



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Automated Legal Guidance at Federal Agencies

Committee on Administration and Management

Proposed Recommendation | June 16, 2022

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Federal agencies increasingly automate the provision of legal guidance to the public
2 through online tools and other technologies.¹ The Internal Revenue Service, for example,
3 encourages taxpayers to seek answers to questions regarding various tax credits and deductions
4 through its online “Interactive Tax Assistant,” and the United States Citizenship and Immigration
5 Services suggests that potential green card holders and citizens with questions about their
6 immigration rights communicate with its interactive chatbot, “Emma.” Almost a dozen federal
7 agencies have either implemented or piloted such automated legal guidance tools in just the past
8 three years.²

9 Automated legal guidance tools can take several forms. The most common are chatbots
10 and virtual assistants. The simplest chatbots provide standardized responses based on keywords

¹ This Recommendation defines “guidance” broadly to include interpretive rules, general statements of policy, and other materials that agencies considered to be guidance documents under other, separate definitions adopted by government agencies. 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 They include the Department of the Army, Internal Revenue Service, United States Citizenship and Immigration Services, the Department of Education, the Environmental Protection Agency, the General Services Administration, the Food and Drug Administration, the Internal Revenue Service, the Social Security Administration, the National Institutes of Health, the Patent and Trademark Office, the Army, the General Services Administration, the Social Security Administration, and the Veterans Benefits Administration, the Food and Drug Administration, the National Institutes of Health, and the Environmental Protection Agency.

Commented [CMA1]: Proposed Amendment from Special Counsel Jeffrey Lubbers #1:

Please see proposed edits in footnote 2.



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11 included in a user’s question. Although the terms can overlap, virtual assistants tend to be more
12 versatile than chatbots and can often perform additional tasks such as making an appointment or
13 filling out a form in response to a conversation.³ More robust tools rely on natural language
14 processing, or artificial intelligence to interpret natural language and generate an individualized
15 response.⁴

16 Agencies use automated legal guidance tools for a number of reasons. These reasons They
17 include efficiently allocating limited staff resources, improving user experience and service
18 delivery, and enhancing the quality, consistency, speed, and predictability of guidance, as well
19 as the speed with which it is provided to the public. Because they are always available from any
20 location and can efficiently and effectively provide answers to common questions, automated
21 legal guidance tools have the potential to revolutionize the provision of agency guidance to the
22 public.

23 Agencies generally take the position that users cannot rely on automated legal guidance.
24 As this Recommendation recognizes, agencies must be clear in disclosing this position to users.
25 That is true, of course, of all forms of guidance documents.⁵ Automated legal guidance may,
26 however, create an especially heightened risk of a user’s relying on the guidance issued in a way
27 that the issuing agency does not intend. Since users often enter specific facts relating to their
28 circumstances, users may assume that the automated guidance tool is giving a customized
29 response that has accounted for all of the facts that have been entered, which may or may not be
30 the case. As with other forms of guidance, there also is an issue regarding the extent to which
31 users are able to rely upon automated legal guidance. Agencies generally take the position that

Commented [CA2]: Proposed Amendment from Council #1:

The Council finds the original language unclear concerning why automated legal guidance poses an especially large risk of a user’s relying on guidance issued in the way an agency does not intend, among other things. It has suggested the following revision for the Committee’s consideration.

Commented [CA3]: Inquiry from Council:

Here and elsewhere, does “users” refer only to direct users of automated legal guidance tools or to third-parties as well? If the latter, then should an amendment be made?

³ See Joshua D. Blank & Leigh Osofsky, Automated Legal Guidance at Federal Agencies 1, 10 (May 26, 2022) (report to the Admin. Conf. of the U.S.).

⁴ See Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Blank & Osofsky, *supra* note 3.

⁵ See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 11 – 12, 84 Fed. Reg. 38,931, 38,933 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, ¶¶ 6, 11, 84 Fed. Reg. 38,927, 38,929 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶¶ 4 – 6, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).



