Agency Guidance

Committee on Judicial Review

Proposed Recommendation for Committee | October 17, 2017

Guidance consists of agency statements of general applicability, not binding on members of the public, that advise the public of the manner in which the agency proposes to exercise a discretionary power or of the agency’s construction of the statutes and legislative rules it administers. Guidance is an essential instrument of administration across numerous agencies.

Compared with adjudication or enforcement, guidance can make agency decisionmaking faster and less costly, saving time and resources for the agency and the regulated public. It can also make agency decisionmaking more predictable and uniform, shield regulated parties against unequal treatment, unnecessary costs, and unnecessary risk and promote compliance with law.\(^1\)

Compared with legislative rulemaking, guidance is generally better for dealing with conditions of uncertainty and for making agency policy comprehensible to regulated parties who lack counsel. Further, the provision of guidance often takes less time and resources than legislative rulemaking, freeing up the agency to address more issues within its statutory mission.

Despite its usefulness, guidance is sometimes criticized for coercing members of the public as if it were a legislative rule, notwithstanding its officially nonbinding status. Although

\(^1\) See Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective 28-30 (Sept. 18, 2017), https://www.acus.gov/report/agency-guidance-draft-report; see also Administrative Conference of the United States, Recommendation 71-3, Articulation of Agency Policies, 38 Fed. Reg. 19,788 (July 23, 1973) (“Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determination in various types of agency action, either through published decisions, general rules or policy statements other than rules.”). Additional prior ACUS Recommendations regarding guidance, apart from others to be referenced specifically in this preamble, include Recommendation 2015-3, Declaratory Orders, 80 Fed. Reg. 78163 (Dec. 4, 2015); and Recommendation 2014-3, Guidance in the Rulemaking Process, 79 Fed. Reg. 35992 (June 25, 2014).

Commented [GB1]: From Nick Parrillo:

As drafted, this opening sentence would make the Recommendation applicable to both policy statements and interpretive rules as those terms are used in APA § 553(b). It is possible that, instead, the Recommendation should apply only to policy statements (as Recommendation 92-2 did), and not to interpretive rules. (In that case, the word “guidance” throughout the Recommendation could be replaced with “policy statements.”) The law is clear that policy statements are to be nonbinding, meaning that this Recommendation’s focus on how agencies should handle nonbinding documents is clearly applicable to policy statements. But the law is unclear as to whether interpretive rules are to be nonbinding. On this confusion, see the Report, Introduction, Subsection B.1. Notwithstanding the unclarity of the law regarding the nonbinding status of interpretive rules, the Conference might decide that agencies should, as a matter of good government, treat interpretive rules as having the same nonbinding status—that is, entailing the same aspiration for the agency to keep an “open mind”—as policy statements have. I do not think the findings in the Report compel this view, but neither do they preclude it. (For elaboration, see the Report, Introduction, Subsection B.1.) Alternatively, the Conference could remain agnostic as to whether interpretive rules should be treated as nonbinding but suggest that each agency apply the approach set forth in this Recommendation to interpretive rules insofar as the agency itself thinks interpretive rules should be treated as nonbinding.
an agency issuing guidance may act with no coercive purpose, structural features of certain regulatory schemes may deprive regulated parties of any practical choice but to follow the guidance. These features include the following:

- The law may require regulated parties to obtain the affirmative assent of the agency (pre-approval) in order to get some legal advantage, like a permit or monetary benefit. If the advantage sought is important to the party, and if the agency’s decision is discretionary and subject to delay, the incentive to follow whatever the agency’s wishes appear to be (including guidance) can be overwhelming.

- The regulatory scheme may subject the regulated party to frequent monitoring and evaluation by the agency. If the law is complex, regulated parties may inevitably fail to comply with at least a few of its requirements. Under these circumstances, a regulated party may have a strong incentive to invest in its relationship to the agency, that is, seek to build up the agency’s trust and confidence in its good faith and cooperativeness, including by following guidance.

- A regulated party that may be subject to ex post enforcement will have an incentive to follow guidance that increases with the probability of detection of guidance-noncompliant behavior, the cost of an enforcement proceeding irrespective of outcome, the probability of an unfavorable outcome, and the probable sanction in that event. In some (though far from all) contexts, it may be that the regulated party cannot expect, without prohibitive risk, to get the accusation meaningfully examined and adjudicated by an official distinct from the enforcement personnel. This creates a strong incentive to avoid being accused in the first place, as by following guidance.

