



Agency Guidance

Committee on Judicial Review

Proposed Recommendation from Committee on Judicial Review | October 31, 2017

1 General statements of policy as defined under the Administrative Procedure Act
2 (hereinafter policy statements) are agency statements of general applicability, not binding on
3 members of the public, that advise the public of the manner in which the agency proposes to
4 exercise a discretionary power.¹ Interpretive rules are defined as rules or statements issued by an
5 agency to advise the public of the agency's construction of the statutes and rules which it
6 administers.² Both policy statements and interpretive rules are exempt from the APA's
7 requirements for the issuance of legislative rules that legally bind the public (including notice
8 and comment),³ and are often referred to as "guidance" or "guidance documents" (although
9 usage varies). This Recommendation, however, covers only policy statements, not interpretive
10 rules; nevertheless, many of the recommendations herein regarding flexible use of policy
11 statements may also be helpful with respect to agencies' use of interpretive rules.

12 Over the years, the Conference has issued several recommendations pertaining to policy
13 statements. Recommendation 76-5 states that agencies should provide for public participation in
14 the formulation of policy statements (and of interpretive rules) depending on the impact of the
15 statement in question and the practicability of participation.⁴ Recommendation 92-2 recognizes

¹ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

² *Id.*

³ 5 U.S.C. § 553(b)(A).

⁴ Administrative Conference of the United States, Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976). Additional prior Conference Recommendations pertaining to policy statements and agency guidance more broadly, apart from others referenced



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

16 the value of policy statements but expresses concern about policy statements “that are intended
17 to impose binding substantive standards or obligations upon affected persons” notwithstanding
18 the legal requirement that they be nonbinding on the public, and it advises agencies to establish
19 flexible procedures that allow members of the public a fair opportunity to argue for approaches
20 different from those set forth in a policy statement.⁵ The Conference has now determined,
21 twenty-five years after Recommendation 92-2, to update its recommendations on the formulation
22 and use of policy statements in light of current administrative experience.⁶

23 Policy statements are important instruments of administration across numerous agencies,
24 and of great value to agencies and the public alike. Compared with adjudication or enforcement,
25 policy statements can make agency decisionmaking faster and less costly, saving time and
26 resources for the agency and the regulated public. They can also make agency decisionmaking
27 more predictable and uniform and shield regulated parties from unequal treatment, unnecessary
28 costs, and unnecessary risk, while promoting compliance with the law.⁷ Compared with
29 legislative rules, policy statements are generally better for dealing with conditions of uncertainty
30 and often for making agency policy accessible, especially to regulated parties who lack counsel.
31 Further, the provision of policy statements often takes less time and resources than legislative
32 rulemaking, freeing up the agency to, for instance, take other action within its statutory mission.
33 In pursuit of benefits such as these, agencies may use policy statements to bind some agency

specifically in this preamble, include Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 4, 2015); and Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014).

⁵ Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992).

⁶ 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* (Oct. 12, 2017), <https://www.acus.gov/report/agency-guidance-second-draft-report>.

⁷ 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.”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

34 employees to the approach of the policy statement,⁸ so long as such employees are not bound in a
35 manner that forecloses a fair opportunity for the public and/or employee to argue for approaches
36 different from that in the policy statement or seek modification of the policy statement.⁹

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

44 There are several kinds of reasons why members of the public sometimes find they have
45 no practical escape from the terms of a policy statement. First are those that are not of the
46 making of an agency or its officials and do not depend primarily on whatever intent the officials
47 may have. Specifically, modern regulatory schemes often have structural features that tend to
48 lead *regulated parties* to follow the policy statement's approach even if in theory they might be
49 legally free to choose a different course, because the costs and risks associated with doing so are
50 simply too high. This is often the case if statutes or regulation (a) require a regulated party to
51 obtain prior approval from an agency to obtain essential permissions or benefits; (b) subject a
52 regulated party to repeated agency evaluation under a legal regime with which perfect
53 compliance is practically unachievable, incentivizing the party to seek to cultivate a reputation
54 with the agency as a good-faith actor by following even non-binding guidance; or (c) subject the

⁸ See Recommendation 92-2, *supra* note 5; Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency 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.”).

⁹ See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3440. For example, a policy statement could bind officials at one level of the agency hierarchy to the approach in the policy statement, with the proviso that officials at a higher but still accessible level can authorize action at variance with the statement.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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 though these reasons are
64 more within an agency's or its officials' control than the earlier set, this lack of flexibility may
65 often stem from causes other than bad faith. Officials who behave inflexibly may be seeking in
66 good faith to balance (a) the importance of being flexible; and (b) stakeholder demands to honor
67 other, competing values that officials would be remiss to ignore. For example, if one regulated
68 firm argues for a different approach from that in a policy statement and the agency approves, this
69 may prompt other firms to criticize the agency for not keeping a level playing field among
70 competitors; may cause other firms to lose faith in the agency's consistency and predictability,
71 which may render them less likely to trust and cooperate with the agency; and may open the
72 agency to accusations of favoritism from NGOs, the media, and congressional overseers.

