



Combined Edits From Lee Liberman Otis and Alan Morrison

Agency Guidance

Committee on Judicial Review

Proposed Recommendation for Committee | October 31, 2017

1 Policy statements are agency statements of general applicability, not binding on members
 2 of the public, that advise the public of the manner in which the agency proposes to exercise a
 3 discretionary power.¹ They are exempt from the Administrative Procedure Act’s requirements
 4 (including notice and comment) for the issuance of legislative rules that legally bind the public.²

5 This provision also exempts interpretive rules, which are “rules or statements issued by an
 6 agency to advise the public of the agency’s construction of the statutes and rules which it
 7 administers.” Attorney General’s Manual, supra, at 30 n.3. Insofar as agencies seek to use
 8 interpretive rules in a nonbinding manner, the recommendations herein regarding flexible use of
 9 policy statements may be helpful for that purpose [those agencies’ use of interpretive rules].
 10 Policy statements and this category of interpretive rules are often referred to as guidance.

11 Recommendation 76-5 states that agencies should provide for public participation in the
 12 formulation of policy statements (and of interpretive rules) depending ~~up~~ on the impact of the
 13 statement in question and the practicability of participation.³ Recommendation 92-2 recognizes

¹ Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1947).

² 5 U.S.C. § 553(b)(A). ~~This provision also exempts interpretive rules, which are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” Attorney General’s Manual, supra, at 30 n.3. Insofar as agencies seek to use interpretive rules in a nonbinding manner, the recommendations herein regarding flexible use of policy statements may be helpful for those agencies’ use of interpretive rules.~~ **[Alan Morrison Edit]**

³ Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56769 (Dec. 30, 1976). Additional prior ACUS Recommendations pertaining to policy statements and agency guidance more broadly, apart from others referenced specifically in this preamble, include Recommendation 2015-3,

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The preamble already makes certain references to OMB’s Good Guidance Practices of 2007, on points where OMB’s concerns clearly overlapped with those of the present project, esp. on binding effect on agency employees and the use of binding language. Committee members suggested including some additional discussion about the similarities or differences between our recommendation and the OMB document, including on whether our recommendation covers items like official speeches or media interviews. In trying to add such discussion, I ran into some problems and opted not to attempt it, for a few reasons. (1) The drawing of boundaries around what is “guidance” is itself a fraught and controversial issue (e.g., whether agency adjudicators can cite speeches by the agency head, or whether the category includes letters to Congress – a point on which OMB directly opposes at least one circuit court), but one on which my report did not focus at all. (2) OMB was under an obligation to be very explicit about defining its category, because its pronouncements are binding in a way that ACUS recommendations are not, and it deliberately disclaimed inclusion of certain kinds of official statements out of concern (as Jim Tozzi pointed out to me) about the role of the Data Quality Act, which is not a focus of our recommendation. (3) Our recommendation’s exclusion of interpretive rules means we are focusing on a different category than OMB (which referred to “guidance documents”), which further complicates any comparison of OMB’s very exact line-drawing with our own.

Commented [GB2]: Nick Parrillo suggests renaming to Agency Policy Statements to better reflect the content of the recommendation.

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14 the value of policy statements but expresses concern about policy statements “that are intended
15 to impose binding substantive standards or obligations upon affected persons” notwithstanding
16 the legal requirement that they be nonbinding, and it advises ~~that agencies to~~ establish flexible
17 procedures that allow members of the public a fair opportunity to argue for approaches different
18 from those set forth in a policy statement.⁴ The Conference has now determined, twenty-five
19 years after Recommendation 92-2, to update its recommendations on the formulation and use of
20 policy statements in light of current administrative experience.⁵

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21 Policy statements are essential instruments of administration across numerous agencies,
22 and of great value to agencies and the public alike. Compared with ~~adjudication or enforcement,~~
23 policy statements can make agency decisionmaking faster and less costly, saving time and
24 resources for the agency and the regulated public. They can also make agency decisionmaking
25 more predictable and uniform, shield regulated parties ~~against from~~ unequal treatment,
26 unnecessary costs, and unnecessary risk, ~~while and promote~~ing compliance with the law.⁶
27 Compared with legislative rules, policy statements are generally better for dealing with
28 conditions of uncertainty and for making agency policy accessible to regulated parties who lack

Commented [AM6]: I do not understand the difference between these two terms – same question on line 79, p. 5. [now line 84 in this version]

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Declaratory Orders, 80 Fed. Reg. 78163 (Dec. 4, 2015); and Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).