In addition, guidance may operate on the beneficiaries of a regulatory statute or legislative rule as if the guidance were itself a legislative rule. The guidance can operate this way if it promises to treat regulated parties less stringently than the statute or legislative rule would. Such guidance may cause regulated parties to take advantage of the new latitude by shifting their behavior in a direction that does harm to the beneficiaries. The guidance may thus effectively deprive the beneficiaries of the protection of the governing statute or legislative rule.
While these legislative-rule-like effects on regulated parties and regulatory beneficiaries may occur whenever guidance is operative, if the guidance remains truly tentative, in that the agency affords members of the public a fair opportunity to seek modification of or departure from the guidance in any given instance, then the guidance does not operate like a legislative rule. Guidance may also permissibly bind some agency employees, but it cannot bind those employees in a manner that forecloses the fair opportunity to seek modification or departure from the guidance. (For example, the guidance could bind officials at one level of the agency hierarchy, with the proviso that officials at a higher but still accessible level can authorize departure from the guidance.)

Maintaining Flexibility in Implementing Guidance

Despite the imperative to be flexible, agencies sometimes are not, and guidance can therefore have a coercive, legislative-rule-like effect on members of the public. This can be explained to a large degree by agencies’ sensitivity to competing rule-of-law values that favor consistency, by their lack of resources, and by their inertia in the face of unintended organizational tendencies that foster rigidity. Agencies are often under active stakeholder pressure to be inflexible (i.e., to be consistent), and these stakeholder pressures spring from legitimate concerns that agencies would be remiss to ignore entirely. For one thing, if a regulated party obtains a favorable departure from guidance, this may put the party’s competitors at a disadvantage, and they may protest. Further, they may come to lose faith in the predictability of the agency and in the idea that the agency provides them a level playing field—a shift that may cause them to withdraw from cooperation with the agency, thereby diminishing compliance and making the whole regulatory program less effective. Meanwhile, individualized

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2 Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30103 (July 8, 1992). Cf. OMB Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) (“[A]gency employees should not depart from significant agency guidance documents without appropriate justification and supervisory concurrence.”); id. at 3437 (“[W]hile a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking.”).

3 Parrillo, supra note 1, at 26–28; see also OMB Good Guidance Practices, supra note 2, at 3440.
flexibility on guidance, if it favors a particular regulated party, may seem like favoritism and thereby attract negative scrutiny from the media, non-governmental organizations, and members of Congress. On top of all this, some competitors of the party that received a favorable departure from guidance may view it as unfair and ask why they themselves cannot get the same exception. One departure may therefore invite other requests for departure, and these requests can eat up the agency’s resources and pose the danger that any coherent policy will unravel. To prevent all this from happening, agencies sometimes have simply denied departure requests to avoid opening the floodgates.

Agencies can maintain flexibility while addressing these legitimate pressures for consistency by taking the approach of principled flexibility. That is, for each departure the agency makes, it can give a written explanation that is accessible to other agency officials and to the public, with the understanding that the exception then becomes generally applicable to like cases prospectively. The departure explanations can then accumulate to form a body of evolving precedent. Principled flexibility helps refute accusations of favoritism, cabins the rationale for each departure so as to avoid opening the floodgates to more requests, promotes fairness among competitors by ensuring that all exceptions become generally available on a prospective basis, and aids predictability because the obligation to provide a reason for each departure will tamp down the number of departures and make it easier to anticipate when departures may happen.

All that said, principled flexibility can be challenging to implement. The need for reason-giving means that every request for departure requires time and money to evaluate, and the giving of reasons must be reconciled with legitimate needs for confidentiality. On top of these organizational and resource-based obstacles to principled flexibility, there are additional obstacles that can stand in the way of flexibility of any kind, principled or not: the antagonism of some officials toward being challenged; the institutional motives of higher-level officials to back their subordinates; the counter-intuitive nature of the rule/guidance distinction for many people; and the fact that some agency offices, by reason of their principal day-to-day business, may be socialized to be less receptive to stakeholder requests than others.
That said, there are some instances in which agencies refuse to entertain requests for departures from guidance not because of legitimate external pressures for consistency, nor because of inertia or resource poverty, but instead because agency personnel just think the guidance is right. That is, they are committed to the substantive content of the guidance, and they therefore are not open to reconsideration or departure. Of the many reasons why agencies are inflexible, this one is particularly problematic. If an agency wants to shut off the possibility of departing from a policy simply because it thinks the policy’s substantive content is right, that is the archetypal scenario for legislative rulemaking.