73 In principle, one way an agency might reconcile these understandable pressures would be
74 to prepare and disseminate written reasons when it approves an approach different from that in a
75 policy statement, thereby making the same reasoning available to all similarly-situated parties
76 going forward. This transparency helps level the playing field, makes agency behavior more
77 predictable, and diminishes concerns about favoritism. But, again without any bad faith,
78 agencies might still find inflexibility the easier course and adopt it by default, because reason-
79 giving requires agency resources.¹⁰ Besides this, there are additional organizational reasons for

¹⁰ 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

80 inflexibility that likewise do not depend on official bad faith: some agency offices, by reason of
81 their usual day-to-day business, are socialized to be less receptive to stakeholder requests than
82 others; higher-level officials have institutional reasons to back the decisions of their
83 subordinates; and the distinction between binding and nonbinding policies is counter-intuitive for
84 many officials, at least without substantial training.

85 These various pressures tend to give at least some policy statements a quasi-binding
86 character in fact regardless of their legal status. That said, there are important steps that agency
87 officials can take to mitigate these legislative-rule-like effects of policy statements by making
88 clear that they are not binding and by remaining flexible in their use of such statements by
89 offering members of the public a fair opportunity to argue for other approaches. What steps to
90 take and when is the focus of one set of today's recommendations. In addition, agencies should
91 also, in appropriate circumstances, use appropriate tools to enable public participation in the
92 formulation of policy statements before these statements are adopted. This is the focus of the
93 other set of today's recommendations.

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

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

104 Choosing a level and means of public participation that is appropriate to a policy
105 statement's likely impact and is practicable requires consideration of several factors. Given the
106 complexity of these factors and their tendency to vary with context, it is appropriate to make



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

107 decisions about whether and how to seek public participation on policy statements on a
108 document-by-document or agency-by-agency basis.¹¹ A government-wide requirement for
109 inviting written input from the public on policy statements is not recommended, unless confined
110 to the very most extraordinary documents.¹² This is a function both of the complex cost-benefit
111 considerations noted above and the fact that broad mandates for written public input on policy
112 statements can result in two additional unintended consequences. First, a broad mandate applied
113 to a resource-strapped agency may cause the agency to fail to process and incorporate comments
114 and instead leave many policy statements in published “draft” form indefinitely, which may at
115 least partly defeat the purpose of participation and cause stakeholder confusion. Second, a broad
116 mandate may so legitimize policy statements in the eyes of the agency that such statements could
117 end up largely supplanting legislative rulemaking.

RECOMMENDATION

Policy Statements Should Not Bind the Public

- 118 1. An agency should not use a policy statement to create a standard binding on the public,
119 that is, as a standard with which noncompliance may form an independent basis for
120 action in matters that determine the rights and obligations of any member of the public.
- 121 2. An agency should afford members of the public a fair opportunity to argue for lawful
122 approaches other than those put forward by the policy statement or for modification or
123 rescission of the policy statement.
- 124 3. Although a policy statement should not bind an agency as a whole, it is sometimes
125 appropriate for an agency, as an internal agency management matter, to direct some of its
126 employees to act in conformity with a policy statement. But the agency should ensure

¹¹ 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 on a decentralized, ad hoc basis. Parrillo, *supra* note 6, at 167–68.

¹² 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 id.*, at 167–71.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

127 that this does not interfere with the fair opportunity called for in Recommendation 2. For
128 example, an agency may direct officials at one level to follow the approach described in a
129 policy statement while authorizing officials at a higher level to act in ways different from
130 that described in the statement, when appropriate, despite the position taken by the lower
131 level official.

Minimum Measures to Avoid Binding the Public

- 132 4. A policy statement should prominently state that it is not binding on members of the
133 public and explain that a member of the public may take a lawful approach different from
134 the one set forth in the policy statement, or request that the agency take such a lawful
135 approach. The policy statement should also include the identity and contact information
136 of officials to whom such a request should be made.
- 137 5. A policy statement should not include mandatory language unless the agency is using that
138 language to describe an existing statutory or regulatory requirement, or the language is
139 addressed to agency employees and will not interfere with the fair opportunity called for
140 in Recommendation 2.
- 141 6. The agency should instruct all employees engaged in activity to which a policy statement
142 pertains to refrain from making any statements suggesting that a policy statement is
143 binding on the public. Insofar as any employee is directed, as an internal agency
144 management matter, to act in conformity with a policy statement, that employee should
145 be instructed as to the difference between such an internal agency management
146 requirement and law that is binding on the public.

