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Strategic or Sincere? Analyzing Agency Use of Guidance Documents

ABSTRACT. This Note examines whether U.S. regulatory agencies frequently use guidance documents to issue policy decisions, avoiding the notice and comment process and other procedures normally required to issue rules. Legal scholars and recent presidential administrations both have debated this issue. This Note uses newly available data to conduct the first large-scale analysis of whether agencies actually abuse guidance. The Note investigates whether agency leaders: (1) issue guidance strategically; (2) use guidance to implement ideological policies; or (3) promulgate guidance on a large scale. The Note reports negative answers to these questions, suggesting that agencies do not frequently use guidance documents to avoid the rulemaking process.

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INTRODUCTION

Scholars and policymakers alike have devoted increasing attention to a seemingly obscure question: do federal agencies improperly issue “guidance documents”¹ in place of legally binding “legislative rules” on a widespread basis?² This attention has been motivated by concern that agencies frequently use guidance documents to avoid procedures³ intended both to facilitate public participation in the regulatory process and to enable the elected branches of government to monitor agencies more easily.⁴ The scope of this loophole is potentially vast. Guidance documents greatly outnumber legislative rules,⁵

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1. This Note uses the definition of the term “guidance document” set forth in the Bush Administration’s executive order on guidance. See Exec. Order No. 13,422, 3 C.F.R. 191, 192 (2007) (defining a guidance document as “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue”). The Office of Management and Budget’s bulletin accompanying Executive Order No. 13,422 provides examples of documents encompassed by this definition:

Guidance documents often come in a variety of formats and names, including interpretive memoranda, policy statements, guidances, manuals, circulars, memoranda, bulletins, advisories, and the like. Guidance documents include, but are not limited to, agency interpretations or policies that relate to: the design, production, manufacturing, control, remediation, testing, analysis or assessment of products and substances, and the processing, content, and evaluation/approval of submissions or applications, as compliance guides. Guidance documents do not include solely scientific research.

- Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007). Other studies of guidance documents have used a similar definition. See, e.g., William R. Andersen, *Informal Agency Advice—Graphing the Critical Analysis*, 54 ADMIN. L. REV. 595, 596 (2002) (noting that agency guidance includes “memos, bulletins, staff manuals, letters”).
2. The term “legislative rule” is defined to include all rules adopted under the Administrative Procedure Act’s (APA) notice and comment process. See 5 U.S.C. § 553 (2006). The use of this term is not intended to assume a position in the debate over whether Congress may delegate legislative authority to agencies. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (considering whether Congress improperly delegated legislative authority to the EPA in the Clean Air Act).
 3. Guidance documents are exempt from executive orders and statutes governing the issuance of legislative rules, the most important of which is the APA’s notice and comment provisions. See 5 U.S.C. § 553.
 4. For a discussion of the compatibility between these goals, see Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).
 5. No systematic analysis of the total volume of guidance documents has been compiled, but case studies strongly suggest that agencies issue significantly more guidance documents

which in turn are approximately ten times more common than enacted legislation.⁶ As a result, agency use of guidance documents is an important issue in administrative law. This Note provides the first large-scale empirical analysis of this issue, probing newly available data to determine whether agencies commonly issue guidance to avoid the notice and comment process.

Both Congress and the President have expressed concern that agencies use guidance to circumvent the rulemaking process. For example, a report from the House Committee on Government Reform notes that guidance documents may allow agencies to avoid procedures that “protect citizens from arbitrary decisions and enable citizens to effectively participate in the process.”⁷ Likewise, the Bush Administration issued an executive order that subjects guidance documents to a standardized review process.⁸ This attempt to exert executive control over agency guidance prompted significant opposition from interest groups and Congress,⁹ highlighting the degree to which the Bush Administration was concerned that agencies were using guidance to formulate policy “below the radar.” Progressive groups argued that this review process was unnecessary.¹⁰ This Note provides the first large-scale empirical analysis of the central issue underlying this dispute: in practice, do agencies frequently use guidance documents to implement important policy decisions?

Debate over the Bush executive order reinvigorated scholarly interest in guidance documents.¹¹ Existing academic work has primarily described how administrative law establishes legal boundaries between legislative rules and guidance documents. Most studies then discuss the normative implications of guidance practices, arguing that agencies use guidance documents to avoid

than legislative rules. See, e.g., Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1469 (1992) (showing that agencies issue far more guidance than legislative rules).

6. CLYDE WAYNE CREWS, JR., *TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2* (2007), <http://cei.org/pdf/6018.pdf> (noting that in 2006, agencies issued 3718 rules and the President signed only 321 bills into law).
7. H.R. REP. NO. 106-1009, at 1 (2000).
8. Exec. Order No. 13,422, 3 C.F.R. 191 (2007).
9. For an example of interest group opposition, see OMB WATCH, E.O. 13,422: UNANSWERED AND UNACCOUNTABLE (2007), <http://www.ombwatch.org/files/regs/PDFs/EO13422UnansweredandUnaccountable.pdf>. For examples of comments from members of Congress opposed to the order, see *Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part I: Hearing Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007).
10. See, e.g., OMB Watch, *Obama Begins Regulatory Reform* (Feb. 10, 2009), <http://www.ombwatch.org/node/9689>.
11. See, e.g., Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 696 (2007).

accountability to the public, Congress, the White House, and the courts.¹² The common concern is that guidance documents allow agencies to make policy secretly and unilaterally, undermining the legitimacy of the administrative process.

Like the Bush Administration, these studies generally assume that agencies often improperly substitute guidance documents for legislative rules. No academic work has examined this assumption empirically, however. This Note does so by using newly available data to analyze whether guidance documents are actually used as a substitute for legislative rules. This issue can only be approached indirectly. However, the answers to three questions should be suggestive. First, do strategic concerns appear to influence when agencies issue guidance? Second, is guidance used on a large scale relative to the notice and comment process? Third, is guidance used to implement important policy decisions? Affirmative answers to these questions would certainly suggest that agencies commonly use guidance documents as a substitute for the rulemaking process. If this is the case, then guidance is undermining the accountability mechanisms governing the regulatory process and should be the target of legal reforms such as the Bush Administration's executive order.

This Note first outlines how the law distinguishes between legislative rules and guidance documents. Next, it discusses previous work on guidance documents. Then, it discusses the strategic tradeoff between using legislative rules and guidance documents from the perspective of an agency leader. The Note next uses data generated by the Bush executive order to empirically analyze whether concern that agencies use guidance documents to avoid the rulemaking process is well justified. Analysis of this data suggests that agencies do not frequently abuse guidance documents to avoid issuing significant legislative rules. Concern over agency abuse of guidance documents has therefore been overstated in both the policy world and the administrative law literature. In light of these findings, proponents of restricting guidance should bear the burden of providing empirical support before assuming that agencies commonly abuse guidance documents.

12. For the seminal example of such work, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311 (1992).

I. LEGAL TREATMENT OF GUIDANCE DOCUMENTS

A. Introduction

The term “guidance document” suggests a wide variety of regulatory materials. Examples of such materials include general agency interpretations of existing legislative rules, statements outlining how an agency intends to regulate an evolving policy area, training manuals written for internal agency staff, compliance guides directed to the general public, advisory opinions tailored to individual case facts, and memoranda from agency leaders providing direction to agency staff members. As these examples suggest, agencies use guidance documents both to manage internal operations and to communicate with outside parties.

“Legislative rules”¹³ are the administrative equivalent of public laws passed by Congress. Like public laws, legislative rules are legally binding, generally applicable, and nonretroactive.¹⁴ Before issuing a legislative rule under the Administrative Procedures Act’s (APA) informal rulemaking process, agencies are required to provide notice of the proposed text and to accept public comments.¹⁵ Agencies must also complete a number of lesser-known procedural requirements before issuing a legislative rule.¹⁶ Guidance documents are not subject to any of these requirements, however.¹⁷

In many situations, an agency holds clear authority to issue a guidance document. The line between guidance and legislative rules is unclear in other

13. The APA simply uses the term “rule” for what this Note terms a “legislative rule.” See 5 U.S.C. § 553 (2006).

14. See *id.* § 551(4) (defining a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing”).

15. *Id.* § 553.

16. See, e.g., Unfunded Mandates Reform Act, 2 U.S.C. §§ 1532-1535; Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.); Regulatory Flexibility Act, 5 U.S.C. §§ 601-612; Congressional Review Act, 5 U.S.C. §§ 801-808; Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520; Small Business Paperwork Relief Act of 2002, 44 U.S.C. § 3504(c).

17. The term “guidance document” as defined in this Note encompasses all documents qualifying for the Administration Procedures Act’s exemptions for interpretive rules or policy statements. See 5 U.S.C. § 553; see also Anthony, *supra* note 12, at 1323 (delineating the scope of exceptions to the APA).

cases, however. The following discussion outlines how the courts have distinguished between the two in these difficult cases.

B. Interpretive Rules

Courts are commonly asked to determine whether interpretive rules are legislative rules in disguise. Interpretive rules clarify an agency's interpretation of an existing legislative rule or statute without imposing substantive changes.¹⁸ Unlike legislative rules, they do not have the force of law. They therefore do not bind external parties,¹⁹ but they may, nonetheless, have the effect of altering their conduct.²⁰ Finally, the literature has noted that interpretive rules sometimes serve as instructions from agency leaders to subordinates.²¹

In analyzing this question, courts ask whether a rule has a "legally binding" effect.²² If so, agencies are required to issue a legislative rule. The D.C. Circuit has adopted a multifactor test to implement this standard. The test asks whether: (1) there would have been an adequate legislative basis for the agency to perform its mandate in the absence of the rule; (2) the rule was published in the Code of Federal Regulations; (3) the agency explicitly invoked its general legislative authority; and (4) the rule effectively amended a prior legislative rule.²³ Affirmative answers to the first question and negative answers to the final three increase the probability that a court will find that the rule is, indeed, interpretive rather than legislative.

