

Before the Office of Management and Budget
Proposed Bulletin for Good Guidance Practice

Comments of the Coalition for Effective Environmental Information

The Office of Management and Budget (OMB) has issued a proposed Bulletin for Good Guidance Practices for public comment. This Bulletin, issued to advance a variety of legal and policy mandates of the federal government, is intended to improve the quality and transparency of the practices agencies employ to issue guidance documents.

The Coalition for Effective Environmental Information (CEEI) is a group of leading corporation and business groups interested in the policies guiding how agencies collect, manage, use and disseminate to the public information about health and environmental matters. CEEI has a particular focus on promoting “information stewardship” – the obligation of agencies to present important information about health and environmental matters in an accurate, balanced and understandable way. For this reason, CEEI has been actively involved in broad-based federal information quality initiatives, such as implementation of the Information Quality Act.

While there are several aspects of the Bulletin that are of interest to the members of CEEI, these comments will focus on the “Standard Elements” of a guidance document that are set forth in Section II of the Bulletin. This section is a particularly important component of the Bulletin because it directly addresses a core problem with many agency guidance documents – public confusion about the agency’s overall purpose in issuing a guidance document and the specific legal effect of such documents.

Agencies often find their guidance documents embroiled in controversy. Many disagreements about specific guidance documents are rooted in misunderstandings about what role the document may play in the ongoing implementation of regulatory programs. Agencies could alleviate much of this misunderstanding if they would be clearer about the context and intent of each guidance document as a standard practice in their operations.

To clarify the context and intent of a guidance document, agencies should address the following topics as “Standard Elements” of each such document:

1. Relationship to statutes and regulations

The agency should identify the particular portions of its statutes, programs and regulations for which the guidance document is relevant. To the extent the document is part of a specific docket or other administrative file for an agency action, this information should be provided.

In some cases, this relationship will be fairly clear to the agency and the public. In other cases, the potential relevance of a guidance document is not clear. Specifying the statutory context for the guidance helps to ground the guidance document in particular programs, avoiding implications that the guidance is relevant to other programs.

2. Identification of Author

CEEI supports a requirement that agencies include the guidance document's author, by agency and office, in the document. To the extent a guidance document represents a collaboration among differing agencies or offices within an agency, all such parties should be identified.

Identification of a document's author, particularly the office within an agency, is useful contextual information that helps clarify the legal significance of a guidance document. For example, a guidance document issued by the enforcement office within an agency is likely to carry a different intent than a document issued by a scientific research office within an agency. In a similar vein, a listing of the agencies and offices collaborating on a guidance document clarifies what parts of the government are supporting the content of the document. This can be particularly important when the document has multiple uses or when statutes call for collaboration among governmental agencies on particular decisions.

3. Date and Prior Actions

A guidance document should be placed in a temporal context. CEEI supports OMB's requirement that the date of the guidance document be provided. The date should be specified at least by month and year (and preferably by specific date.) CEEI also supports OMB's requirement that the agency identify any prior guidance document that the current document amends, amplifies or supplements.

This is important information that has often been missing from broadly published guidance documents, particularly those that are posted on-line. In a regulatory context, the public will need to know when an agency first articulated its view of a legal requirement. Similarly, agencies need to clarify when they have modified or revoked a prior interpretation of law. In rapidly evolving regulatory programs, this information is essential to define compliance responsibilities (and therefore the reasonableness of enforcement) over time.

The importance of this kind of contextual information has increased as more guidance documents (e.g., fact sheets, question and answer sites) are created, stored and publicly disseminated on-line. Agencies do not always retain “old versions” of such electronic guidance documents, either in hard copy or electronic form. Thus the pedigree of a particular regulatory issue can be hard to reconstruct in the world of electronic records.

This is ironic because the electronic medium is particularly adaptable to the creation of living archives on guidance documents. As part of the “metadata” for on-line guidance documents, agencies could and should provide public access to the prior versions, dates of modification, authors and other information for the on-line version of a guidance document.

4. Specific Effect on Prior Guidance

As OMB has proposed, a guidance document should indicate whether it is addressing an issue of first impression or is modifying a previous statement on an issue. The agency should state clearly whether a new guidance document is revoking or retaining in place a previous related statement of position. To the extent there is any previous guidance that contradicts a position taken in the new guidance, the existence of this contradiction should be identified and the position of the agency going forward should be explained.

The purpose of this provision is to make sure that agencies reconcile prior inconsistent guidance whenever that situation arises. In some regulatory programs, agencies have sometimes maintained contradictory interpretations of the same provision, usually issued by differing offices of the same agency, for long periods of time. Such a situation only breeds confusion and lack of credibility for the program. Good guidance practices should reflect a policy of “speaking with one voice.” One way to implement this policy is an obligation to address how any new guidance document affects prior agency statements on the same issues.

5. Relationship to Future Actions

An agency should provide an explanation about how a guidance document could be changed over time. This is particularly important if the document is described as a “draft” or “interim” policy statement. The document should outline, to the extent possible, the future procedural steps that the agency intends to take to produce a “final” version of any draft or interim guidance document.

As indicated in other parts of these comments, agencies should be particularly vigilant about explaining the context and intent of “draft” documents. In the absence of a clear explanation, such documents invite confusion and misunderstanding. Making clear how a “draft” or “interim” guidance document is related to future actions by an agency, including the procedural steps the agency will take to complete a “final” version of the guidance document, is valuable contextual information that clarifies the effective life and intent of a current guidance document.

