December 2007

To: Greg Ogden
From: Ron Levin
Re: Redraft of Proposed MSAPA § 310 (guidance documents)

Per your invitation, following are my suggestions for § 310, the provision on guidance documents in the proposed revision of the Model State Administrative Procedure Act (November 2007 draft). In this redraft, proposed statutory text is in **bold**; proposed language for official comments is in roman type; editorial comments intended purely to facilitate the committee's deliberations are in *italics.* An addendum at the end of the memo explains why I dropped certain provisions of the previous version from this redraft.

SECTION 310. GUIDANCE DOCUMENTS.

This section seeks to encourage an agency to advise the public of its current opinions, approaches, and likely courses of action by using guidance documents (also commonly known as interpretive rules and policy statements). The section also recognizes agencies' need to promulgate such documents for the guidance of both its employees and the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency's opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, "California Underground Regulations," 44 Admin. L. Rev. 43 (1992); Peter L. Strauss, "Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element," 53 Admin. L. Rev. 803 (2001). This section strengthens agencies' ability to fulfill these legitimate objectives by excusing them from having to comply with the full range of rulemaking procedures before they may issue these nonbinding statements. At the same time, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability.

Four states have adopted detailed provisions regulating guidance documents in their administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp. Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This section draws upon those provisions, and also upon requirements and recommendations issued by federal authorities and the American Bar Association.

(a) An agency may issue a guidance document without following the procedures set forth in Sections 304 through 308. Guidance documents do not have the force of law and do not constitute an exercise of an agency's delegated authority, if any, to establish the rights or duties of any person.

Subsection (a) exempts guidance documents from the procedures that are required for

issuance of rules. Many states have recognized the need for this type of exemption in their administrative procedure statutes. These states have defined guidance documents—or interpretive rules and policy statements—differently from rules, and have also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Code § 41-22-3(9)(c) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public"); Colo. Rev. Stat. § 24-4-102(15), 24-4-103(1) (exception for interpretive rules or policy statements "which are not meant to be binding as rules"); AMAX, Inc. v. Grand County Bd. of Equalization, 892 P.2d 409, 417 (Colo. Ct. App. 1994) (assessors' manual is interpretive rule); Ga. Code Ann. § 50-13-4 ("Prior to the adoption, amendment, or repeal of any rule, *other than interpretive rules or general statements of policy*, the agency shall [follow notice-and-comment procedure]") (emphasis added); Mich. Comp. Laws § 24.207(h) (defining "rule" to exclude "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory"); Wyo. Stat. Ann. § 16-3-103 ("Prior to an agency's adoption, amendment or repeal of all rules *other than interpretative rules or statements of general policy*, the agency shall . . .") (emphasis added); In re GP, 679 P.2d 976, 996-97 (Wyo. 1984). See also Michael Asimow, "Guidance Documents in the States: Toward a Safe Harbor," 54 Admin. L. Rev. 631 (2002) (estimating that more than thirty states have relaxed rulemaking requirements for agency guidance documents such as interpretive and policy statements). The federal Administrative Procedure Act draws a similar distinction. See 5 U.S.C. § 553(b)(A) (exempting "interpretative rules [and] general statements of policy" from notice-and-comment procedural requirements).

The second sentence of subsection (a) sets forth the fundamental proposition that a guidance document, in contrast to a rule, lacks the force of law. Many state and federal decisions recognize the distinction. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986); District of Columbia v. Craig, 930 A.2d 946, 968-69 (D.C. 2007); Clonlara v. State Bd. of Educ., 501 N.W.2d 88, 94 (Mich. 1993); Penn. Human Relations Comm'n v. Norristown Area School Dist., 374 A.2d 671, 678 (Pa. 1977).

(b) An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding must afford that person a fair opportunity to contest the legality or wisdom of positions taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.

Subsection (b) requires an agency to allow affected persons to challenge the legality or wisdom of guidance documents when it seeks to rely on such documents to their detriment. In effect, this subsection prohibits an agency from treating guidance documents as though they were rules. Because rules have the force of law (i.e., are binding), an agency need not respond to criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be obliged in any event to adhere to them until such time as they have been lawfully rescinded or invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons seek to contest a position expressed in a guidance document, the agency may not treat the document as determinative of the issues raised. See Recommendation 120C of the American Bar

Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) ("When an agency proposes to apply a nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge the wisdom or legality of the rule [and] not allow the fact that a rule has already been made available to the public to foreclose consideration of [their] positions").

