



## Individualized Guidance

### Committee on Rulemaking

#### Draft Recommendation for Committee | April 24, 2024

**Commented [BB1]:** At committee meeting #1, members suggested changing the title of the recommendation. Suggestions included “Agency Treatment of Requests for Individualized Guidance” and “Individualized Guidance by Request.”

**Commented [JL2]:** Comment from Special Counsel Jeffrey S. Lubbers:

“Line 9--I would omit the first sentence of the second paragraph. The first paragraph makes that plain--the second one introduces individualized guidance.”

**Commented [BB3]:** At committee meeting #1, members suggested clarifying that individualized guidance does not include guidance not prompted by request. ACUS staff have added a footnote to address this suggestion.

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 rules<sup>1</sup>—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.<sup>2</sup>

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.<sup>3</sup> Such “individualized guidance” goes by a variety of names,

<sup>1</sup> 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).

<sup>2</sup> *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).

<sup>3</sup> This recommendation does not cover guidance that is not requested by a member of the public, such as an agency warning letter explaining why the agency believes a regulated party is in violation of a law or regulation.



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12 including advisory opinions, opinion letters, and letters of interpretation.<sup>4</sup> The Internal Revenue  
13 Service issues private letter rulings to provide tax law advice to taxpayers,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>4</sup> 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 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).

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> 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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31 individualized guidance publicly available can inform other interested persons about how the  
32 agency evaluates issues that may affect them.

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.



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RECOMMENDATION

Individualized Guidance Generally

- 55 1. ~~In response to requests from members of the public for written guidance. Consistent with~~  
56 ~~agency resources,~~ agencies should, ~~consistent with their resources, priorities, and~~  
57 ~~missions,~~ provide individualized guidance ~~in response to requests from individual~~  
58 ~~members of the public~~ that is, written guidance regarding how the law applies to  
59 requestors' specific circumstances.
- 60 2. Agencies should not treat individualized guidance as creating standards with which  
61 noncompliance may form an independent basis for action in matters that determine the  
62 rights and obligations of any member of the public.
- 63 3. Agencies, should develop policies regarding whether and when it is appropriate to allow  
64 a requestor or other individual to rely on individualized guidance and in so doing,  
65 consider factors including:
  - 66 a. The certainty of the relevant facts and law at the time the agency issued the  
67 guidance;
  - 68 b. Changes in facts or law after initial issuance of the guidance;
  - 69 c. The formality of the agency's individualized guidance procedure, including the  
70 position and authority of the agency officials involved in developing and issuing  
71 the guidance;
  - 72 d. The accuracy and completeness of the information the requestor provided at the  
73 time it sought the guidance;
  - 74 e. Whether a person other than the requestor of individualized guidance may rely on  
75 it, which might depend on the similarity of the person's circumstances to the  
76 requestor's circumstances;
  - 77 f. Whether allowing reliance is necessary to prevent significant hardship; and
  - 78 g. The applicability of constitutional, statutory, or other authorities mandating or  
79 prohibiting a party's entitlement to rely on such guidance.

Commented [BB4]: These edits reflect changes made during committee meeting #1, except for minor style edits made by ACUS staff.

Commented [BB5]: Question for Committee: Should the Recommendation address the circumstances (resources aside) under which the use of individualized guidance is or is not appropriate?



80 4. Agencies should explain in individualized guidance provided to requestors the extent to  
81 which requestors or others can rely on that guidance.

Commented [BB6]: ACUS staff have made minor style edits to new paragraph 4, which was added during committee meeting #1.

82 4.5. Even if agencies do not provide for persons to rely on individualized guidance, agencies  
83 should, where appropriate and lawful, minimize hardships on persons who nevertheless  
84 acted in conformity with the guidance, such as by reducing or waiving penalties for past  
85 non-compliance or issuing an order solely with prospective effect.

**Individualized Guidance Procedures**

86 5.6. Agencies should develop and make publicly available written procedures for requesting  
87 and issuing individualized guidance. Agencies should publish such procedures in the  
88 Federal Register and codify them in the Code of Federal Regulations. Agencies should  
89 also make the procedures publicly available on their websites. The procedures should  
90 describe:

Commented [JG7]: Question for Committee: Should the Recommendation specify how agencies should make such procedures publicly available (e.g., in the CFR or elsewhere).

Commented [BB8]: ACUS staff have drafted the highlighted language based on the committee's direction that the document recommend that agencies publish the procedures in the Federal Register and CFR and that agencies make them available on their websites.