This standard has been applied repeatedly, and the final factor generally receives the greatest emphasis.²⁴ The courts focus on whether interpretive rules contradict the meaning of an underlying legislative rule or break with

18. Anthony, *supra* note 12, at 1325 (defining an interpretive rule as "an agency statement that was not issued legislatively and that interprets language of a statute (or of an existing legislative rule) that has some tangible meaning" (footnotes omitted)).

19. *E.g.*, 16 C.F.R. § 1.73 (2009) ("The interpretations are not substantive rules and do not have the force or effect of statutory provisions.").

20. *See* Cent. Tex. Tel. Coop. v. FCC, 402 F.3d 205, 214 (D.C. Cir. 2005) (noting that an interpretive rule may "have the effect of creating new duties" or may turn "a vague statutory duty or right into a sharply delineated duty or right" (internal quotation marks and citations omitted)).

21. Anthony, *supra* note 12, at 1384.

22. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1326 (2001).

23. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993).

24. *See, e.g.*, Erringer v. Thompson, 371 F.3d 625, 630 (9th Cir. 2004); Air Transp. Ass'n of Am. v. FAA, 291 F.3d 49, 56 (D.C. Cir. 2002).

precedent.²⁵ A rule that makes a meaningful amendment to the text of an underlying legislative rule is less likely to be deemed interpretive.²⁶ Some D.C. Circuit cases have extended this requirement even further, holding that an interpretive rule may not alter an agency's prior interpretation (rather than merely the text) of a legislative rule.²⁷ However, this standard has not been applied in most other circuits.²⁸

One of the most frequently cited cases on the validity of interpretive rules, *American Mining Congress v. Mine Safety & Health Administration*,²⁹ illustrates the difficulty courts face in evaluating interpretive rules. The Mine Safety and Health Administration (MSHA) held licensing authority over mines and could require mine owners to submit safety data. The agency issued a legislative rule pursuant to this authority requiring mine owners to report "diagnosed" cases of lung disease. Mine owners applied widely different definitions of "diagnosis," prompting MSHA to issue an interpretive rule defining diagnosis as the point at which a miner's x-ray crossed a particular disease level.³⁰ The court held that the interpretive rule merely clarified the reporting requirement imposed by MSHA's legislative rule, but did not invoke MSHA's legislative authority or effectively amend the prior rule. This decision appears reasonable, but one could imagine the court writing an equally compelling decision holding that the x-ray requirement impermissibly required mines to comply with a stronger safety standard.

C. Policy Statements

Policy statements are intended to provide the public with a sense of an agency's position on an issue. Policy statements are commonly called guidance documents, manuals, circulars, memoranda, and bulletins. Like interpretive

25. *E.g.*, *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087-91 (9th Cir. 2003) (holding that the expansive interpretation of a drug on a listing of controlled substances effectively amended the underlying list adopted via notice and comment); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

26. *Hemp Indus.*, 333 F.3d at 1087-88.

27. *Alaska Prof'l Hunters*, 177 F.3d at 1034.

28. *See, e.g.*, *Warder v. Shalala*, 149 F.3d 73 (1st Cir. 1998) (allowing the Department of Health and Human Services to issue an interpretive rule provided that the change was accompanied by an explanation).

29. 995 F.2d 1106 (D.C. Cir. 1993).

30. For a more complete discussion, see Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 554-59 (2000).

rules, they are nonbinding on both private parties and the issuing agency.³¹ In determining whether a document qualifies for the APA's "general policy statement" exception, courts apply a two-part test.³² First, does the policy statement impose any additional rights or obligations? Second, does the policy statement leave the agency free to exercise discretion? Under the latter inquiry, sometimes referred to as the "definitiveness test," courts seek to determine whether the agency is likely to use the policy statement as determinative when deciding subsequent cases.³³

Like interpretive rules, the line between a permissible and impermissible policy statement is often blurry. Policy statements may legitimately establish the starting point that an agency will use when exercising its discretion, provided that the agency evaluates each case anew.³⁴ Nonetheless, policy statements may have significant policy implications. For instance, an agency is permitted to state that it will consider initiating an enforcement action against a party violating a policy statement.³⁵ Such statements of intent may have important policy implications if they alter the behavior of regulated parties.

The degree to which a policy statement imposes new rights or obligations is fuzzy, and often depends on the context.³⁶ For instance, in *Chamber of Commerce of the United States v. United States Department of Labor*,³⁷ the Occupational Safety and Health Administration (OSHA) promulgated a policy statement pledging to inspect workplaces less frequently and less intensively if they complied with a set of conditions that OSHA lacked authority to mandate directly. The court held that the benefits of compliance with the policy statement were so great that regulated parties effectively had no choice but to

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31. *E.g.*, *Consol. Edison Co. of N.Y. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) ("Policy statements' differ from substantive rules that carry the 'force of law,' because they lack 'present binding effect' on the agency." (quoting *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 59 (D.C. Cir. 2002))); *Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997); *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).
 32. *See, e.g.*, William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002).
 33. *Appalachian Power Co. v. EPA (Appalachian II)*, 249 F.3d 1032 (D.C. Cir. 2001); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987).
 34. *See, e.g.*, *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).
 35. *E.g.*, 16 C.F.R. § 1.5 (2006) ("Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions.").
 36. For examples of such cases, see *Appalachian Power Co. v. EPA (Appalachian I)*, 208 F.3d 1015 (D.C. Cir. 2000); and *Community Nutrition Institute*, 818 F.2d 943.
 37. 174 F.3d 206 (D.C. Cir. 1999). For a more thorough treatment, see Funk, *supra* note 22, at 1335.

comply.³⁸ Because the program was voluntary, however, one could easily imagine a different court declaring the policy statement nonbinding and therefore exempt from the notice and comment process.

D. Legal Implications of the Distinction Between Legislative Rules and Guidance Documents

From the perspective of agency leaders, legislative rules differ from guidance documents in three major ways: (1) procedural requirements for issuance; (2) legal effects both inside and outside the agency; and (3) the availability and the scope of judicial review. The following discussion details these differences.

1. Procedural Requirements

The APA has long required agencies to publish interpretive rules and policy statements in the Federal Register.³⁹ Guidance documents outside these categories with public implications are exempt from this requirement but must be made available to the general public.⁴⁰ Failure to satisfy these requirements precludes the agency from using the document in a manner that may adversely affect private parties.⁴¹ Beyond those basic constraints, minimal procedural requirements governed the issuance of guidance before the Bush Administration's 2007 executive order.⁴² The Bush Administration's executive order required nonindependent agencies to submit significant guidance documents to Office of Management and Budget (OMB).⁴³ However, guidance was still exempt from many other procedures required for legislative rules.⁴⁴

38. 174 F.3d at 212.

39. 5 U.S.C. § 552(a)(1) (2006).

40. *Id.* § 552(2)(b).

41. *Id.* § 552(a)(1). Interestingly, this provision would be moot if guidance were always nonbinding because a nonbinding document could not impose adverse consequences. The provision therefore introduces some question as to whether agencies may ever use guidance to bind private parties. See Strauss, *supra* note 5, at 1467-68 (noting that section 552 of the APA may be construed to allow agencies to issue binding guidance conditional on satisfying the publication requirement).

42. See Johnson, *supra* note 11, at 699 (“[N]onlegislative rules are subject to fewer procedural requirements than legislative rules The APA merely requires that agencies publish and make available *some*, but not all, nonlegislative rules.”).

43. See Exec. Order No. 13,422, 3 C.F.R. 191 (2007) (requiring agencies to submit all guidance documents with an estimated annual impact exceeding one hundred million dollars and all documents with significant policy implications to Office of Information and Regulatory

2. *Legal Effects*

A primary policy justification for exempting guidance documents from most procedural requirements is that they are not binding on external parties.⁴⁵ A significant line of cases invalidates guidance documents that bind external parties.⁴⁶ Congress has affirmed this policy, declaring FDA guidance documents nonbinding.⁴⁷ At the same time, however, Congress has instructed the courts to use guidance documents as evidence when hearing cases involving small businesses.⁴⁸

Guidance documents are also generally treated as nonbinding on agencies themselves.⁴⁹ This policy has several important caveats. First, agencies must provide a reasonable explanation in cases where they deviate from guidance.⁵⁰ Second, Congress has occasionally indicated that it expects agencies to follow their guidance documents. For instance, the FDA Modernization Act declared that FDA staff must generally observe the agency's guidance.⁵¹ Agencies such as the FDA may also be induced to follow guidance if regulated parties complain to Congress or the White House in response to agency deviation.

3. *Standard of Judicial Review*

Although agencies face fewer procedural requirements when issuing guidance documents, they often face a stricter standard of judicial review.

Affairs (OIRA) review); *see also* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007) (requiring agencies to develop internal processes to approve and publicize guidance documents).

44. *See* sources cited *supra* note 16.

45. *See, e.g.*, Anthony, *supra* note 12, at 1313-14.

46. *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

47. 21 U.S.C. § 371(h) (2006).

48. *See* Small Business Regulatory Enforcement Fairness Act of 2006 § 213, 5 U.S.C. § 601 note ("In any civil or administrative action against a small entity, guidance given by an agency applying the law to facts provided by the small entity may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against such small entity.").

49. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 410 (2007). *But see* Strauss, *supra* note 5 (arguing that section 552 of the APA strongly suggests that agencies are bound by their unpublicized guidance material).

50. William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1038 (2004) (noting that an agency's failure to explain a change "would likely lead to the change being held arbitrary and capricious").

51. FDA Modernization Act of 1997 § 701, 21 U.S.C. § 371(h).

Unlike legislative rules, which typically receive *Chevron* deference,⁵² most guidance documents are accorded *Skidmore* deference,⁵³ which is less favorable to the agency.⁵⁴ This area of the law remains in flux because the Supreme Court has not clearly defined *Chevron*'s scope. In 2001, the Supreme Court held in *United States v. Mead Corp.* that agencies receive *Chevron* deference when implementing a delegation of authority that is "generally to make rules carrying the force of law."⁵⁵ This decision did not restrict *Chevron* deference to cases where an agency exercised authority to issue a legislative rule. Instead, *Chevron* deference could also apply when an agency implemented policy through adjudication or "some other indication of a comparable congressional intent."⁵⁶

Mead did not definitively clarify whether guidance documents receive *Chevron* deference. In *Barnhart v. Walton*, the Court attempted further clarification, stating that it would consider the following factors when determining whether to grant *Chevron* deference to a guidance document: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question"⁵⁷ This array of factors obviously leaves lower courts with significant discretion. Preliminary research indicates that different circuits have implemented this broad standard differently.⁵⁸

Guidance that clearly interprets an existing legislative rule, and not a statute, may fall outside the *Chevron* regime and instead receive *Seminole Rock* deference.⁵⁹ The *Seminole Rock* standard grants an agency's interpretation of its own rules "controlling weight unless it is plainly erroneous or inconsistent

52. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

53. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (holding that courts should defer to an agency interpretation to the extent that it is persuasive).

54. The focus on deference standards should not obscure the fact that both guidance documents and legislative rules are subject to court review under the APA's "arbitrary and capricious" standard. See 5 U.S.C. § 706(2).

55. 533 U.S. 218, 226-27 (2001).

56. *Id.* at 227.

57. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

58. E.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005).

59. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

with the regulation.”⁶⁰ Although many guidance documents could presumably qualify for this exception, the courts do not appear to have applied it widely.⁶¹

Though guidance documents generally receive less deference than legislative rules, bringing a legal challenge to guidance documents is actually more difficult. Parties seeking to challenge a guidance document must satisfy the APA’s “finality” requirement.⁶² Any decision that is not a final agency action is unreviewable under the finality doctrine.⁶³ Guidance documents that either were not approved by the head of the promulgating agency or that include a disclaimer stating that the policy is not a “final action” are especially likely to fail the finality requirement.

A guidance document meeting the finality requirement must also hold legal consequences for private parties in order to be challengeable.⁶⁴ By definition, valid guidance documents, which must leave the agency some discretion, fail to meet this requirement. Thus, if a court agrees with this claim (and also holds that the rule satisfies the consummation requirement outlined above), it will allow the suit to proceed and the agency is very likely to lose.⁶⁵

Plaintiffs must also satisfy the ripeness doctrine. The requirements for ripeness are very similar to the requirements for finality. The leading ripeness case, *Abbott Laboratories v. Gardner*, explicitly notes the overlap between the two doctrines.⁶⁶ When evaluating ripeness, courts inquire whether a decision has a direct effect on the party seeking review and whether the decision is fit for judicial review.⁶⁷ Despite this overlap with the finality doctrine, parties may satisfy the finality test while failing the ripeness test when the consent of another actor besides the agency is required for a decision to take effect.⁶⁸

60. *Id.* at 414.

61. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1103-04 (2008) (noting that the Supreme Court has applied *Seminole Rock* quite sparingly since 1984).

62. 5 U.S.C. § 704 (2006).

63. Kevin M. McDonald, *Are Agency Advisory Opinions Worth Anything More than the Government Paper They’re Printed on?*, 37 TEX. TECH L. REV. 99, 101 (2004).

64. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

65. See, e.g., *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 663 (7th Cir. 1998).

66. 387 U.S. 136, 148-49 (1967).

67. *Id.*

68. The D.C. Circuit’s independent evaluation of finality and ripeness in *Atlantic States Legal Foundation v. EPA*, 325 F.3d 281 (D.C. Cir. 2003), illustrates this point, though the court ultimately concluded that the finality requirement was also not satisfied.

In short, guidance documents present tradeoffs for agency leaders. On one hand, they are easier to issue and more difficult to challenge in court. On the other hand, they are not legally binding.

II. PREVIOUS STUDIES

Much existing work on guidance documents assumes that agencies commonly use guidance to issue important policy decisions.⁶⁹ Such studies argue that agencies use guidance to avoid the notice and comment process, and they suggest potential reforms to curb this abuse. This Note challenges this literature by scrutinizing the assumption that agencies frequently use guidance to circumvent the notice and comment process.

A number of studies have analyzed the implications of allowing agencies to use guidance documents to improperly avoid the notice and comment process. For instance, Anthony describes examples where agencies use guidance documents to impose substantive policy changes that are effectively binding on regulated parties.⁷⁰ These examples cut across a number of contexts, including direct enforcement efforts, standards setting, benefits determination, and state implementation of federal programs.⁷¹ Anthony concludes that agencies should be required to complete the notice and comment process in such cases.⁷²

Recent work has analyzed whether the courts apply an appropriate review standard for guidance documents in light of concern over widespread agency abuse. Such work has frequently asked two questions. First, do the courts apply a consistent standard to distinguish between legislative rules and guidance documents?⁷³ Second, have the courts established the correct boundary between these categories?⁷⁴ Other studies have suggested that Congress curb the assumed abuse of guidance by requiring agencies to complete additional procedural requirements before issuing guidance.⁷⁵ Congress could subject all guidance documents to the notice and comment process, but imposing such a heavy-handed restriction may further impede an

69. See, e.g., Anthony, *supra* note 12; Randolph J. May, *Ruling Without Real Rules—Or How To Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001).

70. Anthony, *supra* note 12, at 1332-55.

71. *Id.*

72. *Id.* at 1314.

73. E.g., Bressman, *supra* note 58, at 1445.

74. See, e.g., Funk, *supra* note 32; Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002).

75. E.g., Mendelson, *supra* note 49, at 438.

already cumbersome rulemaking process.⁷⁶ This may encourage agencies to rely more heavily on adjudication,⁷⁷ introducing additional drawbacks.⁷⁸ This concern may explain why the Bush Administration moved only partially toward requiring notice and comment for guidance.⁷⁹

The literature has also made a number of more modest suggestions. Funk proposes requiring agencies to label all guidance documents as such at the time of enactment, providing clarity for regulated parties.⁸⁰ Such labeling would also encourage agencies to consider the implications of their policymaking method.⁸¹ Agencies could also empower citizens to formally petition agencies to issue guidance. Other studies suggest increasing the precedential value of guidance⁸² or requiring agencies to better publicize their guidance documents.⁸³

Several studies have proposed modifying the APA to grant agencies full discretion to classify policies as either legislative rules or guidance documents subject to a clear and stringent ex post judicial review regime. The courts would create a scale of judicial deference contingent upon the form of agency policymaking. This would incentivize agencies to use the appropriate form of policy.⁸⁴ For instance, Elliott argues that courts should cease drawing inevitably arbitrary distinctions about when guidance documents are

76. For analysis of the ossification problem, see JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 9–25 (1990) (analyzing ossification in the context of the National Highway Traffic Safety Administration); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385 (1992); and Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *ADMIN. L. REV.* 59 (1995).

77. Agencies have significant latitude to choose between adjudication and rulemaking when authorized to use both forms of policymaking. See *SEC v. Chenery*, 332 U.S. 194, 202–03 (1947).

78. Rulemaking generally provides greater policy certainty, costs less, and uses a more inclusive notice and comment process. See sources cited *infra* note 176.

79. Exec. Order No. 13,422, 3 C.F.R. 191 (2007) (requiring agencies to accept comments only on significant guidance documents).

80. See Funk, *supra* note 50, at 1035–36.

81. *Id.*

82. See, e.g., Strauss, *supra* note 5, at 1486.

83. See Mendelson, *supra* note 49, at 447–50.

84. See Johnson, *supra* note 11, at 740–42 (arguing that courts should allow agencies to choose a form of policymaking with the knowledge that less formal forms will be subject to lesser judicial deference); see also E. Donald Elliott, *Re-Inventing Rulemaking*, 41 *DUKE L.J.* 1490, 1490–91 (1992) (advocating that courts permit agencies to issue guidance subject to vigorous review of the application to individual cases).

permissible and instead simply subject guidance to an exacting review standard when it is applied in individual cases.⁸⁵

Two studies have advanced positive theories predicting when agencies issue guidance documents. Asimow argues that internal budgetary pressures often influence when agency leaders issue guidance documents.⁸⁶ Hamilton and Schroeder argue that agencies use procedures strategically to achieve their policy goals while minimizing political opposition.⁸⁷ Hamilton and Schroeder find that agencies issue guidance documents more frequently when interpreting an associated legislative rule that was issued pursuant to a judicial deadline or a rule where Congress is pressuring the agency to issue a policy decision quickly.⁸⁸ This finding supports Asimow's argument that agencies use guidance to fulfill their policy mandates within limited budgets, but does not support the claim that agencies use guidance strategically to avoid political conflict. These studies provide a foundation for analyzing what may motivate agencies to use guidance in place of legislative rules.

