



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Individualized Guidance

Committee on Rulemaking

Proposed Recommendation for Plenary | June 13, 2024

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

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

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

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

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

DRAFT June 7, 2024



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

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

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

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

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

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

⁷ This Recommendation does not address guidance provided orally.

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



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

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

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

54 This Recommendation recognizes the wide variation **in among** the programs that
55 agencies administer, the resources available to agencies, and the needs and preferences of

⁹ See also Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).



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56 persons with whom they interact. Agencies should account for these differences when
57 implementing the best practices below and tailor their individualized guidance procedures
58 accordingly.

RECOMMENDATION

Individualized Guidance Policies

- 59 1. ~~In response to requests from members of the public for written guidance, agencies~~
60 ~~should, consistent with their resources, priorities, and missions, provide individualized~~
61 ~~guidance—that is, written guidance regarding how the law applies to requesters’ specific~~
62 ~~circumstances. To the extent of, and in a manner consistent with, their resources,~~
63 ~~priorities, and missions, agencies should respond to requests from members of the public~~
64 ~~for written guidance by providing individualized written guidance regarding how the law~~
65 ~~applies to requesters’ specific circumstances. Agencies should avoid charging fees for~~
66 ~~such guidance that would impose undue burdens on people of limited means.~~
- 67 2. Agencies should not treat individualized guidance as creating standards with which
68 noncompliance may form an independent basis for action in matters that determine the
69 rights and obligations of any member of the public.
- 70 3. Agencies should develop policies regarding whether and when it is appropriate to allow a
71 requester or other individual to rely on individualized guidance. ~~I and, in so doing,~~
72 ~~agencies should~~ consider factors including:
- 73 ~~a.~~ The applicability of constitutional, statutory, or other authorities mandating or
74 prohibiting a party’s entitlement to rely on such guidance;
- 75 ~~a.b.~~ ~~The accuracy and completeness of the information the requester provided at the~~
76 ~~time it sought the guidance;~~
- 77 ~~b.c.~~ The certainty of the relevant facts and law at the time the agency issued the
78 guidance;
- 79 ~~e.d.~~ Changes in facts or law after initial issuance of the guidance;
- 80 ~~d.~~ ~~The accuracy and completeness of the information the requester provided at the~~
81 ~~time it sought the guidance;~~

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

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Individualized Guidance Procedures

- 101 7. Agencies should develop written procedures for requesting and issuing individualized
102 guidance. Agencies should publish such procedures in the *Federal Register* and, as
103 appropriate, codify them in the *Code of Federal Regulations*. Agencies should also make
104 the procedures publicly available on their websites and, if applicable, in other agency
105 publications. The procedures should describe:
- 106 a. How members of the public may submit requests for individualized guidance,
107 including the office(s) or official(s) responsible for receiving requests;
- 108 b. The type(s) of individualized guidance members of the public may request;



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



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

Public Availability of Individualized Guidance

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

Centralized Accessibility of Individualized Guidance Materials

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



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

164 ~~14.15.~~ Agencies should ensure that their processes for requesting and receiving
165 individualized guidance (see Paragraph 7) and their individualized guidance webpages
166 (see Paragraph 14) are accessible to persons with disabilities.

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Use of Individualized Guidance in Aid of General Rulemaking

167 ~~15.16.~~ Agencies should periodically review individualized guidance to identify matters
168 that may warrant the development of a general rule.