

DRAFT

**STATEMENT OF PRINCIPLES FOR AGENCY GUIDANCE
DOCUMENTS**

Office of the Chair
Administrative Conference of the United States

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Statement of Principles for Agency Guidance Documents

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1 Consistent with the Administrative Procedure Act (APA), federal agencies issue rules to
2 implement, interpret, and prescribe laws and policies that they administer and to describe their
3 organization, procedure, and practice requirements.¹ This Statement of Principles focuses on two
4 types of rules: general statements of policy (hereinafter, policy statements) and interpretive
5 rules.² Policy statements “advise the public prospectively of the manner in which the agency
6 proposes to exercise a discretionary power.”³ Interpretive rules “advise the public of the agency’s
7 construction of the statutes and rules which it administers.”⁴ Together, policy statements and
8 interpretive rules are called “guidance documents.” Agencies issue guidance documents to help
9 explain their programs and policies and to communicate other important information to the
10 public.

11 Guidance documents can take many forms, including documents issued to the general
12 public as well as documents provided in response to requests for advice from individuals
13 (referred to here as “individualized guidance”).⁵ Guidance documents also go by a variety of
14 names, including guidelines, manuals, rulings, opinion letters, circulars, and advisories.

15 Guidance documents are notable for the process by which they are adopted and their legal
16 effect. Before an agency adopts a rule, the APA generally requires the agency to publish a notice
17 of proposed rulemaking and give interested persons the opportunity to participate in the

¹ See 5 U.S.C. § 551(4) (defining the term “rule” to include “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”).

² 5 U.S.C. § 553(b)(A).

³ Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017) (quoting ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)).

⁴ Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019) (quoting ATTORNEY GENERAL’S MANUAL, *supra* note 3, at 30 n.3)

⁵ See Admin. Conf. of the U.S., Recommendation 2024-2, *Individualized Guidance*, 89 Fed. Reg. 56,277 (July 9, 2024). Recommendation 2024-2 did not seek to characterize all processes for issuing individualized guidance as being either “rulemaking” or “adjudication” under the APA.

18 rulemaking.⁶ The APA does not require these notice-and-comment procedures for guidance
19 documents, however.⁷

20 Unlike rules adopted through the notice-and-comment process, guidance documents lack
21 the “force and effect of law[.]”⁸ As a result, guidance documents are not binding on the public,
22 meaning that they do not create standards with which noncompliance may form an independent
23 basis for action in matters that determine the rights and obligations of any member of the public.⁹

24 Guidance documents can be important instruments of administration and of great value to
25 agencies and the public. Guidance documents can make agency decision making faster and less
26 costly, saving time and resources for agencies and the regulated public. Guidance documents can
27 also make agency decision making more predictable and uniform and shield regulated parties
28 from unequal treatment, unnecessary costs, and unnecessary risks, while promoting compliance
29 with the law. Given the importance and value of guidance documents, the law requires agencies
30 to make certain guidance documents available to the public in the *Federal Register* or on agency
31 websites.¹⁰

32 Since its establishment, the Administrative Conference of the United States (ACUS) has
33 adopted numerous recommendations, listed in the Appendix, to assist federal agencies in the use
34 of guidance documents. These recommendations address best practices for agency guidance in
35 general, such as providing for public participation in the development of guidance documents,
36 making guidance documents publicly available, and ensuring that guidance documents do not
37 bind the public in practice. ACUS recommendations also provide best practices for specific types

⁶ 5 U.S.C. § 553(b).

⁷ *Id.* § 553(b)(A).

⁸ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

⁹ *See* Recommendation 2019-1, *supra* note 4, at ¶ 1; Recommendation 2017-5, *supra* note 3, at ¶ 1.

Recommendation 2019-1 notes that the concept of “binding” effect can give rise to misunderstanding in some contexts, such as when guidance documents use mandatory language to describe an existing statutory or regulatory requirement or when agencies direct employees to follow guidance documents as an internal management matter.

