



## **Administrative Conference Recommendation 2017-5**

### **Agency Guidance Through Policy Statements**

**Adopted December 14, 2017**

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

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

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<sup>1</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 553(b)(A).

<sup>4</sup> Admin. Conf. of the U.S., 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 specifically in this preamble,



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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 on the public, and it advises agencies to 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.<sup>5</sup> The Conference has now decided, 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.<sup>6</sup>

Policy statements are important instruments of administration across numerous agencies, and are 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 and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law.<sup>7</sup> Compared with legislative rules, policy statements are generally better for dealing with conditions of uncertainty and often for making agency policy accessible, especially 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, take other action within its statutory mission. In pursuit of benefits such as these, agencies may use policy

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include Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 16, 2015); and Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014).

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992).

<sup>6</sup> The Conference commissioned a study that resulted in interviews with 135 individuals across agencies, industry, and non-governmental organizations (NGOs), which are the basis for this Recommendation. See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-final-report>.

<sup>7</sup> See *id.* at 28–30; see also Admin. Conf. of the U.S., 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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statements to bind some agency employees to the approach of the policy statement,<sup>8</sup> so long as such employees are not bound in a manner that forecloses a fair opportunity for the public or employee to argue for approaches different from those in the policy statement or seek modification of the policy statement.<sup>9</sup>

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 legally nonbinding status. Recommendation 92-2 defined this problem in terms of an agency's *intent* to use policy statements to bind the public, which may imply that the problem is one of agency bad faith. While agency intent to make a policy statement binding, if shown, would deserve criticism and correction, a focus on intent is often inadequate for understanding and addressing the phenomenon of binding policy statements. This Recommendation supplements Recommendation 92-2 by addressing other reasons why members of the public may feel bound by what they perceive as coercive guidance.

There are several kinds of reasons why 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. Specifically, modern regulatory schemes often have structural features that tend 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 statutes or regulations (a) require a regulated party to obtain prior approval from an agency to obtain essential permissions or benefits; (b) subject a regulated party to repeated agency evaluation under a legal regime with which perfect compliance is practically unachievable, incentivizing the

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<sup>8</sup> 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.”).

<sup>9</sup> See Final Bulletin for Agency Good Guidance Practices, *supra* note 8, 72 Fed. Reg. at 3440.



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party to cultivate a reputation with the agency as a good-faith actor by following even non-binding guidance; or (c) subject 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. Meanwhile, 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. Similarly, in its focus on regulatory beneficiaries and regulated parties, an agency policy statement may induce conduct harmful to other interested parties.

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 though these reasons are more within an agency's or its officials' control than those discussed above, this lack of flexibility may often stem from causes other than agency intent. Officials who behave inflexibly may be seeking to balance the importance of being flexible against stakeholder demands to honor other, competing 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 cooperate with the agency; and may open the agency to accusations of favoritism from non-governmental organizations (NGOs), the media, and congressional overseers.

In principle, one way an agency might reconcile these understandable pressures would be to prepare and disseminate written reasons when it approves an approach different from that in a policy statement, thereby 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 agencies might still find inflexibility



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the easier course and adopt it by default, because reason-giving requires agency resources.<sup>10</sup> Besides this, there are additional organizational reasons for inflexibility: some agency offices, by reason of their usual day-to-day business, are socialized to be less receptive to stakeholder requests than others; 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. That said, there are important steps that agency officials can take to mitigate these legislative-rule-like effects of policy statements by stating that they are not binding<sup>11</sup> 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 paragraphs 4 through 8 of this Recommendation. 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 paragraphs 9 through 11 of this Recommendation.

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.

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<sup>10</sup> Another difficulty with giving reasons is a potential tension 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.

<sup>11</sup> See, e.g., *About Guidance Documents*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/RegulatoryInformation/Guidances/default.htm#about> (“Guidance documents represent FDA’s current thinking on a topic. They do not create or confer any rights for or on any person and do not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations.”).



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In addition, public participation at the time of a policy statement's adoption may be of value to the agency, regulated parties, regulatory beneficiaries, and other interested parties. Such public participation may be especially valuable to parties that lack the opportunity and resources to participate in the individual adjudicatory or enforcement proceedings to which a policy may apply.

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. Given the complexity of these factors and their tendency to vary with context, it is appropriate to make decisions about whether or how to seek public participation on policy statements on a document-by-document or agency-by-agency basis.<sup>12</sup> A government-wide requirement for inviting written input from the public on policy statements is not recommended, unless confined to the most extraordinary documents.<sup>13</sup> 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.

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<sup>12</sup> 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.

<sup>13</sup> 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 (citing Final Bulletin for Agency Good Guidance Practices, *supra* note 8, 72 Fed. Reg. at 3439–40).



## 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 a policy statement or for modification or rescission of the policy statement.
3. Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct 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, a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement. Agency review should be available in cases in which frontline officials fail to follow policy statements in conformity with which they are properly directed to act.

### **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. The policy statement 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 an existing 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.



