



Combined Edits From Lee Liberman Otis, Alan Morrison, and Danny Fischler

Agency Guidance

Committee on Judicial Review

Proposed Recommendation for Committee | October 31, 2017

1 Policy statements are agency statements of general applicability, not binding on members
2 of the public, that advise the public of the manner in which the agency proposes to exercise a
3 discretionary power.¹ They are exempt from the Administrative Procedure Act’s requirements
4 (including notice and comment) for the issuance of legislative rules that legally bind the public.²

5 This provision also exempts interpretive rules, which are “rules or statements issued by an
6 agency to advise the public of the agency’s construction of the statutes and rules which it
7 administers.” Attorney General’s Manual, supra, at 30 n.3. Insofar as agencies seek to use
8 interpretive rules in a nonbinding manner, the recommendations herein regarding flexible use of
9 policy statements may be helpful for that purpose [those agencies’ use of interpretive rules].
10 Policy statements and this category of interpretive rules are often referred to as guidance.

11 Recommendation 76-5 states that agencies should provide for public participation in the
12 formulation of policy statements (and of interpretive rules) depending ~~on~~ on the impact of the

¹ Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1947).

² 5 U.S.C. § 553(b)(A). ~~This provision also exempts interpretive rules, which are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” Attorney General’s Manual, supra, at 30 n.3. Insofar as agencies seek to use interpretive rules in a nonbinding manner, the recommendations herein regarding flexible use of policy statements may be helpful for those agencies’ use of interpretive rules.~~ [Alan Morrison Edit]

Commented [T1]: From Nick Parrillo:

The preamble already makes certain references to OMB’s Good Guidance Practices of 2007, on points where OMB’s concerns clearly overlapped with those of the present project, esp. on binding effect on agency employees and the use of binding language. Committee members suggested including some additional discussion about the similarities or differences between our recommendation and the OMB document, including on whether our recommendation covers items like official speeches or media interviews. In trying to add such discussion, I ran into some problems and opted not to attempt it, for a few reasons. (1) The drawing of boundaries around what is “guidance” is itself a fraught and controversial issue (e.g., whether agency adjudicators can cite speeches by the agency head, or whether the category includes letters to Congress – a point on which OMB directly opposes at least one circuit court), but one on which my report did not focus at all. (2) OMB was under an obligation to be very explicit about defining its category, because its pronouncements are binding in a way that ACUS recommendations are not, and it deliberately disclaimed inclusion of certain kinds of official statements out of concern (as Jim Tozzi pointed out to me) about the role of the Data Quality Act, which is not a focus of our recommendation. (3) Our recommendation’s exclusion of interpretive rules means we are focusing on a different category than OMB (which referred to “guidance documents”), which further complicates any comparison of OMB’s very exact line-drawing with our own.

Commented [GB2]: Nick Parrillo suggests renaming to Agency Policy Statements to better reflect the content of the recommendation.

Commented [AM3]: Material moved from footnote 2 to text and “for that purpose” substituted for material in brackets.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 statement in question and the practicability of participation.³ Recommendation 92-2 recognizes
14 the value of policy statements but expresses concern about policy statements “that are intended
15 to impose binding substantive standards or obligations upon affected persons” notwithstanding
16 the legal requirement that they be nonbinding, and it advises that agencies to establish flexible
17 procedures that allow members of the public a fair opportunity to argue for approaches different
18 from those set forth in a policy statement.⁴ The Conference has now determined, twenty-five
19 years after Recommendation 92-2, to update its recommendations on the formulation and use of
20 policy statements in light of current administrative experience.⁵

21 Policy statements are essential instruments of administration across numerous agencies,
22 and of great value to agencies and the public alike. Compared with adjudication or enforcement,
23 policy statements can make agency decisionmaking faster and less costly, saving time and
24 resources for the agency and the regulated public. They can also make agency decisionmaking
25 more predictable and uniform, shield regulated parties against from unequal treatment,
26 unnecessary costs, and unnecessary risk, while and promoting compliance with the law.⁶

³ Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56769 (Dec. 30, 1976). Additional prior ACUS Recommendations pertaining to policy statements and agency guidance more broadly, apart from others 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).

