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Legal Sidebar

Agency Use of Guidance Documents

April 19, 2021

Agencies often issue statements that, unlike legislative rules, do not carry the force of law. These statements include interpretative rules, which advise the public of an agency's interpretation of the statutes and regulations it administers; and general statements of policy, which advise the public about an agency's intended use of its discretionary authority. Interpretive rules and policy statements are collectively known as "guidance documents." Although guidance is a common tool for agencies to advise the public, critics have argued that it allows agencies to bind the regulated public without adequate accountability. Additionally, courts have struggled with maintaining a consistent framework to apply in reviewing guidance. This Sidebar provides a brief overview of guidance documents, and discusses recent efforts by presidential administrations and Congress to reform how agencies issue guidance.

What Is a Guidance Document?

Guidance comprises two categories of documents identified in the Administrative Procedure Act (APA): interpretative (or interpretive) rules and general statements of policy. Interpretive rules are statements of general applicability and future effect that set forth an agency's interpretation of a statute or regulation. General statements of policy set forth an agency's policy on a statutory, regulatory, or technical issue—for example, the agency's intended posture on enforcement priorities. (For further information on policy statements, see CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey.) Within these two general categories, guidance takes a variety of forms, such as explanations of how an agency intends to regulate or use its enforcement discretion; interpretations of legislative rules, including clarifications of technical details; compliance guides; statements that are applicable to a single or small group of regulated entities; and internal training materials.

Guidance differs in two key ways from legislative rules. First, legislative rules have legal effect and are promulgated pursuant to authority delegated by Congress. Guidance documents generally are not considered binding on agencies or regulated parties, though the two different types of guidance might be treated differently in this respect. While there is widespread agreement that policy statements are nonbinding, there is less uniformity as to whether interpretive rules may be binding or must preserve an agency's discretion to act on a case-by-case basis.

Second, guidance is subject to fewer procedural requirements than legislative rules. Legislative rules typically must undergo the informal rulemaking process set forth in the APA, which generally requires that agencies publish a notice of proposed rulemaking in the Federal Register and allow members of the

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LSB10591

public an opportunity to submit comments on the proposed rule. Final rules generally must be published in the Federal Register at least 30 days before becoming effective, and are then subject to judicial review immediately after taking effect. By contrast, the APA exempts guidance from the notice-and-comment and delayed effective date requirements. Additionally, only guidance that qualifies as a statement of *general* policy or an interpretation of *general* applicability must be published in the Federal Register. Other guidance must be publicly available, but does not need to be published in the Federal Register. Other procedural requirements for legislative rules also do not apply to guidance, including requirements in the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

The use of guidance provides some flexibility for agencies, but with a trade-off. Agencies can issue and revoke guidance more quickly, using fewer agency resources and with less public involvement as compared to the issuance and revocation of legislative rules. But the practice can raise questions about the legal effect of an agency's action and whether additional procedures may be necessary to take that action.

Judicial Review of Guidance

Unlike legislative rules, guidance is not necessarily reviewable by a court immediately after an agency issues it. Courts have sometimes held that a policy statement is unreviewable upon issuance because it is not yet ripe for review, and that it may only be challenged after an agency implements or enforces the policy described in the document. At times, however, courts have held that policy statements may be effectively binding and immediately reviewable. Courts have suggested that interpretive rules may more frequently be subject to pre-enforcement judicial review, though they have not uniformly done so.

Courts have not uniformly delineated the circumstances under which they may review guidance, but some principles are evident. First, courts may review only agency actions that are "final." To determine whether a guidance document constitutes final agency action, courts apply the two-prong test described in *Bennett v. Spear*: an action must "mark the 'consummation' of the agency's decisionmaking process," and be one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

Second, litigation regarding guidance often turns on whether a purportedly nonbinding guidance document is actually a binding legislative rule (which must therefore be promulgated pursuant to notice and comment). Guidance may be reviewable even if it is not a legislative rule, however. Although courts have sometimes combined the finality test and the determination of whether an agency statement is a legislative rule, the U.S. Court of Appeals for the D.C. Circuit has affirmed that the inquiries require "related but separate" analyses. The court explained that allowing for the review of certain non-legislative rules "safeguards against agencies evading both judicial review and notice and comment."

In deciding whether guidance is reviewable, courts have considered factors such as the consequences of the guidance, including whether it confers rights or imposes legal obligations beyond those in existing statutes or regulations, and the agency's characterization and application of the guidance. Courts have also evaluated whether interpretive rules merely interpret or clarify preexisting requirements, or whether they effect a substantive change in existing law or policy. For example, the D.C. Circuit held that an Environmental Protection Agency (EPA) guidance document that instructed agency staff to recommend limitations on mining projects in Clean Water Act permits was not reviewable because it did not compel regulated parties to do anything, state permitting authorities could ignore it, it could not serve as the basis of an enforcement action, and EPA stated throughout the guidance that it did not impose binding requirements or prohibitions. By contrast, the D.C. Circuit held that EPA guidance regarding monitoring requirements under the Clean Air Act was reviewable notwithstanding boilerplate language regarding its nonbinding status, because it required state permitting authorities to address deficiencies in existing monitoring regulations and replace them through permit terms and conditions, and thus also had legal consequences for companies that were required to obtain permits.