In short, the existing literature assumes that agencies use guidance documents in place of the notice and comment process, and then debates reforms to reduce this behavior.

III. THE TRADEOFF BETWEEN LEGISLATIVE RULES AND GUIDANCE DOCUMENTS

In order to measure whether agency leaders use guidance documents to circumvent the rulemaking process, we must determine whether they issue guidance strategically. This Part outlines the complex strategic tradeoff that agency leaders face when choosing whether to promulgate a legislative rule or a guidance document. The account below is then empirically tested to determine whether agency leaders use guidance strategically.

85. See Elliott, *supra* note 84, at 1491.

86. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 404-08.

87. James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, LAW & CONTEMP. PROBS., Spring 1994, at 111. Their theory predicts that agencies are more likely to use guidance documents when the following conditions are met: legislative rules are complicated and therefore costly to issue; disagreement exists over the policy area; the regulation imposes significant costs on regulated parties; enforcement is difficult; Congress monitors the agency closely and imposes constraints on the agency's ability to write legislative rules; and the courts monitor the issue area actively. *Id.* at 130-32.

88. *Id.* at 141, 157.

The following discussion assumes that agency leaders make this tradeoff as rational, goal-oriented, strategic actors responding to their environment.⁸⁹ It also assumes that agency leaders prefer to set policy as close as possible to their preferred outcome.⁹⁰ In pursuing this goal, agency leaders face important constraints. They must simultaneously adhere to their internal agency budgets, manage their subordinates, respond to judicial decisions, and serve as the agents of Congress and the President.⁹¹ Moreover, they must navigate the legal requirements outlined in the preceding discussion. Failure to heed these constraints will jeopardize their ability to achieve their policy goals and may hinder their career development.

A. Congressional and Presidential Preferences

Guidance documents generally attract less attention from Congress and the President, giving agency leaders greater latitude to impose their preferred policy choices. Guidance is not subject to the many procedural requirements devised to alert the political branches to agency rulemaking activity.⁹² In addition, guidance documents arouse less attention and opposition. Agencies can generally issue a guidance document without attracting advance publicity. The agency therefore has the opportunity to set a new status quo before opponents mobilize. This status quo may generate self-reinforcing feedbacks that strengthen the agency's position. By contrast, agencies must solicit comments on legislative rules. This process generates political activity that may be noticed by Capitol Hill and the White House; some important legislative rulemakings gain political salience as interest group conflict escalates during

89. Some contemporary positive political theory considers agencies as passive vessels controlled by Congress, the White House, and the courts. Recent work in this tradition has considered agencies as strategic actors in their own right, however. See, e.g., GREGORY A. HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY* (2007); LAWRENCE S. ROTHENBERG, *REGULATION, ORGANIZATIONS, AND POLITICS* (1994).

90. Policy goals are clearly important, but agency leaders have other goals as well. See, e.g., ANTHONY DOWNS, *INSIDE BUREAUCRACY* 84-85 (1967) (noting the desire for convenience, security, personal loyalty, and pride in proficient performance of one's work).

91. For an analysis of the interaction between these principal-agency relationships, see HUBER, *supra* note 89; and Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, *LAW & CONTEMP. PROBS.*, Spring 1994, at 185.

92. See sources cited *supra* note 16 (listing prominent examples of such procedures).

the notice and comment process.⁹³ This comparison is not intended to suggest that interest groups are unaware of guidance documents. Rather, at the margin, legislative rules arouse more interest group attention and opposition, which results in greater congressional interest. Guidance documents, therefore, are relatively more attractive in cases where Congress and the President are likely to intervene against the agency.

A number of forces shape the intensity of congressional and presidential preferences on regulatory issues. An analysis of these preferences must begin by noting briefly the goals of the President and members of Congress. The reelection goal is primary for elected officials because it is instrumental in achieving all other goals.⁹⁴ Of course, presidents and members of Congress have different electoral incentives because their constituencies and term lengths differ, but both seek the support of interest groups to win reelection.⁹⁵ Interest groups are especially important because they deliver votes and campaign contributions on particular issues.⁹⁶ Interest groups distribute these benefits in part to encourage members of Congress to lobby agencies on their behalf.⁹⁷

The elected branches hold a well-known set of tools to overturn agency decisions. Congress may reverse an agency rule legislatively or strip the agency of funds to implement the rule.⁹⁸ Congress also may implement very effective indirect sanctions including imposing general budget cuts, holding bruising oversight hearings, and removing portions of the agency's jurisdiction. These and other tools may be used equally against legislative rules or guidance documents. However, guidance documents may be less likely to provoke interest groups to press Congress to use these tools against the agency. Presidents too may reverse agency actions. In some cases, they may seek to

93. No systematic analysis has documented this phenomenon, but ample anecdotal evidence exists. See, e.g., STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS* 163-213 (2008) (describing four highly politicized rulemakings).

94. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974).

95. See HUBER, *supra* note 89, at 20.

96. Studies in the public choice tradition have long assumed that elected officials skew public policy to interest groups with the greatest ability to support their reelection bids. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON.* 3, 17-18 (1971).

97. The interest group environment may differ substantially between agencies. For a typology, see JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 79-83 (1989) (noting that agencies with only one major interest group are likely to have a clear political mandate).

98. See, e.g., Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. POL. ECON.* 765 (1983).

exercise directive authority to dictate an agency leader's decision.⁹⁹ Presidents may also seek to change agency decisions via institutionalized procedures such as OMB review of agency legislative rules.

B. Alignment of Political Principals

Agency leaders facing a Congress and President in agreement on their issue area have a relatively simple means of minimizing political pressure: obey their political principals. This is not to suggest that agencies hold no discretion during unified government.¹⁰⁰ Nonetheless, agencies hold greater slack when Congress and the President are divided. This situation is more likely when different political parties control the two branches.¹⁰¹ Such division increases the cost of issuing a legislative rule. By contrast, a guidance document is less likely to draw the attention of Congress and the President because it is exempt from the numerous procedural requirements that alert the political branches to agency rulemakings.¹⁰² In short, this Note argues that the advantage of avoiding this attention increases when Congress and the President are divided because the agency cannot please both of its superiors.

C. Judicial Challenge

Agencies also must account for the courts, which may invalidate both legislative rules and guidance documents. Courts may seek to substitute their own policy preferences for those of the agency.¹⁰³ Alternatively, they may seek to ensure that agency rules do not stray from the bargain reached by Congress

99. For a description of this process in the Clinton Administration, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Depending on the official in whom the statute vests power, this tactic may arguably be illegal. For an overview of this issue with an application to recent controversy, see Peter L. Strauss, *Foreword: Overseer, or 'The Decider'?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

100. A large literature in political science has argued that the President and Congress inevitably struggle to oversee agencies. For an overview of this literature, see HUBER, *supra* note 89, at 15-18.

101. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 126-27 (1999).

102. See sources cited *supra* note 16.

103. *E.g.*, Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996).

and the President.¹⁰⁴ Whatever the courts' motivation, agency leaders must worry that the courts will reverse their policy decisions.

Legislative rules may be more easily challenged than guidance documents because, in the latter case, parties often struggle to overcome ripeness and finality requirements.¹⁰⁵ In the event of a challenge, however, guidance documents usually receive less deference. The courts have occasionally expressed significant concern that agencies use guidance documents to unilaterally make law.¹⁰⁶ Nonetheless, agencies often lose challenges to legislative rules as well.¹⁰⁷ On balance agencies face a lower litigation risk from guidance documents because the lower probability of engaging in litigation outweighs the greater probability of winning once challenged. Concerns over litigation risk should therefore motivate agency leaders to use guidance documents.

D. Difference in Level of Procedural Constraints

Agencies sometimes face procedural requirements beyond those required by the APA in order to issue a legislative rule. Examples of such procedures include reporting requirements, deadlines, and consultation requirements.¹⁰⁸ These procedures consume an agency's time and effort. They also often prompt interest groups to inform Congress and the OMB about agency activity. Some agencies and program areas face greater constraints than others. For example, in the mid-1970s Congress imposed additional constraints on

104. See William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 187 (1992) (suggesting that courts can help to prevent agencies from straying from the original bargain reached by Congress and the President).

105. See *supra* notes 62-68 and accompanying text.

106. See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) ("Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.").

107. See, e.g., *Pierce*, *supra* note 76, at 84 (noting that courts invalidate legislative rules in more than fifty percent of challenged cases).

108. For an overview of the effect of such procedures, see Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663 (1998).

FTC rulemakings.¹⁰⁹ Similarly, EPA and OSHA face additional procedural requirements under the Small Business Regulatory Enforcement Fairness Act of 1996.¹¹⁰ Because these procedures are not required for guidance documents, guidance is more attractive.

E. Durability

Once successfully enacted, legislative rules are generally more durable than guidance documents. This is no small concern, as political appointees have an average tenure of eighteen to twenty-four months.¹¹¹ Agency leaders must worry that a successor will reverse a policy decision expressed as a guidance document because the cost of modification is so low. By contrast, legislative rules are more costly to modify and are therefore more durable.¹¹² Thus, agency leaders concerned over the durability of their policy decisions should favor legislative rules.

F. Enforceability

Guidance documents are more difficult to enforce because they are nonbinding.¹¹³ Agencies obtain voluntary compliance much more easily in certain contexts. Some agencies, such as the FDA and FCC, hold gatekeeping power over private parties. This power gives regulated entities a strong incentive to cooperate with the agency. Such parties are therefore generally extremely receptive to guidance documents. For instance, a television station seeking FCC renewal of its license has its entire business at stake.¹¹⁴ Therefore, the station's first inclination is to accommodate FCC requests, including those expressed in the form of guidance documents. Similarly, a company manufacturing medical devices has strong incentives to accommodate FDA requests.¹¹⁵

109. See Magnuson-Moss Act, 15 U.S.C. § 57a (2006).

110. Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C.).

