Policy statements are 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. They are exempt from the Administrative Procedure Act’s requirements (including notice and comment) for the issuance of legislative rules that legally bind the public. 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 that purpose [those agencies’ use of interpretive rules]. Policy statements and this category of interpretive rules are often referred to as guidance.

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

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


2 Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30103 (July 8, 1992). It is sometimes suggested that a policy statement must contain a legally binding requirement to bind some agency employees in a manner that forecloses the fair opportunity for the regulated party and the 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 with the provision that officials at a higher but still accessible level can authorize action at variance with the statement.

3 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.

4 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

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

6 The Conference has now determined, twenty-five years after Recommendation 92-2, to update its recommendations on the formulation and use of policy statements in light of current administrative experience. Additionally, the Conference has determined, in light of the results of its study, that an expanded number of individuals are familiar with Recommendations 92-2 and 71-3 and that the Conference should expand its insight into the public’s experience with them.

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Commented [FD6]: I 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 on the guidance and discretion. 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 rephrased 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 sentence 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 [ATM]: 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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Compared with legislative rules, policy statements are generally better for dealing with conditions of uncertainty and for making agency policy accessible to regulated parties who lack counsel. Further, the provision of policy statements often takes less time and resources than legislative rulemaking, freeing up the agency to, for instance, address more issues within its statutory mission.

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

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

Commented [FD9]: There are many possible benefits from resource savings; this is just one.
that entail prohibitively high costs regardless of outcome, or can lead to sanctions so severe that
the party will not risk forcing an adjudication of the accusation. Also, a policy rule by effectively depriving them of the statute or legislative rule’s protection. This can occur if
the policy statement promises to treat regulated parties less stringently than the statute or
legislative rule requires, effectively freeing those parties to shift their behavior in a direction that
harms beneficiaries.

But agency officials can avoid these legislative-rule-like effects of policy statements if
they remain flexible in their use of such statements by offering members of the public a fair
opportunity to argue for other approaches.2

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

1 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.

2 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.
cooperate with the agency; and may open the agency to accusations of favoritism from NGOs, 
the media, and congressional overseers.

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

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

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

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

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

Choosing a level and means of public participation that is appropriate to a policy statement’s likely impact and is practicable requires consideration of several factors, this Recommendation highlights. Given the complexity of these factors and their tendency to vary with context, it is appropriate to make decisions about whether and how to seek public participation on policy statements on a document-by-document or agency-by-agency basis 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.

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.
not recommended, unless confined to the very most extraordinary documents.\footnote{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.} It is not recommended. This is a function both of the complex cost-benefit considerations noted above and the fact that broad mandates for written public input on policy statements can result in 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 policy statements in published “draft” form indefinitely, which may at least partly defeat the purpose of participation and cause stakeholder confusion. Second, a broad mandate may so legitimize policy statements in the eyes of the agency that such statements could end up largely supplanting legislative rulemaking.

RECOMMENDATION

Policy Statements Should Not Bind the Public

1. An agency should not use a policy statement to create 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 policy statement or for modification or rescission of the policy statement.

3. It is sometimes appropriate for an agency, in an internal agency management matter, to require some of its employees to act in conformity with a policy statement as though it formed an “independent basis for action” as described in Recommendation 1. \footnote{But the agency generally 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 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.
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 policy statement 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 different from
the one set forth in the policy statement, or request that the agency take such a lawful
approach. This explanation should also include the identity and contact information of officials to whom such a request should be made.

5. A policy statement 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 policy statement
pertains to refrain from making any statements suggesting that a policy statement is
binding on the public. Insofar as some employees are required, as an internal agency
management matter, to act in conformity with a policy statement, 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 policy statements 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 policy statements in a manner that still takes due
      account of needs for consistency and predictability. In particular, when the
      agency accepts a proposal for a lawful approach other than that put forward in a
      policy statement and the approach seems likely applicable to other situations, the

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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 its policies on protection of confidential
business or personal information).

b. assigning the task of considering arguments for approaches other than that in a
policy statement to a component of the agency other than the component that
issued the policy statement and which 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 policy statement 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.

d. investing in training and monitoring of frontline personnel to ensure that they (i)
understand the difference between binding rules and policy statements; (ii) treat
parties’ ideas for lawful approaches different from that in a policy statement in an
open and welcoming manner; and (iii) understand that approaches other than that
in a policy statement, if undertaken according to the proper internal agency
procedures for approval and justification, are appropriate and will not have
adverse employment consequences for them.

e. setting up channels for members of the public, anonymously through
intermediaries such as ombudspersons or trade associations, to argue in favor of
approaches different from those in a policy statement and to provide feedback to
the agency on whether its officials are giving reasonable consideration to such
arguments.

Priorities in Deciding When to Invest in Promoting Flexibility

8. Because measures to promote flexibility (including those listed in Recommendation 7)
may take up agency resources, it will be necessary to set priorities for which policy
statements are most in need of such measures. In deciding when to take such measures the agency should consider the following, bearing in mind that these considerations will not always point in the same direction:

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

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

c. On the other hand, the agency should assign a higher priority to promoting flexibility in the use of a policy statement insofar as the statement’s value to the agency lies in officials’ belief that the substantive content of the statement is right as a matter of policy. Under that circumstance, the agency ought to test its belief in the policy’s correctness either by going through the process for legislative rulemaking or by investing in measures to ensure serious consideration of arguments by members of the public to take approaches other than those in the policy statement.

Public Participation in Adoption of Policy Statements

9. When an agency is contemplating adopting or modifying a policy statement, it should consider whether to solicit public participation, and if so, what kind, before adopting the document. The options range from outreach to selected stakeholder representatives to stakeholder meetings or webinars to advisory committee proceedings to invitation for written input from the public with or without a response. In deciding how to proceed, the agency should consider:
a. existing agency procedures for the adoption of policy statements, including any
   procedures adopted in response to the Office of Management and Budget’s Final
   Bulletin for Agency Good Guidance Practices (2007);

b. the factors listed in Recommendation 8;

c. 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 policy statements other than at the time
   of adoption;

d. 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 policy statements other than at the time of adoption, and that policy
   acceptance may be less likely if the agency is not responsive to stakeholder input;

e. 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

f. the practicability of broader forms of participation, including invitation for written
   input from the public, keeping in mind that broader participation may slow the
   adoption of policy statements and may diminish resources for other agency tasks,
   including the provision of policy statements on other matters.

10. An agency may make decisions about the appropriate level of participation document-by-
    document or by 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 policy statements, if
    any, should be understood to reflect current agency thinking or (b) provide in each draft
    policy statement that, at a certain time after publication, the document will automatically
    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?
Where an agency decides against providing pre-promulgation public participation, the agency should consider offering an opportunity for such participation after promulgation.