⁴ Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30103 (July 8, 1992). In some cases appropriate for a policy statement may be possible to bind some agency employees to an outcome-determinative rule of decision. See *id.*; see also 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.”). But such policy statements cannot generally should not bind these such employees in a manner that forecloses the fair opportunity for the regulated entity and/or employee to seek modification or departure from the guidance. See OMB Good Guidance Practices, at 3440. For example, a policy statement could bind officials at one level of the agency hierarchy to applying the policy in an outcome-determinative way, with the proviso that officials at a higher but still accessible level can authorize action at variance with the statement.

⁵ The Conference commissioned a study that resulted in interviews with 135 individuals across agencies, industry, and NGOs, which are the basis for this Recommendation. See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Sept. 18, 2017), <https://www.acus.gov/report/agency-guidance-draft-report>.

⁶ See *id.* at 28-30; 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

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Commented [FD6]: I would recommend either including the accompanying footnote edits, or simply deleting the highlighted portion of the footnote as extraneous (because the core point is contained in Recommendation 3 below). Here are my concerns:

First, in all circuits, agencies can use *some* kinds of policy statements to bind *all* agency employees – it just depends what one means by “bind.” For instance, a policy statement can establish a rebuttable presumption, or identify a nonexhaustive set of factors for adjudicators to consider, while leaving individual outcomes to the staff’s case-by-case discretion. In such cases, the guidance is “binding” on all employees (in the sense that all employees must consider and apply the guidance), even though the guidance vests so much discretion in staff that it is not outcome-determinative. As drafted, the FN could easily be read to imply otherwise.

Second, the proposition in the FN should be reframed as a policy position, rather than a description of the law. Neither ACUS Recommendation 92-2 nor the GGP (the two sources cited in the FN) explicitly support the proposition that a policy statement *can* only bind some employees. And neither source is intended to summarize or constitute current legal authority, so ACUS should not rely on these sources to support a descriptive statement about what the law allows.

Third (and this reason is somewhat more controversial): a minority of circuits have case law suggesting that agencies can bind all employees outcome-determinative guidance. See, e.g., *Disabled Am. Veterans v. VA*, 859 F.3d 1072 (Fed. Cir. 2017) (“To amount to substantive rulemaking with the force and effect of law, the rule’s change in existing law must be binding *not only within the agency, but binding on tribunals outside the agency*” (citations omitted and emphasis added)); *Erringer v. Thompson*, 371 F.3d 625, 631 (9th Cir. 2004) (Although the [agency manual’s] criteria do bind the Medicare contractors, our query is whether the [putatively interpretive] rule has a binding effect ‘on tribunals outside the agency.’”). Most of the case law is focused on interpretive rules, but some can be read more broadly. As drafted, the FN would be contrary to the broader reading, which is another reason to make clear that the FN states a policy position, rather than a legal one.

Commented [AM7]: I do not understand the difference between these two terms – same question on line 79, p. 5. [now line 84 in this version]

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

27 Compared with legislative rules, policy statements are generally better for dealing with
28 conditions of uncertainty and for making agency policy accessible to regulated parties who lack
29 counsel. Further, the provision of policy statements often takes less time and resources than
30 legislative rulemaking, freeing up the agency to, for instance, address more issues within its
31 statutory mission.

Commented [FD9]: There are many possible benefits from resource savings; this is just one.

32 Despite their usefulness to both agencies and the public, policy statements are sometimes
33 criticized for coercing members of the public as if they were legislative rules, notwithstanding
34 their officially nonbinding status. Recommendation 92-2 defined this problem in terms of an
35 agency's *intent* to use such statements to bind the public, which may imply that the problem is
36 one of official bad faith. While official intent to make a policy statement binding, if shown,
37 would deserve criticism and correction, intent is often inadequate for understanding and
38 addressing the phenomenon of binding policy statements.

