products value the opportunity to gauge the agency’s reaction to their proposal in the relatively collaborative setting of a pre-submission conference. Are the scientific studies relied upon adequate? If not, how can the evidence supporting the applicants’ claims be shored up against potential objections? Faced with an eager public, many agencies strive to provide useful advice.

Agency practices, however, also shape the demand for advice. If advice is expensive, slow coming, overly general, or otherwise unhelpful, the public will demand less of it. Ultimately, the quality of the advice—including ease of access and ultimate utility of the advice—influences the demand for it.

On the supply side, Congress has mandated that some agencies provide advice.⁹⁶ Although these statutory provisions do not obligate agencies to provide advice to all requesters, the statutes contemplate that the agencies will provide some. Other supply-side factors include resource constraints, a concern for fairness, and a desire to facilitate compliance *ex ante* versus focusing on enforcement *ex post*. This dovetails with ideological considerations (discussed below).

Resources shape an agency’s capacity and willingness to offer advice. Producing a carefully researched response to a question requires substantial resources and the time of numerous agency personnel—from the staff member responsible for research and writing, to supervisors, and possibly to higher levels of agency leadership. Given limited resources, some agencies do not regard individualized guidance as a priority. Some similarly do not wish to advertise the provision of individualized guidance for fear of an excessive volume of requests. This concern for resources, thus, dampens the willingness to advise.

Concerns for fairness and equity also play a role. Agencies regulating financial institutions and other well-heeled entities tend to have formal channels for obtaining high-quality written advice.⁹⁷ Agencies regulating individuals or parties of lesser means tend not to provide individualized guidance or offer it only over the phone.⁹⁸ Often, such guidance resembles customer assistance more than legal advice. Such advice might be sufficient, but it carries less weight, and is less likely to be as thoughtful and reasoned as written advice.⁹⁹ Not only might some individuals receive advice and others none; some receive *better* advice and others worse. In addition, actors that receive more or better advice stand to gain

⁹⁶ See, e.g., Federal Election Campaign Act, 52 U.S.C. §§ 30101 et seq.; Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1 et seq.

⁹⁷ See, e.g., *Forms of Advice*, INTERNAL REVENUE SERV. https://www.irs.gov/irm/part32/irm_32-003-001 (last updated Sept. 10, 2017); *Contact the Federal Trade Commission*, FED. TRADE. COMM’N. <https://www.ftc.gov/about-ftc/contact> (last visited Mar. 12, 2024); *Tips, Questions, and Complaints*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/complaint/select> (last modified Dec. 15, 2021).

⁹⁸ For example, USCIS has at some point disavowed providing legal advice to applicants and employers.

⁹⁹ *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 64 (1984); *Fletcher v. United States*, 14 Cl. Ct. 776, 782 (1988).

vis-à-vis competitors in some sectors. Thus, a concern about the impact of advice on market participants may also play a role.

Political or ideological factors can also shape an agency’s willingness to provide individualized guidance. Recall that one of the key benefits of individualized guidance for requesting parties is that it reduces uncertainty and may offer a shield against enforcement. But one could argue that the agency would better achieve its mission by investing in robust back-end enforcement instead of individualized guidance *ex ante*. Unsurprisingly, in some settings, this trade-off has a political valence. For example, the Obama administration’s Wage & Hour Division declined to issue opinion letters finalized during the second Bush term and any opinion letters during its entire duration. Progressives viewed such letters as generally pro-employer “get out of jail free” cards for would-be violators.¹⁰⁰ In contrast, the Trump administration swiftly issued these holdover opinion letters and several new ones.

Agency Practices

This section canvasses key regulatory areas to illuminate the variety of advice-giving practices across the federal bureaucracy.

Agencies Regulating Revenue-Collection¹⁰¹

i. Internal Revenue Service

The Internal Revenue Code authorizes the issuance of an annual Revenue Procedure (“Rev Proc”), which describes and authorizes the agency’s processes, including the provision of individualized guidance in several forms. The most relevant forms include letter rulings, in which the Service interprets and then applies tax law to specific facts that the taxpayer posits; determination letters, which apply “principles and precedents previously announced to a specific set of facts”¹⁰²; and oral advice on procedure, technical matters, and substantive tax issues. The Service also produces internal advice during enforcement. The Internal Revenue Code requires the Service to make all written advice available to the public: “[T]he text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.”¹⁰³

Private Letter Rulings

A private letter ruling (PLR) is “a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s represented set of facts.”¹⁰⁴ When a taxpayer requests a private letter ruling, several outcomes are possible. First, the Service could agree with the taxpayer’s view and issue a favorable ruling. Second, the Service could disagree with the taxpayer’s view and issue an adverse ruling.

¹⁰⁰ Juliet Eilperin, *The Trump Administration Just Changed Its Overtime Guidance – And Business Cheers*, WASH. POST. (Jan. 8, 2018, 6:38 PM), https://www.washingtonpost.com/politics/the-trump-administration-just-changed-its-overtime-guidance--and-business-cheers/2018/01/08/f00d3eee-f4a6-11e7-beb6-c8d48830c54d_story.html (quoting Obama WHD administrator David Weil).

¹⁰¹ See ASIMOW, *supra* note 2, at 128 for this characterization of IRS and Customs.

¹⁰² INTERNAL REVENUE SERV., REV. PROC. 1.01(5), 2024-5 I.R.B. 8 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>;

¹⁰³ 26 U.S.C. § 6110(a).

¹⁰⁴ See INTERNAL REVENUE SERV., REV. PROC. 2.01, 2024-1 I.R.B. 8 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>; see also *Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts#:~:text=A%20private%20letter%20ruling%2C%20or,taxpayers%20or%20by%20IRS%20personnel> (last updated Aug. 7, 2023).

The Service informs the taxpayer if it intends to issue an adverse ruling, and the taxpayer may withdraw its request rather than have an adverse ruling published. Third, the Service might decline to rule.

A key consideration in deciding whether to issue a PLR is administrability. The Service might decline to rule for a variety of reasons.¹⁰⁵ For example, the Service “ordinarily does not issue letter rulings or determination letters in certain areas because of the factual nature of the matter involved....”¹⁰⁶ Similarly, the Service ordinarily does not issue letter rulings or determination letters if the identical issue is being litigated by the taxpayer or related party at that time,¹⁰⁷ or if a regulation or published guidance is pending that addresses the issue.¹⁰⁸

If the Service decides to draft a PLR in response to a request, the taxpayer pays the user fee of \$38,000, and the “request package” is assigned to the branch specializing in the relevant topic. The branch chief assigns the case to a docket attorney and a reviewer, i.e., the PLR drafting team. The docket attorney checks for required documents before starting work on the PLR. The docket attorney further pulls all prior PLRs to check for consistency with prior agency positions. One IRS interviewee noted, “The reviewer can be involved to a greater or lesser degree.” The drafting team circulates the PLR within the branch to solicit comments. In one division, the drafting team circulates the draft PLR to *all* the lawyers in the division. In the typical case, the drafting team will discuss the PLR with the branch chief, and if the issue is unclear, or the agency wants to change position or adopt a new one, it discusses the matter in a “front office briefing” involving the Associate Chief Counsel.

Branches are attentive to training docket attorneys and facilitating discussion of novel or emerging issues. Docket attorneys take writing courses, complete an in-house program comparable to a law-school LLM program in taxation, and work closely with reviewers, who offer varied input. Some branches host weekly branch meetings to facilitate discussion of novel issues. Drafting teams can bring up cases in these meetings to discuss with colleagues within the branch. In one branch, a reviewer might elect to speak about a topic at a group meeting. Another branch hosted a periodic “free for all” for brainstorming.¹⁰⁹

After submitting the letter ruling request, the taxpayer has “one conference of right.” This conference offers an important opportunity for the taxpayer, along with counsel, to speak directly to a senior Associate office representative regarding the Associate office’s “tentative decision on the substantive issues and the reasons for that decision.”¹¹⁰

Prior to submitting a PLR and paying the user fee, the taxpayer can request a “pre-submission conference” in writing or by telephone.¹¹¹ The branch asks the taxpayer to “write up a few paragraphs, come in, and discuss the case.”¹¹² None of the discussion is binding, in that the agency does not offer

¹⁰⁵ Interview 3.

¹⁰⁶ INTERNAL REVENUE SERV., REV. PROC. 6.01, 2024-1 I.R.B. 19 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>.

¹⁰⁷ *Id.* at 18.

¹⁰⁸ *Id.* at 20.

¹⁰⁹ Interview 2.

¹¹⁰ INTERNAL REVENUE SERV., REV. PROC. 10.04, 2024-1 I.R.B. 61 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>.

¹¹¹ INTERNAL REVENUE SERV., REV. PROC. 10.07, 2024-1 I.R.B. 62 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>.

¹¹² Interview 2.

definitive analysis in this meeting. Instead, it is an opportunity for the taxpayer to “get a sense of the questions the agency wants to address.”

Letter rulings are not precedential,¹¹³ which means that agency personnel are not obligated to follow the result reached or the reasoning contained therein when considering other cases.¹¹⁴ Moreover, they bind the agency *only* as to the requesting taxpayer and regarding the facts posited, absent a change in law or discovery of an error that would support revocation.¹¹⁵ In the absence of official guidance on a topic, however, tax professionals routinely consume letter rulings to discern the Service’s thinking on an issue.

Cost remains a significant barrier to obtaining a letter ruling. A PLR ranges in cost from \$5,000 to \$38,000.¹¹⁶ IRS personnel noted that the higher end of this range reflects the substantial legal research required to answer the complex questions typically posed by corporate taxpayers.¹¹⁷

For well-heeled taxpayers, the cost may not prove burdensome, but obtaining a PLR takes time. The Service has worked to bring the process for obtaining a PLR down to 6 months. In addition, it has created an expedited option called “Fast-Track” that takes only 12 weeks. Although it started as a pilot program, it has since been adopted on an enduring basis; a vast majority of requesters seek Fast-Track.

Determination letters

The IRS issues determination letters in response to an organization’s inquiry about whether specific facts support a finding of tax-exempt status.¹¹⁸ The Service accepts applications exclusively through the Pay.gov website. As with other forms of advice, an annual Revenue Procedure outlines the process for obtaining a determination letter.¹¹⁹

Revenue agents perform the review. They review the relevant facts set out in the application and may ask for additional information from the applicant, but the Service recognizes that each request imposes a burden on the taxpayer. Under the Internal Revenue Manual, “the official compilation of IRS policies, procedures, and guidelines,”¹²⁰ the IRS does not ask for information already in the case file or that is not needed to make a determination.¹²¹ Unlike a private letter ruling, which may contain complex

¹¹³ 26 U.S.C. § 6110(k)(3) (2018); *David R. Webb Co., Inc. v. Comm’r*, 708 F.2d 1254, 1257 n.1 (7th Cir. 1983).

