Agency Guidance

Committee on Judicial Review

Proposed Recommendation for Committee | October 31, 2017

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.

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 statement in question and the practicability of participation. 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

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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.


years after Recommendation 92-2, to update its recommendations on the formulation and use of policy statements in light of current administrative experience. 5

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 and promote compliance with law. 6

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 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,

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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 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.”).
would deserve criticism and correction, intent is often inadequate for understanding and
addressing the phenomenon of binding policy statements.

That members of the public sometimes find they have no practical escape from the terms
of a policy statement is often due to structural features of 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. 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 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 statement can operate on beneficiaries of a statute or legislative rule
as if it were a legislative 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.7

While agencies can be inflexible, this often does not imply official bad faith, and efforts
to ferret out bad faith can miss many of inflexibility’s actual causes. Officials who behave
inflexibly may be seeking in good faith to balance (a) their obligation to be flexible and
(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

7 An agency’s obligation to provide this fair opportunity should not foreclose the agency from using the document as
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.
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 cooperate with the agency; and may open the agency to accusations of favoritism from NGOs, the media, and congressional overseers. To reconcile these understandable pressures for consistency with the obligation to be flexible, an agency, when approving an approach different from that in a policy statement, may find it helpful to draw up and disseminate reasons 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. 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 that the distinction between binding and nonbinding policies is counter-intuitive for many officials, at least without substantial training.

Thus, 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, for beneficiaries often lack the opportunity and resources to

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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.
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.\(^9\) A government-wide requirement for inviting written input from the public on policy statements, unless confined to the very most extraordinary documents,\(^10\) 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 legitimate policy statements in the eyes of the agency that such statements could end up largely supplanting legislative rulemaking.

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\(^9\) 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.

\(^10\) 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 5, at 50–58.
RECOMMENDATION

Policy Statements Should Not Bind the Public

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

3. An agency may, as an internal agency management matter, require some of its employees to act in conformity with a policy statement, 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 a policy statement 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 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 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 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 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 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, 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. 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. 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 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 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.