Commentators have highlighted the problem of distinguishing between guidance and legislative rules, particularly in the context of judicial review. In 2014, describing that inquiry as "quite difficult and confused," then-Judge Kavanaugh suggested that "[a]n important continuing project for the Executive Branch, the courts, the administrative law bar, and the legal academy—and perhaps for Congress—will be" to provide "clarity and predictability" in the law surrounding guidance.

Where judicial review is available, guidance is subject to the standard set forth in the APA, which directs courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law." The nature of a document will determine how much deference the agency receives. While courts often defer to agencies' statutory interpretations, especially those in legislative rules, the Supreme Court has not addressed whether guidance that interprets statutes is entitled to deference under the *Chevron* doctrine, which generally instructs courts to defer to an agency's reasonable interpretation of an ambiguous statute it administers. Although *Chevron* deference may be available when an agency has not undertaken notice-and-comment rulemaking, reviewing courts typically (but not always) refuse to extend such deference to guidance documents. Instead, guidance may receive a less favorable level of deference under the *Skidmore* doctrine. And if a guidance document interprets a statute the issuing agency is not charged by Congress to administer (for example, an appropriations statute), a reviewing court may provide *no* deference.

To the extent guidance interprets "genuinely ambiguous" regulations, a reviewing court may sometimes defer to the agency's reasonable interpretation under the *Auer* or *Seminole Rock* doctrine. As the Supreme Court clarified in *Kisor v. Wilkie*, in order to receive *Auer* deference, the interpretation must meet certain criteria, including that it must represent the agency's "authoritative" or "official position"; while an agency head need not have issued or approved the interpretation, it must have "at least [emanated] from those actors, using those vehicles, understood to make authoritative policy in the relevant context." Although *Kisor* leaves open the possibility that guidance could be entitled to *Auer* deference, courts have appeared not to apply the *Auer* framework to guidance, or at least have not done so expressly, since the Supreme Court's ruling in *Kisor*. Regardless of whether an agency considers its action to be a legislative rule, the *Kisor* test appears to strengthen the distinction between actions that are authoritative and reviewable, albeit under a deferential standard, and actions from lower-level agency employees that are not entitled to deference (if they are reviewable at all).

Executive Branch Guidance Reform Efforts

Some commentators have expressed concern that agencies treat their own guidance as binding, thereby coercing regulated parties to adhere to it. According to this view, guidance allows agencies to circumvent notice and comment and avoid congressional attention. Alternatively, some have suggested that, even if an agency does not intend for its guidance to be binding, regulated parties may face pressure to follow it; the problem thus is not always one of "bureaucratic bad faith" but instead an "institutional problem that calls for institutional-reform response." Others have argued that the concerns about guidance have been overstated, and have presented empirical research to support their contention that agencies do not use guidance to avoid scrutiny. Some scholars have emphasized the value of allowing agencies to create "internal administrative law" more quickly and in a less resource-intensive manner. Guidance can thus provide clarity to regulated parties about an agency's intended approach while preserving the agency's flexibility and ability to undertake other regulatory activities.

In 2017, the Administrative Conference of the United States (ACUS) issued a set of recommendations aimed at ensuring that policy statements do not bind the public, promoting flexibility for approaches different from those outlined in a policy statement, and providing avenues for public participation before and after an agency adopts or modifies a policy statement. Some have suggested that agencies should undertake additional procedural steps, such as notice and comment, before issuing guidance documents;

for example, one commentator has suggested an approach of "principled flexibility," whereby agencies provide a written explanation each time they depart from their guidance. Others have warned that doing so would further burden the regulatory process and could push agencies to favor informal adjudication as opposed to rulemaking, which may result in less transparency and regulatory certainty.

Several presidential administrations have limited the use of guidance by aiming to increase public access to guidance and prevent the effective coercion of regulated parties. In 2007, President George W. Bush issued Executive Order 13422 to define and create a review process for "significant" guidance, which was defined as guidance that may be anticipated to, among other things, have an economic effect above a specified threshold, interfere with actions taken or planned by another agency, or alter the budgetary impact of government programs or the rights or obligations of their beneficiaries. The executive order also expanded the centralized review authority of the Office of Information and Regulatory Affairs, a component of the Office of Management and Budget (OMB), to include significant guidance documents.