¹¹⁴ One court rejected a taxpayer’s characterization of letter rulings as creating a “law of the agency.” *Peerless Corp. v. United States*, 185 F.3d 922, 928 (8th Cir. 1999).

¹¹⁵ If the parties signed a “closing agreement,” then the letter ruling is binding on the parties regardless of errors. *See* INTERNAL REVENUE MANUAL pt. 32, ch. 3, INTERNAL REVENUE SERV. (last updated Oct. 7, 2011), https://www.irs.gov/irm/part32/irm_32-003-001 (“Unless it was part of a closing agreement, a letter ruling found to be in error or not in accord with the current views of the Service may be revoked or modified.”).

¹¹⁶ *See* REV. PROC. APPENDIX A, *Schedule of User Fees*; INTERNAL REVENUE SERV., 2024–1 I.R.B. 247 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>.

¹¹⁷ The ABA Tax Section submitted comments on user fees for private letter rulings, arguing for lower fees for simpler issues. *See* SECTION OF TAX’N, A.B.A., RE: COMMENTS ON USER FEES FOR PRIVATE LETTER RULING REQUESTS (2022), <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2022/122122comments.pdf>.

¹¹⁸ *See* Mitchell Rogovin & Donald L. Korb, *The Four R’s Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from within*, DUQUESNE L. REV. 323, 351 (2008).

¹¹⁹ *See Exempt Organization Revenue Procedures*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/exempt-organization-revenue-procedures> (last updated Jan. 7, 2024).

¹²⁰ INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL, 1.11.6, https://www.irs.gov/irm/part1/irm_01-011-006#:~:text=The%20IRM%20is%20the%20official,to%20provide%20instructions%20to%20staff.

¹²¹ INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 7.20.2.2(3), https://www.irs.gov/irm/part7/irm_07-020-002r.

legal analysis in the published ruling, a determination letter answers the question of tax-exempt status “yea” or “nay.” The IRS personnel I spoke with noted that “each determination stands on its own.”¹²² The current IRS Revenue Procedure establishes that “[a] determination letter is issued based solely upon the facts, attestations, and representations contained in the administrative record” of each case.¹²³ All determinations are subject to management approval, and the Service strives to cultivate consistency across revenue agents through a variety of approaches, including by providing access to technical support from the IRS Office of Chief Counsel personnel,¹²⁴ providing training, holding roundtables to facilitate discussion, and undertaking quality review of determination cases.¹²⁵ In addition, the Service’s “knowledge management group” coordinates opportunities for personnel to learn from each other. The Internal Revenue Code requires the payment of user fees for determination letters, with most determinations of tax-exempt status costing \$275 or \$600,¹²⁶ likely reflecting the less complex inquiry required than in letter rulings.

Oral and Email Advice

The Service offers a customer assistance program, through which taxpayers can call for advice on simple questions. In addition, attorneys in the national office may draft email advice under the umbrella of “Chief Counsel Advice,” which is published by a nonprofit tax publisher, Tax Analysts, in the online publication “Tax Notes.”¹²⁷

Going beyond “advice,” taxpayers have other sources of assistance as well as they navigate disputes with the IRS. Some use the low-income taxpayer clinics. Others seek out the Taxpayer Advocate Service (TAS), a unit with the IRS that provides reports directly to Congress. The Office of the Taxpayer Advocate is directed by the National Taxpayer Advocate, whom the Secretary of the Treasury appoints “after consultation with the Commissioner of Internal Revenue and the Oversight Board....”¹²⁸ The TAS employs case advocates to take up individual taxpayers’ cases, stepping in “when the process breaks down” to broker a compromise or resolution with IRS.¹²⁹ TAS’s mission is grounded in the Taxpayer Bill of Rights. It offers an example of an agency offering assistance, although not necessarily legal advice, through an ombudsperson.

ii. U.S. Customs and Border Protection

Like the IRS, U.S. Customs and Border Protection (CBP) also occupies the “revenue generating” corner of the bureaucracy.¹³⁰ Congress has tasked CBP with fixing “the final classification and rate of duty applicable to...merchandise” under the Harmonized Tariff Schedule of the United States (HTSUS).¹³¹ As relevant to this study, CBP produces prospective tariff classification rulings or “ruling letters,” also sometimes referred to herein as “customs rulings” due to their relation to customs and related law. In applying the law to facts to assist importers in planning their prospective conduct, CBP

¹²² Interview 3.

¹²³ INTERNAL REVENUE SERV., REV. PROC. 3-05, 2024-1 I.R.B. 270 (2024), <https://www.irs.gov/irb/2024-01>.

¹²⁴ INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 7.20.1.2, https://www.irs.gov/irm/part7/irm_07-020-001.

¹²⁵ INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 7.20.5.2, https://www.irs.gov/irm/part7/irm_07-020-005.

¹²⁶ See 26 U.S.C. § 7528 (authorizing user fees); INTERNAL REVENUE SERV., REV. PROC. Appendix A 2024-1, I.R.B. 300 (2024), <https://www.irs.gov/pub/irs-irbs/irb24-01.pdf>.

¹²⁷ *About Tax Notes*, TAX NOTES, <https://www.taxnotes.com/document/about-tax-notes> (last visited Mar. 11, 2024).

¹²⁸ 26 U.S.C. § 7803(c).

¹²⁹ TAS reports directly to Congress and operates as an internal ombudsperson within the IRS. Interview 21.

¹³⁰ See ASIMOW, *supra* note 2, at 28.

¹³¹ 19 U.S.C. § 1500.

ruling letters may count as “advice.”¹³² The Supreme Court declined to characterize customs letters definitively in *Mead*, and CBP staff I spoke with rejected a characterization of customs letters as APA “guidance.”¹³³

Businesses that import goods into the United States must pay duties, taxes, and fees according to applicable customs and related laws. A subunit of the Department of Homeland Security, CBP determines applicable duty rates based on the HTSUS, a complex “compendium.”¹³⁴ The HTSUS establishes the tariff rates and categories “for all merchandise imported into the United States.”¹³⁵

As part of its mission, CBP advises importers on the applicability of the customs laws to their transactions on a variety of issues, including the duty rate for the goods they plan to import. The agency provides this guidance in writing, through issuance of binding ruling letters and decisions and provides general non-binding, advice orally via its interactions with the public.¹³⁶ The guidance contained in ruling letters provides the international trade community with “a transparent and efficient means of understanding how CBP will treat a prospective import or carrier transaction.”¹³⁷

In the context of prospective tariff classification rulings, a ruling letter “interprets and applies the provisions of the Customs and related laws to a specific set of facts.”¹³⁸ They constitute definitive interpretations of the applicable law regarding prospective transactions.¹³⁹ Each ruling sets out a “thorough factual description” and how the law applies to those facts.¹⁴⁰ According to the applicable regulations, any importer or exporter of merchandise or person who “has a direct and demonstrable interest in the question or questions presented in the ruling request” may request a ruling.¹⁴¹ Requests should “be in the form of a letter.”¹⁴²

A person requesting a ruling can also ask CBP personnel to orally discuss the issues involved,¹⁴³ much as in a pre-sub conference with the IRS before it issues a private letter ruling. CBP personnel will schedule such a conference when they believe that “a conference will be helpful in deciding the issue or issues involved” or when CBP contemplates an adverse ruling.¹⁴⁴ A CBP official with whom I spoke noted that trade interests wanted rulings to bind CBP, but in exchange, trade interests must “read the rulings” and understand the agency’s reasoning.

¹³² In his study, Professor Asimow included customs letters as a key example of agency advice. *See* ASIMOW, *supra* note 2, at 144–46.

¹³³ Some scholars have characterized ruling letters as “informal adjudications.” *See* Claire R. Kelly & Patrick C. Reed, *Once More Unto the Breach: Reconciling Chevron Analysis and de Novo Judicial Review After United States v. Haggar Apparel Company*, 49 AM. U. L. REV. 1167, 1223 (2000).

¹³⁴ *Determining Duty Rates*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/programs-administration/determining-duty-rates> (last modified Jun. 21, 2023).

¹³⁵ *Harmonized Tariff Schedule*, U.S. INT’L TRADE COMM’N, <https://hts.usitc.gov/> (last visited Mar. 12, 2024).

¹³⁶ Under the North American Free Trade Agreement, Customs issues “rulings to importers and other interested persons.” 19 C.F.R. § 177.0 (2022).

¹³⁷ *Rulings and Legal Decisions*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/rulings> (last modified Nov. 24, 2020).

¹³⁸ 19 C.F.R. § 177.1(d)(1) (2022).

¹³⁹ *Id.* § 177.1(a)(1).

¹⁴⁰ Interview 11.

¹⁴¹ 19 C.F.R. § 177.1(c) (2022).

¹⁴² *Id.* § 177.2(a).

¹⁴³ *Id.* § 177.4(a).

¹⁴⁴ *Id.*

Two components within CBP, both within CBP’s Regulations and Rulings Directorate in the Office of Trade, issue prospective rulings on tariff classification. The first is the National Commodity Specialist Division (NCSD), and the second is the Commercial and Trade Facilitation (CTF) Division. With respect to the prospective rulings on tariff classification issued by the CTF Division, the process for drafting a letter ruling begins with a case attorney producing a draft, followed by supervisor review. As in many other settings, an iterative process ensues. Often, a preliminary conversation takes place where the case attorney and supervisor discuss “where we’re headed.”¹⁴⁵ NCSD follows the same general procedure, in that a National Import Specialist (NIS) prepares a draft, which a supervisor reviews. However, the NIS is a commodity specialist rather than an attorney.

The agency has several safeguards to promote consistency. First, the agency maintains an online database of customs rulings, known as Customs Rulings On-Line Search System, or CROSS.¹⁴⁶ CROSS now contains over 200,000 rulings, and the CBP official I interviewed noted that CROSS research promotes consistency because importers can see how the agency has treated certain goods and transactions. Second, extensive procedures govern changes in position.¹⁴⁷ For instance, if CBP contemplates issuing an interpretive ruling that would modify or revoke another ruling that has been in effect for 60 or more days, CBP must publish a proposal in the Customs Bulletin, subject to a 30-day notice-and-comment period, to revoke or modify the prior ruling. Further, if a published ruling will change “an established and uniform practice” resulting in a higher duty rate, the agency must publish notice in the *Federal Register* that this practice is under review.¹⁴⁸ The agency further strives to honor the reliance interests that develop through longstanding practices, even in the absence of a ruling letter.¹⁴⁹ Sometimes, CBP simply develops an approach toward certain goods for which the importer has not sought a ruling, and such practices constitute “treatment.” If an anticipated ruling letter stands to modify or revoke existing treatment of “substantially identical transactions,” the agency must also publish notice of its intention to do so in the *Customs Bulletin*.¹⁵⁰ Finally, if CBP officials in different locations issue inconsistent decisions, the regulations provide that an interested party may file a petition to resolve the inconsistency with CBP Headquarters.¹⁵¹ The agency then publishes notice of the petition and its contents in the *Federal Register*, followed by a brief period for public comments.¹⁵² The agency then issues a decision resolving the inconsistency or clarifying that the agency views no inconsistency among the decisions complained of.¹⁵³ Thus, the agency has adopted various procedural safeguards to promote consistency in a largely decentralized advice giving structure.

