



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Individualized Guidance

Committee on Rulemaking

Draft Recommendation for Committee | April 10, 2024

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

9 Agencies regularly issue guidance addressed to the public. In many federal programs,
10 individuals may also request written guidance from an agency regarding how the law applies to a
11 requestor’s specific circumstances. Such “individualized guidance” goes by a variety of names,
12 including advisory opinions, opinion letters, and letters of interpretation.³ The Internal Revenue

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 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



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

18 Agency practices vary in several key respects. Some individualized guidance is issued in
19 a relatively formal manner (e.g., via letter), while other individual guidance may be issued in
20 relatively informal ways (e.g., via email). (This Recommendation does not address guidance
21 provided orally.) Some individualized guidance is prepared and issued by lower-level staff, while
22 other individualized guidance is reviewed and issued by agency heads or other senior officials.
23 Some individualized guidance has no legally binding effect on the agency or requestor, while
24 other such guidance may, for example, provide the requestor with a defense to an agency
25 enforcement action.⁶

26 Individualized guidance offers many benefits. It facilitates communication between an
27 agency and requestors, reduces uncertainty, promotes compliance, spurs useful transactions, and
28 can be faster and less costly than other agency actions. For example, agencies may provide
29 individualized guidance to help a regulated party better understand whether its conduct may be
30 permissible, and this may limit the need for future enforcement action. In addition, making
31 individualized guidance publicly available can inform other interested persons about how the
32 agency evaluates issues that may affect them.

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.” *See* 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).

⁴ *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).

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

⁶ *See 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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33 At the same time, individualized guidance may raise concerns. Even if an agency does
34 not intend to use individualized guidance to bind the public, requestors or others may
35 nevertheless choose to follow the guidance strictly to limit the risk of sanction in a future agency
36 proceeding. Agencies risk providing inconsistent guidance if they lack appropriate procedures
37 for developing and reviewing it. Members of the public may lack equal access to processes for
38 requesting individualized guidance or have limited opportunities to participate in processes for
39 developing individualized guidance that affects them.

40 These benefits can be increased, and these concerns addressed, through the best practices
41 identified in this Recommendation. It encourages agencies, when appropriate, to establish
42 procedures for providing individualized guidance to members of the public. It identifies
43 procedures agencies should use to process requests for individualized guidance fairly, efficiently,
44 and accurately, and it encourages agencies to make individualized guidance available to agency
45 personnel and the public. It recommends that agencies not treat individualized guidance as
46 creating binding standards on the public but identifies circumstances in which agencies should
47 consider allowing the public to rely on such guidance (that is, circumstances where agencies
48 should consider adhering to guidance that is favorable to a person in a subsequent agency
49 proceeding despite the nonbinding character of the guidance). Finally, it addresses circumstances
50 in which agencies should use individualized guidance to support other forms of agency action.

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

RECOMMENDATION

Individualized Guidance Generally

- 55 1. Consistent with agency resources, agencies should provide individualized guidance in
56 response to requests from individual members of the public—that is, written guidance
57 regarding how the law applies to requestors' specific circumstances.

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- 58 2. Agencies should not use individualized guidance to create binding standards on members
59 of the public—that is, standards with which noncompliance may form an independent
60 basis for action in matters that determine the rights and obligations of the requestor or
61 other members of the public.
- 62 3. Agencies should determine whether and when it is appropriate to allow a requestor or
63 other individual to rely on individualized guidance, considering factors including:
- 64 a. The certainty of the relevant facts and law at the time the agency issued the
65 guidance;
- 66 b. Changes in facts or law after initial issuance of the guidance;
- 67 c. The formality of the agency’s individualized guidance procedure, including the
68 position and authority of the agency officials involved in developing and issuing
69 the guidance;
- 70 d. The accuracy and completeness of the information the requestor provided at the
71 time it sought the guidance;
- 72 e. In the case of reliance by a person other than the requestor of individualized
73 guidance, the similarity of the person’s circumstances to the requestor’s
74 circumstances;
- 75 f. Whether allowing reliance is necessary to prevent significant hardship; and
76 g. The applicability of constitutional, statutory, or other authorities mandating or
77 prohibiting a party’s entitlement to rely on such guidance.
- 78 4. If agencies do not allow parties to rely on individualized guidance, agencies should
79 minimize hardships on parties where appropriate and lawful, such as by reducing or
80 waiving penalties for past non-compliance or issuing an order solely with prospective
81 effect.