111. Paul C. Light, *Our Tottering Confirmation Process*, BROOKINGS, Spring 2002, http://www.brookings.edu/articles/2002/spring_governance_light.aspx.

112. See, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983) (requiring agencies to provide a "reasoned analysis" for changing a rule).

113. See *supra* notes 45-51 and accompanying text.

114. See, e.g., 47 U.S.C. § 308 (granting the FCC licensing power).

115. See, e.g., 21 U.S.C. § 360e (granting the FDA premarket approval over medical devices).

On the other hand, a regulated party has a much greater incentive to resist complying with a guidance document issued by an agency threatening only a fine or an inspection. For instance, the EPA may issue a guidance document detailing requirements for power plants to install new pollution abatement equipment. The power plant operator has little incentive to refrain from challenging the guidance document's legality, as even a failed court challenge forestalls an unfavorable change to the status quo.

G. Budget

Almost all agencies face meaningful resource constraints.¹¹⁶ Agency leaders must consider the difference in cost between using legislative rules and guidance documents. To produce a legislative rule, agencies are frequently forced to process thousands of comments, write long preambles to rules, and satisfy the procedural requirements outlined above.¹¹⁷ Guidance documents are cheap by comparison.¹¹⁸ The cost differential varies with agency characteristics. Some agencies face a less contentious rulemaking environment, other agencies may use more efficient systems for developing legislative rules,¹¹⁹ and some agencies face greater procedural requirements.¹²⁰

The timeframe over which costs are calculated may influence the choice between legislative rules and guidance documents. The long-term costs of guidance may be greater if the agency is forced to repeatedly relitigate the policy. In the short-term, legislative rules are more likely to face a challenge.¹²¹ Moreover, the cost of this challenge may impede agencies with a short timeframe.¹²² Long-term litigation costs are likely to be lower because agencies

116. For an example of an agency facing such constraints, see Richard J. Pierce, *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991).

117. For a complete list of the 109 requirements that may apply to a rulemaking, see Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

118. Johnson, *supra* note 11, at 701.

119. See THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 191-263 (1991) (describing significant differences in agency rulemaking systems and noting the potential effect on substantive outcomes).

120. See *supra* notes 109-110 and accompanying text.

121. Johnson, *supra* note 11, at 700.

122. See *supra* note 76.

hold significant discretion to interpret their existing rules,¹²³ but agency leaders may have very rational reasons for focusing on only short-term costs; again, the average time horizon of agency leaders is only eighteen to twenty-four months.¹²⁴

IV. EMPIRICAL ANALYSIS

This Part examines whether agency leaders frequently use guidance to issue important policy decisions while avoiding the rulemaking process. To address this question, this Part first presents a suggestive analysis of whether the strategic concerns outlined above prompt agencies to issue guidance documents instead of legislative rules. This Part then analyzes additional data measuring the extent to which agency leaders use guidance to implement important policy.

A. Testing for Strategic Use of Guidance

The following analysis applies the measurable elements of the theoretical discussion presented above in a suggestive analysis of whether strategic concerns influence issuance of guidance. The analysis includes the EPA, FDA, FCC, OSHA, and IRS over the years 1996 to 2006. These five agencies were selected to constitute a representative cross-section of the administrative state. The sample includes agencies engaged in high-profile rulemaking (EPA, FCC), agencies heavily involved in enforcement (FDA, OSHA, IRS), an agency providing large-scale service to the public (IRS), and an independent agency (FCC). For all agencies, the data includes both significant and nonsignificant guidance documents. In all analyses, agency use of guidance documents is measured by calculating a ratio of the number of guidance documents issued in a particular year to the number of legislative rules issued.¹²⁵

Because all guidance is included, this data set includes a more heterogeneous sample than the subsequent analysis, which is confined to economically significant documents. This heterogeneity increases the potential that omitted variable bias influences the results. In particular, agencies may use

123. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

124. See Light, *supra* note 111.

125. The number of legislative rules was collected from the GAO Federal Rules Database. U.S. Gov't Accountability Office, GAO Federal Rules Database Search, <http://www.gao.gov/fedrules.html> (last visited Nov. 19, 2009).

nonsignificant guidance in systematically different ways. Developing meaningful control measures to account for such differences in guidance practice is difficult. Thus, this analysis is used only in conjunction with the additional data presented later in the Note.

1. *Time in Office*

If agency leaders issued guidance strategically, they would use more guidance as their expected time remaining in office decreased and less time remained to achieve their goals. When time is limited, guidance is more attractive than time-consuming rulemakings. Agency leaders should feel such time pressure at the end of a President's first term because the President may lose reelection. However, the dynamic should be stronger at the end of the President's second term when a change in administration is certain.

The results below suggest that agency leaders increase the relative frequency with which they issue guidance during the first three years of the President's tenure. The proportional use of guidance then declines as the President's tenure progresses. If agency leaders were strategically substituting guidance for rules, the proportion of guidance issued would increase in the President's second term as the amount of time remaining to complete a rule declined. These findings are drawn from a small sample, however. Only one data point—the Clinton Administration—exists for the seventh and eighth year of a President's term. Nonetheless, the available data do not suggest that agency leaders use guidance to implement a flurry of policies at the end of their terms.

Table 1.

USE OF GUIDANCE OVER TENURE OF AGENCY LEADERSHIP, 1996-2006

TOTAL NUMBER OF YEARS PRESIDENT SERVED	RATIO OF GUIDANCE DOCUMENTS TO LEGISLATIVE RULES
1	3.5
2	4.4
3	11.4
4	8.0
5	5.8
6	5.1
7	3.5
8	2.3

2. *Alignment of Preferences of Political Superiors*

Agencies confronting divided partisan control of Congress and the presidency are often forced to choose between alienating one branch or the other. Agencies may reduce this problem by issuing guidance documents, which attract less attention and political conflict. In the period analyzed, government was divided from 1996 to 2002 and unified from 2003 to 2006. The difference in the ratio of guidance to legislative rules suggests that agencies issue guidance slightly more frequently under divided government, but this difference is not statistically significant. Thus, the results do not show that agency leaders behave strategically and use guidance to avoid scrutiny during divided government.

Table 2.
POLITICAL CONTROL AND USE OF GUIDANCE, 1996-2006

ALIGNMENT OF POLITICAL SUPERIORS, 1996-2006	AVERAGE RATIO OF GUIDANCE DOCUMENTS TO LEGISLATIVE RULES (STANDARD ERROR IN PARENTHESES)
Divided Government	9.4 (3.0)
Unified Government	7.0 (5.1)
Difference	2.4 (5.9)
	T-test assuming unequal variances = 40, Satterthwaite's degrees of freedom = 50.73

3. *Congressional Preferences*

Agencies facing a hostile Congress should use guidance documents more frequently to avoid attracting additional scrutiny. Measuring congressional preferences toward an agency or a particular issue is difficult. Roll call votes rarely concern one issue or even one agency. Congress rarely votes on individual agency budgets, and the few available votes are contaminated by the threat of a presidential veto. Other potential measures of congressional dissatisfaction, such as attempts to override agency rules, occur too infrequently.

This Note therefore uses the number of oversight hearings conducted by congressional committees for an agency in a particular year as a measure of

congressional preferences toward a particular agency.¹²⁶ More hearings indicate congressional dissatisfaction. Agencies should respond to congressional dissatisfaction by issuing guidance documents in place of legislative rules because guidance documents are not subject to procedural requirements that attract congressional interest. An increase in the number of hearings should therefore be positively correlated with the ratio of guidance documents to legislative rules.¹²⁷

The data suggest the opposite, however. The correlation between this ratio and number of oversight hearings is $-.22$ over the years 1996 to 2006. Because agencies may require time to adjust from signals sent by Congress, this correlation is also calculated when the ratio of guidance documents to legislative rules lags one year behind the number of hearings. In this case, the ratio is $-.32$, even further in the opposite direction of the effect expected if agencies were behaving strategically.

This finding suggests that agencies do not issue guidance documents strategically in the face of congressional disapproval. This finding is clearly tempered by the limitations of congressional hearings as a measure of congressional dissatisfaction toward agencies. This measure is clearly imperfect for two reasons. First, congressional hearings may be a response to important external changes in an agency's policy area. For instance, Congress held forty-five committee hearings in response to the Enron scandal alone, investigating agencies such as the Commodities Futures Trading Commission¹²⁸ and the Federal Energy Regulatory Commission.¹²⁹ Second, the causal relationship between rulemaking and congressional oversight is actually flipped in many cases: an increase in oversight hearings may actually be a response to high-profile legislative rulemakings. Nonetheless, this evidence is consistent with other findings in this Note suggesting that agencies do not use guidance strategically.

126. Data were collected from LexisNexis Congressional by searching for all congressional hearings with the agency's name in the hearing title. See LexisNexis Congressional, <https://web.lexis-nexis.com/congcomp> (last visited Dec. 9, 2009).

127. Because this variable is measured as the ratio of guidance to legislative rules, it is not skewed by changes in overall agency output. For instance, the ratio will not change in the case of an agency that reduces total activity because of congressional dissatisfaction.

128. See, e.g., *CFTC Regulation and Oversight of Derivatives: Hearing Before the S. Comm. on Agriculture, Nutrition, and Forestry*, 107th Cong. (2002).

