



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 Recommendation 76-5 states that agencies should provide for public participation in the
6 formulation of policy statements (and of interpretive rules) depending upon the impact of the
7 statement in question and the practicability of participation.³ Recommendation 92-2 recognizes
8 the value of policy statements but expresses concern about policy statements “that are intended
9 to impose binding substantive standards or obligations upon affected persons” notwithstanding
10 the legal requirement that they be nonbinding, and it advises that agencies establish flexible
11 procedures that allow members of the public a fair opportunity to argue for approaches different
12 from those set forth in a policy statement.⁴ The Conference has now determined, twenty-five

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.

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). A policy statement may permissibly bind some agency employees. *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

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.



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

15 Policy statements are essential instruments of administration across numerous agencies,
16 and of great value to agencies and the public alike. Compared with adjudication or enforcement,
17 policy statements can make agency decisionmaking faster and less costly, saving time and
18 resources for the agency and the regulated public. They can also make agency decisionmaking
19 more predictable and uniform, shield regulated parties against unequal treatment, unnecessary
20 costs, and unnecessary risk and promote compliance with law.⁶ Compared with legislative
21 rules, policy statements are generally better for dealing with conditions of uncertainty and for
22 making agency policy accessible to regulated parties who lack counsel. Further, the provision of
23 policy statements often takes less time and resources than legislative rulemaking, freeing up the
24 agency to address more issues within its statutory mission.

25 Despite their usefulness to both agencies and the public, policy statements are sometimes
26 criticized for coercing members of the public as if they were legislative rules, notwithstanding
27 their officially nonbinding status. Recommendation 92-2 defined this problem in terms of an
28 agency's *intent* to use such statements to bind the public, which may imply that the problem is
29 one of official bad faith. While official intent to make a policy statement binding, if shown,

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 policy statements cannot bind those employees in a manner that forecloses the fair opportunity 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 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 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.”).



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

32 That members of the public sometimes find they have no practical escape from the terms
33 of a policy statement is often due to structural features of modern regulatory schemes that are
34 beyond the control of officials who formulate or use policy statements and do not depend on
35 whatever intent those officials might have. This is often the case if a statute (a) requires a
36 regulated party to obtain prior approval from an agency to obtain essential permissions or
37 benefits; (b) subjects a regulated party to repeated agency evaluation under a legal regime with
38 which perfect compliance is practically unachievable, incentivizing the party to invest in a
39 reputation with the agency as a good-faith actor; or (c) subjects the regulated party to the
40 possibility of enforcement proceedings that entail prohibitively high costs regardless of outcome,
41 or can lead to sanctions so severe that the party will not risk forcing an adjudication of the
42 accusation. Also, a policy statement can operate on beneficiaries of a statute or legislative rule
43 as if it were a legislative rule by effectively depriving them of the statute or legislative rule's
44 protection. This can occur if the policy statement promises to treat regulated parties less
45 stringently than the statute or legislative rule requires, effectively freeing those parties to shift
46 their behavior in a direction that harms beneficiaries. But agency officials can avoid these
47 legislative-rule-like effects of policy statements if they remain flexible in their use of such
48 statements by offering members of the public a fair opportunity to argue for other approaches.⁷

49 While agencies can be inflexible, this often does not imply official bad faith, and efforts
50 to ferret out bad faith can miss many of inflexibility's actual causes. Officials who behave
51 inflexibly may be seeking in good faith to balance (a) their obligation to be flexible and
52 (b) stakeholder demands to honor other, competing rule-of-law values that officials would be
53 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 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.



