



Guidance in the Rulemaking Process

Committee on Administration and Management

Proposed Recommendation | June 5-6, 2014

1 Over the past two decades, the use of guidance—nonbinding statements of
2 interpretation, policy, and advice about implementation—by administrative agencies has
3 prompted significant interest from Congress, executive branch officials, agency officials, and
4 commentators. Most of this attention has been directed to “guidance documents,”
5 freestanding, nonbinding statements of policy and interpretation issued by agencies. While
6 such guidance is often helpful to the public and is normally to be encouraged, commentators
7 and the Administrative Conference have expressed concern that agencies too often rely on
8 guidance in ways that circumvent the notice-and-comment rulemaking process.¹ The long-
9 standing debate about guidance and its relationship to notice-and-comment rulemaking has,
10 however, largely overlooked consideration of the function and varieties of *contemporaneous*
11 *guidance*—that is, guidance that agencies provide about the meaning and purpose of their rules
12 in the rulemaking process.²

13 Contemporaneous guidance appears in three main forms. First, agencies provide
14 guidance about the meaning and application of their rules in explanatory “statement[s] of their
15 basis and purpose,”³ statements that constitute the bulk of the regulatory “preambles” issued
16 with final rules. Second, agencies sometimes provide guidance in the regulatory text itself, in
17 the form of notes and examples, and more general guidance in appendices that appear in the

¹ Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30101, 30103-04 (July 8, 1992).

² See KEVIN M. STACK, GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE at 2 (APRIL 1, 2014) (draft report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/sites/default/files/documents/Guidance%20in%20Agency%20Draft%20Report%204%201%202014.pdf> [hereinafter Stack Report].



18 Code of Federal Regulations (CFR). Third, when agencies promulgate their regulations, they
19 sometimes also issue freestanding guidance documents. Contemporaneous guidance has a
20 fundamental fair-notice benefit. It furnishes the public and regulated entities with the agency's
21 understanding of its regulations at the time of issuance, as opposed to later in time or in the
22 context of an enforcement proceeding, and can thereby reduce some of the uncertainty
23 incident to regulatory changes.

24 The Administrative Conference commissioned a study of agencies' current practices in
25 providing contemporaneous guidance and the law applicable to this form of guidance.⁴ This
26 Recommendation and the underlying report identify a set of best practices for agencies in
27 providing guidance in preambles to final rules,⁵ as well as some problems in agencies' current
28 practices in providing contemporaneous guidance. The report also describes the law applicable
29 to guidance provided in preambles to final rules, regulatory text, and separate guidance
30 documents.⁶

31 This Recommendation builds upon two prior Conference recommendations with regard
32 to the use of guidance by agencies. Administrative Conference Recommendation 76-5,
33 *Interpretive Rules of General Applicability and Statements of General Policy*,⁷ identified the
34 benefits for an agency and potentially affected parties of providing notice and an opportunity

³ 5 U.S.C. § 553(c) (2006).

⁴ See Stack Report, *supra* note 2.

⁵ The underlying study and this Recommendation address preambles to final rules, not preambles to other documents such as a notice of proposed rulemaking (NPRM). However, some of the recommendations herein may nonetheless have some application to preambles to NPRMs.

⁶ Among other legal issues, the Stack Report addresses the application of the D.C. Circuit's decision in *Alaska Professional Hunters Association v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)—that definitive guidance may be significantly revised only through a notice-and-comment rulemaking—to contemporaneous guidance. See Stack Report, *supra* note 2.

⁷ Administrative Conference of the United States, Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56767, 56769-70 (Dec. 30, 1976).



35 to comment prior to the agency’s adoption of guidance (sometimes called “non-legislative”
36 rules). In Recommendation 92-2, *Agency Policy Statements*, the Conference advised agencies to
37 impose binding standards or obligations only through use of the legislative rulemaking
38 procedures of the Administrative Procedure Act (APA), typically the notice-and-comment
39 process, and reiterated the importance of allowing parties an opportunity to challenge the
40 wisdom of the policy statement prior to its application.⁸ The Office of Management and
41 Budget’s *Final Bulletin for Agency Good Guidance Practices (OMB’s Good Guidance Bulletin)*,⁹
42 adopted in 2007, reflects the concerns identified in these prior recommendations; the *Bulletin*
43 obliges covered agencies to provide a means for public feedback on significant guidance
44 documents and to undertake notice-and-comment procedures before issuing economically
45 significant guidance, among other things. Neither of the Conference’s prior recommendations
46 nor *OMB’s Good Guidance Bulletin* specifically addresses the guidance that agencies provide in
47 preambles to final rules or in text that appears in the CFR.

48 This Recommendation is aimed at addressing a number of issues regarding agencies’
49 current practices by isolating ways in which agencies’ presentation and drafting of preambles
50 can be improved to make it easier to identify the guidance agencies provide in these
51 documents. First, some preambles do not include the issuing agency’s statement of the
52 purposes of the rules adopted in light of the statute’s objectives. That absence reduces the
53 usefulness of these statements in providing even the most basic guidance about the effect of
54 the rules, and also does not reflect the governing understanding of what is required by the
55 APA’s provision that agencies accompany their final rules with a statement of the rules’ “basis
56 and purpose.” Second, the length of preambles to many major rules makes locating preambular
57 guidance difficult, particularly where a preamble is written as narrative discussion without clear

⁸ Recommendation 92-2, *supra* note 1, at 30103-04.

⁹ Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007), available at <http://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.