¹⁰ *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019) (explaining that agencies must make certain guidance documents available to the public under the Federal Records Act, the Freedom of Information Act, and other agency-specific statutes).

38 of agency guidance documents, such as automated legal guidance, regulatory enforcement
39 manuals, and individualized guidance.¹¹

40 This Statement of Principles sets forth common best practices derived from ACUS
41 recommendations on agency guidance documents. The ACUS Office of the Chair will update
42 this statement from time to time as ACUS adopts new recommendations on this topic.

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¹¹ This Statement of Principles does not cover declaratory orders, which agencies may issue in an adjudication to “terminate a controversy or remove uncertainty.” 5 U.S.C. 554(e). Unlike agency guidance documents, declaratory orders are legally binding final agency actions. *See* Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

STATEMENT OF PRINCIPLES

Ensuring That Agency Guidance Does Not Bind the Public

- 43 1. Agencies should not use a guidance document to create a standard that is binding on the
44 public, that is, a standard with which noncompliance may form an independent basis for
45 action in matters that determine the rights and obligations of any member of the public.¹
- 46 2. Agencies should afford members of the public a fair opportunity to argue for the
47 modification, waiver, or rescission of a guidance document. If the guidance document is
48 amenable to alternative approaches or analyses, this opportunity should include the
49 chance to argue for lawful approaches other than those put forward by the document.²
- 50 3. Agencies may, as an internal management matter, direct some employees to act in
51 conformity with a guidance document so long as they afford the public a fair opportunity
52 to argue for its modification, waiver, or rescission (see Principle 2). However, agencies
53 should instruct employees to refrain from making any statements suggesting that a
54 guidance document is binding on the public and should instruct employees as to the
55 difference between an internal agency management requirement and a statute or
56 regulation that is binding on the public.³
- 57 4. A guidance document should state prominently that it is non-binding or that it reflects the
58 agency's current interpretation of the law and that a member of the public may take—or
59 request that the agency take—a lawful alternative approach to the one set forth in the
60 document.⁴
- 61 5. A guidance document should not include mandatory language unless the language
62 describes an existing statutory or regulatory requirement or the language is addressed to
63 agency employees consistent with Principle 3.⁵
- 64 6. In determining whether to modify, rescind, or waive a guidance document, agencies
65 should give due regard to any reasonable reliance interests. A guidance document should
66 indicate the nature of the reliance that may be placed on it and the opportunities for
67 modification, rescission, or waiver of it.⁶

Developing Agency Guidance

- 68 7. Agencies should develop different types of guidance documents as appropriate, including
69 general guidance, individualized guidance, automated legal guidance, and regulatory
70 enforcement manuals.⁷
- 71 8. Agencies should tailor guidance documents to the informational needs and level of
72 expertise of the intended audiences, including through the use of plain language best
73 practices and writing techniques.⁸

Managing Agency Guidance

- 74 9. Agencies should develop written procedures pertaining to the internal management of
75 guidance documents.⁹
- 76 10. Agency procedures for managing guidance documents should address:
- 77 a. The categories of guidance subject to the procedures;
 - 78 b. If applicable, the process for members of the public to request guidance from the
79 agency;
 - 80 c. The development process for the guidance, including any opportunity for public
81 comment;
 - 82 d. The publication and dissemination of the guidance; and
 - 83 e. The periodic review of existing guidance.¹⁰
- 84 11. Agencies should periodically review their guidance document management procedures to
85 assess their performance and identify opportunities for improvement.¹¹
- 86 12. Agencies should train staff on their guidance document management procedures and use
87 appropriate internal controls to ensure adherence to such procedures.¹²
- 88 13. Agencies should consider assigning a unique identifier to each guidance document, for
89 internal and external tracking purposes. Once assigned, such identifiers should appear on
90 the document and be used when publicly referring to it.¹³

Providing for Public Participation in the Adoption or Modification of Agency Guidance

- 91 14. Agencies should consider whether to solicit public participation before adopting or
92 modifying guidance documents. If agencies do not provide opportunities for public