An integral aspect of a fair opportunity to challenge a guidance document is the agency's responsibility to respond reasonably to arguments made against the document. Thus, when affected persons take issue with propositions expressed in a guidance document, the agency "must be prepared to support the policy just as if the [guidance document] had never been issued." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); see Center for Auto Safety v. NHTSA, 452 F.3d 798, 807 (D.C. Cir. 2006); Professionals and Patients for Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995); American Mining Cong. v. MSHA, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

An agency may not, therefore, treat its prior promulgation of a guidance document as a justification for not responding to arguments against the legality or wisdom of the positions expressed in such a document. Flagstaff Broadcasting Found. v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Giant Food Stores, Inc. v. Commonwealth, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); Agency Policy Statements, Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS), 57 Fed. Reg. 30,103 (1992), ¶ II.B. An agency may, however, refer to a guidance document during a subsequent administrative proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the positions expressed in the document. See, e.g., Steeltech, Ltd. v. USEPA, 273 F.3d 652, 655-56 (6th Cir. 2001) (upholding decision of ALJ who "expressly stated that the [guidance document] was not a rule and that she had the discretion to depart from [it], if appropriate," but who adhered to the document upon determining "that the present case does not present circumstances that raise policy issues not accounted for in the [document]"); Panhandle Producers & Royalty Owners Ass'n v. Econ. Reg. Admin., 847 F.2d 1168, 1175 (5th Cir. 1988) (agency "responded fully to each argument made by opponents of the order, without merely relying on the force of the policy statement," but was not "bound to ignore [it] altogether"); American Cyanamid Co. v. State Dep't of Envir. Protection, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that agency had treated a computer model as a rule, because agency afforded opposing party a meaningful opportunity to challenge the model's basis and did not apply the model uniformly in every case). See generally John F. Manning, "Nonlegislative Rules," 72 Geo. Wash. L. Rev. 893, 933-34 (2004); Ronald M. Levin, "Nonlegislative Rules and the Administrative Open Mind," 41 Duke L.J. 1497 (1992). The relevance of a guidance document to subsequent administrative proceedings has been compared with that of the agency's adjudicative procedents. See subsection (d) infra.

What constitutes a fair opportunity to contest a policy statement within an agency will depend on the circumstances. See ACUS Recommendation 92-2, supra, ¶ II.B. ("[A]ffected persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy statement] and suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials," preferably "at or before the time the policy

statement is applied to [them]"). Affected persons' right to a meaningful opportunity to be heard on the issues addressed in guidance documents must be reconciled with the agency's interest in being able to set forth its interpretations and policies for the guidance of agency personnel and the public without undue impediment. An agency may use its rulemaking authority to set forth procedures that it believes will provide affected persons with the requisite opportunity to be heard. To the extent that these procedures survive judicial scrutiny for compliance with the purposes of this subsection (b), the agency will thereafter be able to rely on established practice and precedent in determining what hearing rights to afford to persons who may be affected by its guidance documents. As new fact situations arise, however, courts should be prepared to entertain contentions that procedures that have been upheld in past cases did not, or will not, afford a meaningful opportunity to be heard to some persons who may wish to challenge the legality or wisdom of a particular guidance document.

(c) A guidance document may contain binding instructions to agency staff members, provided that the agency's procedures also afford to affected persons, in compliance with subsection (b), an adequate opportunity to contest positions taken in the document at an appropriate stage in the administrative process.

Subsection (c) permits an agency to issue mandatory instructions to agency staff members, typically those who deal with members of the public at an early stage of the administrative process, provided that affected persons will have a fair opportunity to contest the positions taken in the guidance document at a later stage. See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007), § II(2)(h) (significant guidance documents shall not "contain mandatory language . . . unless . . . the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties"); ACUS Recommendation 92-2, supra, ¶ III (an agency should be able to "mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence"). For example, an agency manual might prescribe requirements that are mandatory for low-level staff, leaving to higher-ranking officials the discretion to depart from the interpretation or policy stated in the manual. The question of what constitutes an adequate opportunity to be heard may vary among agencies or programs. In some programs, centralization of discretionary authority may be a necessary concession to "administrative uniformity or policy coherence"; in other programs, the obligation to proceed through multiple stages of review might be considered so burdensome as to deprive members of the public of a meaningful opportunity to obtain agency consideration of whether the guidance document should apply to their particular situations. The touchstone in every case is whether the opportunity to be heard prescribed by subsection (b) remains realistically available to affected persons.

(d) When an agency proposes to act at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the departure.