⁴ Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30103 (July 8, 1992). A policy statement may permissibly bind some agency employees. *Id.*; see also OMB Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) (“[A]gency employees should not depart from significant agency guidance documents without appropriate justification and supervisory concurrence.”); *id.* at 3437 (“[W]hile a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking.”). But policy statements cannot bind those employees in a manner that forecloses the fair opportunity to seek modification or departure from the guidance. See OMB Good Guidance Practices, at 3440. For example, a policy statement could bind officials at one level of the agency hierarchy, with the proviso that officials at a higher but still accessible level can authorize action at variance with the statement.

⁵ The Conference commissioned a study that resulted in interviews with 135 individuals across agencies, industry, and NGOs, which are the basis for this Recommendation. See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Sept. 18, 2017), <https://www.acus.gov/report/agency-guidance-draft-report>.

⁶ See *id.* at 28-30; see also Administrative Conference of the United States, Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973) (“Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determination in various types of agency action, either through published decisions, general rules or policy statements other than rules.”).



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29 counsel. Further, the provision of policy statements often takes less time and resources than
30 legislative rulemaking, freeing up the agency to address more issues within its statutory mission.

31 Despite their usefulness to both agencies and the public, policy statements are sometimes
32 criticized for coercing members of the public as if they were legislative rules, notwithstanding
33 their officially nonbinding status. Recommendation 92-2 defined this problem in terms of an
34 agency's *intent* to use such statements to bind the public, which may imply that the problem is
35 one of official bad faith. While official intent to make a policy statement binding, if shown,
36 would deserve criticism and correction, intent is often inadequate for understanding and
37 addressing the phenomenon of binding policy statements.

38 There are several kinds of reasons why ~~That~~ members of the public sometimes find they
39 have no practical escape from the terms of a policy statement. ~~First are those that are not of the~~
40 making of an agency or its officials and do not depend primarily on whatever intent the officials
41 may have. ~~Specifically, is often due to~~modern regulatory schemes often have structural features
42 of modern regulatory schemes that ~~are beyond the control of officials who formulate or use~~
43 policy statements and do not depend on whatever intent those officials might have ~~tend to lead~~
44 regulated parties to follow the policy statement's approach even if in theory they might be
45 legally free to choose a different course, because the costs and risks associated with doing so are
46 simply too high. This is often the case if a statute (a) requires a regulated party to obtain prior
47 approval from an agency to obtain essential permissions or benefits; (b) subjects a regulated
48 party to repeated agency evaluation under a legal regime with which perfect compliance is
49 practically unachievable, incentivizing the party to invest in a reputation with the agency as a
50 good-faith actor; or (c) subjects the regulated party to the possibility of enforcement proceedings
51 that entail prohibitively high costs regardless of outcome, or can lead to sanctions so severe that
52 the party will not risk forcing an adjudication of the accusation. ~~Also~~Meanwhile, a policy
53 statement can operate on beneficiaries of a statute or legislative rule as if it were a legislative
54 rule by effectively depriving them of the statute or legislative rule's protection. This can occur if
55 the policy statement promises to treat regulated parties less stringently than the statute or

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56 legislative rule requires, effectively freeing those parties to shift their behavior in a direction that
57 harms beneficiaries.

58 ~~But agency officials can avoid these legislative rule-like effects of policy statements if~~
59 ~~they remain flexible in their use of such statements by offering members of the public a fair~~
60 ~~opportunity to argue for other approaches.⁷~~

61 Second, there are a number of reasons why agencies themselves may naturally tend to be
62 somewhat inflexible with respect to their own policy statements even where in theory they are
63 free not to be.. While agencies can be inflexible, ~~Even though these reasons are more within an~~
64 agency's or its officials' control than the earlier set, this lack of flexibility ~~is~~ often does not
65 imply official bad faith, and efforts to ferret out bad faith can miss ~~many of inflexibility's~~ the
66 actual causes ~~for this kind of inflexibility~~. Officials who behave inflexibly may be seeking in
67 good faith to balance (a) their obligation to be flexible and (b) stakeholder demands to honor
68 other, competing rule-of-law values that officials would be remiss to ignore. For example, if one
69 regulated firm argues for a different approach from that in a policy statement and the agency
70 approves, this may prompt other firms to criticize the agency for not keeping a level playing field
71 among competitors; may cause other firms to lose faith in the agency's consistency and
72 predictability, which may render them less likely to trust and cooperate with the agency; and may
73 open the agency to accusations of favoritism from NGOs, the media, and congressional
74 overseers.