129. See, e.g., *Asleep at the Switch—Vol. I: FERC's Oversight of Enron Corporation: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. (2002).

4. *Presidential Preferences*

Agencies facing intense presidential scrutiny should rely more heavily on guidance documents. This Note uses the Bush OMB's Program Assessment Rating Tool (PART) scores as a measure of presidential preferences.¹³⁰ OMB assigns PART scores to agencies on the following ordinal scale: "Results Not Demonstrated,"¹³¹ "Ineffective," "Adequate," "Moderately Effective," and "Effective."¹³²

Agencies receiving a low PART score may have greater incentives to avoid the rulemaking process. For instance, such agencies may be more likely to face delays during OIRA review of their legislative rules. Other areas of the White House may also seek to alter their rules.¹³³ Agencies should respond to this disapproval by issuing guidance documents instead of legislative rules. The existing data are inadequate to fully test this relationship because each of the five agencies received only one PART score during the period analyzed. Nonetheless, future analysis should utilize PART scores as more data become available.

5. *Judicial Challenge*

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use guidance documents more frequently relative to legislative rules. Guidance documents are advantageous because they are less likely to be

130. Presidential preferences are difficult to measure. One potential measure entails evaluating statements of administration policy on important legislative issues in an agency's jurisdiction. Agencies with broad jurisdictions will have many such statements, however, raising questions about the proper weight to assign to each. Measuring the change in administration budget proposals for an agency is a more objective measure, but historical data at the subagency level are difficult to collect. Because PART scores are subjective, they are often viewed as a reflection of the administration's approval toward an agency. *See, e.g.,* ADAM HUGHES & J. ROBERT SHULL, OMB WATCH, PART BACKGROUNDER 3 (2005), <http://www.ombwatch.org/files/regs/2005/performance/PARTbackgrounder.pdf> (arguing that the "element of subjectivity in the PART evaluation process is very distressing").

131. This category was omitted for the purposes of this analysis.

132. Some agencies have subcomponents that received different PART scores. For such agencies, a simple average of subcomponent scores was used to calculate the overall PART score.

133. For a description of the different areas of the White House and Executive Office of the President that monitor agencies, see Lisa Schultz Bressman & Michael P. Vanderbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 65-76 (2006).

challenged. Even if challenged, agencies have a reasonable probability of winning on ripeness or finality grounds.

A count of the cases in which an agency was challenged in a federal appellate case measures the extent to which an agency is threatened by litigation.¹³⁴ As the number of such challenges increases, agencies should rely more heavily on guidance documents. The data do not support this relationship, however. The correlation between the number of cases and the proportional use of guidance documents is weakly negative (-.24). When the form of rulemaking is lagged one year, the ratio is -.27. These results suggest that agency leaders do not behave strategically, but additional data would increase confidence in this conclusion.

B. Measuring the Scope of Significant Guidance

This Section analyzes the relative frequency at which agencies use guidance to implement important policy decisions. The Bush executive order¹³⁵ provides the first uniform measure of guidance significance that has been applied across agencies. The order required that all nonindependent agencies¹³⁶ construct a list of significant guidance documents currently in effect. Agencies were mandated to classify all existing guidance documents as significant or nonsignificant. The order defined significant guidance documents as all guidance satisfying the following conditions:

- (i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

134. Data were collected from the LexisNexis All Federal Cases Database by counting all cases for each year from 1996 to 2006 in which an agency was a named appellant or appellee. LexisNexis, <http://www.lexisnexis.com/> (last visited Dec. 9, 2009).

135. Exec. Order No. 13,422, 3 C.F.R. 191 (2007) (defining and creating a review process for "significant" guidance documents).

136. Independent agencies are not directly accountable to the President, but instead function independently within the executive branch. See Paperwork Reduction Act, 44 U.S.C. § 3502(5) (2006) (defining the set of independent agencies as "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission").

- productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
 - (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
 - (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended.¹³⁷

The Bush Administration adopted this definition¹³⁸ to encompass the subset of guidance documents with important policy implications. The order was clearly intended to establish an effective monitoring process for guidance. This came at a political price, however, as progressive interest groups and congressional Democrats opposed the order.¹³⁹ The Bush OMB would have been unlikely to incur this price had it expected the order to be ineffectual. To justify the order, the OMB therefore had a strong incentive to write a definition that would encompass the most important guidance.

The OMB review process encourages agencies to apply the criteria correctly when classifying guidance. Some agencies may be tempted to minimize the number of documents classified as significant to avoid oversight, but such classifications are reviewable by OMB. As importantly, interest groups often have a strong incentive to monitor agencies and report misclassifications to OMB. Finally, agencies are engaged in repeated interaction with OMB and therefore have little desire to provoke a long-term conflict with the agency.

To analyze the proportion of guidance with salient policy implications, this Note compiled a count of significant guidance documents by agency.¹⁴⁰

137. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007).

138. This definition is very similar to the definition of significant rules, which the Order terms "significant regulatory action." See Exec. Order No. 12,866, 3 C.F.R. 638, 641-42 (1993), reprinted in 5 U.S.C. § 601 note.

139. For a sense of controversy engendered by the Order, see Strauss, *supra* note 99, at 696-700. See also OMB WATCH, E.O. 13422: UNANSWERED AND UNACCOUNTABLE (2007), <http://www.ombwatch.org/files/regs/PDFs/EO13422UnansweredandUnaccountable.pdf>.

140. Counts were compiled from agency websites on August 2, 2008. OMB required each agency to post a list of all significant guidance documents in effect. See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3440. Data were unavailable for the following agencies: the Department of Commerce, the Food and Drug Administration, and the Federal Motor Carrier Safety Administration. In addition, data were unavailable for all independent agencies, which are exempted from OMB review. See Exec. Order No. 12,866, 3

Restricting the analysis to significant guidance documents has several important advantages relative to analyzing the entire population of guidance. First, the fact that all significant documents satisfy OMB's consistent criteria removes much of the heterogeneity that typically complicates empirical analysis of guidance. As a result, aggregate analysis of guidance documents is not contaminated by the fact that some guidance documents are substantially more important than others. In addition, significant guidance documents are directly comparable to significant legislative rules because the definition of both categories is almost identical.¹⁴¹ As a result, the count of significant guidance documents and significant legislative rules captures a comparable set of agency policies.

C.F.R. 638, 641 (1993), *reprinted in* 5 U.S.C. § 601 note (defining agencies as "any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10)").

141. Compare Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3439 (defining "significant guidance document"), *with* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note (detailing when a rule constitutes a "significant regulatory action").

Table 3.**USE OF GUIDANCE DOCUMENTS BY AGENCY**

AGENCY	NUMBER OF SIGNIFICANT GUIDANCE DOCUMENTS IN EFFECT IN AUGUST 2008	NUMBER OF SIGNIFICANT LEGISLATIVE RULES ISSUED, 1993-2008	RATIO OF SIGNIFICANT GUIDANCE DOCUMENTS TO LEGISLATIVE RULES
Agriculture	25	1327	0.02
Defense	0	199	0.00
Education	127	405	0.31
Energy	1	108	0.01
Environmental Protection Agency	204	1095	0.19
Health and Human Services	46	1792	0.03
Homeland Security	67	170	0.39
Housing and Urban Development	2	607	0.00
Interior	2	570	0.00
Justice	43	432	0.10
Labor	80	405	0.20
State	0	61	0.00
Transportation	124	853	0.15
Treasury	2	853	0.00
Veterans Affairs	0	461	0.00
Total:	723	9338	0.08

A total of 723 significant guidance documents are currently in effect. The data show that most of these documents were issued since the Reagan Administration. This sum may appear substantial at first glance, but it is small relative to the number of significant legislative rules issued each year. From 1993 to 2008, OMB reviewed over 10,800 significant legislative rules.¹⁴² Again, the definitions of significant guidance and significant legislative rules are

142. This data was gathered from the General Services Administration. See General Services Administration, RegInfo.gov, <http://www.reginfo.gov/public/do/eoHistoricReport> (last visited Dec. 9, 2009).

nearly identical, making these categories comparable. In short, the proportion of outstanding significant guidance documents is small relative to the body of legislative rules.

This finding may be the result of both legal requirements and political forces. In a number of cases, Congress requires agencies to promulgate a rule.¹⁴³ This is partially offset, however, by the fact that Congress occasionally requires agencies to issue guidance documents.¹⁴⁴ In other cases, administrative law doctrine clearly requires the agency to use a legislative rule.¹⁴⁵ Finally, the agency leader may simply prefer to issue a rule. An analysis comparing the relative importance of these explanations is, however, beyond the scope of this Note. The important point is that, for whatever reason, agencies do not use significant guidance documents on a wide scale relative to significant rules.

Several agencies issued guidance documents at a significantly higher rate than their peers. A qualitative analysis of these outliers provides some insight as to whether this behavior is strategic. In most cases, the behavior appears to be motivated by the agency's need to fulfill a policy mandate within a time constraint. The Department of Homeland Security is perhaps the clearest example. The Department was created in relative haste after September 11 and was required to quickly implement a number of policy changes. This pressure was especially significant in the wake of September 11. The Department used guidance because it often lacked the time and resources to make policy via legislative rules.¹⁴⁶ For instance, the newly created Transportation Security Administration, a unit of the DHS, quickly issued a number of guidance

143. No existing study has systematically analyzed the proportion of agency rules mandated by Congress. However, a recent study analyzing agency deadlines imposed by Congress shows that some agencies devote a high proportion of their rulemaking docket to nondiscretionary rules. See Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 977 (2008).