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54 a policy statement and the agency approves, this may prompt other firms to criticize the agency
55 for not keeping a level playing field among competitors; may cause other firms to lose faith in
56 the agency's consistency and predictability, which may render them less likely to trust and
57 cooperate with the agency; and may open the agency to accusations of favoritism from NGOs,
58 the media, and congressional overseers. To reconcile these understandable pressures for
59 consistency with the obligation to be flexible, an agency, when approving an approach different
60 from that in a policy statement, may find it helpful to draw up and disseminate reasons for its
61 approval, making the same reasoning available to all similarly-situated parties going forward.
62 This transparency helps level the playing field, makes agency behavior more predictable, and
63 diminishes concerns about favoritism. That said, reason-giving requires agency resources, and
64 thus agencies sometimes are unable to do it and end up behaving inflexibly by default.⁸ Besides
65 this, there are additional organizational reasons for inflexibility that likewise do not depend on
66 official bad faith: that some agency offices, by reason of their usual day-to-day business, are
67 socialized to be less receptive to stakeholder requests than others; that higher-level officials have
68 institutional reasons to back the decisions of their subordinates; and that the distinction between
69 binding and nonbinding policies is counter-intuitive for many officials, at least without
70 substantial training.

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

76 In addition, public participation at the time of a policy statement's adoption may be of
77 value to the agency, to regulated parties, and especially to regulatory beneficiaries and
78 organizations representing them, for beneficiaries often lack the opportunity and resources to

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.



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79 participate in the individual adjudicatory or enforcement proceedings in which a policy statement
80 will be applied.

81 Choosing a level and means of public participation that is appropriate to a policy
82 statement's likely impact and is practicable requires consideration of several factors, this
83 Recommendation highlights. Given the complexity of these factors and their tendency to vary
84 with context, it is appropriate to make decisions about whether and how to seek public
85 participation on policy statements on a document-by-document or agency-by-agency basis.⁹ A
86 government-wide requirement for inviting written input from the public on policy statements,
87 unless confined to the very most extraordinary documents,¹⁰ is not recommended. This is a
88 function both of the complex cost-benefit considerations noted above and the fact that broad
89 mandates for written public input on policy statements can result in two additional unintended
90 consequences. First, a broad mandate applied to a resource-strapped agency may cause the
91 agency to fail to process and incorporate comments and instead leave many policy statements in
92 published "draft" form indefinitely, which may at least partly defeat the purpose of participation
93 and cause stakeholder confusion. Second, a broad mandate may so legitimize policy statements
94 in the eyes of the agency that such statements could end up largely supplanting legislative
95 rulemaking.

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.



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RECOMMENDATION

Policy Statements Should Not Bind the Public

- 96 1. An agency should not use a policy statement as a standard binding on the public, that is,
97 as a standard with which noncompliance may form an independent basis for action in
98 matters that determine the rights and obligations of any member of the public.
- 99 2. An agency should afford members of the public a fair opportunity to argue for lawful
100 approaches other than those put forward by the policy statement or for modification or
101 rescission of the policy statement.
- 102 3. An agency may, as an internal agency management matter, require some of its employees
103 to act in conformity with a policy statement, but the agency should ensure that this does
104 not interfere with the fair opportunity called for in Recommendation 2. For example, an
105 agency may require officials at one level to follow the approach described in a policy
106 statement while authorizing officials at a higher level to act in ways different from that
107 described in the document when appropriate.

Minimum Measures to Avoid Binding the Public

- 108 4. A policy statement should prominently state that it is not binding on members of the
109 public and explain that a member of the public may take a lawful approach different from
110 the one set forth in the policy statement, or request that the agency take such a lawful
111 approach. This explanation should include the identity and contact information of
112 officials to whom such a request should be made.
- 113 5. A policy statement should not include mandatory language unless the agency is using that
114 language to describe a statutory or regulatory requirement, or the language is addressed to
115 agency employees and will not interfere with the fair opportunity called for in
116 Recommendation 2.
- 117 6. The agency should instruct all employees engaged in activity to which a policy statement
118 pertains to refrain from making any statements suggesting that a policy statement is
119 binding on the public. Insofar as some employees are required, as an internal agency



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120 management matter, to act in conformity with a policy statement, they should be
121 instructed as to the difference between such an internal agency management requirement
122 and law that is binding on the public.