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32 ~~users cannot rely upon automated legal guidance, and that automated legal guidance does not~~
33 ~~bind the agency. Critics argue, however, that automated legal guidance tools can oversimplify or~~
34 ~~misstate the law or offer users guidance that does not apply well to their factual circumstances.~~
35 ~~Although the same can be said for other explanatory materials, such as brochures and fact sheets,~~
36 ~~automated legal guidance tools pose unique concerns because they can appear to be human.~~
37 ~~Users may perceive the kind of instantaneous and seemingly personalized responses provided by~~
38 ~~an automated legal guidance tool to be more authoritative or persuasive than a guidance~~
39 ~~document.~~

40 The Administrative Conference has adopted several recommendations on the
41 development, use, and public availability of agency guidance documents.⁶ This Recommendation
42 builds on those recommendations by identifying best practices for agencies to consider when
43 they develop, use, and manage automated legal guidance tools. ~~In identifying these best~~
44 ~~practices, the Conference recognizes that automated legal guidance~~~~The use of these~~ tools may
45 not be suitable for all agencies and administrative programs ~~and that.~~ ~~Moreover,~~ even when
46 ~~agencies use them~~ ~~automated legal guidance tools are used,~~ agencies ~~should expect that they will~~
47 need to provide additional guidance ~~through by other channels~~ ~~means,~~ including live person-to-
48 person support. ~~This Recommendation provides best practices to guide agencies when~~
49 ~~considering using automated legal guidance tools.~~

Commented [CA4]: Proposed Amendment from Council #2

RECOMMENDATION

Design and Management

⁶ See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); 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).



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- 50 1. Agencies should explore the possible benefits of offering automated legal guidance tools,
51 including enhancing administrative efficiency and helping the public understand complex
52 laws using plain language. This is especially true for those agencies that have a high
53 volume of individual interactions with members of the public who may not be familiar
54 with legal requirements.
- 55 2. Agencies should also weigh the potential downsides of automated legal guidance tools,
56 including potentially oversimplifying the law creating confusion as to whether and when
57 the agency intends users to rely on the guidance issued. To avoid such confusion,
58 agencies should follow the recommendations set forth in Paragraphs 18–20, letting
59 guidance appear more personalized than it actually is, and not adequately disclosing that
60 users cannot rely on the guidance to bind the agency.
- 61 3. Agencies using automated legal guidance tools should design and manage them in ways
62 that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.
- 63 4. Agencies should ensure that automated legal guidance tools do not displace other agency
64 mechanisms for increasing access to the underlying law.
- 65 5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the
66 substance embedded in automated legal guidance tools and should publish these
67 procedures on their websites. These procedures should incorporate periodic user testing
68 and other forms of evaluation by internal and external researchers to ensure accessibility
69 and effectiveness.
- 70 6. The General Services Administration should regularly evaluate the relative costs and
71 benefits of using outside vendors for the introduction-production of automated legal
72 guidance tools and share such information with agencies.

Accessibility

- 73 7. Agencies should utilize human-centered design methodologies, empirical customer
74 research, and user testing, as described and defined in Executive Order 14,058,
75 *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in*

Commented [CA5]: Proposed Amendment from Council #3:

The Council finds the original language unclear as to the potential downsides unique to automated legal guidance tools and what the agency might do to mitigate them. It has suggested this revision for the Committee's consideration.



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76 *Government* (86 Fed. Reg. 71,357, Dec. 13, 2021) in designing and maintaining their
77 automated legal guidance tools.

- 78 8. Agencies should, consistent with applicable laws and policies, design **and periodically**
79 **review and (when necessary) reconfigure** automated legal guidance tools to ensure that
80 they meet the needs of the particular populations that are intended to utilize the
81 automated legal guidance tools.