OMB issued the Final Bulletin for Agency Good Guidance Practices (Good Guidance Bulletin) to accompany Executive Order 13422. The Good Guidance Bulletin established policies and procedures for agencies to apply in developing, issuing, and using guidance. Among other things, it directed agencies to ensure the approval of significant guidance by appropriate agency officials, to include specific standard elements in guidance, to avoid using mandatory language outside the context of describing a statutory or regulatory requirement, and to provide avenues for public access to and feedback on significant guidance documents (including notice and comment on economically significant guidance).

President Barack Obama revoked Executive Order 13422, but not the Good Guidance Bulletin. In 2019, President Donald Trump issued Executive Order 13891, which reinstated similar requirements and directed each agency to (1) establish a publicly available database of its guidance; (2) review its guidance documents and rescind those that it determines should not be in effect; and (3) finalize rules establishing procedures for issuing guidance, including procedures for the public to petition for withdrawal or modification of a guidance document. For significant guidance documents, agencies were directed to require (1) notice-and-comment procedures except for good cause; (2) approval by the agency head or a component head appointed by the President; (3) centralized OIRA review; and (4) compliance with the applicable requirements for regulations or rules set forth in several additional executive orders. A follow-up OMB memorandum provided further instruction and identified the types of agency documents that were included in or excluded from the executive order's definition of "guidance". Agencies (such as the Department of Commerce, the Department of Labor, and EPA) then implemented Executive Order 13891 by issuing their own internal rules on guidance and publishing webpages with links to their guidance documents. The Department of Justice also limited its attorneys' ability to rely on agency guidance documents in litigation.

On January 20, 2021, President Biden issued Executive Order 13992, which aimed to revoke "harmful policies and directives that threaten to frustrate the Federal Government's ability" to confront challenges, and to empower agencies "to use appropriate regulatory tools" to address national priorities. President Biden's executive order revoked Executive Order 13891, among other things, and also directed OMB and agency heads to "rescind any orders, rules, regulations, guidelines, or policies" implementing the prior executive order. President Biden also issued a memorandum titled "Modernizing Regulatory Review," which instructed the Director of OMB to begin a process to create a set of recommendations for improving and modernizing regulatory review, including by identifying reforms that will "determine an appropriate approach with respect to the review of guidance documents."

Agencies have begun rescinding their prior internal rules on guidance. For example, the Department of Labor concluded that its prior rule "deprives the Department and subordinate agencies of necessary flexibility in determining when and how best to issue public guidance based on particular facts and circumstances, and unduly restricts the Department's ability to provide timely guidance on which the public can confidently rely." Agencies that implemented President Trump's executive order through

notice-and-comment rulemaking may undertake notice and comment before rescinding their earlier rules, as the Department of Energy has recently done.

Considerations for Congress

Guidance is recognized by statute in the APA, and Congress has legislative options to address the debate regarding its use. Congress may impose procedural requirements with which agencies must comply when issuing guidance. Bills in the 116th and 117th (S. 628 and H.R. 1605) Congresses have proposed to require agencies to publish guidance on their websites. The Guidance Clarity Act of 2019 and 2020 proposed to require agencies to include in certain categories of guidance a statement that the guidance does not have the force and effect of law, and to state that noncompliance does not conclusively establish a violation of applicable law. Other proposed legislation would have required agencies to follow notice-and-comment procedures when issuing guidance where "feasible or appropriate." Some agency-specific procedural limitations have been enacted into law, such as Section 5203 of the Fixing America's Surface Transportation Act, which directed the Federal Motor Carrier Safety Administration to publish, periodically review and reissue, and (where practicable) incorporate its guidance into regulations.

Congress has, on occasion, also taken action with respect to the substance of particular, notable agency guidance actions in the same way that it might legislatively overturn, alter, or limit the issuance of legislative rules. For example, Congress may enact legislation to rescind agency guidance, and can use its power of the purse to prevent operation of guidance through exercise of its authority over appropriations. Congress also may use the expedited procedures provided by the Congressional Review Act (CRA) to overturn agency guidance. The CRA adopts the APA's definition of "rule", which is broad enough to include at least some guidance documents. In 2019, OMB issued a memo stating that the Congressional Review Act applies to guidance documents. Prior to the issuance of that memo, Members of Congress introduced several bills (such as H.R. 5377 in 2016, and H.R. 462 in 2017) to explicitly include within the CRA's ambit guidance documents with an anticipated annual economic impact of $100 million or more.

Congress may direct agencies to issue or follow their own guidance. For example, the FAA Extension, Safety, and Security Act of 2016 directed the Federal Aviation Administration to publish guidance for applications for the use of drones in emergency response activities. The FDA Modernization Act instructed the Secretary of the Food and Drug Administration to ensure that employees do not deviate from the agency's guidance "without appropriate justification and supervisory concurrence." A bill before the 117th Congress would legislatively codify guidance, thereby enacting it into law.

Author Information

Kate R. Bowers
Legislative Attorney

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