39 There are several kinds of reasons why ~~That~~ members of the public sometimes find they
40 have no practical escape from the terms of a policy statement. First are those that are not of the
41 making of an agency or its officials and do not depend primarily on whatever intent the officials
42 may have. Specifically, ~~is often due to~~ modern regulatory schemes often have structural features
43 of modern regulatory schemes that are beyond the control of officials who formulate or use
44 policy statements and do not depend on whatever intent those officials might have tend to lead
45 regulated parties to follow the policy statement's approach even if in theory they might be
46 legally free to choose a different course, because the costs and risks associated with doing so are
47 simply too high. This is often the case if a statute (a) requires a regulated party to obtain prior
48 approval from an agency to obtain essential permissions or benefits; (b) subjects a regulated
49 party to repeated agency evaluation under a legal regime with which perfect compliance is
50 practically unachievable, incentivizing the party to invest in a reputation with the agency as a
51 good-faith actor; or (c) subjects the regulated party to the possibility of enforcement proceedings

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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.”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

52 that entail prohibitively high costs regardless of outcome, or can lead to sanctions so severe that
53 the party will not risk forcing an adjudication of the accusation. ~~Also~~Meanwhile, a policy
54 statement can operate on *beneficiaries* of a statute or legislative rule as if it were a legislative
55 rule by effectively depriving them of the statute or legislative rule’s protection. This can occur if
56 the policy statement promises to treat regulated parties less stringently than the statute or
57 legislative rule requires, effectively freeing those parties to shift their behavior in a direction that
58 harms beneficiaries.

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59 ~~But agency officials can avoid these legislative rule like effects of policy statements if
60 they remain flexible in their use of such statements by offering members of the public a fair
61 opportunity to argue for other approaches.⁷~~

62 ~~Second, there are a number of reasons why agencies themselves may naturally tend to be
63 somewhat inflexible with respect to their own policy statements even where in theory they are
64 free not to be. While agencies can be inflexible, tEven though these reasons are more within an
65 agency’s or its officials’ control than the earlier set, this lack of flexibility his~~ often does not
66 imply official bad faith, and efforts to ferret out bad faith can miss ~~many of inflexibility’s the~~
67 actual causes for this kind of inflexibility. Officials who behave inflexibly may be seeking in
68 good faith to balance (a) the ~~ir~~ obligation to benefits of being flexible and, for instance,
69 (b) stakeholder demands to honor other, competing ~~rule of law~~ values that officials would be
70 remiss to ignore. For example, if one regulated firm argues for a different approach from that in
71 a policy statement and the agency approves, this may prompt other firms to criticize the agency
72 for not keeping a level playing field among competitors; may cause other firms to lose faith in
73 the agency’s consistency and predictability, which may render them less likely to trust and

Commented [FD10]: I recommend that the committee consider broadening this, because there are many potential benefits to agency flexibility (including downstream benefits to society as a result of the firm’s cost savings and benefits to the agency in avoiding litigation).

The deletion of the word “obligation” in particular is also consistent with the topic sentence of the paragraph (which highlights that officials sometimes can be flexible, not that they always must be flexible). And as noted above, it appears that not all circuits agree that agency officials have a general obligation to be flexible in how they apply all types of guidance.

⁷~~An agency’s obligation to provide this fair opportunity should not foreclose the agency from using the document as a decisional tool. When a member of the public requests an agency to reexamine a position taken in a policy statement, the agency may consult, rely on, and cite to the statement (if it has been properly published under 5 U.S.C. § 552(a)(1) and (a)(2)) insofar as the contents thereof are responsive to the request, but the agency should give fair consideration to issues that are raised by the request and not addressed in the statement.~~



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

74 cooperate with the agency; and may open the agency to accusations of favoritism from NGOs,
75 the media, and congressional overseers.