Subsection (d) is based on a similar provision in ABA Recommendation No. 120C, supra. It is in accord with general principles of administrative law, under which an agency's failure to

reasonably explain its departure from established policies or interpretations renders its action arbitrary and capricious on judicial review. See § 509(a)(3)(H) [Alternative 2] (court may grant relief against agency action other than a rule if it is "inconsistent with the agency's prior practice or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and rational basis for the inconsistency"); 1981 MSAPA § 5-116(c)(8)(iii) (equivalent provision); Yale-New Haven Hospital v. Leavitt, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been said that a guidance document should constrain subsequent agency action in the same manner that the agency's adjudicative precedents do. See Peter L. Strauss, "The Rulemaking Continuum," 41 Duke L.J. 1463, 1472-73, 1486 (1992) (cited with approval on this point in United States v. Mead Corp., 533 U.S. 218, 232 (2001)); see also Manning, supra, at 934-37.

One purpose of this subsection is to protect the interests of persons who may have reasonably relied on a guidance document. An agency that acts at variance with its past practices may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated persons outweighs the government's interest in applying its new view to those persons. Heckler v. Community Health Servs., 467 U.S. 51, 61 (1984) ("an administrative agency may not apply a new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests"); Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007); Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001); Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a guidance document, the agency's explanation for departing from the position taken in that document should ordinarily include a reasonable justification for the decision to override their reliance interests.

(e) Each agency shall publish all currently operative guidance documents and may file the guidance document with the [publisher].

> *[Possibly the first clause of this section should be limited in some fashion, so that only relatively important guidance documents need be published. One option would be to revise the definition of "guidance documents" to incorporate the same "internal documents" exclusion as already applies to the definition of "rule."]*

(f) Each agency shall maintain an index of all of its currently operative guidance documents, file the index with the [publisher] on or before January 1 of each year, make the index readily available for public inspection, and make available for public inspection the full text of all guidance documents to the extent inspection is permitted by law. Upon request, an agency shall make copies of guidance indexes or guidance documents available without charge; at cost; or, where authorized by law, on payment of a reasonable fee. If any agency does not index a guidance document, the agency may not rely on that guidance document or cite it as precedent against any party to a proceeding, unless that party has actual and timely notice of the guidance document.

The first two sentences of subsection (f) are based directly on Va. Code Ann. § 2.2-4008. Similar provisions have been adopted in Arizona and Washington. See Ariz. Rev. Stat. Ann. §

41-1091; Wash. Rev. Code Ann. § 34.05.230(3)-(4).

The last sentence of the subsection is based on the federal APA. See 5 U.S.C. § 552(a)(2); Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles, see § 509(b), a court may invoke the sanction prescribed in this section without necessarily concluding that the party against whom the document is cited has valid objections to the substance of the document.

The addition of the phrase "where authorized by law" in the second sentence responds to Commissioner Behr's observation that an agency might not have authority to prescribe a fee (August 2007 Plenary Session, Transcript 105). An alternative solution could be to provide the requisite authority in the MSAPA itself.

(g) Any person may petition under section 317 to request an agency (1) to adopt a rule in place of an existing guidance document or (2) to revise or repeal an existing guidance document, or (3) both.

[Note: Section 317 would need a conforming change, so that it could also apply to guidance documents.]

Clause (1) of subsection (g) is based on Wash. Rev. Code Ann. § 34.05.230(2), which provides for a petition "requesting the conversion of interpretive and policy statements into rules." However, it is phrased more generally than the Washington provision, because an agency that receives a rulemaking petition will not necessarily wish to "convert" the existing guidance document into a rule without change. Knowing that it will now be speaking with the force of law, in a format that would be more difficult to revise than a guidance document is, the agency might prefer to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance document that it would replace. In any event, the agency will, as provided in section 317, need to explain any rejection of the petition, whether in whole or in part, and such a rejection will be judicially reviewable to the same extent as other actions taken under that section.

Clause (2) of subsection (g) provides a means by which interested persons can petition an agency to revise or repeal an existing guidance document. The petition would enable them to "engage an agency on the substance of a guidance document. The agency would be obligated to respond in a reasoned way, [a requirement that] would in turn make judicial review of these documents more effective. Petitioning might also prompt agencies to identify more significant and controversial policies earlier, as well as to use a more thorough, participatory process for these policies." Nina A. Mendelson, "Regulatory Beneficiaries and Informal Agency Policymaking," 92 Cornell L. Rev. 397, 439-40 (2007). Denials of these petitions, like denials of petitions for rulemaking, must be explained and are reviewable in court for abuse of discretion.