Reliance and Publicity

The ruling letters issued by CBP bind all CBP personnel “with respect to the particular transaction or issue described therein...until modified or revoked.”¹⁵⁴ Thus, an importer who receives a

¹⁴⁵ Interview 11.

¹⁴⁶ *About the Customs Rulings Online Search System (CROSS)*, U.S. CUSTOMS & BORDER PROT., <https://rulings.cbp.gov/home> (last visited Mar. 12, 2024).

¹⁴⁷ *See generally* 19 C.F.R. §§ 177.10, 177.12, 177.13 (2022).

¹⁴⁸ *Id.* § 177.10(c).

¹⁴⁹ Not every importer obtains a customs ruling before undertaking a transaction. Unlike a permit system, ruling letters are voluntary.

¹⁵⁰ 19 C.F.R. § 177.12(c)(2) (2022).

¹⁵¹ *Id.* § 177.13(a).

¹⁵² *Id.* § 177.13(c).

¹⁵³ *Id.* § 177.13(d).

¹⁵⁴ 19 C.F.R. § 177.9(a) (2022). If, in applying the letter ruling to the contemplated transaction, Customs field office personnel believe the ruling should be modified or revoked, they forward their findings and recommendations to

ruling letter can rely on it. The regulations, however, warn third parties against reliance on these ruling letters, noting that CBP may modify or revoke the ruling letter without notice to anyone other than the requesting party.¹⁵⁵ Despite disclaimers about applicability to third parties, the CBP official I interviewed empathized with the urge to reason by analogy: “Everybody looks for lessons.”¹⁵⁶ Notably, import specialists, customs brokers, and lawyers use CROSS as well, to understand the likely treatment of similar products.

Financial Institution Regulation

i. Commodity Futures Trading Commission

The CFTC is an independent regulatory agency that implements the Commodity Exchange Act (CEA),¹⁵⁷ as well as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.¹⁵⁸ The CEA regulates U.S. derivative markets. It does not require the agency to issue advice letters.¹⁵⁹ However, recognizing the value of advice to industry participants, the CFTC produces three kinds of advice letters: (1) exemptive letters, (2) no-action letters, and (3) interpretive letters.¹⁶⁰

The Division of Swap Dealer and Intermediary Oversight, the Division of Clearing and Risk, and the Division of Market Oversight provide letters, as does the Office of the General Counsel. Letters are typically issued regarding prospective conduct, although a letter regarding a past transaction may be issued in “extraordinary” circumstances.¹⁶¹

Exemptive letters and no-action letters relate to enforcement and generally offer little by way of legal analysis. An exemptive letter is a “written grant of relief issued by staff of a Division of the Commission from the applicability of” a CEA provision or “Commission rule, regulation, or order.” A no-action letter is a “written statement issued by the staff of a Division of the Commission or of the Office of the General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of [the CEA] or a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary.”¹⁶²

In contrast, “interpretative letters” are “written advice or guidance issued by the staff of a Division of the Commission or the Office of the General Counsel.” As discussed further below, interpretive letters, like no-action letters, but unlike exemptive letters, “bind only the issuing Division or

Headquarters prior to “final disposition with respect to the transaction by that office.” *See id.* § 177.9(b)(1). In contrast, informal advice is not binding on the agency. *See id.* § 177.1(b).

¹⁵⁵ *Id.* § 177.9(c). As expressed in this provision, “[N]o other person should rely on a ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.”
¹⁵⁶ Interview 11.

¹⁵⁷ *See* 7 U.S.C. §§ 1 et seq. The Commission was created in 1974 pursuant to the Commodity Futures Trading Commission Act. Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (codified as amended in scattered sections of 7 U.S.C.).

¹⁵⁸ *Dodd-Frank Act*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>.

¹⁵⁹ Requests for Exemptive, No-Action and Interpretative Letters, 63 Fed. Reg. 68,175, 68,176 (Dec. 10, 1998) (to be codified at 17 C.F.R. pt. 140), <https://www.govinfo.gov/content/pkg/FR-1998-12-10/pdf/98-32587.pdf> (“While the Commission recognizes the importance of Letters to industry participants and their counsel, nothing in the Act or Commission’s rules requires Commission staff to issue Letters.”).

¹⁶⁰ 17 C.F.R. § 140.99 (2023).

¹⁶¹ *Id.* § 140.99(b)(3).

¹⁶² *Id.*

[the OGC], as applicable, and [do not bind] the Commission or other Commission staff.”¹⁶³ Of the three categories of letters, interpretative letters fit most neatly in the category of “individualized guidance.”

Regulations specify the process for requesting advice letters.¹⁶⁴ For example, beneficiaries must include information about the requesting party, the provision of the CEA or Commission rules, regulations, or orders relating to the request, and a certification that the facts set forth are “true and complete....” Requests must be submitted via email, followed by a hard copy. A request may be treated confidentially upon the beneficiary’s separate request.¹⁶⁵ The Commission is not obligated to issue a letter; the decision to do so is purely discretionary.

Publicity

Advice letters are available on the CFTC website, unless parties have requested confidential treatment under 17 C.F.R. § 145.9. Under 17 CFR §140.98, such letters must be made available to “any person as soon as practicable” after a copy has been sent to the requester. But the CFTC exceeds this bare minimum by making these letters available via the agency’s website, searchable by letter number, letter type, divisions, year, and other markers.¹⁶⁶

Reliance and Finality

CFTC regulations establish that exemptive and no-action letters can be relied upon only by the beneficiary. While exemptive letters “bind the Commission and its staff with respect to the relief provided therein,” a no-action letter “binds only the issuing Division or Office of the General Counsel, as applicable, and not the Commission or other Commission staff.” In contrast, third parties *may rely* on interpretative letters.¹⁶⁷ This feature of interpretative letters distinguishes them from many other forms of advice that other agencies produce, such as letter rulings and advisory opinions.

Historically, federal courts have deemed advice letters to fall short of final agency action, especially when written by staff without agency head review, and hence not subject to judicial review.¹⁶⁸ As noted in the Legal Background, however, the Fifth Circuit has ruled that the CFTC’s rescission of a no-action letter was not committed to the agency’s discretion because the no-action letter was in fact a “license” under 5 U.S.C. § 551, and therefore, final agency action.¹⁶⁹ Crucial to the court’s conclusion was that beneficiaries of the letter “may rely” on it under the applicable law.¹⁷⁰ It remains to be seen if other courts will follow suit. If this treatment of advice letters persists, the agency might produce far fewer of them or could cease to produce them at all, given that the CEA does not require the Commission to issue advice letters.

ii. Securities and Exchange Commission

The SEC implements several statutes: the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. The SEC provides no-action and interpretive letters to

¹⁶³ *Id.*

¹⁶⁴ 17 C.F.R. § 140.99(c) (2023) (“information requirements”).

¹⁶⁵ *See id.* § 145.9 (“Petition for confidential treatment of information submitted to the Commission”).

¹⁶⁶ *CFTC Staff Letters*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm> (last visited Mar. 12, 2024).

¹⁶⁷ 17 C.F.R. § 140.99(a)(3) (2023).

¹⁶⁸ *See Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004) (noting that “agency letters based on . . . fact submitted to the agency, as opposed to fact-findings made by the agency, are classically non-final [because of their tentative nature]”).

¹⁶⁹ *Clarke v. Commodity Futures Trading Comm’n*, 74 F.4th 627, 637 (5th Cir. 2023).

¹⁷⁰ *Id.* at 638.

permit private parties to request advice from SEC staff as to whether their prospective conduct complies with the relevant law.¹⁷¹ The Division of Corporate Finance typically handles requests regarding compliance, although other divisions may do so from time to time “in their areas of expertise.”¹⁷² These letters are not regarded as binding, and courts have ruled that they do not constitute a “final order of the Commission,” which the 1934 Act requires for jurisdiction in the federal courts.¹⁷³

A “pure no action letter” simply communicates that “an authorized staff official...will not recommend any enforcement to the Commission if the proposed transaction described in the incoming correspondence is consummated.”¹⁷⁴ In contrast, an interpretive letter offers a staff interpretation “of a specific statute, rule or regulation in the context of an actual fact situation.”¹⁷⁵ Interpretive letters are the kind of advice most relevant to this study. But scholars have observed that the distinction between the two kinds of letters “is frequently blurred.”¹⁷⁶

Requesters submit their request for an advice letter online. Because I was not able to speak with current SEC personnel, I cannot verify the current practices of the agency. However, according to a classic study by former SEC Chief Counsel of the Division of Investment Management, Thomas Lemke, after a request is received, a triaging process occurs, through which the request comes to the staff attorney most suitable for addressing the issues that the request implicates.¹⁷⁷ The staff attorney conducts research on the legal questions, drawing on publicly available and internal Commission resources. Crucially, they take the facts asserted as given and do not conduct investigations “to verify the facts and circumstances which are the basis of the letter.”¹⁷⁸ At times, requests implicate the expertise and jurisdiction of multiple divisions, and the staff attorney then coordinates preparation of a joint or separate (but coordinated) response. A supervisor then reviews the draft. Depending on the novelty or significance of the issues, further review within the division or by the Commission itself may take place.¹⁷⁹

Publicity

Advice letters are publicly available on the SEC’s website, indexed by subject categories, alphabetically, and chronologically. Because the agency does not store them in a term-searchable database online, one must have access to a database such as Lexis or Westlaw or have a high degree of familiarity with securities law to know what to look for.¹⁸⁰

¹⁷¹ *Requests for No-Action, Interpretive, Exemptive, and Waiver Letters*, U.S. SEC. & EXCH. COMM’N, https://www.sec.gov/forms/corp_fin_noaction?#no-back (last visited Mar. 12, 2024); Thomas Lee Hazen, *SEC No Action Letters*, 1 Law. Sec. Reg. § 1:35 (2023).

¹⁷² THOMAS LEE HAZEN, § 1:35 *SEC No Action Letters*, in TREATISE ON THE LAW OF SECURITIES REGULATION (Nov. 2023 ed.).

