

To: ACUS Committee on Judicial Review
From: James Goodwin (Center for Progressive Reform, signing in individual capacity)
Re: Comments on Third Draft of Agency Guidance recommendation
Date: October 30, 2017

Thank you for the opportunity to comment on the third draft recommendation for the Administrative Conference of the United States (ACUS) project on “Agency Guidance” to be discussed at the October 31, 2017 meeting.

In these comments, I wish to express the following four points to guide the Committee’s consideration of this draft of the recommendations.

1. With respect to recommendation 7(a), I have concerns regarding the discretionary nature of agencies duty to report to members of the public (*e.g.*, other stakeholders, etc.) when it has accepted a proposal to adopt a lawful approach other than that put forward in a policy statement.

I understand that agencies face conflicting incentives in these situations. On the one hand, a preference for reporting to the public promotes the goals of fairness. On the other hand, a strict requirement for reporting to the public risks imposing a significant burden on agencies, which might discourage agencies from accepting proposals to adopt alternate lawful approaches in the first place. It seems this recommendation would benefit from identifying this conundrum that agencies will face in deciding whether and when to report. Moreover, this recommendation would benefit from some guidance on what factors agencies might wish to consider and how to balance them when navigating this conundrum. Finally, this recommendation might benefit from a stated presumption on how agencies should proceed in these situations. My sense is that the presumption should be in favor of reporting with agencies being able to rebut this presumption based upon countervailing factors, such as resource constraints and likelihood that other affected parties (including, most notably, regulatory beneficiaries) will not benefit from or have interest in knowing about an agency’s decision to accept a proposal to adopt an alternative lawful approach.

2. With respect to recommendation 7(e), I have strong concerns about setting up an anonymous channel for members of the public to propose an alternative lawful approach or to criticize agency decisions for failing to accept such proposals.

In general, I do not see anything in the preamble to the recommendations that warrants this recommendation. Put differently, I am unaware of any “problem” this solution is meant to address, and none is apparent from the preamble. To the contrary, this recommendation seems to run against the preamble. In particular, I read the preamble as favoring transparency in agency interactions over guidance as a means for promoting fairness.

3. Starting with recommendation 9(c), the recommendations begin using the term “non-regulated parties.”

Is this term meant to be synonymous with “regulatory beneficiaries” (which is used elsewhere in the recommendations)? Or is it meant to denote all interested stakeholders other than regulatory beneficiaries? If it is synonymous with regulatory beneficiaries, we would suggest adopting one term or the other for clarity’s sake.

4. With respect to the new recommendation 11, perhaps this recommendation would benefit from additional details on whether and how to approach post-promulgation public participation.

My sense is that the same factors for determining the appropriate approach for pre-promulgation public participation should apply. A simple cross-reference to the relevant recommendations would likely suffice.