75 In principle, one way an agency might ~~To~~ reconcile these understandable pressures for
76 consistency with the obligation to be flexible ~~, an agency, when approving an approach different~~
77 from that in a policy statement, ~~may find it helpful~~ would be to ~~draw up~~ prepare and disseminate
78 written reasons when it approves an approach different from that in a policy statement,

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⁷An agency's obligation to provide this fair opportunity should not foreclose the agency from using the document as a decisional tool. When a member of the public requests an agency to reexamine a position taken in a policy statement, the agency may consult, rely on, and cite to the statement (if it has been properly published under 5 U.S.C. § 552(a)(1) and (a)(2)) insofar as the contents thereof are responsive to the request, but the agency should give fair consideration to issues that are raised by the request and not addressed in the statement.



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79 ~~thereby for its approval,~~ making the same reasoning available to all similarly-situated parties
80 going forward. This transparency helps level the playing field, makes agency behavior more
81 predictable, and diminishes concerns about favoritism. But, again without any bad faith,
82 agencies might still find inflexibility the easier course and adopt it by default, because ~~That said,~~
83 Reason-giving requires agency resources, ~~and thus agencies sometimes are unable to do it and~~
84 end up behaving inflexibly by default.⁸ Besides this, there are additional organizational reasons
85 for inflexibility that likewise do not depend on official bad faith: ~~that~~ some agency offices, by
86 reason of their usual day-to-day business, are socialized to be less receptive to stakeholder
87 requests than others; ~~that~~ higher-level officials have institutional reasons to back the decisions of
88 their subordinates; and ~~that~~ the distinction between binding and nonbinding policies is counter-
89 intuitive for many officials, at least without substantial training.

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90 These various pressures tend to give at least some policy statements a quasi-binding
91 character in fact regardless of their legal status and with no bad faith on anyone's part. That said,
92 however, there are important steps that agency officials can take to mitigate these legislative-
93 rule-like effects of policy statements by making clear that they are not binding and by remaining
94 flexible in their use of such statements by offering members of the public a fair opportunity to
95 argue for other approaches.⁹ What steps to take and when is the focus of one set of today's
96 recommendation. In addition, agencies should also, in appropriate circumstances, use
97 appropriate tools to enable public participation in the formulation of policy statements before
98 these statements are adopted. This is the focus of the other major set of today's
99 recommendations.

⁸ Another difficulty with giving reasons is to act consistently with agency policies on the protection of confidential business or personal information. This recommendation is not intended to alter existing agency policies on such protection.

⁹ An agency's obligation to provide this fair opportunity should not foreclose the agency from using the document as a decisional tool. When a member of the public requests an agency to reexamine a position taken in a policy statement, the agency may consult, rely on, and cite to the statement (if it has been properly published under 5 U.S.C. § 552(a)(1) and (a)(2)) insofar as the contents thereof are responsive to the request, but the agency should give fair consideration to issues that are raised by the request and not addressed in the statement.



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101 ~~First, Thus,~~ flexibility often requires managerial initiative and resources to foster and
102 maintain. This Recommendation identifies concrete organizational measures that agencies may
103 take to foster flexibility: low-cost measures that agencies should take at a minimum and
104 additional measures with higher cost that agencies should consider in light of resource
105 limitations and competing priorities.

106 In addition, public participation at the time of a policy statement’s adoption may be of
107 value to the agency, to regulated parties, and especially to regulatory beneficiaries and
108 organizations representing them, ~~for because~~ beneficiaries often lack the opportunity and
109 resources to participate in the individual **adjudicatory or enforcement** proceedings in which a
110 policy statement will be applied.

