



## Individualized Guidance

### Committee on Rulemaking

#### Proposed Recommendation from Committee | May 1, 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 rules<sup>1</sup>—  
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.<sup>2</sup>

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.<sup>3</sup> Such “individualized  
12 guidance” goes by a variety of names, including advisory opinions, opinion letters, and letters of

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<sup>1</sup> 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).

<sup>2</sup> *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).

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



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13 interpretation.<sup>4</sup> The Internal Revenue Service issues private letter rulings to provide tax law  
14 advice to taxpayers,<sup>5</sup> 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.<sup>6</sup> 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).<sup>7</sup> 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.<sup>8</sup>

27 Individualized guidance offers many benefits. It facilitates communication between an  
28 agency and requesters, 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

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<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> This Recommendation does not address guidance provided orally.

<sup>8</sup> See generally Shalini Bhargava Ray, *Individualized Guidance in the Federal Bureaucracy* (Apr. 4, 2024) (draft 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). Finally, it addresses circumstances in which  
51 agencies should use individualized guidance to support development of general rules.

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



## RECOMMENDATION

### Individualized Guidance Policies

- 56 1. In response to requests from members of the public for written guidance, agencies  
57 should, consistent with their resources, priorities, and missions, provide individualized  
58 guidance—that is, written guidance regarding how the law applies to requesters’ specific  
59 circumstances.
- 60 2. Agencies should not treat individualized guidance as creating standards with which  
61 noncompliance may form an independent basis for action in matters that determine the  
62 rights and obligations of any member of the public.
- 63 3. Agencies should develop policies regarding whether and when it is appropriate to allow a  
64 requester or other individual to rely on individualized guidance and, in so doing, consider  
65 factors including:
- 66 a. The applicability of constitutional, statutory, or other authorities mandating or  
67 prohibiting a party’s entitlement to rely on such guidance;
  - 68 b. The certainty of the relevant facts and law at the time the agency issued the  
69 guidance;
  - 70 c. Changes in facts or law after initial issuance of the guidance;
  - 71 d. The accuracy and completeness of the information the requester provided at the  
72 time it sought the guidance;
  - 73 e. The formality of the agency’s individualized guidance procedure, including the  
74 position and authority of the agency officials involved in developing and issuing  
75 the guidance;
  - 76 f. Whether a person other than the requester of individualized guidance may rely on  
77 it, which might depend on the similarity of the person’s circumstances to the  
78 requester’s circumstances; and
  - 79 g. Whether allowing reliance is necessary to prevent significant hardship.
- 80 4. Agencies should explain in individualized guidance provided to requesters the extent to  
81 which requesters or others can rely on that guidance.



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- 82 5. Even if agencies do not provide for persons to rely on individualized guidance, agencies  
83 should, when appropriate and lawful, minimize hardships on persons who nevertheless  
84 acted in conformity with the guidance, such as by reducing or waiving any penalty for  
85 past non-compliance or taking enforcement action with solely prospective effect.
- 86 6. Agencies with ombuds offices should provide opportunities for members of the public to  
87 seek assistance from such offices as a supplement to individualized guidance or to  
88 resolve issues related to individualized guidance. Agencies should also involve such  
89 offices in efforts to improve agency policies and procedures related to individualized  
90 guidance.

### **Individualized Guidance Procedures**

- 91 7. Agencies should develop written procedures for requesting and issuing individualized  
92 guidance. Agencies should publish such procedures in the *Federal Register* and, as  
93 appropriate, codify them in the *Code of Federal Regulations*. Agencies should also make  
94 the procedures publicly available on their websites and, if applicable, in other agency  
95 publications. The procedures should describe:
- 96 a. How members of the public may submit requests for individualized guidance,  
97 including the office(s) or official(s) responsible for receiving requests;
  - 98 b. The type(s) of individualized guidance members of the public may request;
  - 99 c. Any matters that the agency will not address through individualized guidance,  
100 including the rationale for not providing guidance as to such matters;
  - 101 d. The information that the requester should include with the request for  
102 individualized guidance;
  - 103 e. Whether the agency will make individualized guidance and any related  
104 information (including the identity of the requester and information from the  
105 request) publicly available as described in paragraphs 10 through 13;
  - 106 f. Any fees the agency charges for providing individualized guidance, as well as any  
107 provisions for waivers of, exemptions from, or reduced rates for such fees;



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- 108 g. Any opportunities for public participation in the preparation of individualized  
109 guidance;
- 110 h. The manner in which a response to a request for individualized guidance will be  
111 provided to the requester;
- 112 i. To the extent practicable, the expected timeframe for responding to requests for  
113 individualized guidance;
- 114 j. Whether requesters may seek review of individualized guidance by a higher-level  
115 official; and
- 116 k. The agency's policy, developed as described in paragraph 3, regarding whether  
117 and when it is appropriate for a requester or other individual to rely on  
118 individualized guidance.
- 119 8. Agencies should develop procedures for agency personnel to manage and process  
120 requests for individualized guidance, including:
- 121 a. Allowing for electronic submission of, and response to, requests;
- 122 b. Creating methods for identifying and tracking requests;
- 123 c. Maintaining past responses to requests in a manner that allows agency personnel  
124 to identify and consider them when developing responses to new requests that  
125 present similar or related issues; and
- 126 d. Ensuring that relevant personnel receive training in the agencies' individualized  
127 guidance procedures.
- 128 9. In cases in which members of the public other than the requester are likely to have  
129 information relevant to the request or are likely to be significantly affected by the  
130 agency's action, agencies should consider soliciting public participation before issuing  
131 individualized guidance.

### **Public Availability of Individualized Guidance**

- 132 10. Absent substantial countervailing considerations, agencies should make publicly  
133 available on their websites any individualized guidance that affects, or may be of interest



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

### **Centralized Accessibility of Individualized Guidance Materials**

- 150 14. Agencies that provide individualized guidance should maintain a page on their websites  
151 that provides easy access to the procedures described in Paragraph 7, all individualized  
152 guidance that they make publicly available as described in paragraphs 10 through 13, and  
153 information about electronically submitting a request for individualized guidance.

### **Use of Individualized Guidance in Aid of General Rulemaking**

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