6. Name and Public Access Points

The document should include an official title, as well as any identifying document numbers or docket indicators that are typically used in the agency. The document should also provide any common names (e.g., the “green book”) that have come to be associated with the document in common practice. The document should also identify places where the document can be obtained, either as a hard copy or electronic document.

7. Topic Addressed

The specific regulatory, policy or technical issues that are within the scope of the guidance should be identified. If the agency intends to address a concept, term or common issue that arises in different part of the same program or in differing programs, this broader intent should be clearly explained.

8. Legal Effect

The draft Bulletin, at Section II.2.vii, states that an agency should not use mandatory language in a guidance document, unless it is describing a statutory or regulatory requirement. While this directive makes sense, it should be included as part of a broader mandate on agencies to address explicitly the legal effect of a guidance document.

The most important point to emphasize in this regard is that a guidance document cannot impose a legally binding requirement on the public. Legal obligations are created by statutes or by regulations that have been issued under the Administrative Procedure Act’s (APA) provisions applicable to “legislative” or “substantive” rules. By its nature, a guidance document does not have a legal effect of this nature.

Agencies can, however, issue interpretative or procedural rules, as well as statements of policy, that guide implementation of their programs. These actions cannot create binding obligations on the public, although they can define the positions that agency staff will take in proceedings before the agency or in enforcement actions. Some interpretative or procedural rules or statements of policy appear in guidance documents. While such actions are not legally binding, they can have practical effects on the public.

It is essential, then, for agencies to state explicitly the intended legal effect of a guidance document. As part of that statement, the agency must make it clear that the guidance document itself does not create a legal obligation. To the extent the document interprets a pre-existing statutory or regulatory requirement, it should also recognize that the opinion of the agency can be challenged in judicial proceedings. More broadly, the agency should explain the guidance document’s legal intent in terms of the actions allowed under the APA. This obligation includes clarifying when the guidance document is simply a technical resource document that is not intended to interpret law or set policy.

Providing this type of clarity is particularly important when agencies issue documents as “draft” guidance. Depending on the agency and program, draft guidance can remain in

circulation and use for many years. Programs may eventually adopt such draft documents as common practice and begin to treat them as legally binding on field offices and regulated parties. This common behavioral progression, which has been criticized by courts and administrative law experts, will be less likely to occur if agencies explain, at the outset, the intended legal effect of a guidance document.

9. Effective Date

Agencies should also include in each guidance document an effective date for the guidance provided. An effective date is certainly important when the agency is changing a pre-existing interpretation of law in another agency document. Even when an agency is clarifying prior guidance or addressing a new issue for the first time, the effective date should also be addressed.

In particular, the question that should be considered is whether the position taken in guidance will be applied prospectively only or will be “retroactive” in the sense of defining a pre-existing obligation. Quite often agencies generate guidance documents in response to misunderstandings about the meaning of regulatory requirements. In those situations, agencies should, and often do, explain that such guidance will be applied prospectively and thus will not be used to determine past compliance with an unclear obligation. At a minimum, agencies should clarify its approach to this issue in the guidance document.

10. Use by Implementing Organizations

To further clarify the intended legal effect of a guidance document, agencies should explain the appropriate use of the document by implementing groups in federal, state and local government. In some cases, this may require the issuer of a guidance document to identify uses of the document that are not appropriate, given the document’s intended purpose. This obligation may also necessitate more specific directions to the agency’s field offices about how to align the elements of the guidance with standard operating procedures, administrative directives or other guides to agency operations.

Explicit directions to implementation offices are often essential to assure that the scope and limits of a guidance document are understood and fairly translated into action. As an example, implementing agencies sometimes cite “guidance from Headquarters” as mandating a particular field response on permitting matters or inspections. In some cases, however, the guidance document itself provides greater discretion and flexibility to make case-by-case decisions than is fully recognized by implementation officials. Therefore, a good guidance document should address this question directly to eliminate potential confusion.

11. Comment Opportunity

This Bulletin establishes a strong focus on assuring public engagement and comment on guidance documents, a principle which CEEI endorses. When such comment periods are

offered, agencies should assure that the scope, procedures, deadlines and contact points for providing such comments are explained clearly in the document.

While this may seem self-evident, some agencies simply issue documents in draft form, assuming that this label carries a presumption about a right to comment. Given the frequent use, and sometimes misuse, of the term “draft” in agency document, it is not always clear when an agency is seriously seeking comment on a guidance document. Thus, agencies should clearly state when and how a guidance document will be subject to public comment.

Implementation of the Bulletin

OMB has not offered a public explanation of how it intends to implement the Bulletin. The Bulletin states that its provisions are for the “internal management of the Executive Branch” and do not provide a basis for judicial review. This statement, which is typical of many Executive Branch orders to agencies, places a particular responsibility on OMB to provide a public explanation of how it intends to assure that agencies adopt good guidance practices. By analogy, OMB explained, and received comment on, its approach for implementing its Information Quality Act Guidelines.

In particular, OMB should consider when a guidance document that does not meet the standards of the Bulletin should not be treated as an “official position” of an agency. For example, in the absence of a clear articulation of the legal effect of a guidance document, members of the public should not be expected to guess at the agency’s intent. OMB could address this issue explicitly in the Bulletin or decide that the question of when a guidance document is insufficiently clear to be considered an official position of an agency is a matter for the courts to consider on a case-by-case basis, in consideration of the Bulletin and other factors. This question should, at a minimum, be addressed by OMB in future actions on the Bulletin.

Coalition for Effective Environmental Information

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