58 structure. Third, many agencies incorporate or rely upon discussions of the basis and purpose
59 of the rule provided in the notice of proposed rulemaking or other prior notices in their
60 preambles to final rules. This practice can save time and costs for agencies in preparing
61 preambles, but it also requires affected parties to integrate two or more agency treatments of
62 the rule's basis and purpose. Fourth, many agencies do not mention preambles on their
63 webpages and in other compilations of guidance, nor do they integrate the guidance content of
64 preambles into their indices or topical treatments of guidance. This does not assist the public
65 and regulated entities in integrating the guidance provided in preambles with other guidance
66 documents. Fifth, displaying electronic versions of regulations with hyperlinks to relevant
67 portions of their preambles and other guidance—a practice with which some agencies are
68 experimenting¹⁰—could make it easier to find this content, and holds promise for future
69 innovation.

70 A separate but equally important concern for preamble drafting is that some agencies
71 include statements in preambles to final rules that appear to create binding standards or
72 obligations as opposed to making those statements in the regulatory text. In this respect, this
73 Recommendation makes explicit that the prohibition on agencies stating standards or
74 obligations in a form that appears to be binding in guidance documents also applies to
75 statements in preambles.¹¹

76 Many agencies have policies on issuing guidance documents, but these policies do not
77 generally address preambles and other forms of contemporaneous guidance. The Conference
78 encourages agencies to include contemporaneous guidance within these policies as a step
79 toward better integrating these forms of guidance with other guidance material. This

¹⁰ See, e.g., <http://www.consumerfinance.gov/eregulations/1005> (visited April 15, 2014) (providing a copy of 12 C.F.R. Part 1004 with hyperlinks to section-by-section analysis from regulatory preamble and other navigation tools and links).

¹¹ See *OMB's Good Guidance Bulletin*, *supra* note 9, at 3440 (prohibiting mandatory language in guidance documents); *Recommendation 92-2*, *supra* note 1, at 30103-04 (advising against making binding statements in policy statements).



80 Recommendation also highlights that for agencies covered by *OMB's Good Guidance Bulletin*,
81 the guidance content of their preambles must comply with the *Bulletin's* requirements.

82 Finally, the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)¹²
83 requires that when agencies produce small business compliance guides, those guides be posted
84 on the agency website in an "easily identified location."¹³ Despite this requirement, these
85 guides are often difficult to find on agency webpages. The Recommendation highlights this
86 statutory requirement and urges greater agency attention to it with the guidance of the Small
87 Business Administration.

RECOMMENDATION

88 Drafting of Preambles to Final Rules

89 1. In the statement of basis and purpose accompanying a final rule, agencies should
90 address how the rule advances statutory objectives in a way that goes beyond merely parroting
91 the statutory title or language.

92 2. For rules with lengthy preambles, agencies should consider including a section-by-
93 section analysis in which the organization of the preambular discussion corresponds to the
94 organization of the final rules themselves without merely parroting the regulatory text
95 discussed.

96 3. When agencies incorporate or rely upon discussions of the rule's basis and purpose
97 from prior notices, such as from the notice of proposed rulemaking, they should do so mindful
98 that such incorporation and reliance may make it more burdensome for readers to find all
99 relevant information.

¹² 5 U.S.C. § 601 note, § 212 (requiring the production of compliance guides whenever the agency must produce a regulatory flexibility analysis under 5 U.S.C. § 605(b), and quoting § 605(b)).

¹³ *Id.* § 212(a)(2)(A).



100 4. Agencies should not issue statements of generally applicability that are intended to
101 impose binding substantive standards or obligations upon affect persons in preambles.
102 Agencies should avoid use of mandatory language in the preambles to final rules, unless an
103 agency is using these words to describe a statutory, regulatory, or constitutional requirements,
104 or the language is addressed to agency staff and will not foreclose agency consideration of
105 positions advanced by affected private parties. Such language should be understood to include
106 not only mandatory terms such as “shall,” “must,” “required,” and “requirement,” mentioned
107 in the *OMB Final Bulletin for Agency Good Guidance Practices (OMB’s Good Guidance Bulletin)*,
108 but also any other language that purports to specify the future legal effects of particular
109 actions.

110 **Policies on Guidance and Collections of Guidance**

111 5. Agencies should mention preambles to their final rules as sources of guidance in their
112 general compilations of guidance and on their webpages devoted to guidance. Agencies should
113 also consider ways to integrate the guidance content of their preambles into their general
114 compilations of guidance and on their webpages devoted to guidance.

115 6. To the extent agencies have policies on issuing guidance; those policies should
116 address the guidance content of preambles to their final rules. For agencies covered by *OMB’s*
117 *Good Guidance Bulletin*, their policies should address compliance with the *Bulletin’s* procedural
118 requirements applicable to any significant guidance documents and economically significant
119 guidance included in preambles to final rules.

120 **Electronic Presentation of Regulations**

121 7. The Office of the Federal Register and the Government Printing Office are
122 encouraged to work with agencies to develop ways to display the Code of Federal Regulations
123 in electronic form in order to enhance its understanding and use by the public, such as finding
124 reliable means of directing readers to relevant guidance in preambles to rules and to other
125 relevant guidance documents.



126 **Small Entity Compliance Guides**

127 8. Agencies should reassess how they are displaying the small entity compliance guides
128 on their websites to ensure that these guides are in an “easily identified location,”¹⁴ as
129 required by Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

130 9. The Small Business Administration should work with agencies to develop guidelines
131 for posting small entity compliance guides on agency websites in ways that make them easily
132 identifiable.

¹⁴ 5 U.S.C. § 601 note, § 212(a)(2)(A).