144. Those concerned by the use of guidance documents often neglect the fact that Congress sometimes requires agencies to issue guidance documents to ensure that agencies help regulated entities comply with legislative rules. As the House Committee on Government Reform noted, "[a]gencies sometimes claim they are just trying to be 'customer friendly' and serve the regulated public when they issue advisory opinions and guidance documents. This may, in fact, be true in many cases." H.R. REP. NO. 106-1009, at 1 (2000). The Small Business Regulatory Enforcement Fairness Act of 1996 § 212, 5 U.S.C. § 601 note (2006), directs agencies to issue guidance on regulations affecting small businesses. In 2007, Congress amended the act to require agencies to provide compliance guides for most new rules. See 5 U.S.C. § 601 (Supp. 2008).

145. See *supra* notes 13-36 and accompanying text.

146. For an account detailing the challenges faced by DHS, see Donald F. Kettl, *Overview*, in *THE DEPARTMENT OF HOMELAND SECURITY'S FIRST YEAR: A REPORT CARD 1-24* (Donald F. Kettl ed., 2004).

documents related to airline safety.¹⁴⁷ Similarly, the Department of Education used approximately one-third of its total guidance to meet the tremendous policymaking mandate imposed by the No Child Left Behind Act.¹⁴⁸ Again, the pressure to quickly implement the law was substantial and the policymaking burden was significant. Under such conditions, the choice of guidance was not a strategic substitution, because the agency lacked the time that would make rulemaking a viable option.

Other agencies appear to use much of their guidance to clarify highly technical details. The Department of Transportation is not known as an ideological agency. Political science ideology measures of federal agencies show that the Department is one of the most moderate government agencies.¹⁴⁹ Anecdotally, both Presidents Obama and Bush appointed Transportation Secretaries of the opposite party.¹⁵⁰ Transportation's use of guidance reflected this reputation, as over two-thirds of the Department's total guidance documents were technical modifications to airline and trucking safety standards. These safety standards sometimes changed rapidly in response to new studies and field experience, making rulemaking impractical.¹⁵¹ Moreover, the technical nature of these regulations required frequent and rapid clarification, which was not amenable to the much slower rulemaking process.

Finally, EPA and OSHA also used most of their guidance for technical purposes. For instance, the EPA has been criticized for substituting guidance for rules, but many of its guidance documents clarified highly technical provisions of existing rules.¹⁵² OSHA guidance frequently clarified technical details as well.¹⁵³ Such details can clearly hold important policy implications,¹⁵⁴

147. See, e.g., TRANSP. SEC. ADMIN., DEP'T OF HOMELAND SEC., SECURITY GUIDELINES FOR GENERAL AVIATION AIRPORTS (2004).

148. See, e.g., U.S. DEP'T OF EDUC., PEER REVIEW GUIDANCE FOR THE NCLB GROWTH MODEL PILOT APPLICATIONS (2006).

149. Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 6 (2008).

150. See, e.g., Ron Hutcherson, *Bush Fills Last Cabinet Shelf; Democrat Gets Transportation Post; Energy, Labor Nominees Also Named*, SAN DIEGO UNION-TRIB., Jan. 3, 2001, at A1; *Lahood Is Transportation Pick*, NEWSDAY, Dec. 18, 2008, at A36.

151. See, e.g., FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., AIRFRAME GUIDE FOR CERTIFICATION OF PART 23 AIRPLANES (2007).

152. See, e.g., U.S. ENVTL. PROT. AGENCY, AVERAGING TIMES FOR COMPLIANCE WITH VOC EMISSION LIMITS-SIP REVISION POLICY (1984).

153. See, e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, SAFETY AND HEALTH GUIDE FOR THE MEATPACKING INDUSTRY (1988).

154. See, e.g., *Appalachian Power Co. v. EPA (Appalachian I)*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

but the fact that the overwhelming majority of guidance documents were not challenged in court suggests that they do not.

C. *Measuring the Ideological Significance of Guidance*

If guidance is used to implement ideologically charged policy decisions, it should be revised when a new President appoints agency leaders with different policy preferences. An agency leader who disagrees with a guidance document issued by his predecessor has a strong incentive to modify it because amendments are cheap. Amendments to guidance do not require the notice and comment process or the other procedural requirements associated with legislative rulemaking. Revisions are therefore less likely to incite political controversy or consume time of agency staff. If guidance documents are used to implement ideological policy decisions, a substantial number should be amended after a change in partisan control of the presidency.

The ideological preferences of agency leaders respond primarily to the preferences of the appointing President and the confirming Senate.¹⁵⁵ The change from the Clinton Administration to the Bush Administration therefore led to a significant shift in the ideological composition of agency leaders. Thus, Bush Administration appointees would be expected to prefer altering a number of important policy decisions initiated or modified by Clinton appointees. If guidance documents were among these decisions, they would be revised. The following chart indicates that this change did not occur on a large-scale basis, however.¹⁵⁶

155. For an empirical analysis of the importance of each of these factors, see David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438, 450-51 (2004).

156. Data on modifications to guidance documents were gathered from agency websites on August 9, 2008. OMB required each agency to post on its website a list of all significant guidance documents in effect. See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007). Documents were coded as either "modified" or "not modified" using agency-provided modification dates. In many cases, agency websites listed the last date of modification for each document. In other cases, this information was embedded within the document. Any update was coded as a modification regardless of importance. Data were unavailable for the following agencies: the Department of Commerce, the Food and Drug Administration, and the Federal Motor Carrier Safety Administration. In addition, data were unavailable for all independent agencies, which are exempted from OMB review. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note (2006).

Table 4.**PROPORTION OF GUIDANCE DOCUMENTS MODIFIED BY THE BUSH ADMINISTRATION**

AGENCY	NUMBER OF SIGNIFICANT GUIDANCE DOCUMENTS IN EFFECT AS OF AUGUST 2008	NUMBER OF SIGNIFICANT GUIDANCE DOCUMENTS MODIFIED BY THE BUSH ADMINISTRATION	PROPORTION OF DOCUMENTS MODIFIED
Agriculture	25	4	0.16
Defense	0	0	-
Education	127	6	0.05
Energy	1	0	0.00
Environmental Protection Agency	204	4	0.02
Health and Human Services	46	12	0.26
Homeland Security	67	3	0.05
Housing and Urban Development	2	0	0.00
Interior	2	0	0.00
Justice	43	3	0.07
Labor	80	2	0.03
State	0	0	-
Transportation	124	69	0.56
Treasury	2	0	0.00
Veterans Affairs	0	0	-
Total:	723	103	0.12

President Bush's appointees revised only 11.8% of guidance documents issued by previous administrations. This comparison to all previous administrations is appropriate because Clinton agencies would have been expected to modify any ideological guidance issued by the Reagan and Bush Administrations, forcing the second Bush Administration to remodify the guidance.

Several interesting patterns emerge from these data. Agencies that used significant guidance documents more often than average, such as the EPA and the Department of Labor, revised their guidance infrequently. For instance, the

Bush EPA declined to revise several of its guidance documents detailing proper procedures for conducting risk assessments.¹⁵⁷ Such guidelines have significant implications for the projected net benefits of particular regulations and therefore may influence the stringency of environmental regulation. Although the leaders of the Bush EPA may have been expected to hold different views on this subject from their predecessors in the Clinton Administration, they declined to revise a number of their guidance documents

As previously noted, a number of the revisions to significant guidance were highly technical and did not fundamentally alter policy. For instance, virtually all Federal Aviation Administration (FAA) (housed within the Department of Transportation) revisions focused on airplane safety standards. Most of these changes were motivated by findings from FAA inspectors or the airlines.¹⁵⁸ Including such technical revisions therefore overstates the extent to which agency leaders modified guidance documents to move policy toward their ideological preferences.

Guidance documents appear to be modified less frequently than legislative rules. Calculating the proportion of legislative rules modified by agencies is complicated by the lack of data counting the number of outstanding rules for each agency. Moreover, no official count of rule revisions exists. The best available data come from a recent Government Accountability Office (GAO) report summarizing rule revisions for eight agencies over a one-year period.¹⁵⁹ These revisions are compared to the total number of rules issued by agencies in the preceding eleven years (see Table 5).¹⁶⁰ This analysis uses the best available data, but it likely understates the frequency of legislative rule revisions because it captures only one year of revision. Nonetheless, the results show that the Consumer Product Safety Commission, Department of Justice, Department of Labor, and Small Business Administration all revised legislative rules more frequently than the average revision rate for guidance documents. This was true for a number of the individual agencies for which data were available,

157. See, e.g., Guidelines for Ecological Risk Assessment, 63 Fed. Reg. 26,846 (May 14, 1998).

158. See, e.g., FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., ADVISORY CIRCULAR: ELECTRONIC FLIGHT DECK DISPLAYS (2007).

159. For the data used in this analysis, see U.S. GOV'T ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS (2007).

160. U.S. Gov't Accountability Office, *supra* note 125. This comparison is inexact because the rule revisions compiled by the GAO include revisions to all existing agency rules, and not only those issued from 1995 to 2007. This simplification is necessary because no existing count of the total number of agency rules outstanding exists.

including the Environmental Protection Agency, Department of Labor, and Department of Transportation.

Table 5.

MODIFICATION OF LEGISLATIVE RULES, 2007

AGENCY	PROPORTION OF LEGISLATIVE RULES MODIFIED IN 2007
Agriculture	0.05
Consumer Product Safety Commission	0.16
Environmental Protection Agency	0.12
Federal Communications Commission	0.01
Federal Deposit Insurance Corporation	0.01
Justice	0.24
Labor	0.29
Small Business Administration	0.02
Transportation	0.09

In summary, agencies have issued few significant guidance documents relative to the body of outstanding legislative rules. Moreover, the Bush Administration chose to revise relatively few of these significant guidance documents. Taken together, these results indicate that agencies do not frequently use significant guidance documents to implement ideological policy decisions.