Individualized Guidance Procedures

- 82 5. Agencies should develop and make publicly available written procedures for requesting
83 and issuing individualized guidance. The procedures should describe:

Commented [JG2]: Question for Committee: Should the Recommendation specify how agencies should make such procedures publicly available (e.g., in the CFR or elsewhere).



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- 84 a. The procedure by which members of the public may submit requests for
85 individualized guidance, including the office(s) or official(s) responsible for
86 receiving requests;
- 87 b. The type(s) of individualized guidance members of the public may request;
- 88 c. Any matters that the agency will not address through individualized guidance,
89 including the rationale for not providing guidance as to such matters;
- 90 d. The information that the requestor should include with the request for
91 individualized guidance;
- 92 e. Any fees the agency charges for providing individualized guidance;
- 93 f. The procedure for responding to requests for individualized guidance, including
94 the office(s) or official(s) responsible for preparing, reviewing, approving, and
95 issuing such guidance;
- 96 g. Any opportunities for public participation in the preparation of individualized
97 guidance;
- 98 h. The manner in which a response to a request for individualized guidance will be
99 provided to the requestor and, if appropriate, made available to the general public;
- 100 i. To the extent practicable, the expected timeframe for responding to requests for
101 individualized guidance;
- 102 j. Any procedure by which requestors may seek review of individualized guidance
103 by a higher-level official; and
- 104 k. Whether requestors and others may rely on individualized guidance in subsequent
105 proceedings.
- 106 6. Agencies should develop procedures for agency personnel to manage and process
107 requests for individualized guidance, including:
- 108 a. Allowing for electronic submission of, and response to, requests;
- 109 b. Creating methods for identifying and tracking requests;
- 110 c. Maintaining past responses to requests in a manner that allows agency personnel
111 to identify and use them when developing responses to new requests that present
112 similar or related issues; and

Commented [BB3]: Question for Committee: Should this Recommendation address the propriety of agencies charging for individualized guidance?



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113 d. Ensuring that relevant personnel receive training in the agencies' individualized
114 guidance procedures.

115 7. Agencies should solicit public participation before or after issuing individualized
116 guidance in cases in which members of the public other than the requestor are likely to
117 have information relevant to the request or are likely to be affected by the agency's
118 action.

Public Availability of Individualized Guidance

119 8. Agencies that provide individualized guidance should maintain a page on their websites
120 that provides easy access to the procedures described in Paragraph 5, all individualized
121 guidance documents that they make publicly available, and information about
122 electronically submitting a request for individual guidance.

123 9. Agencies should make publicly available on the webpage described in Paragraph 8 any
124 individualized guidance document that affects, or may be of interest to, persons other
125 than the requestor, including regulated parties and regulatory beneficiaries.

126 10. When making individualized guidance documents available on their websites, agencies
127 should, as appropriate:

- 128 a. Identify the date, requestor, and subject matter of the guidance;
- 129 b. Identify the legal authority under which the guidance was issued and under what
130 circumstances other parties may rely on the guidance; and
- 131 c. Use other techniques to help the public find relevant information, such as
132 indexing or tagging guidance documents by general topic area.

133 11. When making individualized guidance documents publicly available, agencies should
134 redact any information that is sensitive or otherwise protected from disclosure and redact
135 identifying details to the extent required to prevent an unwarranted invasion of personal
136 privacy.

137 12. Agencies should keep individualized guidance on their websites current. If an agency
138 modifies or rescinds a publicly available individualized guidance document, it should



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139 indicate on the face of the document that it has been modified or rescinded and provide
140 access to any explanation for the modification or rescission or successor guidance.

Relationship to Other Agency Processes

141 13. Agencies should periodically review individualized guidance documents to identify
142 matters that may warrant the development of a general rule.