Additional Measures to Avoid Binding the Public

- 123 7. In order to avoid using policy statements to bind the public and in order to provide a fair
124 opportunity for other lawful approaches, an agency should, subject to considerations of
125 practicability and resource limitations and the priorities described in Recommendation 8
126 below, consider additional measures, including the following:
- 127 a. promoting the flexible use of policy statements in a manner that still takes due
128 account of needs for consistency and predictability. In particular, when the
129 agency accepts a proposal for a lawful approach other than that put forward in a
130 policy statement and the approach seems likely applicable to other situations, the
131 agency may disseminate its decision and the reasons therefor to other persons who
132 might make the argument, to other affected stakeholders, and to officials likely to
133 hear the argument (consistent with its policies on protection of confidential
134 business or personal information).
 - 135 b. assigning the task of considering arguments for approaches other than that in a
136 policy statement to a component of the agency that is likely to engage in open and
137 productive dialogue with persons who make such arguments, such as a program
138 office that is accustomed to dealing cooperatively with regulated parties and
139 regulatory beneficiaries.
 - 140 c. in cases where frontline officials are authorized to take an approach different from
141 that in a policy statement but refuse to do so, directing appeals of such a refusal to
142 a higher-level official who is not the direct superior of those frontline officials.
 - 143 d. investing in training and monitoring of frontline personnel to ensure that they (i)
144 understand the difference between binding rules and policy statements; (ii) treat
145 parties' ideas for lawful approaches different from that in a policy statement in an
146 open and welcoming manner; and (iii) understand that approaches other than that



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147 in a policy statement, if undertaken according to the proper internal agency
148 procedures for approval and justification, are appropriate and will not have
149 adverse employment consequences for them.

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

155 **Priorities in Deciding When to Invest in Promoting Flexibility**

156 8. Because measures to promote flexibility (including those listed in Recommendation 7)
157 may take up agency resources, it will be necessary to set priorities for which policy
158 statements are most in need of such measures. In deciding when to take such measures,
159 an agency should assign a higher priority to a policy statement the greater the statement's
160 impact is likely to be on the interests of regulated parties and regulatory beneficiaries,
161 either because regulated parties have strong incentives to comply with the statement or
162 because the statement practically reduces the stringency of the regulatory scheme
163 compared to the status quo. But an agency should assign a lower priority to promoting
164 flexibility in the use of a policy statement insofar as the statement's value to the agency
165 and to stakeholders lies in the fact that it is helpful to have consistency for consistency's
166 sake, independent of the statement's substantive content. On the other hand, the agency
167 should assign a higher priority to promoting flexibility in the use of a policy statement
168 insofar as the statement's value to the agency lies in officials' belief that the substantive
169 content of the statement is right as a matter of policy. Under that circumstance, the
170 agency ought to test its belief in the policy's correctness either by going through the
171 process for legislative rulemaking or by investing in measures to ensure serious
172 consideration of arguments by members of the public to take approaches other than those
173 in the policy statement.



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Public Participation in Adoption of Policy Statements

- 174 9. When an agency is contemplating adopting or modifying a policy statement, it should
175 consider whether to solicit public participation, and if so, what kind, before adopting the
176 document. The options range from outreach to selected stakeholder representatives to
177 stakeholder meetings or webinars to advisory committee proceedings to invitation for
178 written input from the public with or without a response. In deciding how to proceed, the
179 agency should consider:
- 180 a. existing agency procedures for the adoption of policy statements, including any
181 procedures adopted in response to the Office of Management and Budget's Final
182 Bulletin for Agency Good Guidance Practices (2007);
 - 183 b. the factors listed in Recommendation 8;
 - 184 c. the likely increase in useful information available to the agency from broadening
185 participation, keeping in mind that non-regulated parties may offer different
186 information than regulated parties and that non-regulated parties will often have
187 no opportunity to provide input regarding policy statements other than at the time
188 of adoption;
 - 189 d. the likely increase in policy acceptance from broadening participation, keeping in
190 mind that non-regulated parties will often have no opportunity to provide input
191 regarding policy statements other than at the time of adoption, and that policy
192 acceptance may be less likely if the agency is not responsive to stakeholder input;
 - 193 e. whether the agency is likely to learn more useful information by having a specific
194 agency proposal as a focal point for discussion, or instead having a more free-
195 ranging and less formal discussion; and
 - 196 f. the practicability of broader forms of participation, including invitation for written
197 input from the public, keeping in mind that broader participation may slow the
198 adoption of policy statements and may diminish resources for other agency tasks,
199 including the provision of policy statements on other matters.



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