¹⁷³ *Amalgamated Clothing and Textile Workers Union v. SEC*, 15 F.3 254, 256 (2d Cir. 1994).

¹⁷⁴ Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 937 (1998) (quoting *Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice*, Securities Act Release No. 6253, 21 SEC Docket 320 n.2 (Oct. 28, 1980)).

¹⁷⁵ *Id.* at 938.

¹⁷⁶ *Id.* A third kind of letter, a no-action letter relating to shareholder proposals under Rule 14a-8, simply authorizes a public company to “omit a shareholder proposal on any of thirteen grounds.” *Id.* at 939.

¹⁷⁷ Nagy, *supra* note 175, at 941 (referencing Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1029 (1987)).

¹⁷⁸ *Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice*, Securities Act Release No. 6253, 21 SEC Docket 323 (Oct. 28, 1980).

¹⁷⁹ Nagy, *supra* note 175, at 941.

¹⁸⁰ Interview 9.

Reliance and Finality

These staff-written advice letters do not reflect the views of or bind the Commission, but any statement by certain agency officials (in contrast to lower-level staff) “can be relied upon as representing the views of that division.”¹⁸¹ Further, the regulations provide that the staff may elect to “present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex....”¹⁸² The Commission may then produce an informal statement, but the decision to do so is within the Commission’s discretion.

Despite their lack of binding effect, these letters form of a body of soft law that private practitioners parse to discern the Commission’s thinking.¹⁸³ As a result, no action letters “substantially affect[] the behavior of all market participants,” and they have served as “an effective policymaking tool.”¹⁸⁴ Because the corpus of no action letters has created a body of soft law on which market participants rely, courts have held that the Commission must explain “departure from prior norms.”¹⁸⁵

Oral advice

SEC staff attorneys have also provided interpretive advice over the phone but refrain from expressing “specific conclusions about the legal consequences of specific courses of action without a written request detailing all pertinent facts.”¹⁸⁶

iii. Consumer Financial Protection Bureau

The 2010 Dodd-Frank Act created the CFPB as a component of the Federal Reserve. The Bureau’s core functions include “conducting financial education programs,”¹⁸⁷ directed at consumers. It also has authority to issue guidance concerning regulated entities.¹⁸⁸ These functions intersect substantially with advising and guidance. However, the agency has revised its approach to individualized guidance concerning regulated entities “dramatically” in recent years.¹⁸⁹

For a time, the Bureau tried operating regulatory “sandboxes” to allow companies to test out new products or new ways to inform consumers.¹⁹⁰ But Bureau personnel characterized the experience as “negative.” The Bureau devoted substantial internal resources to “negotiating terms of sandbox approvals.” “Once you say something, it’s hard to change course,” and companies treated approvals as if

¹⁸¹ 17 C.F.R. § 202.1(d) (2023).

¹⁸² *Id.*

¹⁸³ Interview 9.

¹⁸⁴ Nagy, *supra* note 175, at 947.

¹⁸⁵ *Am. Fed’n of State, Cnty., & Mun. Emp. v. Am. Int’l Grp.*, 462 F.3d 121, 129 (2d Cir. 2006) (observing that the SEC position advanced in amicus brief conflicted with prior longstanding statement was not entitled to deference).

¹⁸⁶ William J. Lockhart, Report of the Committee on Informal Action in Support of Recommendation No.19 (SEC No-Action Letters Under Section 4 of the Securities Act of 1933) 461 (1970) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/sites/default/files/documents/1970-02%20SEC%20No-Action%20Letters%20Under%20Section%204%20of%20the%20Securities%20Act.pdf>.

¹⁸⁷ 12 U.S.C. § 5514(c).

¹⁸⁸ 12 U.S.C. § 5492(a)(1) (discussing “implementing the Federal consumer financial laws through [among other tools] guidance”); *see also* 12 U.S.C. § 5512(b)(1) (“The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws.”).

¹⁸⁹ Interview 5.

¹⁹⁰ Policy on the Compliance Assistance Sandbox, 84 Fed. Reg. 48,246 (Sept. 13, 2019) (to be codified at 12 CFR ch. X). This policy expired in 2022. *See* Statement on Competition and Innovation, 87 Fed. Reg. 58,439 (Sept. 27, 2022) (to be codified at 12 CFR ch. X).

they had the “effect and importance of an interpretive rule.” Sandboxes, thus, did little to advance the Bureau’s mission.¹⁹¹

The Bureau also tried offering no-action letters. But entities would characterize the receipt of a no-action letter as the agency’s endorsement of the product, and due to limited resources, not every entity can receive one, even if warranted. Bureau personnel felt they were inadvertently “putting our thumbs on the scale” for entities that received no-action letters. Moreover, recipients of no-action letters tended to be “very well-resourced, [with] fancy lawyers, many of whom once worked at the Bureau.” Thus, concerns about “feeding the revolving door” counseled against the no-action process as well. Ultimately, the Bureau determined that the benefits did not justify the internal costs, the risk of distorting markets, and the possibility of special treatment for former Bureau personnel.

Given these experiences with individualized guidance, the Bureau has focused on developing plain language materials that allow the public to benefit from guidance even without consultants or lawyers. These materials include summaries, guides, and webinars intended to be helpful to industries and consumers alike. In addition, the Bureau maintains an inbox for petitions for an advisory opinion. Crucially, these advisory opinions do not apply the law to specific facts. Instead, they are general interpretive rules, clarifications of the law not tied to a private party’s specific factual circumstances. The Bureau also operates an informal oral guidance program.

Ultimately, the Bureau focuses on providing written and oral advice “within the four corners of the rules,” i.e., statutes or regulations. As one CFPB interviewee noted, “We don’t dictate what a bank or other regulated entity should do. We just explain the law.” As with personnel at other agencies, Bureau personnel do not view advice giving as an avenue for resolving ambiguities or addressing novel issues. Limited resources as well as a strong commitment to fairness led the Bureau to abandon most individualized guidance in favor of directing advice-seekers to generally applicable authority.

Health & Safety Regulation

i. Department of Labor – Wage & Hour Division (WHD)

Congress authorized the WHD to issue opinion letters (OLs) in its first major amendment to the Fair Labor Standards Act, called the Portal-to-Portal Act.¹⁹² As with guidance generally, the agency has authority to issue these letters for the purpose of clarifying the law. Courts have routinely characterized these OLs as “interpretive rules.”¹⁹³ These opinion letters have, in recent years, become controversial.

The WHD posts on its website the procedures for requesting an OL.¹⁹⁴ It begins with a hyperlinked list of applicable laws and regulations, to the extent consulting these sources might help the would-be requester answer the question on their own. The requester must aver that they are not a party in a Wage and Hour investigation or a representative or third party acting on their behalf, and that they seek the letter for themselves rather than on behalf of a third party. Beyond that, the requester must specify the law or regulation about which an opinion is sought, the relevant facts, such as the employee’s job duties

¹⁹¹ Interview 5.

¹⁹² 29 U.S.C. §§ 251, et seq. Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171, 1177 (2022).

¹⁹³ See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–88 (2000).

¹⁹⁴ *Request an Opinion Letter*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/opinion-letters/request> (last visited Mar. 12, 2024).

or compensation structure, and contact information. WHD receives requests by email or regular mail. The agency then determines whether to provide an opinion letter.

When a request is received, WHD engages in a “triage process” to determine whether the question merits an opinion letter. A former WHD official stated that the agency focused on requests that “involve pushing the envelope [and are] worthy of the resources.” The question should be specific enough to be interesting to answer but “broad enough to help the regulated community as a whole.” This official estimated that roughly 25% of OL requests are written up, whereas 75% of OL requests raise questions of insufficient novelty. In such cases, WHD personnel may elect to call the requester and provide an answer over the phone.

The OL drafting team consists of the WHD Administrator, political appointees, policy personnel, and enforcement leaders. They will receive OL requests and meet periodically to review them and decide whether to “do a letter.” The political appointee and career staff write the letter together, after which they escalate it to the policy personnel, consisting of both career staff and political appointees. It then goes to the Solicitor’s office, and then to the WHD Administrator. Ultimately, the proposed OL goes “to the front office,” i.e., to the Secretary of Labor, and, if it is approved, is released by WHD.

OLs play an important role as working law for the agency. The Field Operations Handbook, a multi-volume enforcement manual for investigators and technicians, for example, draws on OLs to supply fact patterns for illustrative examples and hypotheticals. OLs are used in training to cultivate consistency in investigations. It is “baked into” enforcement materials. They might ultimately make their way into fact sheets on the WHD website.

According to a former WHD official, opinion letters not only “offer insight into how the department is thinking.” They might “eventually be incorporated into the preamble of a [legislative] rule or as [illustrative] examples in the rules.” When the agency is ready to promulgate a rule, it often draws upon the existing body of opinion letters, and in that sense, these letters can serve as “building blocks” of rules.

Ideological factors also shape the issuance of OLs. The former WHD official I spoke with characterized WHD as less “political” than the EEOC or NLRB, but nevertheless, the willingness to issue OLs has varied significantly in recent years based on the administration. For example, at the close of George W. Bush’s second term, WHD had produced 17 OLs that awaited mailing. However, the incoming Obama Administration decided not to mail them, thus preventing their issuance. Moreover, WHD under Obama declined to issue OLs, instead opting for more general “Administrative Interpretations.”¹⁹⁵ The Trump Administration WHD, on the other hand, issued the OLs held over from the second Bush term and many more.¹⁹⁶

WHD has long provided means of seeking advice outside of formal opinion letters. For example, a former WHD official described phone duty that technicians and, at times, investigators, would perform to answer basic questions. During the Obama administration, WHD also innovated with providing informal guidance through its Community Outreach Resource Planning Specialists, or CORPS.¹⁹⁷ Staffed

¹⁹⁵ See *Final Rulings and Opinion Letters*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance> (defining “Administrative Interpretations”). For a discussion of the Obama Administration’s approach, see Bruce S. Levine & Wendy M. LaManque, *Labor & Employment Law*, 68 SYRACUSE L. REV. 953, 959 (2018).

¹⁹⁶ Eilperin, *supra* note 100.

¹⁹⁷ *CORPS – Community Outreach Resource Planning Specialists*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/CORPS> (last visited Mar. 12, 2024).

by former WHD investigators, CORPS conducts community outreach to unions and community-based organizations. They field phone calls and provide “basic guidance.”¹⁹⁸ Wage and hour law is known as “a very technical area of the law.” Questions about how to calculate wages and benefits owed and how to count the work week require careful analysis. CORPS is designed to provide technical assistance less formally and on a larger scale.