93 participation before adopting or modifying guidance documents, they should consider
94 offering such opportunities after doing so.¹⁴

95 15. Agencies should consider different options for the public to participate before or after the
96 adoption or modification of guidance documents, including:

- 97 a. Invitations for written input from the public, with or without a response from the
98 agency (including requests for information published in the *Federal Register*);
- 99 b. Targeted outreach to affected persons;
- 100 c. Meetings with affected persons and other potentially interested persons, including
101 listening sessions and webinars; and
- 102 d. Advisory committee proceedings.¹⁵

103 16. When deciding whether and how to solicit public participation before the adoption or
104 modification of guidance documents (generally, or in the context of specific guidance
105 documents), agencies should consider:

- 106 a. Existing agency guidance procedures for soliciting public input, including those
107 adopted in response to the Office of Management and Budget's Final Bulletin for
108 Agency Good Guidance Practices (2007);
- 109 b. The likely increase in useful information available to agencies from broadening
110 public participation;
- 111 c. The likely increase in policy acceptance from broadening public participation;
- 112 d. Whether agencies are likely to learn more useful information by putting forward a
113 specific agency proposal or instead having a more free-ranging and less formal
114 discussion; and
- 115 e. The practicability of broader forms of public participation, taking into account the
116 time and resource constraints on agencies.¹⁶

Making Agency Guidance Publicly Available

117 17. Agencies should maintain webpages dedicated to informing the public about the
118 availability of their guidance documents and facilitating access to those documents.

119 These webpages should include:

- 120 a. Agencies' written guidance document management procedures, as described in
121 Principle 10;

- 122 b. Plain-language explanations about guidance documents and their legal effects;
123 c. A method for users to find relevant guidance documents, such as a comprehensive
124 list of such documents, links to pages where they are located, or a dedicated
125 search engine; and
126 d. A method for the public to provide feedback on problems accessing agencies’
127 guidance documents and on other issues related to the availability of those
128 documents.¹⁷
- 129 18. Agencies should maintain dedicated webpages providing the public with a
130 comprehensive set of their guidance documents. The webpages should:
- 131 a. Include, at a minimum, all guidance documents required by law to be published in
132 the *Federal Register* or otherwise to be made publicly available;
133 b. Make guidance documents available in a downloadable form; and
134 c. Include relevant information for each guidance document, such as its title, any
135 legal authorities related to the document, the date of issuance, and any assigned
136 identifying number.¹⁸
- 137 19. Agencies should publish current guidance documents on their websites and, to the extent
138 feasible, clearly mark such documents as current and identify their effective dates. If
139 agencies rescind guidance documents, they should identify the rescission dates and direct
140 the public to any successor guidance documents.¹⁹
- 141 20. Agencies should consider maintaining inoperative guidance documents on their websites
142 and, if they do so, should:
- 143 a. Organize the documents to make it easy for members of the public to find them
144 and relate them to any successor guidance documents; and
145 b. Label the documents to ensure that the public can readily understand that they are
146 no longer in effect.²⁰
- 147 21. Agencies should alert potentially interested persons to new and revised guidance
148 documents using methods such as email distribution lists, social media posts, speaking
149 opportunities at public meetings, press releases, and notifications in the *Federal*
150 *Register*.²¹

151 22. Agencies should consider providing descriptive references (such as links, if possible) to
152 relevant guidance documents in appropriate sections of the *Code of Federal Regulations*,
153 stating where the public can access the documents.²²

Using Agency Guidance in the Rulemaking Process

154 23. Agencies should provide guidance about the meaning and application of their final rules
155 in the preambles to those final rules. Agencies should address how a final rule advances
156 statutory objectives and should consider including—particularly for lengthy rules—a
157 section-by-section analysis that corresponds to the organization of the final rule.
158 Agencies should go beyond merely repeating the relevant statutory or regulatory text in
159 the preamble.²³