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111 Choosing a level and means of public participation that is appropriate to a policy
112 statement’s likely impact and is practicable requires consideration of several factors, ~~this~~
113 **Recommendation highlights**. Given the complexity of these factors and their tendency to vary
114 with context, it is appropriate to make decisions about whether and how to seek public
115 participation on policy statements on a document-by-document or agency-by-agency basis.¹⁰ A
116 government-wide requirement for inviting written input from the public on policy **statements is**
117 **not recommended**, unless confined to the very most extraordinary documents,¹¹ ~~is not~~
118 **recommended**. This is a function both of the complex cost-benefit considerations noted above
119 and the fact that broad mandates for written public input on policy statements can result in two
120 additional unintended consequences. First, a broad mandate applied to a resource-strapped
121 agency may cause the agency to fail to process and incorporate comments and instead leave

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¹⁰ Some agencies have adopted procedural rules requiring solicitation of written input from the public for large and well-defined categories of their policy statements, whereas others have undertaken such solicitations for a large number of statements but selected those documents on a decentralized, ad hoc basis. Parrillo Report, *supra* note 1, at 167–71.

¹¹ The Office of Management and Budget’s Good Guidance Practices calls for pre-adoption public comment on “economically significant” guidance documents, but this appears to cover only a very small number of documents. See Parrillo, *supra* note 5, at 50–58.



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122 many policy statements in published “draft” form indefinitely, which may at least partly defeat
123 the purpose of participation and cause stakeholder confusion. Second, a broad mandate may so
124 legitimize policy statements in the eyes of the agency that such statements could end up largely
125 supplanting legislative rulemaking.

RECOMMENDATION

Policy Statements Should Not Bind the Public

- 126 1. An agency should not use a policy statement ~~as to create~~ a standard binding on the public,
127 that is, as a standard with which noncompliance may form an independent basis for
128 action in matters that determine the rights and obligations of any member of the public.
- 129 2. An agency should afford members of the public a fair opportunity to argue for lawful
130 approaches other than those put forward by the policy statement or for modification or
131 rescission of the policy statement.
- 132 3. An agency may, as an internal agency management matter, require some of its employees
133 to act in conformity with a policy statement, but the agency should ensure that this does
134 not interfere with the fair opportunity called for in Recommendation 2. For example, an
135 agency may require officials at one level to follow the approach described in a policy
136 statement while authorizing officials at a higher level to act in ways different from that
137 described in the document when appropriate.

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Minimum Measures to Avoid Binding the Public

- 138 4. A policy statement should prominently state that it is not binding on members of the
139 public and explain that a member of the public may take a lawful approach different from
140 the one set forth in the policy statement, or request that the agency take such a lawful
141 approach. ~~This explanation~~ The policy statement should also include the identity and
142 contact information of officials to whom such a request should be made.
- 143 5. A policy statement should not include mandatory language unless the agency is using that
144 language to describe a statutory or regulatory requirement, or the language is addressed to

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145 agency employees and will not interfere with the fair opportunity called for in
146 Recommendation 2.
147 6. The agency should instruct all employees engaged in activity to which a policy statement
148 pertains to refrain from making any statements suggesting that a policy statement is
149 binding on the public. Insofar as some employees are required, as an internal agency
150 management matter, to act in conformity with a policy statement, they should be
151 instructed as to the difference between such an internal agency management requirement
152 and law that is binding on the public.

Additional Measures to Avoid Binding the Public

153 7. In order to avoid using policy statements to bind the public and in order to provide a fair
154 opportunity for other lawful approaches, an agency should, subject to considerations of
155 practicability and resource limitations and the priorities described in Recommendation 8
156 below, consider additional measures, including the following:
157 a. promoting the flexible use of policy statements in a manner that still takes due
158 account of needs for consistency and predictability. In particular, when the
159 agency accepts a proposal for a lawful approach other than that put forward in a
160 policy statement and the approach seems likely applicable to other situations, the
161 agency may disseminate its decision and the reasons therefor to other persons who
162 might make the argument, to other affected stakeholders, and to officials likely to
163 hear the argument ~~(consistent with its policies on protection of confidential~~
164 ~~business or personal information).~~
165 b. assigning the task of considering arguments for approaches other than that in a
166 policy statement to a component of the agency, ~~other than the component that~~
167 ~~issued the policy statement and which that~~ is likely to engage in open and
168 productive dialogue with persons who make such arguments, such as a program
169 office that is accustomed to dealing cooperatively with regulated parties and
170 regulatory beneficiaries.