Although most questions received over the phone are technical, involving the “nuts and bolts” of wage and hour law, the questions range from basic to complex. A technician might be capable of answering a more basic question. At times, a requester need only be referred to content on the agency’s website. But if a requester asks a more difficult question, a technician or investigator can seek input from the Assistant District Director or District Director, and beyond that, the District Director can refer the question to policy experts in agency headquarters. This is the “escalation” model used to handle queries of different levels of complexity. The challenge of limited time and resources is real, however, as not all technicians and investigators can staff the phones.

Reflecting on individualized guidance generally, a former WHD official noted the advantages include creating a “better dialogue with the regulated community,” educating workers and employers, and cultivating compliance and cooperation between regulated entities and the agency. In the absence of these efforts, it becomes easy for the agency to be cast as a monolithic enforcement agent.

Regarding the concern for equity, this interviewee noted the benefits of individualized guidance for “Mom and Pop” employers: “Not all employers are McDonald’s or Coca-Cola with hundreds of lawyers on staff [to parse technical wage and hour law].” On this view, in creating a channel for smaller employers to receive guidance, the agency *promotes* equity.

Publicity

WHD publishes its OLs on its website.¹⁹⁹ The website allows users to search OLs by year and topic, and through term-searching. Third parties parse the agency’s body of OLs for guidance.

Reliance and Finality

WHD OLs are binding on the agency in that, by statute, they serve as a defense against any DOL enforcement action in federal court, assuming no change in material facts or law.²⁰⁰ A requester or other party can rely on an OL if it “pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative...interpretation...”²⁰¹ Such a defense bars the action or proceeding, even if the underlying “regulation, order, ruling, approval, interpretation, or practice” is subsequently rescinded or deemed invalid by judicial authority.²⁰² However, the agency remains free to change its position in a future case, and the employer cannot rely on the prior interpretation in perpetuity – only until its rescission.²⁰³

Courts have generally treated OLs like other advisory opinions, as falling short of final agency action, but the Fifth Circuit recently held that a DOL Employee Benefits Security Administration advisory

¹⁹⁸ Source 7.

¹⁹⁹ *Final Rulings and Opinion Letters*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance> (last visited Mar. 12, 2024).

²⁰⁰ See 29 U.S.C. § 259(a).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 29 C.F.R. § 790.17(i). For a discussion of “reliance in good faith,” see *Perry v. Randstad Gen. Partner LLC*, 876 F.3d 191, 213-14 (6th Cir. 2017) (noting that “good faith” in this setting has subjective and objective components).

opinion on a question arising under the Employee Retirement Income Security Act amounted to final agency action that the court could review. If that view takes hold, courts might also deem WHD OLs reviewable.

ii. Department of Labor – Occupational Safety and Health Administration (OSHA)

OSHA implements the Occupational Safety and Health Act of 1970 (OSH Act), “to ensure safe and healthful working conditions for workers by setting and enforcing standards and providing training, outreach, education, and assistance.”²⁰⁴ The agency has a decentralized structure, with 10 regions, and multiple area offices within each region. Each region has a regional administrator as well as assistant regional administrators covering different functions. The agency is characterized by a “strong chain of command.”²⁰⁵

OSHA provides several forms of individualized guidance, formal and informal. As for formal written responses to requests for advice, the agency offers Standard Interpretations,²⁰⁶ or “Letters of Interpretation” (LOI),²⁰⁷ similar to “opinion letters” or “advisory opinions” in other agencies. LOIs offer the agency’s interpretation of its workplace standards and “how they apply to particular circumstances[.]” At least one court has characterized an LOI before it as an interpretive rule.²⁰⁸

Although the OSH Act does not mention either type of written advice, the agency has developed internal protocols around the production of this advice. An OSHA official I spoke with described a “rigorous concurrence process” for these letters. These letters begin with a statement of the standard and the preamble to the standard, which conveys OSHA’s intent. This official stated, “Our interpretations are based on the intent of the standard as written in the preamble.” The letter then undergoes office review by office director. Ultimately letters go to the Office of the Solicitor. Throughout, the agency is focused on “mak[ing] sure we’re not changing the intent of the standard.”

Publicity

OSHA posts LOIs on its website.

Reliance

OSHA’s website on Standard Interpretations states, “OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Each letter constitutes OSHA’s interpretation of requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new

²⁰⁴ *About OSHA*, U.S. DEP’T OF LAB., <https://www.osha.gov/aboutosha> (last visited Mar. 12, 2024). See 29 U.S.C. §§ 661, et seq.

²⁰⁵ Interview 30.

²⁰⁶ *Standard Interpretations*, U.S. DEP’T OF LAB., <https://www.osha.gov/laws-regs/standardinterpretations/standardnumber/1910#:~:text=Standard%20Interpretations%20are%20letters%20or,and%20enforced%20by%20the%20Agency> (last visited Mar. 12, 2024).

²⁰⁷ Occupational Safety and Health Admin., U.S. Dep’t of Lab., Letter of Interpretation on Effect of Directives and Interpretations on Regulations and Standards (Feb. 20, 2002), <https://www.osha.gov/laws-regs/standardinterpretations/2002-02-20>.

²⁰⁸ See, e.g., Nat’l Fed. Of Indep. Bus. v. Dougherty, 2017 WL 1194666 (Feb. 3, 2017) (finding that Standard Interpretation was interpretive rule and final agency action). In litigation, OSHA has argued that these documents do not apply the law to specific facts, thus bringing them out of the ambit of Asimow’s definition of “advice,” but the agency has asserted that they constitute “guidance” (in the APA sense), produced on a case-by-case basis.

information.”²⁰⁹ Some evidence suggests that members of the public can rely on LOIs. For example, the Occupational Safety and Health Review Commission has at times vacated citations on fair notice grounds when the cited party relied on the Secretary’s interpretation.²¹⁰

iii. Food and Drug Administration

The FDA implements over 200 laws relating to public health and consumer protection.²¹¹ Chief among them is the Federal Food, Drug, and Cosmetic Act,²¹² first enacted in 1938, with the goal of “protecting the public health by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices; and by ensuring the safety of our nation’s food supply, cosmetics, and products that emit radiation.”²¹³ The agency provides case-specific advice to regulated parties through several channels. First, the agency maintains “commodity-specific emails” to ask the agency questions about existing regulations, policies, and processes.²¹⁴ Second, many programs provide firms and individuals with program-specific contact emails.²¹⁵ Third, the agency runs a suite of consultation programs that assist parties in ensuring that their products are safe and lawful prior to bringing their product to market.²¹⁶

Food Regulation

The FDA does not have premarket approval authority for finished food products, but it does have this authority for certain food ingredients and packaging.²¹⁷ In addition, applicants can notify the FDA of their conclusion that a substance used in food is “generally recognized as safe” (GRAS) under the conditions of its intended use.²¹⁸ Under the GRAS notification system, individuals submit a notice with supporting scientific evidence that the substance meets the FDA’s safety standard, i.e., that “there is a reasonable certainty of no harm to consumers when an ingredient is proposed or intended for use in food.”²¹⁹

²⁰⁹ *Standard Interpretations*, U.S. DEP’T OF LAB., <https://www.osha.gov/laws-regs/standardinterpretations/standardnumber/1910> (last visited May 30, 2024).

²¹⁰ See *The Ruhlin Co.*, No. 04-2049, 2006 WL 6936753, *7 (OSHRC Nov. 20, 2006); *Erickson Air-Crane, Inc.*, No. 07-0645, n2012 WL 762001, **4-5 (OSHRC Mar. 2, 2012).

²¹¹ *Laws Enforced by FDA*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/regulatory-information/laws-enforced-fda> (last visited Mar. 12, 2024).

²¹² 21 U.S.C. §§ 301 et seq.

²¹³ *What We Do*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/what-we-do> (last updated Nov. 21, 2023).

²¹⁴ See *Submit Questions and Comments*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/industry/fda-basics-industry/submit-questions-and-comments> (current as of September 29, 2023).

²¹⁵ See, e.g., *Device Advice: Comprehensive Regulatory Assistance*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance> (last updated June 22, 2023).

²¹⁶ See, e.g., *Consultation Programs on Food from New Plant Varieties*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/new-plant-varieties/consultation-programs-food-new-plant-varieties> (last updated March 30, 2020); *Pre-IND Consultation Program*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/investigational-new-drug-ind-application/pre-ind-consultation-program> (last updated April 17, 2020).

²¹⁷ *Food & Ingredients Packaging*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-ingredients-packaging> (last updated July 6, 2023).

²¹⁸ *About the GRAS Notification Program*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/generally-recognized-safe-gras/about-gras-notification-program> (last updated Jan. 4, 2018).

²¹⁹ *Food Additives and GRAS Ingredients Information for Customers*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-ingredients-packaging/food-additives-and-gras-ingredients-information-consumers> (last updated July 6, 2023).

An interviewee from the food industry explained the value of FDA feedback in the pre-market approval process for ingredients. In the pre-submission (“pre-sub”) conference, the parties can discuss the sufficiency of the data and studies relied upon. The written exchanges between applicants and the agency are available through a FOIA request.²²⁰ This allows future applicants to learn from prior ones, to see how the agency thought about issues raised in similar situations. Regarding the reliability of advice, one official stated, “If we give advice on design of a clinical trial in a pre-sub, we generally expect to honor that advice.”²²¹

When a sponsor wishes to introduce a food ingredient that is not generally recognized as safe, it files a food additive petition. Before submission, sponsors and agency personnel may meet in a pre-petition meeting. Agency personnel described these meetings as valuable forums for receiving feedback and answers to fact-specific questions.

FDA personnel described numerous channels for seeking advice in the realm of food regulation, and specifically, under the Food Safety Modernization Act (FSMA), a statute focused primarily on preventing foodborne illness.²²² The agency receives FSMA queries through the web, over the phone, via email, and so on.²²³ In a recent 8-year period, the agency received close to 11,000 queries via the web. As part of its broad efforts to implement the FSMA, the agency operates a Technical Assistance Network (TAN).²²⁴ The agency receives questions, and a project manager for the rule underlying a question decides how to assign it. An answer will be drafted and reviewed by appropriate personnel. If a question is complex, they might call in a subject matter expert, but the agency personnel with whom I spoke emphasized that queries received via the TAN were not sites of “novel interpretations.”²²⁵

Pharmaceuticals

Before a new drug can be sold in the United States, the FDA reviews the evidence provided by a drugmaker to determine if the drug’s health benefits outweigh its known and potential risks for the intended patient population. FDA evaluates clinical benefit and risk information, which is generally gathered through two well-designed clinical trials. An interviewee from the pharmaceutical industry described an iterative process of obtaining approval for the design of a clinical trial.²²⁶ Generally, the process features the submission of documentation followed by feedback from the agency, often with follow-up questions. After preclinical (animal) testing of a drug, an “investigational new drug application” (IND) is filed that outlines the sponsor’s proposal for human testing in clinical trials.²²⁷ Phase 1 typically involves a small group of people, 20 to 80. Then phase 2 involves a larger group.