76 In principle, one way an agency might~~To~~ reconcile these understandable pressures ~~for~~
77 ~~consistency with the obligation to be flexible, an agency, when approving an approach~~
78 ~~different from that in a policy statement, may find it helpful~~would be to ~~draw up~~prepare and
79 disseminate written reasons ~~when it approves an approach different from that in a policy~~
80 ~~statement, thereby for its approval,~~ making the same reasoning available to all similarly-situated
81 parties going forward. This transparency helps level the playing field, makes agency behavior
82 more predictable, and diminishes concerns about favoritism. But, again without any bad faith,
83 agencies might still find inflexibility the easier course and adopt it by default, because ~~That said,~~
84 ~~Reason-giving requires agency resources, and thus agencies sometimes are unable to do it and~~
85 ~~end up behaving inflexibly by default.~~⁸ Besides this, there are additional organizational reasons
86 for inflexibility that likewise do not depend on official bad faith: ~~that~~ some agency offices, by
87 reason of their usual day-to-day business, are socialized to be less receptive to stakeholder
88 requests than others; ~~that~~ higher-level officials have institutional reasons to back the decisions of
89 their subordinates; and ~~that~~ the distinction between binding and nonbinding policies is counter-
90 intuitive for many officials, at least without substantial training.

91 These various pressures tend to give at least some policy statements a quasi-binding
92 character in fact regardless of their legal status and with no bad faith on anyone's part. That said,
93 however, there are important steps that agency officials can take to mitigate these legislative-
94 rule-like effects of policy statements by making clear that they are not binding and by remaining
95 flexible in their use of such statements by offering members of the public a fair opportunity to
96 argue for other approaches.⁹ What steps to take and when is the focus of one set of today's

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Commented [FD16]: I recommend that the committee consider deleting this footnote, because it is not necessary to support the main text, and because the statement about 552(a) is not supported by blackletter law -- there is no clear bar on an agency "consulting" or "cit[ing] to" (or even in some cases "rely[ing] on") unpublished guidance. The statement deals with a broadly applicable provision of the APA; given the potential implications of this kind of statement, the committee should avoid addressing the issue here.

⁸ Another difficulty with giving reasons is to act consistently with agency policies on the protection of confidential business or personal information. This recommendation is not intended to alter existing agency policies on such protection.

⁹ An agency's obligation to provide this fair opportunity should not foreclose the agency from using the document as a decisional tool. When a member of the public requests an agency to reexamine a position taken in a policy statement, the agency may consult, rely on, and cite to the statement (if it has been properly published under 5 U.S.C. § 552(a)(1))



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

97 recommendation. In addition, agencies should also, in appropriate circumstances, use
98 appropriate tools to enable public participation in the formulation of policy statements before
99 these statements are adopted. This is the focus of the other major set of today's
100 recommendations.

101
102 ~~First, Thus,~~ flexibility often requires managerial initiative and resources to foster and
103 maintain. This Recommendation identifies concrete organizational measures that agencies may
104 take to foster flexibility: low-cost measures that agencies should take at a minimum and
105 additional measures with higher cost that agencies should consider in light of resource
106 limitations and competing priorities.

107 In addition, public participation at the time of a policy statement's adoption may be of
108 value to the agency, to regulated parties, and especially to regulatory beneficiaries and
109 organizations representing them, ~~for because~~ beneficiaries often lack the opportunity and
110 resources to participate in the individual **adjudicatory or enforcement** proceedings in which a
111 policy statement will be applied.

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112 Choosing a level and means of public participation that is appropriate to a policy
113 statement's likely impact and is practicable requires consideration of several factors, ~~this~~
114 Recommendation highlights. Given the complexity of these factors and their tendency to vary
115 with context, it is appropriate to make decisions about whether and how to seek public
116 participation on policy statements on a document-by-document or agency-by-agency basis.¹⁰ A
117 government-wide requirement for inviting written input from the public on policy ~~statements is~~

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and (a)(2)) insofar as the contents thereof are responsive to the request, but the agency should give fair consideration to issues that are raised by the request and not addressed in the statement.

¹⁰ Some agencies have adopted procedural rules requiring solicitation of written input from the public for large and well-defined categories of their policy statements, whereas others have undertaken such solicitations for a large ~~number of statements but selected those documents~~ on a decentralized, ad hoc basis. Parrillo Report, *supra* note 1, at 167-71.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

118 not recommended, unless confined to the very most extraordinary documents.¹¹ is not
119 recommended. This is a function both of the complex cost-benefit considerations noted above
120 and the fact that broad mandates for written public input on policy statements can result in two
121 additional unintended consequences. First, a broad mandate applied to a resource-strapped
122 agency may cause the agency to fail to process and incorporate comments and instead leave
123 many policy statements in published “draft” form indefinitely, which may at least partly defeat
124 the purpose of participation and cause stakeholder confusion. Second, a broad mandate may so
125 legitimize policy statements in the eyes of the agency that such statements could end up largely
126 supplanting legislative rulemaking.