Because being flexible often requires agency resources and managerial initiative, agencies cannot, as a practical matter, be flexible on everything all the time. Priorities must be set. In deciding which guidance documents deserve the most active exertions in favor of flexibility, assignment of higher priority is warranted (a) the more the guidance is likely to alter regulated-party behavior when operative;⁴ (b) the more the value of the guidance document to the agency lies in its commitment to the guidance’s substantive content;⁵ and (c) the less the guidance is subject to legitimate stakeholder pressures for consistency.⁶

Public Participation in Adopting Guidance

Agencies can also promote flexibility and impart legitimacy on their use of guidance by asking for input when guidance is formulated and issued. It is often appropriate for agencies to invite public participation when considering whether to adopt guidance,⁷ through means such as

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⁴ On structural features of certain regulatory schemes that tend to cause guidance to alter regulated-party behavior, see Parrillo Report, supra note 1, at 37–90. On how deregulatory guidance can alter regulated-party behavior in a way that affects regulatory beneficiaries, see Parrillo, supra note 1, at 131–37.
⁵ Id. at 127–31.
⁶ On these legitimate stakeholder pressures for consistency, see Parrillo Report, supra note 1, at 92–103.
⁷ Recommendation 76-5 states that agencies should undertake pre-adopter notice and comment on a guidance document when the document is “likely to have substantial impact on the public” and when it would not be “impracticable, unnecessary, or contrary to the public interest to use such procedures.” Recommendation 76-5, Interpreting Rules of General Applicability and Statements of General Policy, 41 Fed. Reg. 56769 (Dec. 30, 1976). It also provides that agencies not undertaking notice and comment for adoption of a guidance document prior to adoption should undertake it soon after adoption, though an agency “may omit these post-adopter comment procedures when
outreach to selected stakeholders, stakeholder meetings and webinars, advisory committee proceedings, or voluntary use of notice-and-comment procedures. Broad participatory measures at the time of a guidance document’s adoption may be of value to the agency, to regulated parties, and especially to regulatory beneficiaries and organizations representing them, for beneficiaries often lack the opportunity and resources to participate in the individual adjudicatory or enforcement proceedings in which a guidance document will be applied.

Choosing a level of public participation that is appropriate to a guidance document’s likely impact and is practicable requires consideration of several factors. Broader participation is more appropriate the greater the guidance’s likely impact. Broader participation may increase the agency’s access to useful technical or political information, though it may reach the point of diminishing returns. It may increase stakeholders’ willingness to accept the policy of the guidance and their sense of “buy-in,” although relatively more formalized means of participation (such as notice-and-comment) may cause the agency to become invested in a formal proposal, which may sometimes diminish opportunities for agency learning. Broader forms of participation also have costs that may reduce agencies’ resources for other tasks, including provision of guidance on other subjects, and may even slow agency policymaking processes to the point of alienating part of the stakeholder community.

Given the complexity of these potential costs and benefits and their tendency to vary with context, it is appropriate to make decisions about whether and how to seek public participation on guidance on a document-by-document or agency-by-agency basis. A government-wide requirement for notice and comment on guidance documents, unless confined to the very most

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8 On the variety of forms of participation, see Parrillo, supra note 1, at 138–43. Voluntary notice and comment on a guidance document generally does not involve nearly the same costs as notice-and-comment on legislative rulemaking. See id. at 143–50.

9 Some agencies have adopted procedural rules requiring notice-and-comment for large and well-defined categories of their guidance documents, whereas others have undertaken notice-and-comment for a large number of guidance documents but selected those documents on a decentralized, ad hoc basis. Parrillo, supra note 1, at 167–71.
extraordinary guidance documents, is not recommended. This is a function both of the
complex cost-benefit considerations discussed above and the fact that broad mandates for notice-
and-comment on guidance risk two additional unintended consequences. First, a broad mandate
applied to a resource-strapped agency may cause the agency to fail to process and incorporate
comments and instead leave many guidance documents in published “draft” form indefinitely,
which may at least partly defeat the purpose of notice and comment and cause stakeholder
confusion. Second, a broad mandate may so legitimize guidance in the eyes of the agency that
guidance could end up largely supplanting legislative rulemaking.

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The Administrative Conference recognizes that many agencies consider guidance to be a
useful tool to be employed in appropriate circumstances. This recommendation provides best
practices to agencies as they evaluate how to use guidance.

**RECOMMENDATION**

**Guidance Documents Should Not Bind the Public**

1. An agency should not use a guidance document as a standard binding on the public, that
   is, as a standard with which noncompliance may form an independent basis for action in
   matters that determine the rights and obligations of any member of the public.

2. An agency should afford members of the public a fair opportunity to argue for lawful
   approaches other than those put forward by the guidance document.

3. An agency may, as an internal agency management matter, require some of its employees
   to act in conformity with a guidance document, but the agency should ensure that this
   does not interfere with the fair opportunity called for in Recommendation 2. For
   example, an agency may require officials at one level to follow the approach described in

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10 The Office of Management and Budget’s Good Guidance Practices calls for pre-adoption public comment on
“economically significant” guidance documents, but this appears to cover only a very small number of documents. See Parrillo, supra note 1, at 650–58.
a guidance document while authorizing officials at a higher level to act in ways different from that described in the document when appropriate.