²²⁰ Interview 15.

²²¹ *Id.*

²²² *Food Safety Modernization Act*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma> (last updated Feb. 5, 2024).

²²³ *FSMA Technical Assistance Network (TAN) Inquiries Report*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-technical-assistance-network-tan-inquiries-report> (last updated Sept. 26, 2023).

²²⁴ *FSMA Technical Assistance Network (TAN)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-technical-assistance-network-tan> (last updated March 14, 2024).

²²⁵ Interview 15.

²²⁶ Interview 32.

²²⁷ INDs are also reviewed by a local institutional review board (IRB), a group of scientists and non-scientists at hospitals and research institutions overseeing clinical research. See *Guidance for IRBs, Clinical Investigators, and Sponsors*, U.S. FOOD & DRUG ADMIN. (2013), <https://www.fda.gov/files/about%20fda/published/IRB-Responsibilities-for-Reviewing-the-Qualifications-of-Investigators--Adequacy-of-Research-Sites--and-the-Determination-of-Whether-an-IND-IDE-is-Needed-%28Printer-Friendly%29.pdf>.

The interviewee noted that the sponsor meets with the FDA at the end of phase 1. The interviewee noted that face-to-face meetings are “very documented, very rigid.” Ordinarily, sponsors cannot reach FDA staff by phone to ask questions but repeat players with a good relationship with agency personnel may be able to do so. However, the response they receive tends to be “pretty generic,” as staff prefer not to say much over the phone. Generally, throughout this process, if the sponsor is a known company, “there’s more comfort” within the agency versus a tiny company toward which FDA might take a more stringent approach. Echoing the food industry representative to whom I spoke, the pharmaceutical industry interviewee noted industry’s desire for quicker responses from the FDA. The swift approval of COVID vaccines suggests, “Given enough resources, [the agency] could move faster.”

FDA’s advice to sponsors, whether provided through formal meetings or otherwise, often involve experts from multiple disciplines, such as physicians, toxicologists, statisticians, pharmacologists, and other scientists and regulatory experts.

iv. Consumer Product Safety Commission

Congress created the CPSC in 1972 via the Consumer Product Safety Act as an independent agency responsible for regulating any “consumer product.”²²⁸ Five Commissioners head the agency, which is responsible for establishing mandatory product safety standards, along with collecting data about consumer-product-related injuries and death and recalling products. As one commentator noted, the deregulatory ethos of the Reagan administration led to new limits on the agency’s power in the 1980s, prompting increased reliance on voluntary standards.²²⁹ In 2008, however, Congress passed the Consumer Product Safety Improvement Act (CPSIA), seeking to increase the agency’s regulatory authority in the wake of a surge in recalled products. Through the CPIA, the agency gained authority to ban products.²³⁰ The statute further authorized the creation of an online database of reports of harm.²³¹

The CPSC has long issued advisory opinions, which the agency maintains on its website.²³² Most AOs are from the 1970s and 1980s, and it does not appear that the agency still provides them. Instead, the agency has developed other mechanisms for providing advice. For example, the agency now has a Small Business Ombudsman (SBO) team that addresses “complicated or difficult jurisdictional and legal questions” in place of the Office of General Counsel.²³³ A CPSC official with whom I spoke described how the SBO team advises the public.

The SBO team conducts outreach to and educates industry stakeholders. It advises the public through several channels, from fielding phone calls and responding to emails, to managing online content, such as business education, and conducting outreach via webinars and tradeshow. During tradeshow, agency staff visit sites in-person to “facilitate one-on-one interactions” with industry members. Staff members focus on tradeshow involving products subject to regulation, such as products intended primarily for children. They will tend to focus on products and topics with respect to which the agency has promulgated a mandatory standard, or an area where they have drafted FAQs, or, perhaps after

²²⁸ 15 U.S.C. § 2052(a)(5); James E. Orescanin, Note, *Exploring Change: An Analysis of the Consumer Product Safety Commission*, 30 LOY. CONSUMER L. REV. 72, 74 (2017).

²²⁹ Orescanin, *supra* note 228, at 77.

²³⁰ *Id.* at 80.

²³¹ *The Consumer Product Safety Improvement Act (CPSIA)*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Regulations-Laws--Standards/Statutes/The-Consumer-Product-Safety-Improvement-Act> (last visited Mar. 12, 2024).

²³² *Office of General Counsel Advisory Opinions*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Regulations-Laws--Standards/Advisory-Opinions> (last visited Mar. 12, 2024).

²³³ Email from CPSC interviewee.

checking the data with compliance staff, activities that have resulted in a lot of violations. Industry groups often have questions about when to report a problem and how to develop and implement a corrective action plan. Notably, the CPSC also offers a “Regulatory Robot,” “a unique online tool providing comprehensive business guidance regarding CPSC’s rules and requirements.”²³⁴ The Regulatory Robot generates a customized report to help identify applicable product safety requirements based on information the user inputs.²³⁵

CPSC’s capacity to advise the public via email is structured to enable supervision of and consistency in the advice given. The SBO team of three staff members rotate on email duty. Initially, a supervisor reviews responses to email requests for advice before they are sent. As each staff member gains familiarity with the advising process, however, the need for supervision declines. Emails are further maintained in an internal repository accessible by agency personnel. Each email is coded using criteria relating to topic. Both characteristics enable staff to consult prior emails and respond to questions consistently.

Publicity

Advice emails are not posted online.²³⁶

Reliance and Finality

It is not clear whether advice emails are binding.

Campaign Finance Law

The Federal Election Commission (FEC) offers an example of an independent agency led by a multi-member commission that provides individualized guidance to candidates and other parties regulated by the Federal Election Campaign Act. The agency’s six commissioners are confirmed by the Senate. The agency’s mission is to enforce FECA and statutes dealing with public financing of elections within the bounds of the First Amendment, and agency staff I interviewed characterized the agency’s “job” as promoting transparency and disclosing campaign finance information— “where money is coming and going.”²³⁷ The Policy Division within FEC produces “advisory opinions” (AO). Before seeking an AO, a candidate will sometimes reach out first to the Information Division, but that division will simply “state the law or clarify the law.” This recitation is not tailored to specific facts.

FECA mandates AOs in campaign finance law.²³⁸ The FEC website provides detailed information about how to request an AO, as well as a searchable database of past AOs.²³⁹ Most AO requests are received via email, a practice encouraged during the COVID-19 pandemic. One FEC staff member I

²³⁴ Email from CPSC interviewee. This tool is available at <https://business.cpsc.gov>.

²³⁵ The resulting Robot report, however “is not legal advice and is not to be relied or acted upon as representing legal advice or conclusions of the CPSC or any CPSC employee.” *See, e.g., Regulatory Robot Final Report*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://business.cpsc.gov/robot/decision/viewreport/8-89-103> (providing disclaimer) (last visited May 30, 2024).

²³⁶ Whether these emails would be “publication rules” that the agency is required to “make available for public inspection in an electronic format” depends on whether the emails are “statements of policy [or] interpretations which have been adopted by the agency.” 5 U.S.C. § 552(a)(2)(B).

²³⁷ Interview 4.

²³⁸ 52 U.S.C. § 30108(a)(1) (requiring the rendering of an advisory opinion “[n]ot later than 60 days after the Commission receives . . . a complete written request”).

²³⁹ *Advisory Opinions*, FED. ELECTION COMM’N, <https://saos.fec.gov/saos/searchao> (last visited Mar. 12, 2024).

interviewed thought requests had risen substantially over the last fifteen years. Often, repeat players submit AO requests, and most submit via email or “perhaps more informally, not following the [AO] process to the letter.” Per the Code of Federal Regulations, the Policy Division screens the AO request for subject matter propriety. For example, an AO request cannot ask about a hypothetical fact pattern or past conduct. If the AO request is incomplete, additional information will be requested, sometimes multiple times. Like officials in DOL’s Wage & Hour Division, FEC staff indicated the need to preserve AO resources for truly novel scenarios. Repeatedly, staff referenced a “culture of transparency,” which shaped everything from redaction practices (minimal) to internal emails being addressed to all six Commissioners. “Everyone’s on all emails.”

FEC staff indicated that office norms and practices created a safeguard against inconsistency and arbitrariness. For example, when working on a new AO, a drafter will typically use a previous one as a starting point to serve as a template. Crucially, the template offers a guide not only as to format, but as to *language*, often hard-fought, “the result of a lot of discussion and negotiation” by current and former Commissioners. FEC staff indicated that they “strive to stick to precedent as much as possible.” A small, seasoned campaign finance bar, fluent in existing AOs, also tends to use language from prior AOs to explain the relevant legal standards.

The drafting and supervision processes mirror the processes in other agencies. Staff attorneys in the Policy Division draft AOs, and much like the IRS’s letter rulings, the drafting team consists of an attorney and a supervisor. The attorney conducts research, consults prior AOs, regulations, and guidance. In drafting the AO, itself, the attorney lays out the facts and then the analysis. The attorney and supervisor then review and revise the AO in an iterative process. Once completed, the draft goes to the Commissioners, and another iterative process potentially ensues. The Commissioners then vote whether to issue the AO.

Reliance and Finality

Regulations specify that an AO can be relied upon by “(1) any person involved in the specific transaction or activity with respect to which such [AO] is rendered, and (2) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such [AO] is rendered.”²⁴⁰ Moreover, the regulation establishes that any person who “acts in good faith in accordance” with an AO “shall not, as a result of any such act, be subject to any sanction provided by [applicable campaign finance laws].” Thus, these AOs operate as a shield against enforcement and give AOs a limited binding effect. However, courts considering the matter have concluded that, for the purposes of ripeness, these AOs are “not so final or binding that [they are] reviewable.”²⁴¹ In *U.S. Defense Committee v. FEC*, the Second Circuit noted that a person who proceeds contrary to an AO “would be entitled to all of the enforcement protections, including conciliation, conference, persuasion, and the like” under the statute.²⁴² Thus, an AO is not final agency action, even if a regulated party can invoke it as part of a good-faith defense. Consistent with this reasoning, FEC staff disavowed the finality of AOs, contending that they are “not final agency action, not a final adjudication.”²⁴³

²⁴⁰ 11 C.F.R. § 112.5 (2023).

²⁴¹ See *U.S. Defense Committee v. Fed. Election Comm’n*, 861 F.2d 765, 771 (2d Cir. 1988) (for purposes of ripeness analysis, an FEC advisory opinion was “not so final or binding that it is reviewable”).

²⁴² *Id.*

²⁴³ Interview 4.