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RECOMMENDATION

Policy Statements Should Not Bind the Public

- 127 1. An agency should not use a policy statement as to create a standard binding on the public,
128 that is, as a standard with which noncompliance may form an independent basis for
129 action in matters that determine the rights and obligations of any member of the public.
- 130 2. An agency should afford members of the public a fair opportunity to argue for lawful
131 approaches other than those put forward by the policy statement or for modification or
132 rescission of the policy statement.
- 133 3. It is sometimes appropriate for An agency may, as an internal agency management
134 matter, to require some of its employees to act in conformity with treat a policy statement
135 as though it formed an “independent basis for action” as described in Recommendation
136 1. But the agency generally should ensure that this does not interfere with the fair
137 opportunity called for in Recommendation 2. For example, an agency may require
138 officials at one level to follow the approach described in a policy statement while

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Commented [FD22]: I recommend the accompanying edits, consistent with my longer comment bubble on page one. The edits clarify that this Recommendation is only about “outcome-determinative” guidance. The edits also shift the focus from what an agency “may” do to what an agency ought to do, consistent with the uncertainty surrounding the case law in this area.

¹¹ 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 5, at 50–58.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

139 authorizing officials at a higher level to act in ways different from that described in the
140 document when appropriate.

Minimum Measures to Avoid Binding the Public

- 141 4. A policy statement should prominently state that it is not binding on members of the
142 public and explain that a member of the public may take a lawful approach different from
143 the one set forth in the policy statement, or request that the agency take such a lawful
144 approach. ~~This explanation~~ The policy statement should also include the identity and
145 contact information of officials to whom such a request should be made.
- 146 5. A policy statement should not include mandatory language unless the agency is using that
147 language to describe a statutory or regulatory requirement, or the language is addressed to
148 agency employees and will not interfere with the fair opportunity called for in
149 Recommendation 2.
- 150 6. The agency should instruct all employees engaged in activity to which a policy statement
151 pertains to refrain from making any statements suggesting that a policy statement is
152 binding on the public. Insofar as ~~some~~ employees are required, as an internal agency
153 management matter, to act in conformity with a policy statement, they should be
154 instructed as to the difference between such an internal agency management requirement
155 and law that is binding on the public.

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Additional Measures to Avoid Binding the Public

- 156 7. In order to avoid using policy statements to bind the public and in order to provide a fair
157 opportunity for other lawful approaches, an agency should, subject to considerations of
158 practicability and resource limitations and the priorities described in Recommendation 8
159 below, consider additional measures, including the following:
- 160 a. promoting the flexible use of policy statements in a manner that still takes due
161 account of needs for consistency and predictability. In particular, when the
162 agency accepts a proposal for a lawful approach other than that put forward in a
163 policy statement and the approach seems likely applicable to other situations, the



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 164 agency may disseminate its decision and the reasons therefor to other persons who
165 might make the argument, to other affected stakeholders, and to officials likely to
166 hear the argument ~~(consistent with its policies on protection of confidential~~
167 ~~business or personal information).~~
- 168 b. assigning the task of considering arguments for approaches other than that in a
169 policy statement to a component of the agency ~~other than the component that~~
170 ~~issued the policy statement and which that~~ is likely to engage in open and
171 productive dialogue with persons who make such arguments, such as a program
172 office that is accustomed to dealing cooperatively with regulated parties and
173 regulatory beneficiaries.
- 174 c. in cases where frontline officials are authorized to take an approach different from
175 that in a policy statement but refuse to do so, directing appeals of such a refusal to
176 a higher-level official who is not the direct superior of those frontline officials.
- 177 d. investing in training and monitoring of frontline personnel to ensure that they (i)
178 understand the difference between binding rules and policy statements; (ii) treat
179 parties' ideas for lawful approaches different from that in a policy statement in an
180 open and welcoming manner; and (iii) understand that approaches other than that
181 in a policy statement, if undertaken according to the proper internal agency
182 procedures for approval and justification, are appropriate and will not have
183 adverse employment consequences for them.
- 184 e. setting up channels for members of the public, anonymously through
185 intermediaries such as ombudspersons or trade associations, to argue in favor of
186 approaches different from those in a policy statement and to provide feedback to
187 the agency on whether its officials are giving reasonable consideration to such
188 arguments.