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- 171 c. in cases where frontline officials are authorized to take an approach different from
- 172 that in a policy statement but refuse to do so, directing appeals of such a refusal to
- 173 a higher-level official who is not the direct superior of those frontline officials.
- 174 d. investing in training and monitoring of frontline personnel to ensure that they (i)
- 175 understand the difference between binding rules and policy statements; (ii) treat
- 176 parties' ideas for lawful approaches different from that in a policy statement in an
- 177 open and welcoming manner; and (iii) understand that approaches other than that
- 178 in a policy statement, if undertaken according to the proper internal agency
- 179 procedures for approval and justification, are appropriate and will not have
- 180 adverse employment consequences for them.
- 181 e. setting up channels for members of the public, anonymously through
- 182 intermediaries such as ombudspersons or trade associations, to argue in favor of
- 183 approaches different from those in a policy statement and to provide feedback to
- 184 the agency on whether its officials are giving reasonable consideration to such
- 185 arguments.

Priorities in Deciding When to Invest in Promoting Flexibility

187 8. Because measures to promote flexibility (including those listed in Recommendation 7)

188 may take up agency resources, it will be necessary to set priorities for which policy

189 statements are most in need of such measures. In deciding when to take such measures

190 the agency should consider the following, bearing in mind that these considerations will

191 not always point in the same direction:

- 192 a. an agency should assign a higher priority to a policy statement the greater the
- 193 statement's impact is likely to be on the interests of regulated parties and
- 194 regulatory beneficiaries, either because regulated parties have strong incentives to
- 195 comply with the statement or because the statement practically reduces the
- 196 stringency of the regulatory scheme compared to the status quo.
- 197 b. ~~But~~ an agency should assign a lower priority to promoting flexibility in the use of
- 198 a policy statement insofar as the statement's value to the agency and to

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199 stakeholders lies in the fact that it is helpful to have consistency for consistency's
200 sake, independent of the statement's substantive content.
201 ~~§.c. On the other hand, the~~ Notwithstanding paragraph b. an agency should assign a
202 higher priority to promoting flexibility in the use of a policy statement insofar as
203 the statement's value to the agency lies in officials' belief that the substantive
204 content of the statement is right as a matter of policy. Under that circumstance,
205 the agency ought to test its belief in the policy's correctness either by going
206 through the process for legislative rulemaking or by investing in measures to
207 ensure serious consideration of arguments by members of the public to take
208 approaches other than those in the policy statement.

Public Participation in Adoption of Policy Statements

- 209 9. When an agency is contemplating adopting or modifying a policy statement, it should
210 consider whether to solicit public participation, and if so, what kind, before adopting the
211 document. The options range from outreach to selected stakeholder representatives to
212 stakeholder meetings or webinars to advisory committee proceedings to invitation for
213 written input from the public with or without a response. In deciding how to proceed, the
214 agency should consider:
- 215 a. existing agency procedures for the adoption of policy statements, including any
216 procedures adopted in response to the Office of Management and Budget's Final
217 Bulletin for Agency Good Guidance Practices (2007);
 - 218 b. the factors listed in Recommendation 8;
 - 219 c. the likely increase in useful information available to the agency from broadening
220 participation, keeping in mind that non-regulated parties may offer different
221 information than regulated parties and that non-regulated parties will often have
222 no opportunity to provide input regarding policy statements other than at the time
223 of adoption;
 - 224 d. the likely increase in policy acceptance from broadening participation, keeping in
225 mind that non-regulated parties will often have no opportunity to provide input



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- 226 regarding policy statements other than at the time of adoption, and that policy
227 acceptance may be less likely if the agency is not responsive to stakeholder input;
228 e. whether the agency is likely to learn more useful information by having a specific
229 agency proposal as a focal point for discussion, or instead having a more free-
230 ranging and less formal discussion; and
231 f. the practicability of broader forms of participation, including invitation for written
232 input from the public, keeping in mind that broader participation may slow the
233 adoption of policy statements and may diminish resources for other agency tasks,
234 including the provision of policy statements on other matters.

235 10. An agency may make decisions about the appropriate level of participation document-by-
236 document or by rules assigning certain participatory procedures to general categories of
237 documents. If an agency opts for the latter, it should consider whether resource
238 limitations may cause some documents to remain in draft for substantial periods of time
239 and, if so, should either (a) make clear to stakeholders which draft policy statements, if
240 any, should be understood to reflect current agency thinking or (b) provide in each draft
241 policy statement that, at a certain time after publication, the document will automatically
242 either be adopted or withdrawn.

243 ~~10.~~11. Where an agency decides against providing pre-promulgation public participation,
244 the agency should consider offering an opportunity for such participation after
245 promulgation.