Despite their lack of finality, AOs play a role in cultivating stability in the regulated community and in supporting other agency processes. The FEC does not typically change positions in AOs barring an exogenous development, such as change in technology or a Supreme Court decision that invalidates an agency regulation. AOs offer an important forum for the agency to work issues out prior to engaging in rulemaking.

Immigration & National Security

The immigration bureaucracy governs the admission and removal of noncitizens. It consists principally of the Department of Homeland Security, the Department of State, and the Department of Justice. Within DHS, the immigration bureaucracy consists of several subunits: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). This bureaucracy generally lacks formal channels for seeking and providing individualized guidance, although attorneys and applicants have, at times, sought and received opinion letters from USCIS staff or leadership offering interpretations of ambiguous law.²⁴⁴ This section begins with a discussion of practices at USCIS relating to the adjudication of immigration benefits and then considers the role of individualized guidance in immigration enforcement. Because I was unable to speak with current USCIS or ICE officials, this discussion is largely limited to past practices.

Formally, USCIS disavows legal advice to applicants in individual cases. Several factors appear to drive the agency's stated reluctance to advise. One relates to agency culture and attorneys' views about their proper role. A former USCIS official described the prevailing view at USCIS: the agency could properly *educate* applicants about visa options, the visa process, and related matters, but not provide legal advice. The agency did not field pre-application queries because an individual person or entity had to "file an application to get an answer" from the agency.

A strict view of the proper attorney role might also drive this reluctance to advise. According to the former USCIS official, some attorneys at USCIS conceptualized their "client" narrowly as the agency alone, leaving little room for advising the public. However, others viewed their role more expansively, as "an officer of the broader government."²⁴⁵ This latter conception of the job supported advice giving.

Despite skepticism about the propriety of advising individuals, the private immigration bar seeks (or sought) letters "constantly," and the immigration bureaucracy had a longstanding practice of providing such advice on an *ad hoc* basis. Indeed, personnel in both the Immigration and Naturalization Service and its successor agency, the Department of Homeland Security, issued opinion letters offering legal interpretations of gray areas of immigration law, prompted by an individual query.

²⁴⁴ No one from USCIS participated in the interview phase of this study, so current internal agency practices could not be verified. Some corners of the immigration bureaucracy currently produce or have produced advisory opinions in the more recent past, but generally outside of DHS. For example, the State Department issues advisory opinions on J-1 visa eligibility. See *Advisory Opinions*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/advisory-opinions.html> (last visited Mar. 12, 2024). In addition, the Department of Justice's Immigrant and Employee Rights Section, which brings anti-discrimination actions involving immigrant employees, issues advisory opinions to private attorneys. See *Technical Assistance Letters*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/technical-assistance-letters> (last visited Mar. 12, 2024). A former ICE official characterized opinion letters as a casualty of the reorganization of the immigration bureaucracy when DHS was created, but it does appear that some agency personnel continued to write opinion letters well into the early 2000s. See Interview 31.

²⁴⁵ Interview 10.

The letters varied in terms of the process for producing them, the level of supervision, and their reliability and effect. At times, Chief Counsel's office issued these letters, but at other times, individual staff members corresponded with applicants.²⁴⁶ Jacquelyn Bednarz, former Chief of Nonimmigrant Adjudication at legacy INS, wrote many letters to the private sector in response to queries.²⁴⁷

The former USCIS official described how individualized guidance fit within the agency's process for issuing guidance from the Chief Counsel's office. First, like all agencies considering whether to address an issue, USCIS had to decide whether the issue warranted the resources and attention. The agency would be more likely to pursue an issue if it was "an important question," but not so unique that it lacked the potential for broader impact. Often, questions addressed in individualized guidance documents are selected because they are not likely to be resolved through other channels, like benefits adjudications.

Typically, Chief Counsel would work through the existing policymaking apparatus at the agency and obtain clearance through other components to determine if generally applicable guidance is warranted—rendering individualized guidance an aberration to be avoided. The former USCIS official noted, "That's how it should be done and is the default." But just as guidance is to rulemaking, individualized guidance is to generally applicable guidance—potentially faster and less costly. Accordingly, USCIS Chief Counsel sometimes issued advice letters outside of the normal process for issuing guidance. This means that Chief Counsel might issue a letter even if other components had not signed off.

These letters were not maintained in a database available to the public. With no repository containing the corpus of past letters, and no uniform, formalized process for seeking and providing advice, basic safeguards for rule of law values were not evident. The former USCIS official noted that the *ad hoc* process created problems, noting an instance when the practice backfired. The question arose whether an attorney could sign application documents on behalf of a client so long as they had power of attorney. Although done rarely in most cases, it could be routine in a high-volume practice. The Chief Counsel's office issued a letter and press release approving of the practice, opening the door to widespread use, but formal guidance subsequently took a stricter approach and disallowed the practice based on concerns of fraud. The letter introduced substantial uncertainty that remained until USCIS published new guidance on the topic.

Given the enormous demand for advice letters, the intricacies of immigration law, and the high stakes of benefits adjudications, a willingness to respond outside formal channels appears to fulfill a real need. As the former USCIS official put it: "Immigration is tricky because people will engage in conduct for years and later be told it's problematic. That's not good governance."²⁴⁸ Against this rapidly changing legal landscape, replete with gray areas, advice letters have the potential to serve as a clarifying tonic. But they also stand to sow confusion and chaos if produced solely in an informal, decentralized manner. Although the INA does not mandate advice letters, it does not prohibit them either. Of course, opinion letters require resources, but as a fee-funded agency, USCIS could potentially address concerns about cost by charging a user fee for an opinion letter. However, this would likely have predictable negative effects

²⁴⁶ See Letter from Ron Rosenberg, Chief of the DHS Administrative Appeals Office (Apr. 3, 2015) (on file with author).

²⁴⁷ See, e.g., Letter from Jacquelyn A. Bednarz to Lisa B. Enfield (Aug. 23, 1993), <https://www.nafsa.org/sites/default/files/media/document/NAFSAextract1993BednarzLetterReinstatement.pdf>; Letter from Jacquelyn A. Bednarz to Jonathan Ginsburg (Oct. 23, 1992), <https://www.aila.org/aila-files/526C8293-C8DD-4213-B1D6-B8117B90BE47/15081702.pdf?1697590114>.

²⁴⁸ Interview 10.

on equity and fairness, privileging business immigration sponsors and depriving more vulnerable applicants of vital input from the agency.

Reliance

The issuance of letters that had not undergone vetting, however, produced a dilemma regarding the reliability of the advice. Absent full vetting, letters could not be relied upon, especially when written by lower-level staff. They were not binding on agency personnel. For example, a memorandum from an Administrative Appeals Office (AAO) decision references a staff letter that the applicant relied on, but the AAO dismissed the staff letter as “nonbinding” and unpersuasive.²⁴⁹ Even if advice letters are officially nonbinding, however, applicants cite advice letters when they apply for benefits, thereby amplifying the letters’ influence. The former USCIS official described the challenge of limiting the influence of nonbinding opinion letters. This interviewee noted that many people think, “When an official speaks, the public should be able to rely on it.”

During the era when USCIS produced opinion letters, the private immigration bar coveted these letters for the guidance they provided in gray areas of law, even if informal and nonbinding, because, ultimately, the document could “reflect a senior official’s thinking.”²⁵⁰ The former USCIS official noted that some members of the private immigration bar also used the receipt of letters to imply that the attorney “ha[d] sway” with the agency.

Publicity

Although no formal repository exists online, letters were collected before the digital era and published in Kurzban’s renowned immigration law treatise, or another publication called *Interpreter Releases*.²⁵¹

Additional Example of Written Individualized Guidance

Elsewhere in the Department of Homeland Security, sub-agencies offer a range of formal and informal advice to regulated parties. The Transportation Security Administration, for example, has long provided oral advice through its “principal security specialists” and “individual international industry representatives.”²⁵² These personnel interact directly with regulated parties. But concerns for consistency and non-arbitrariness led the agency to adopt a more formal channel for seeking individualized guidance, the Policy Clarification Notice, or PCN. The agency regards PCNs as “improv[ing] the process for providing consistent clarifications to internal and external stakeholders.”²⁵³

Oral Advice and the Demise of Individualized Guidance

A former ICE official described an earlier era, up until about 2011, when private attorneys could reach agency personnel within the immigration bureaucracy and ask questions. On the enforcement side, the government rarely gave individualized advice, but under “extreme” circumstances, ICE personnel might reply by email, and generally that email would offer some protection against enforcement. However, if a novel issue arises, the government is “very careful,” indicating that more formal guidance is

²⁴⁹ See Letter from Ron Rosenberg, Chief of the DHS Administrative Appeals Office (Apr. 3, 2015) (on file with author).

²⁵⁰ Interview 10.

²⁵¹ Interview 12.

²⁵² Interview 13.

²⁵³ Email from TSA personnel.

forthcoming, and perhaps that the response indicates the staff’s “best read of things, but no guarantees.”²⁵⁴ This former official further noted that in the 2009-11 timeframe, a private attorney could also call an ombudsperson at USCIS or ICE to ask agency personnel to “look into” a sympathetic case or an “outrageous” enforcement action. But “that’s dried up, unfortunately.”²⁵⁵ The seasoned immigration attorney with whom I spoke also reasoned that, instead of seeking individualized guidance, the ACLU and other entities now sue the government to uncover policy information through discovery.²⁵⁶

Reliance on Oral Advice

The former ICE official noted that even a high-level agency official’s thinking on a matter probably should not bind the agency, because “there’s no guarantee that they’ve thought of every potential issue.” Binding the government to tentative or initial positions can undermine or even “incapacitate” the deliberative process.²⁵⁷ As a result, when giving advice on rare occasions, the government has the incentive to “caveat” the advice “as much as you can. It’s not binding.”

However, people seeking advice will inevitably rely on it, creating problems arise when low-level staff answer questions incorrectly. A seasoned immigration practitioner related an anecdote about a client who called a military helpline,²⁵⁸ asking whether her child was a U.S. citizen. Using a chart, the non-lawyer service center staff member told her he was, but that was wrong.²⁵⁹ When agencies offer advice over the phone, and without supervision, it becomes difficult to prevent detrimental reliance on erroneous advice—disclaimers notwithstanding.

Civil Rights

Another area where Congress has made advising part of the agency’s mandate is the Civil Rights Division of the Department of Education. Pursuant to a statutory mandate,²⁶⁰ the agency staffs phone lines for parents, students, and schools, to call for advice, including legal advice, labeled “technical assistance.” An individual or school district representative could call with a question and talk with a staff member.