160 24. When providing guidance in preambles of final rules (see Principle 23), agencies should
161 not use such guidance as a substitute for regulatory language and should avoid use of
162 mandatory language except when the language describes a requirement or is addressed to
163 agency employees consistent with Principle 3.²⁴

164 25. Agencies should identify preambles to their final rules as sources of guidance on their
165 webpages devoted to guidance and should consider ways to integrate the guidance in
166 their preambles into other guidance documents.²⁵

167 26. Agencies should periodically review individualized guidance documents to identify
168 matters that may warrant the development of a general rule.²⁶

NOTES

¹ Recommendations 2019-1 ¶ 1; 2017-5 ¶ 1; 92-2, ¶ I(A).

² Recommendations 2019-1 ¶ 2; 2017-5 ¶ 2; 92-2, ¶ II(B).

³ Recommendations 2019-1 ¶¶ 3, 7; 2017-5 ¶¶ 3, 6; 92-2, ¶ III.

⁴ Recommendations 2019-1 ¶ 4; 2017-5 ¶ 4; 92-2, ¶ II(A).

⁵ Recommendations 2019-1 ¶ 5; 2017-5 ¶ 5.

⁶ Recommendations 2024-2, ¶ 3; 2019-1, ¶¶ 2, 11; 2017-5 ¶ 12.

⁷ Recommendations 2024-2, ¶ 1; 2022-5, ¶ 1; 2022-3 ¶ 1.

⁸ Recommendation 2017-3, ¶¶ 1, 8.

⁹ Recommendations 2024-2, ¶ 8; 2022-3, ¶ 5; 2019-3 ¶ 1.

¹⁰ Recommendation 2019-3 ¶ 1.

¹¹ Recommendation 2019-3 ¶ 5.

¹² Recommendation 2019-3 ¶¶ 2, 3.

¹³ Recommendation 2019-3 ¶ 4.

¹⁴ Recommendations 2019-1, ¶¶ 8–9; 2018-7, ¶¶ 6–8; 2017-5, ¶¶ 9–10; 92-2 ¶ III; 76-5, ¶ 2.

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- ¹⁵ Recommendations 2022-5, ¶ 11; 2019-1, ¶¶ 8–9; 2018-7, ¶¶ 6-8; 2017-5, ¶¶ 9–10; 92-2 ¶ III; 76-5, ¶ 2.
¹⁶ Recommendations 2019-1 ¶ 8; 2017-5, ¶ 9.
¹⁷ Recommendations 2024-2, ¶ 14; 2019-3, ¶ 7.
¹⁸ Recommendations 2024-2, ¶ 10; 2022-5, ¶ 9; 2019-3, ¶ 8(a)–(d).
¹⁹ Recommendations 2024-2, ¶ 13; 2019-3, ¶ 8(e).
²⁰ Recommendation 2021-7, ¶¶ 2–4.
²¹ Recommendations 2021-7, ¶ 6; 2019-3, ¶ 11.
²² Recommendation 2019-3, ¶ 12.
²³ Recommendation 2014-3, ¶¶ 1–2.
²⁴ Recommendation 2014-3, ¶ 4.
²⁵ Recommendation 2014-3, ¶¶ 5.
²⁶ Recommendation 2024-2, ¶ 15.

APPENDIX

71-3, Articulation of Agency Policies

76-2, Strengthening the Information and Notice-Giving Functions of the Federal Register

76-5, Interpretive Rules of General Applicability and Statements of General Policy

92-2, Agency Policy Statements

2014-3, Guidance in the Rulemaking Process

2017-3, Plain Language in Regulatory Drafting

2017-5, Agency Guidance Through Policy Statements

2018-7, Public Engagement in Rulemaking

2019-1, Agency Guidance Through Interpretive Rules

2019-3, Public Availability of Agency Guidance Documents

2021-7, Public Availability of Inoperative Agency Guidance Documents

2022-3, Automated Legal Guidance at Federal Agencies

2022-5, Regulatory Enforcement Manuals

2024-2, Individualized Guidance