



Administrative Conference Recommendation 2014-3

Guidance in the Rulemaking Process

Adopted June 6, 2014

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

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

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 (MAY 16, 2014) (Final Report to the Administrative Conference of the U.S.), available at http://www.acus.gov/sites/default/files/documents/Guidance%20in%20the%20Rulemaking%20Process%20Revised%20Draft%20Report%205_16_14%20final.pdf [hereinafter Stack Report].



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Federal Regulations (CFR). Third, when agencies promulgate their regulations, they sometimes also issue freestanding guidance documents. Contemporaneous guidance furthers the legal value of notice; it furnishes the public and regulated entities with the agency's understanding of its regulations at the time of issuance, as opposed to later in time or in the context of an enforcement proceeding.

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

This Recommendation builds upon two prior Conference recommendations with regard to the use of guidance by agencies. Administrative Conference Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*,⁶ identified the benefits of providing notice and an opportunity to comment prior to the agency's adoption of guidance (sometimes called "non-legislative" rules) for both an agency and potentially affected parties. In Recommendation 92-2, *Agency Policy Statements*, the Conference advised agencies to impose binding standards or obligations only through use of the legislative rulemaking procedures of the Administrative Procedure Act (APA), typically the notice-and-comment process, and reiterated the importance of allowing parties an opportunity to challenge the

³ 5 U.S.C. § 553(c) (2012).

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 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).



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wisdom of the policy statement prior to its application.⁷ The Office of Management and Budget's *Final Bulletin for Agency Good Guidance Practices* (*OMB's Good Guidance Bulletin*),⁸ adopted in 2007, reflects the concerns identified in these prior recommendations; the *Bulletin* obliges covered agencies to provide a means for public feedback on significant guidance documents and to undertake notice-and-comment procedures before issuing economically significant guidance, among other things. Neither of the Conference's prior recommendations nor *OMB's Good Guidance Bulletin* specifically addresses the guidance that agencies provide in preambles to final rules or in text that appears in the CFR.

This Recommendation addresses a number of issues regarding agencies' current practices by isolating ways in which agencies' presentation and drafting of preambles can be improved so that guidance contained therein is more helpful and more accessible. First, some preambles do not include the issuing agency's statement of the purposes of the rules adopted in light of the statute's objectives. That absence reduces the usefulness of these statements in providing even the most basic guidance about the meaning and applicability of the rules. It also ignores the APA's requirement that agencies accompany a final rule with a statement of the rule's "basis and purpose." Second, the length of preambles to many major rules makes locating preambular guidance difficult, particularly where a preamble is written as narrative discussion without clear structure. Third, in their preambles to final rules, many agencies incorporate or rely upon discussions of the basis and purpose of the rule provided in the notice of proposed rulemaking or other prior notices. This practice can save time and costs for agencies in preparing preambles, but it also requires affected parties to integrate two or more agency treatments of the rule's basis and purpose. Fourth, many agencies do not mention preambles on their webpages and in other compilations of guidance, nor do they integrate the

⁷ Recommendation 92-2, *supra* note 1, at 30103-04.

⁸ 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>.



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guidance content of preambles into their indices or topical treatments of guidance. This does not assist the public and regulated entities in integrating the guidance provided in preambles with other guidance documents. Fifth, displaying electronic versions of regulations with hyperlinks to relevant portions of their preambles and other guidance—a practice with which some agencies are experimenting⁹—could make it easier to find this content, and holds promise for future innovation.

A separate but equally important concern for preamble drafting is that some agencies include statements in preambles to final rules that appear to create binding standards or obligations as opposed to making those statements in the regulatory text. In this respect, this Recommendation highlights that the prohibition against agencies making statements in guidance documents in forms that appear to be binding also applies to statements in preambles.¹⁰

Many agencies have policies on issuing guidance documents, but these policies do not generally address preambles and other forms of contemporaneous guidance. The Conference encourages agencies to include contemporaneous guidance within these policies as a step toward better integrating these forms of guidance with other guidance materials. This Recommendation also highlights that for agencies covered by *OMB's Good Guidance Bulletin*, the guidance content of their preambles should comply with the *Bulletin*.

⁹ 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).

¹⁰ See *OMB's Good Guidance Bulletin*, *supra* note 8, at 3440 (directing agencies not to use mandatory language in guidance documents); Recommendation 92-2, *supra* note 1, at 30103-04 (advising against making binding statements in policy statements).



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Finally, the Small Business Regulatory Enforcement Fairness Act of 1996¹¹ requires that when agencies produce small business compliance guides, those guides be posted on the agency website in an “easily identified location.”¹² Despite this requirement, these guides are often difficult to find on agency webpages. The Recommendation highlights this statutory requirement and urges greater agency attention to it with the assistance of the Small Business Administration.

RECOMMENDATION

Drafting of Preambles to Final Rules

1. In the statement of basis and purpose accompanying a final rule, agencies should address how the rule advances statutory objectives. Such discussion should go beyond merely repeating the text or title of the statute.
2. Agencies should consider including, particularly for lengthy regulations, a section-by-section analysis in the preamble in which the organization of the preambular discussion corresponds to the organization of the final rules themselves. Such section-by-section analyses should go beyond merely repeating the regulatory text discussed.
3. When agencies incorporate or rely upon discussions of a rule’s basis and purpose from prior notices, such as from the notice of proposed rulemaking, they should be mindful that such incorporation and reliance may make it more burdensome for readers to find all relevant information.
4. Agencies should not use the preamble as a substitute for regulatory language. Agencies should avoid use of mandatory language in the preambles to final rules, unless an

¹¹ See Pub. L. No. 104-121, 110 Stat. 873, codified at 5 U.S.C. § 601 nt., § 212 (2012) (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)).

¹² *Id.* § 212(a)(2)(A).



agency is using these words to describe a statutory, regulatory, or constitutional requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected parties. Such language should be understood to include not only mandatory terms such as “shall,” “must,” “required,” and “requirement,” mentioned in the *OMB Final Bulletin for Agency Good Guidance Practices (OMB’s Good Guidance Bulletin)*, but also any other language that appears to impose substantive standards or obligations.

Policies on Guidance and Collections of Guidance

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

6. To the extent agencies have policies on issuing guidance, those policies should assess and clearly state how they address the guidance content of preambles to their final rules. For agencies covered by *OMB’s Good Guidance Bulletin*, their policies should address compliance with the *Bulletin* with respect to any significant and economically significant guidance included in preambles to final rules.

Electronic Presentation of Regulations

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

Small Entity Compliance Guides



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

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