Addendum

Following is an explanation of the reasons why certain provisions in the November 2007 draft of § 310 have been omitted from this draft.

1. "An agency may not issue a guidance document in place of a rule." [§ 310(a).] This sentence is confusing, because it suggests, probably unintentionally, that an agency may never issue a guidance document under circumstances in which it might have issued a rule on the same subject instead. Presumably the intent of the sentence is to say that an agency may not issue a guidance document that is to be used in the manner in which a rule is used, i.e., as a binding declaration of rights or obligations. So understood, the sentence is unnecessary, because the section elsewhere spells out constraints on an agency's ability to use a guidance document in that way.

2. "A reviewing court may not give deference to a guidance document and shall determine de novo the validity of a guidance document." [§ 310(d)]. An important objection to this provision is that some guidance documents, constituting what are commonly called "policy statements," express an agency's discretionary judgments. If a court were to redecide these matters "de novo," it would be exercising the agency's discretion. Even Professor Anthony, one of the sternest critics of agencies' real or perceived abuses of guidance documents, acknowledges this problem: "De novo review seems to us to be manifestly inappropriate and impractical. It would place the court in the policy-making position of an agency, without the agency's expertise. Especially in a technical area, the court would possess no resources with which to form an independent evaluation of the agency's effort, let alone to form an independent policy of its own devising. Any effort to do so would be unbecoming to the judicial role." Robert A. Anthony & David A. Codevilla, "Pro-Ossification: A Harder Look at Agency Policy Statements," 31 Wake Forest L. Rev. 667, 687-88 (1996). The authors add: "No case has been found in which a court expressly endorsed or applied a de novo standard." *Id.* at 688 n.90.

To be sure, the same problem might not arise in connection with "interpretive rules" as distinguished from "policy statements." However, any attempt to apply a de novo standard to the former and not the latter would require the reviewing court to distinguish in any given case between the two kinds of guidance documents, or at least to distinguish "law" from "discretion." Both of these distinctions are notoriously difficult to draw. Moreover, the suggested "de novo" standard might run into a conceptual problem, because an agency might be judged by one standard of review if it relied on an interpretive rule during an adjudication, but a different standard of review if it simply relied on that same interpretation without mentioning the interpretive rule. In any event, I have suggested in the past that principles of judicial deference to agencies on issues of law are too complex and elusive to be codified in a statute; they should simply be left to case law development. Ronald M. Levin, "Scope of Review Legislation: The Lessons of 1995," 31 Wake Forest L. Rev. 647, 665-66 (1996). (Note that even the lengthy "Alternative 2" in § 509(a) quite properly refrains from attempting to accomplish this feat.) At the August 2007 Plenary Session, some of the commissioners agreed that the deference issue should be left uncodified. Transcript 101 (Winkelman), 104 (Walsh). Finally, even if the committee does decide to address the deference issue, it probably should address it holistically in Article 5, not piecemeal in this section.

3. "A guidance document binds the agency . . .," and a "reviewing court . . . may enforce the guidance document against the agency." [§ 310(c), (d)]. As some commissioners pointed out, this language is inconsistent with the (well-founded) proposition that a guidance document lacks the force of law and is not binding. To hold that the agency is "bound" would necessarily mean that persons who could potentially benefit from persuading the agency to take a different position would also be "bound." Thus, as these commissioners argued, if such a person can show the agency that the guidance document is mistaken, the agency should be free not to follow it. Transcript 92-93 (Thurman), 94 (Stieff), 95 (Takayama), 94-95 (McKay).

The goal of the now-omitted language seems to have been to ensure protection of persons who may have reasonably relied on a guidance document. In the present draft, reliance interests are instead addressed through subsection (d), which provides that when an agency decides not to adhere to the position it has previously taken in a guidance document, it must explain the reasons for that departure. The accompanying comment notes that one aspect of that explanation, in an appropriate case, would be the agency's justification for overriding any justifiable reliance that citizens may have placed on the position articulated in the guidance document.

4. "If any agency does not index a guidance document, the burden of proof shall be upon the agency in any proceeding to establish that a party was not entitled to rely upon the guidance document." [§ 310(f).] The language is perplexing, because a person who *did* rely on a guidance document must necessarily have known about it and thus is in a poor position to complain that it was underpublicized. The more likely victim of an agency's utilization of "secret law" would be the person who did *not* know about it at the relevant time. The revised version of this paragraph now provides a remedy for persons in that situation.