Additional Measures to Avoid Binding the Public

- 147 7. In order to avoid using policy statements to bind the public and in order to provide a fair
148 opportunity for other lawful approaches, an agency should, subject to considerations of
149 practicability and resource limitations and the priorities described in Recommendation 8
150 below, consider additional measures, including the following:



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 151 a. promoting the flexible use of policy statements in a manner that still takes due
152 account of needs for consistency and predictability. In particular, when the
153 agency accepts a proposal for a lawful approach other than that put forward in a
154 policy statement and the approach seems likely applicable to other situations, the
155 agency may disseminate its decision and the reasons therefor to other persons who
156 might make the argument, to other affected stakeholders, to officials likely to hear
157 the argument, and to members of the public, subject to existing protections for
158 confidential business or personal information.
- 159 b. assigning the task of considering arguments for approaches other than that in a
160 policy statement to a component of the agency that is likely to engage in open and
161 productive dialogue with persons who make such arguments, such as a program
162 office that is accustomed to dealing cooperatively with regulated parties and
163 regulatory beneficiaries.
- 164 c. in cases where frontline officials are authorized to take an approach different from
165 that in a policy statement but refuse to do so, directing appeals of such a refusal to
166 a higher-level official who is not the direct superior of those frontline officials.
- 167 d. investing in training and monitoring of frontline personnel to ensure that they (i)
168 understand the difference between binding rules and policy statements; (ii) treat
169 parties' ideas for lawful approaches different from that in a policy statement in an
170 open and welcoming manner; and (iii) understand that approaches other than that
171 in a policy statement, if undertaken according to the proper internal agency
172 procedures for approval and justification, are appropriate and will not have
173 adverse employment consequences for them.
- 174 e. facilitating opportunities for members of the public, including through
175 intermediaries such as ombudspersons or associations, to propose or support
176 approaches different from those in a policy statement and to provide feedback to
177 the agency on whether its officials are giving reasonable consideration to such
178 proposals.



Priorities in Deciding When to Invest in Promoting Flexibility

- 179 8. Because measures to promote flexibility (including those listed in Recommendation 7)
180 may take up agency resources, it will be necessary to set priorities for which policy
181 statements are most in need of such measures. In deciding when to take such measures
182 the agency should consider the following, bearing in mind that these considerations will
183 not always point in the same direction:
- 184 a. an agency should assign a higher priority to a policy statement the greater the
185 statement's impact is likely to be on the interests of regulated parties and
186 regulatory beneficiaries, either because regulated parties have strong incentives to
187 comply with the statement or because the statement practically reduces the
188 stringency of the regulatory scheme compared to the status quo.
 - 189 b. An agency should assign a lower priority to promoting flexibility in the use of a
190 policy statement insofar as the statement's value to the agency and to stakeholders
191 lies primarily in the fact that it is helpful to have consistency for consistency's
192 sake, independent of the statement's substantive content.

Public Participation in Adoption or Modification of Policy Statements

- 193 9. When an agency is contemplating adopting or modifying a policy statement, it should
194 consider whether to solicit public participation, and, if so, what kind, before adopting the
195 statement. Options for public participation range from outreach to selected stakeholder
196 representatives to stakeholder meetings or webinars to advisory committee proceedings to
197 invitation for written input from the public with or without a response. In deciding how
198 to proceed, the agency should consider:
- 199 a. existing agency procedures for the adoption of policy statements, including any
200 procedures adopted in response to the Office of Management and Budget's Final
201 Bulletin for Agency Good Guidance Practices (2007);
 - 202 b. the factors listed in Recommendation 8;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 203 c. the likely increase in useful information available to the agency from broadening
204 participation, keeping in mind that non-regulated parties may offer different
205 information than regulated parties and that non-regulated parties will often have
206 no opportunity to provide input regarding policy statements other than at the time
207 of adoption;
- 208 d. the likely increase in policy acceptance from broadening participation, keeping in
209 mind that non-regulated parties will often have no opportunity to provide input
210 regarding policy statements other than at the time of adoption, and that policy
211 acceptance may be less likely if the agency is not responsive to stakeholder input;
- 212 e. whether the agency is likely to learn more useful information by having a specific
213 agency proposal as a focal point for discussion, or instead having a more free-
214 ranging and less formal discussion; and
- 215 f. the practicability of broader forms of participation, including invitation for written
216 input from the public, keeping in mind that broader participation may slow the
217 adoption of policy statements and may diminish resources for other agency tasks,
218 including the provision of policy statements on other matters.
- 219 10. Where an agency does not provide for public participation before adopting or modifying
220 a policy statement, it should consider offering an opportunity for public participation
221 after adoption. As with Recommendation 9, options for public participation range from
222 outreach to selected stakeholder representatives to stakeholder meetings or webinars to
223 advisory committee proceedings to invitation for written input from the public with or
224 without a response.
- 225 11. An agency may make decisions about the appropriate level of public participation
226 document-by-document or by assigning certain participatory procedures to general
227 categories of documents. If an agency opts for the latter, it should consider whether
228 resource limitations may cause some documents, if subject to pre-adoption participatory
229 procedures, to remain in draft for substantial periods of time. If that is the case, agencies
230 should either (a) make clear to stakeholders which draft policy statements, if any, should
231 be understood to reflect current agency thinking; or (b) provide in each draft policy



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

232 statement that, at a certain time after publication, the document will automatically either
233 be adopted or withdrawn.