I spoke to a former Department of Education civil rights attorney, who indicated that staff might reply orally over the phone or via email, although staff provide nearly all technical assistance over the phone.²⁶¹ For example, a parent could say that the school asked for their availability for an IEP meeting, and the parent indicated that any day except Monday would work, and then the school scheduled it on Monday anyway. The parent would ask, “Is that permissible?” The staff member who answers the phone would cite the relevant CFR provision regarding how to change the meeting date. This example demonstrates two features of technical assistance: first, it staves off complaints by resolving early disputes, and second, it consists of directing parties to publicly available sources rather than providing novel interpretations of the law. Parties seeking technical assistance can invoke it in a case or matter that develops, but it is not regarded as binding on the agency or the public.

²⁵⁴ Interview 31.

²⁵⁵ *Id.*

²⁵⁶ Interview 12.

²⁵⁷ Interview 31.

²⁵⁸ It was unclear from the interview which agency provided this helpline. However, USCIS does have a “Military Help Line.” See *Military Help Line*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/military/military-help-line>. This is a toll-free number “exclusively for current members of the military and their families, as well as veterans,” where help is available on “immigration-related information.”

²⁵⁹ Interview 12.

²⁶⁰ 20 U.S.C. § 1416(e) (“Monitoring, technical assistance, and enforcement”).

²⁶¹ Interview 17.

Criminal Law

The Department of Justice has a suite of advisory opinion programs,²⁶² including one relating to the Foreign Corrupt Practices Act. The FCPA “generally prohibits the bribing of foreign officials.”²⁶³ But this basic prohibition belies the nuanced judgments that shape enforcement. The FCPA requires DOJ to “establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with [DOJ’s] present enforcement policy...”²⁶⁴

Liability under the FCPA often hinges on intent, a fact-intensive, highly contextual determination. For example, taking a guest to a concert might be permissible, but attending a highly sought-after performance might not be. As an interviewee in the private sector noted, “It’s different if it’s Taylor Swift.”²⁶⁵ This interviewee further stated, “It’s not rocket science, but there’s nuance in determining [intent].” Unsurprisingly, parties potentially subject to criminal liability under the FCPA seek guidance about whether DOJ will regard their proposed course of conduct as a violation of the statute.

The procedures for requesting an FCPA opinion letter, known as an Opinion Procedure Release (OPR), are laid out in 28 C.F.R. Part 80. Requests must be in writing, with copies sent to the Assistant Attorney General for the Criminal Division.²⁶⁶ The requester’s inquiry must relate to a real, as opposed to hypothetical, transaction, and the inquiry must relate to prospective conduct rather than past conduct.²⁶⁷ Past conduct, after all, might describe a crime. Finally, as with IRS private letter rulings, FCPA opinions are applicable *only* to the requesting parties.²⁶⁸ Moreover, they have no binding effect beyond DOJ. For example, if a transaction could potentially trigger enforcement by both DOJ and the SEC, any legal analysis offered by the DOJ in an FCPA opinion is not binding on the SEC in its enforcement action.

Just as in these other areas, private practitioners specializing in the FCPA pay close attention to FCPA OPRs, but several features of the program limit their utility. First, DOJ rarely issues these letters. In 2023, DOJ released two. Between 2015 and 2019, DOJ issued *none*. Second, they take a long time to obtain. Sometimes, a requester will submit a request, but DOJ will deem the request incomplete or require additional facts; this iterative process takes time. The FCPA expert with whom I spoke described a company’s emergency request a few years ago when a foreign navy seized its boat.²⁶⁹ The company wanted to know if it could pay for the boat’s return, roughly \$175,000. It took *eight weeks* to obtain a response, possibly due to the issue’s novelty. Third, by seeking an opinion, a company potentially places itself on DOJ’s radar; it might receive permission, say, to hold an event, but if “something goes wrong,” the company could be worse off for having sought an opinion.²⁷⁰

²⁶² See, e.g., *Advisory Opinions*, U.S. DEP’T OF JUST., <https://www.justice.gov/nsd-fara/advisory-opinions> (last visited Mar. 12, 2024).

²⁶³ *Foreign Corrupt Practices Act (FCPA)*, U.S. SECURITIES & EXCH. COMM’N, <https://www.investor.gov/introduction-investing/investing-basics/glossary/foreign-corrupt-practices-act-fcpa> (last visited Mar. 12, 2024).

²⁶⁴ 15 U.S.C. § 78dd-1(e)(1).

²⁶⁵ Interview 7.

²⁶⁶ 28 C.F.R. § 80.2 (2023).

²⁶⁷ *Id.* § 80.3 (“The entire transaction which is the subject of the request must be actual—not a hypothetical—transaction but need not involve only prospective conduct. However, a request will not be considered unless that portion of the transaction for which an opinion is sought involves only prospective conduct.”).

²⁶⁸ *Id.* § 80.5.

²⁶⁹ Interview 7.

²⁷⁰ *Id.*

An interviewee noted that opinions “take too long” and are “too general to be useful.”²⁷¹ For example, a recent FCPA opinion responded to a question posed by an adoption agency that sought to hold an event for foreign officials.²⁷² The expert noted that the request did not inquire about how to manage “execution risk,” or the potential need for actively monitoring the event. The interviewee noted, “What if things go south in implementation—[and guests] order Dom Perignon?” Because the requester made no reference to active monitoring of the event, DOJ did not “come out and require monitoring,” leaving it an open question. This limited the utility of the opinion.

On the other hand, as the interviewee noted, prior FCPA opinions have “moved the needle” by essentially defining the minimum acceptable conduct. The interviewee cited as an example an opinion from 2002 involving Halliburton that, as the interviewee put it, “set the standard for post-acquisition due diligence.” Specifically, “[Within 180 days,] you need to do x, y, and z. This is how we now do due diligence.”

Given the cost and time commitment involved in obtaining an FCPA opinion and their limited utility, the interviewee noted that a company seeking guidance might be better off consulting a seasoned FCPA firm.

Publicity

FCPA opinions are available online, sorted by year of release.²⁷³

Reliance and Finality

Regulations indicate that the requester may rely on the OPR received, but this does not mean an OPR operates as a complete shield against enforcement.²⁷⁴ The FCPA instead creates a rebuttable presumption that the conduct specified in a request complies with the FCPA, so long as the OPR indicates that the conduct conformed to the law.²⁷⁵ Notably, the government can overcome this presumption “by a preponderance of the evidence.”²⁷⁶ This suggests an important limitation on OPRs’ binding effect. In addition, courts have not regarded OPRs as finally agency action. A search of all federal cases in Westlaw failed to turn up a single published opinion in which a courts treated an OPR as such.

Recommendations

This study has uncovered both broad consistency and substantial variation across agencies in individualized guidance practices. Given the enormous diversity in agency missions, this variation is unsurprising and quite possibly a strength. This section summarizes recommendations for best practices for agencies to follow.

The starting point is acknowledging the demand for advice. Members of the public typically want advice about whether their proposed conduct comports with the relevant agencies’ view of the law. This suggests that agencies should seriously consider providing advice, whether by phone, email, or written

²⁷¹ *Id.* See also Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495 (2011) (arguing that OPRs are a poor vehicle to clarify the law).

²⁷² *Foreign Corrupt Practices Review Opinion Procedure Release*, U.S. DEP’T OF JUST. (Aug. 14, 2023), <https://www.justice.gov/criminal-fraud/file/1593226/download>.

²⁷³ *Opinion Procedure Releases*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal/criminal-fraud/opinion-procedure-releases> (last updated Nov. 7, 2023).

²⁷⁴ 28 C.F.R. § 80.6.

²⁷⁵ 15 U.S.C. § 78dd-1(e)(1).

²⁷⁶ *Id.*

letter or opinion. To provide access to a wide range of constituents, agencies should consider offering different levels of advice, from more costly formal advice to less costly informal advice.

FOIA already requires disclosure of many individualized guidance documents, subject to appropriate redaction for identifying information, sensitive security information, or trade secret information.²⁷⁷ These documents should be publicly available and indexed for greater usability by agency personnel and the public. Specifically, agencies should generally make written individualized guidance available on their websites, as many already do.

One challenge in the realm of agency advice giving is the different levels of formality, different formats, and different levels of reliability of advice. Agencies should clearly state the legal effect of individualized guidance documents and adhere to that representation. Agencies should specify to what extent advisory opinions shield from enforcement any conduct undertaken in good faith reliance and what this means practically.

Another challenge for agencies that want to give advice is cost. Drafting individualized guidance documents and providing advice more generally requires the consistent commitment of time and resources. Agencies might address this challenge by charging fees for advice—while simultaneously considering ways to mitigate resulting inequality, such as a sliding scale fee structure.²⁷⁸ Selective adoption of user fees might help increase the supply of coveted advice by bringing resources into the agency to complete the additional work, while also potentially reducing the volume of queries by those unwilling or unable to pay. Charging fees for advice, thus, stands to increase supply and decrease demand.

Fees, however, also stand to exacerbate inequality. Well-resourced individuals and large, established businesses will likely find a user fee unobjectionable, allowing them to benefit from individualized guidance. But this could potentially leave smaller, less established members of the regulated community to proceed without the benefit of it, and therefore, at a competitive disadvantage.

Supervision and consistency are paramount in everyday advice-giving. Agencies should cultivate practices to promote consistency among line-level staff charged with providing oral advice over the phone, drafting advice in email form, or drafting more formal advisory opinions. In the realm of informal advice, agencies might consider documenting informal advice giving through, for example, requiring staff to maintain call logs to facilitate supervision. At the same time, any documentation obligation will necessarily add time and cost to an already resource-intensive enterprise.

In addition, agencies should consider centralizing the maintenance of updated, accurate agency website content, to assist agency staff in directing the public to generally applicable rules and guidance that might answer their question. This avoids placing a burden on staff to interpret the law under exigent circumstances.

Apart from documentation, agencies should consider offering their staff opportunities to share their experiences with individualized guidance with colleagues within their office and/or at other regional offices. Giving staff members an opportunity to discuss commonly received questions, emerging issues,

²⁷⁷ FOIA identifies nine exemptions, including for national security, trade secret information, and “records or information compiled for law enforcement purposes” 5 U.S.C. § 552(b).

²⁷⁸ Professor Asimow also recommended that agencies charge for advice in his study half a century ago. *See* ASIMOW, *supra* note 2, at 128–31. The ACUS Assembly adopted recommendations on user fees recently. *See* Admin. Conf. of the U.S., Recommendation 2023-8, *User Fees*, 89 Fed. Reg. 1509, 1516 (Jan. 10, 2024).

and their approach to answering the questions received promotes a common knowledge base for staff throughout the agency.

Finally, existing agency ombudspersons²⁷⁹ 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.

²⁷⁹ Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016); *see also* Carole S. Houk et al., A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies (Nov. 14, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/PART%201_Executive%20Summary%20%28ACUS%29%2011.16.16_0.pdf