82 ~~9. Agencies should periodically review and reconfigure automated legal guidance tools to~~
83 ~~ensure that they meet the needs of the particular populations that are intended to utilize~~
84 ~~the automated legal guidance tools.~~

85 ~~10.9.~~ Agencies should ensure that information provided by automated legal guidance
86 tools is stated in plain language understandable by the particular populations that are
87 intended to **use utilize these automated legal guidance** tools, consistent with the Plain
88 Writing Act of 2010; Recommendation 2017-3, *Plain Language in Regulatory Drafting*
89 (82 Fed. Reg. 61,728, Dec. 14, 2017); and other applicable laws and policies.

90 ~~11.10.~~ Agencies should design automated legal guidance tools to put users in contact
91 with a human customer service representative to whom **users they** can address questions
92 in the event that a question is not answered by **the an** automated legal guidance tools or if
93 the users are having difficulty using **an automated legal guidance the** tool.

Transparency

94 ~~12.11.~~ When the underlying law is unclear or unsettled, or when the **application of the**
95 **law is especially fact-dependent legal guidance depends upon the facts of the particular**
96 **situation**, agencies should be transparent about the limitations of the advice the user is
97 receiving. To the extent practicable, agencies should also provide access through



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98 automated legal guidance tools to the legal materials underlying the tools, including
99 relevant statutes, rules, and judicial or adjudicative decisions.

100 ~~13~~.12. Agencies should disclose how they store and use the data obtained through
101 automated legal guidance tools.

102 ~~14~~.13. Agencies should update the content of automated legal guidance tools to reflect
103 legal developments or correct errors in a timely manner. Agencies should also maintain
104 an electronic, publicly accessible, searchable archive that identifies and explains ~~such the~~
105 updates. Agencies should ~~ensure that provide~~ the date on which the tool was last updated.

106 ~~15~~.14. When automated legal guidance tools provide programmed responses to users’
107 questions, agencies should publish the questions and responses to provide an immediate
108 and comprehensive source of information regarding the ~~automated legal guidance~~ tools.
109 Agencies should post this information in an appropriate location on their websites and
110 make it accessible through the automated legal guidance tool to which it pertains.

111 ~~16~~.15. When automated legal guidance tools learn to provide different answers to users’
112 questions over time, agencies should publish information related to how the machine
113 learning process was developed and how it is maintained and updated. Agencies should
114 post this information in an appropriate location on their websites and make it accessible
115 through the automated legal guidance tool to which it pertains.

116 ~~17~~.16. Agencies that use automated legal guidance tools should provide users ~~an~~
117 ~~option~~ the ability to provide offer feedback or report errors.

118 ~~18~~.17. When applicable, agencies should provide disclaimers that the automated legal
119 guidance tool is not human.

Reliance

120 ~~19~~.18. ~~When feasible, A~~ agencies should allow users to obtain a written record of their
121 communication with automated legal guidance tools and should include date and time
122 stamps for the information provided.

123 ~~20~~.19. Agencies should consider whether, or under what circumstances, a person's good
124 faith reliance on guidance provided by an automated legal guidance tool should serve as a

Commented [CMA6]: Comment from Public Member Jack Beermann:

This recommendation “seems way in the weeds and may involve disclosing proprietary information of contractors. Is it really necessary?”

Commented [CMA7]: Proposed Amendment from Special Counsel Jeffrey Lubbers #2:

“My reason for suggesting this (I realize that feasibility is an implied condition for many of them) is that this requirement might discourage agencies from using these tools, and the report doesn't even give one example of an agency that does this now.”



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125 defense against a penalty or other consequences for noncompliance with an applicable
126 legal requirement, and it should prominently announce that decision to users.
127 ~~21-20.~~ If an agency takes the position that it can depart from an interpretation or
128 explanation provided by an automated legal guidance tool ~~in a subsequent investigative~~
129 ~~or adjudicative proceeding~~, including in the application of penalties for noncompliance, it
130 should prominently announce its position to users.

Commented [CMA8]: Proposed Amendment from Public Member Jack Beermann:

“Not sure about the phrase ‘in a subsequent investigative or adjudicative proceeding’ because this principle may apply in other contexts. I recommend deleting it.”