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6. The agency should instruct all employees engaged in an 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 any employee is directed, as an internal agency management matter, to act in conformity with a policy statement, that employee 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, 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 to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected stakeholders, to officials likely to hear the argument, and to members of the public, subject to existing protections for 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 decline to do so, directing appeals of such a refusal to a higher-level official who is not the direct superior of those frontline officials.



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- d. Investing in training and monitoring of frontline personnel to ensure that they (i) understand the difference between legislative rules and policy statements; (ii) treat parties' ideas for lawful approaches different from those 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. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support 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 proposals.

### **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, regulatory beneficiaries, and other interested parties, 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. 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 primarily in the fact that it is helpful to have consistency independent of the statement's substantive content.



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### **Public Participation in Adoption or Modification 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 statement. Options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, and 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 (regulatory beneficiaries and other interested 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.
  - 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.



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10. If an agency does not provide for public participation before adopting or modifying a policy statement, it should consider offering an opportunity for public participation after adoption. As with Recommendation 9, options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response.
11. An agency may make decisions about the appropriate level of public participation document-by-document or by assigning certain procedures for public participation to general categories of documents. If an agency opts for the latter, it should consider whether resource limitations may cause some documents, if subject to pre-adoption procedures for public participation, to remain in draft for substantial periods of time. If that is the case, agencies 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.
12. All written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found. Written policy statements should also indicate the nature of the reliance that may be placed on them and the opportunities for reconsideration or modification of them or the taking of different approaches.



## Separate Statement of Senior Fellow Ronald M. Levin

The accompanying Recommendation observes that “[t]his Recommendation . . . concerns only policy statements, not interpretive rules; nevertheless, many of the recommendations herein regarding flexible use of policy statements may also be helpful with respect to agencies’ use of interpretive rules.” This remark is well taken as far as it goes, but in another respect it is notably cautious. Other governmental bodies that have adopted procedures or guidelines regarding the same general subject during the past two decades have each used only one framework to address all guidance – that is, both policy statements and interpretive rules.<sup>1</sup>

In adopting the Recommendation, the Assembly of the Administrative Conference was generally sympathetic to the stance taken by the groups just mentioned, but it concluded that it did not have enough information to take a firm stand. The research for its project had focused primarily on policy statements. Thus, the Assembly opted for a relatively narrow recommendation for the present, but it also adopted a “sense of the Conference” resolution envisioning a follow-up study that would lay the groundwork for a subsequent recommendation on interpretive rules. The Assembly’s caution is understandable, but I will use this separate statement to emphasize that its ancillary resolution has pointed in the right direction.

The basic problem that Recommendation 2017-5 seeks to redress is that regulated persons sometimes feel that they have no choice other than to comply with a policy statement’s position, even if they disagree with it. The Recommendation seeks to mitigate that problem by suggesting ways in which an agency can give those persons a fair opportunity to ask the agency to reconsider and perhaps change its position. At the same time, the Recommendation’s

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<sup>1</sup> See, e.g., Prohibition on Improper Guidance Documents, (DOJ, Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>; Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (OMB, Jan. 25, 2007); FDA Good Guidance Practices, 21 C.F.R. § 10.115 (2017) (issued Sept. 19, 2000).



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solutions are made “subject to considerations of practicability and resource limitations,” so as to avoid deterring agencies from giving advice that the public desires.

Essentially the same analysis can also be applied to interpretive rules: The relative proportion of law and policy in the document has little or nothing to do with either the agency’s interest in giving advice or the private party’s interest in being able to induce the agency to reconsider it. Moreover, in practice, law and policy blend together in many guidance document; thus, procedures that speak to one and not the other are bound to prove somewhat artificial.

Why, then, wouldn’t one urge agencies to apply the same principles to interpretive rules? It may be thought that, in contrast to its handling of policy statements, an agency will naturally treat an interpretive rule as binding, because it concerns binding law. But that is a non-sequitur. An agency should, of course, be free to state and act on its *position* that a statute or regulation, as construed in an interpretive rule, is binding. However, the very purpose of issuing such a rule is to specify which of various imaginable readings of the statute or regulation the agency considers correct. Persons who may believe that a different interpretation is correct should have what Recommendation 2017-5 calls a “fair opportunity” to try to persuade the agency to adopt their preferred view – just as the Recommendation contemplates with respect to policy statements. For an agency to assert that, because the underlying text is binding, the interpretation that the agency happens to have chosen must also be binding is to beg the question that ought to be the subject of that dialogue.

The Assembly was mindful that opinions have differed on the question of whether, for procedural purposes, interpretive rules can be binding in a sense that policy statements cannot be. As just suggested, I myself believe the answer is no, but some agency lawyers think otherwise. Ultimately, however, that divergence in opinion should not prevent the Conference from moving forward with a recommendation in the next phase of its inquiry. As with most Conference pronouncements, the principal goal should be to articulate recommended practices, not to opine about the law.



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I hope that a project of the kind contemplated by the sense of the Conference resolution will be pursued in the near future. I trust that it will culminate in broad recognition that most, if not all, of the advice in the present Recommendation can and should be applied to interpretive rules as well.