**Minimum Measures to Avoid Binding the Public**

4. A guidance document should prominently state that it is not binding on members of the public and explain that a member of the public may take a lawful approach, or argue that the agency should take a lawful approach, that is different from that suggested in the guidance document. This explanation should include the identity and contact information of officials authorized by the agency to approach the subject to which the guidance document pertains in a manner different than that suggested in the guidance document.

5. A guidance document should not include mandatory language unless the agency is using that language to describe a statutory or regulatory requirement, or the language is addressed to agency employees and will not interfere with the fair opportunity called for in Recommendation 2.

6. The agency should instruct all employees engaged in activity to which a guidance document pertains to refrain from making any statements suggesting that a guidance document is binding on the public. Insofar as some employees are required, as an internal agency management matter, to act in conformity with a guidance document, they should be instructed as to the difference between such an internal agency management requirement and law that is binding on the public.

**Additional Measures to Avoid Binding the Public**

7. In order to avoid using guidance documents to bind the public and in order to provide a fair opportunity for other lawful approaches, an agency should, subject to considerations of practicability and resource limitations and the priorities described in Recommendation 8 below, consider additional measures, including the following:
   a. promoting the flexible use of guidance in a manner that still takes due account of needs for consistency and predictability. In particular, when the agency accepts a novel argument by a member of the public for a lawful approach other than that
put forward in a guidance document and said argument seems likely applicable to other situations, the agency may disseminate its decision and the reasons therefor to other persons who might make the argument, to other affected stakeholders, and to officials likely to hear the argument (consistent with the need to protect confidential business or personal information).

b. assigning the task of considering arguments for approaches other than that in a guidance document to a component of the agency that is likely to engage in open and productive dialogue with persons who make such arguments, such as a program office that is accustomed to dealing cooperatively with regulated parties and regulatory beneficiaries.

c. in cases where frontline officials are authorized to take an approach different from that in a guidance document but refuse to do so, directing appeals of such a refusal to a higher-level official who is not the direct superior of those frontline officials, in order to diminish the role played by a superior’s institutional motivation to back his/her subordinates.

d. investing in training and monitoring of frontline personnel to ensure that they (i) understand the difference between legislative rules and guidance; (ii) treat parties’ ideas for lawful approaches different from that in the guidance in an open and welcoming manner; (iii) understand that approaches other than that in the guidance, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them; and (iv) are not to take personally, or retaliate against, a party’s argument for an approach different from guidance or a party’s decision to appeal to a higher level of the agency when such an argument is rejected.

e. setting up channels for anonymous arguments in favor of approaches different from a guidance document based on stated facts.

f. setting up channels for anonymous feedback from members of the public on whether they perceive that arguments for approaches different from that in a guidance document are given reasonable consideration.
Priorities in Deciding When to Take Additional Measures

8. Because the additional measures in Recommendation 7 are likely to take up agency resources, it will be necessary to set priorities for which guidance documents are most in need of such additional measures. In deciding when to take additional measures, an agency should assign a higher priority to a guidance document—

a. the more likely the guidance is to alter the behavior of regulated parties, either because they have strong incentives to comply with guidance or because the guidance practically reduces the stringency of the regulatory scheme compared to the status quo;

b. the more the value of the guidance to the agency lies in its adoption of one substantive approach instead of other substantive approaches that have been recently tried or seriously urged upon the agency; or

c. the less the value of the guidance to the agency or to stakeholders lies in consistency or predictability per se, irrespective of its substantive content.

Public Participation in Adoption of Guidance Documents

9. When an agency is contemplating adopting a guidance document, it should solicit an appropriate level of public participation before adopting the document, which may include nothing at all or outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, or notice-and-comment with or without a response to comments. In deciding what level is appropriate, the agency should consider:

a. the factors listed in Recommendation 8(a) through (c);

b. the likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated parties may offer different information than regulated parties and that non-regulated parties will often have no opportunity to provide input regarding guidance other than at the time of adoption;
c. the likely increase in policy acceptance from broadening participation, keeping in mind that non-regulated parties will often have no opportunity to provide input regarding guidance other than at the time of adoption, and that policy acceptance may be less likely if the agency is not responsive to stakeholder input;

d. whether the agency is likely to learn more useful information by having a specific agency proposal as a focal point for discussion, or instead having a more free-ranging and less formal discussion; and

e. the practicability of broader forms of participation, including notice and comment, keeping in mind that broader participation may slow the adoption of guidance and may diminish resources for other agency tasks, including the provision of guidance on other matters.

10. An agency may make decisions about the appropriate level of participation document-by-document or by rules assigning certain participatory procedures to general categories of documents. If an agency opts for the latter, it should consider whether resource limitations may cause some documents to remain in draft for substantial periods of time and, if so, should either (a) make clear to stakeholders which draft guidance documents, if any, should be understood to reflect current agency thinking or (b) provide in each draft guidance document that, at a certain time after publication, the document will automatically either be adopted or withdrawn.