

**To:** ACUS Committee on Judicial Review

**From:** AFL-CIO  
Public Citizen  
Union of Concern Scientists  
James Goodwin (Center for Progressive Reform, signing in individual capacity)

**Re:** Comments on October 11 draft of Agency Guidance recommendation

**Date:** October 16, 2017

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Thank you for the opportunity to comment on the draft recommendation (dated October 11) on the Administrative Conference of the United States (ACUS) project on “Agency Guidance.”

In these comments, we wish to express the following four points to guide the Committee’s consideration of these recommendations going forward.

1. ACUS should not stipulate how agencies should define or use guidance documents.

The universe of what constitutes “guidance documents” is inordinately complex, its outer reaches are fuzzy, and any efforts at defining those outer reaches would defy reasonable consensus. At best, attempts to draw bright lines or set binding parameters would be both over- and under-inclusive. At worst, they would lead to harmful unintended consequences, including wasted scarce government resources, regulatory uncertainty that is costly to the private sector, the defeat of agency implementation and enforcement of their authorizing statutes, and, ultimately, further degradation of public confidence in our governing institutions.

2. ACUS should continue to recognize its long-standing distinction between policy statements and interpretive rules.

To the extent that these recommendations touch on the issue of “binding” effects on the public, they should be limited to policy statements. Recommendations to improve agency interpretive rules involve matters that are sufficiently complex and distinct enough that they should be subject of a separate ACUS project, if one is deemed warranted.

3. ACUS should recognize that guidance documents provide valuable assistance to regulated parties.

In short, any recommendations with regard to guidance documents should have the overarching goal of promoting their utility: to agencies, to the public interest, and to regulated parties. In should go without saying, but to say it anyway, a recommendation on guidance documents should not be evaluated on the basis of whether it results in “less” guidance documents or “more” guidance documents.

4. ACUS should encourage agencies to use their best discretion in determining how to engage with the public when developing guidance documents.

In the exercise of this discretion, agencies may want to develop a “menu” of best practices for public outreach, as well as the set of appropriate factors to consider and balance when deciding how and when to employ those best practices. In any event, when selecting a mechanism for public participation, the agency should be sensitive to existing disparities that will likely result in the regulated parties dominating the process to the potential minimization or even exclusion of the public interest community.

If you have any additional questions regarding these comments, please contact James Goodwin, Senior Policy Analyst, Center for Progressive Reform at 202.747.0698, extension 5, or at [jgoodwin@progressivereform.org](mailto:jgoodwin@progressivereform.org).