- 91 a. The procedure by which members of the public may submit requests for  
92 individualized guidance, including the office(s) or official(s) responsible for  
93 receiving requests;
- 94 b. The type(s) of individualized guidance members of the public may request;
- 95 c. Any matters that the agency will not address through individualized guidance,  
96 including the rationale for not providing guidance as to such matters;
- 97 d. The information that the requestor should include with the request for  
98 individualized guidance;
- 99 e. Any fees the agency charges for providing individualized guidance, including  
100 waivers, exemptions, or reduced rates for such fees;
- 101 f. The procedure for responding to requests for individualized guidance, including  
102 the office(s) or official(s) responsible for preparing, reviewing, approving, and  
103 issuing such guidance;
- 104 g. Any opportunities for public participation in the preparation of individualized  
105 guidance;

Commented [JL9]: Comment from Special Counsel Jeffrey S. Lubbers:

"Question on line 92--Fees for advice sounds too much like "pay to play." But I recognize that agencies like the IRS already do it. If they are necessary, there should be waivers or sliding scale fees a la FOIA."

Commented [BB10]: Question for Committee: Should this Recommendation address the propriety of agencies charging for individualized guidance?

Commented [BB11]: ACUS staff have added the highlighted language for consideration in response to comments from Special Counsel Jeffrey S. Lubbers and related discussion at committee meeting #1.



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- 106 h. The manner in which a response to a request for individualized guidance will be  
107 provided to the requestor and, if appropriate, made available to the general public;  
108 i. To the extent practicable, the expected timeframe for responding to requests for  
109 individualized guidance;  
110 j. Any procedure by which requestors may seek review of individualized guidance  
111 by a higher-level official; and  
112 k. ~~Whether and when it is appropriate, in accordance with policies developed as~~  
113 ~~described in paragraph 3, for a requestor or other individual to rely~~ Whether  
114 ~~requestors and others may rely~~ on individualized guidance ~~in subsequent~~  
115 ~~proceedings.~~

116 ~~6-7.~~ Agencies should develop procedures for agency personnel to manage and process

117 requests for individualized guidance, including:

- 118 a. Allowing for electronic submission of, and response to, requests;  
119 b. Creating methods for identifying and tracking requests;  
120 c. Maintaining past responses to requests in a manner that allows agency personnel  
121 to identify and use them when developing responses to new requests that present  
122 similar or related issues; and  
123 d. Ensuring that relevant personnel receive training in the agencies' individualized  
124 guidance procedures.

125 ~~7-8.~~ Agencies should solicit public participation before or after issuing individualized

126 guidance in cases in which members of the public other than the requestor are likely to  
127 have information relevant to the request or are likely to be affected by the agency's  
128 action.

### Public Availability of Individualized Guidance

129 ~~8-9.~~ Agencies that provide individualized guidance should maintain a page on their websites

130 that provides easy access to the procedures described in Paragraph 5, all individualized  
131 guidance documents that they make publicly available, and information about  
132 electronically submitting a request for individual guidance.

**Commented [BB12]:** At committee meeting #1, members discussed whether to retain or modify subparagraph k given the edits to paragraph 3 above, which now recommends that agencies should "develop policies" for when reliance is appropriate. ACUS staff have retained subparagraph k here but have modified it to make clear that paragraph 3 above governs an agency's development of a substantive reliance policy, whereas subparagraph k here simply explains that agencies should incorporate that substantive policy choice into their procedural rules for requesting and issuing individualized guidance.



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133 ~~9~~10. Agencies should make publicly available on the webpage described in Paragraph  
134 8 any individualized guidance document that affects, or may be of interest to, persons  
135 other than the requestor, including regulated parties and regulatory beneficiaries.

136 ~~10~~11. When making individualized guidance documents available on their websites,  
137 agencies should, as appropriate:

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

143 ~~11~~12. When making individualized guidance documents publicly available, agencies  
144 should redact any information that is sensitive or otherwise protected from disclosure and  
145 redact identifying details to the extent required to prevent an unwarranted invasion of  
146 personal privacy.

147 ~~12~~13. Agencies should keep individualized guidance on their websites current. If an  
148 agency modifies or rescinds a publicly available individualized guidance document, it  
149 should indicate on the face of the document that it has been modified or rescinded and  
150 provide access to any explanation for the modification or rescission or successor  
151 guidance.

### Relationship to Other Agency Processes

152 ~~13~~14. Agencies should periodically review individualized guidance documents to  
153 identify matters that may warrant the development of a general rule.

Commented [BB13]: Comment from Special Counsel Jeffrey S. Lubbers:

"Maybe add another paragraph 14, linking this to ombuds assistance as the report does."