Commented [AM25]: Not needed here. Note 8 on page 4 is more than enough.

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Priorities in Deciding When to Invest in Promoting Flexibility

- 190 8. Because measures to promote flexibility (including those listed in Recommendation 7)
191 may take up agency resources, it will be necessary to set priorities for which policy



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

192 statements are most in need of such measures. In deciding when to take such measures
193 the agency should consider the following, bearing in mind that these considerations will
194 not always point in the same direction:

195 a. an agency should assign a higher priority to a policy statement the greater the
196 statement's impact is likely to be on the interests of regulated parties and
197 regulatory beneficiaries, either because regulated parties have strong incentives to
198 comply with the statement or because the statement practically reduces the
199 stringency of the regulatory scheme compared to the status quo.

200 b. ~~But~~ an agency should assign a lower priority to promoting flexibility in the use of
201 a policy statement insofar as the statement's value to the agency and to
202 stakeholders lies in the fact that it is helpful to have consistency for consistency's
203 sake, independent of the statement's substantive content.

204 &c. ~~On the other hand, the~~ Notwithstanding paragraph b, an agency should assign a
205 higher priority to promoting flexibility in the use of a policy statement insofar as
206 the statement's value to the agency lies in officials' belief that the substantive
207 content of the statement is right as a matter of policy. Under that circumstance,
208 the agency ought to test its belief in the policy's correctness either by going
209 through the process for legislative rulemaking or by investing in measures to
210 ensure serious consideration of arguments by members of the public to take
211 approaches other than those in the policy statement.

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Public Participation in Adoption of Policy Statements

- 212 9. When an agency is contemplating adopting or modifying a policy statement, it should
213 consider whether to solicit public participation, and if so, what kind, before adopting the
214 document. The options range from outreach to selected stakeholder representatives to
215 stakeholder meetings or webinars to advisory committee proceedings to invitation for
216 written input from the public with or without a response. In deciding how to proceed, the
217 agency should consider:



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 218 a. existing agency procedures for the adoption of policy statements, including any
- 219 procedures adopted in response to the Office of Management and Budget’s Final
- 220 Bulletin for Agency Good Guidance Practices (2007);
- 221 b. the factors listed in Recommendation 8;
- 222 c. the likely increase in useful information available to the agency from broadening
- 223 participation, keeping in mind that non-regulated parties may offer different
- 224 information than regulated parties and that non-regulated parties will often have
- 225 no opportunity to provide input regarding policy statements other than at the time
- 226 of adoption;
- 227 d. the likely increase in policy acceptance from broadening participation, keeping in
- 228 mind that non-regulated parties will often have no opportunity to provide input
- 229 regarding policy statements other than at the time of adoption, and that policy
- 230 acceptance may be less likely if the agency is not responsive to stakeholder input;
- 231 e. whether the agency is likely to learn more useful information by having a specific
- 232 agency proposal as a focal point for discussion, or instead having a more free-
- 233 ranging and less formal discussion; and
- 234 f. the practicability of broader forms of participation, including invitation for written
- 235 input from the public, keeping in mind that broader participation may slow the
- 236 adoption of policy statements and may diminish resources for other agency tasks,
- 237 including the provision of policy statements on other matters.

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

Commented [FD27]: This has the implication of an agency imposing a legally binding requirement on itself (that is, a rule in the CFR). The committee probably does not mean a CFR rule specifically. Can the word “rule” be deleted without affecting the meaning of the sentence?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

246 ~~10.11.~~ Where an agency decides against providing pre-promulgation public participation,
247 the agency should consider offering an opportunity for such participation after
248 promulgation.