D. OMB's Guidance Reform Nominations

In 2002, OMB asked the public to nominate guidance for modification. Interested parties submitted forty-nine such nominations.¹⁶¹ This fact alone is striking. Given the low cost of submitting nominations, regulated parties would be expected to submit many more nominations if the benefits of reform were significant. Moreover, if guidance were important then OMB would be expected to approve reform suggestions from its constituent interest groups quickly. However, OMB did not act upon most of the nominations even

161. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2006 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 110-12 (2006).

though a number came from groups that may have been allies of the Bush Administration.¹⁶² The Bush OMB reformed only seventeen of these forty-nine nominations. The Administration declined to reform twenty-one of the documents, and reform was pending four years later on the remaining eleven documents.¹⁶³ This record suggests that guidance reform was not a high priority.

To take one illustrative example, the U.S. Chamber of Commerce proposed reforming an EPA guidance document issued in the Clinton Administration encouraging state environmental agencies to deny or revoke operating permits in jurisdictions with a high proportion of minority or lower-income residents.¹⁶⁴ The document allowed concerned parties to file administrative complaints against anyone applying for an operating permit in such an area. The Chamber of Commerce argued that this guidance document exceeded the EPA's statutory authority and restricted the development of business in impoverished areas.¹⁶⁵ The Bush EPA declined to act on this suggestion despite its apparent ideological appeal.¹⁶⁶ The EPA did not comment on the reason for this inaction, but this outcome suggests that guidance reform was a low priority.

CONCLUSION

Both policymakers and legal scholars have assumed that agencies frequently use guidance documents to circumvent the notice and comment

162. OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, *STIMULATING SMARTER REGULATION: SUMMARIES OF PUBLIC SUGGESTIONS FOR REFORM OF REGULATIONS AND GUIDANCE DOCUMENTS 288-338* (2002) (showing that the following groups submitted reform suggestions: American Ambulance Association, American Chemistry Council, American Farm Bureau Federation, American Meat Institute, American Osteopathic Association, American Petroleum Institute, American Road and Transportation Builders Association, Association Connecting Electronic Industries, Cement Kiln Recycling Coalition, Center for Progressive Regulation, CNF Inc., Council on Governmental Relations, Credit Union National Association, Equal Employment Advisory Council, Gill Studios, Guidant Corporation, The Heritage Foundation, Institute of Makers of Explosives, International Bottled Water Association, Mercatus Center, National Association of Chain Drugstores, National Association of Home Builders, National Environmental Development Association, National Rural Water Association, Ogletree and Deakins, OMB Watch, Organization Resources Counselors Inc., Small Business Administration, Society of Nuclear Medicine, and the U.S. Chamber of Commerce, as well as several individual citizens).

163. See OFFICE OF MGMT. & BUDGET, *supra* note 161, at 110-12.

164. OFFICE OF INFO. & REGULATORY AFFAIRS, *supra* note 162, at 320.

165. *Id.*

166. See OFFICE OF MGMT. & BUDGET, *supra* note 161, at 111.

process. Professor William Funk notes that there is “extensive literature on, as well as popular outrage at, agencies’ perceived use of nonlegislative rules to achieve impermissible ends.”¹⁶⁷ Before now, however, this perception had not been empirically tested. A number of reform proposals therefore rest on the unverified assumption that guidance is used improperly.¹⁶⁸

Agencies do not commonly use guidance to make important policy decisions outside of the notice and comment process, however. No evidence exists that agencies use nonsignificant guidance strategically. Newly available data from the Bush Administration’s executive order show that significant guidance is issued infrequently relative to legislative rulemaking. Agency leaders with very different ideological views rarely repeal guidance documents issued by their predecessors despite the modest cost of doing so. Finally, the OMB completed reform on only thirty-five percent of guidance documents recommended for revision. In short, agencies do not frequently use guidance documents to issue important policies outside of the notice and comment process.

Viewed together, these results suggest that the consternation over guidance documents raised in both the academic and policy realms is overstated. Ironically, the data generated by the Bush executive order indicate that the reforms imposed by the order itself are unnecessary. Such consternation over guidance may be partially caused by overgeneralization from a few egregious examples of abuse. It may be partially fueled by interest groups seeking to reduce regulation by consuming limited agency resources with additional procedural requirements. It may also be fueled by fear among congressional staffers and OMB officials that agencies are subverting their authority.

This is not to suggest that guidance is never used to formulate important policy outside of the notice and comment process. Generalizing about an entity as large as the executive branch is obviously hazardous. Critics of guidance correctly point to some egregious examples of abuse.¹⁶⁹ Some agencies, such as

¹⁶⁷. Funk, *supra* note 50, at 1028.

¹⁶⁸. *E.g.*, Anthony, *supra* note 12.

¹⁶⁹. *See id.* at 1332-55; *see also* Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gen. Accounting Office, to the Honorable Ted Strickland, U.S. Representative (Feb. 28, 2003), *available at* <http://www.gao.gov/decisions/other/291906.pdf> (declaring a memorandum from the Department of Veterans Affairs to be a rule); Letter from Robert P. Murphy, Gen. Counsel, U.S. Gen. Accounting Office, to the Honorable David M. McIntosh, Chairman, Subcomm. on Nat’l Econ. Growth, Natural Res., and Regulatory Affairs, U.S. House of Representatives Comm. on Gov’t Reform (Jan. 20, 1999), *available at* <http://www.gao.gov/decisions/other/281575.pdf> (declaring an EPA guidance document to be a rule).

the FDA¹⁷⁰ and the IRS,¹⁷¹ clearly use guidance much more frequently than others. On balance, however, the results presented in this Note suggest that concern over agency abuse of guidance is overwrought.

Critics also frequently overlook the benefits of guidance. In many cases, guidance helps regulated entities comply with complicated regulations without being forced to pay for costly legal advice. Indeed, Congress has actually required agencies to issue guidance to reduce compliance costs for regulated parties.¹⁷² Moreover, appropriate use of guidance documents allows agencies to avoid devoting scarce time and resources to unnecessary rulemaking. Such time could instead be used for either policy development or enforcement of existing rules.¹⁷³ Agencies can also issue guidance more quickly than legislative rules, reducing the time that regulated parties are uncertain about their legal obligations.

Ironically, restricting guidance may also discourage agencies from issuing legislative rules.¹⁷⁴ Guidance restrictions could increase the cost of clarifying legislative rules, encouraging agencies to substitute adjudication for issuing legislative rules.¹⁷⁵ The cost imposed by such a shift could be substantial. A sizable literature has noted the benefits of legislative rules, which include establishing a uniform policy, setting policy *ex ante*, reducing adjudication costs, fostering openness and deliberation, increasing political accountability, and reducing the democratic problems introduced by allowing unelected agency leaders to make legally binding rules.¹⁷⁶ Restricting guidance threatens

170. The FDA's heavy use of guidance prompted Congress to pass legislation governing the practice. See FDA Modernization Act of 1997 § 701, 21 U.S.C. § 371(h) (2006).

171. The IRS frequently issues interpretive rules. For an analysis of this practice, see Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007).

172. See Small Business Regulatory Enforcement Fairness Act of 1996 § 212, 5 U.S.C. § 601 note.

173. See *supra* notes 117-118 and accompanying text.

174. For example, the Department of Housing and Urban Development proposed, but ultimately did not adopt, changes to its policy development process that were spurred by the cost of the notice and comment process. See Rulemaking Policies and Procedures—Expediting Rulemaking and Policy Implementation, 57 Fed. Reg. 47,166 (Oct. 14, 1992) (“[S]ubjecting virtually all of the Department’s programs and functions to notice and comment rulemaking before effectiveness . . . threatens to result in regulatory gridlock.”).

175. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

176. For an overview of the costs and benefits of rulemaking, see Asimow, *supra* note 86, at 402-09. See also JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 139-46 (4th ed. 2006) (analyzing the advantages and drawbacks of rulemaking relative to adjudication); Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163-64 (1986) (discussing the merits of rulemaking). For the seminal argument in favor of rulemaking, see KENNETH CULP DAVIS,

to reduce the frequency with which agencies provide these benefits via legislative rules.

Restrictions on guidance may also undermine the ability of agency leaders to manage their own organizations. Agency leaders often issue guidance primarily to provide direction to their own staff members. This reduces distortion of priorities within the agency, and may generate more consistent agency regulatory enforcement. Imposing significant restrictions on guidance could therefore have the perverse effect of creating a regulatory process that is more arbitrary and bureaucratic.

Existing studies have frequently assumed that agencies abuse guidance documents. Before now, however, this assumption had not been empirically tested. This Note analyzes this assumption by compiling the first large data set of guidance documents. The results suggest that agencies do not engage in widespread abuse of guidance. In light of this result and the virtues of guidance documents, proponents of restrictions should face the burden of providing empirical evidence for the assumption that agencies frequently abuse guidance.

ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970), which asserts that “[r]he procedure of administrative rule making is one of the greatest inventions of modern government.”

APPENDIX

Table 1.

VARIABLES USED TO TEST FOR STRATEGIC USE OF GUIDANCE, 1996-2006¹⁷⁷

VARIABLE	DESCRIPTION	MEAN	STANDARD DEVIATION
Guidance Documents	Number of guidance documents issued by agency	70.16	60.25
Legislative Rules	Number of legislative rules issued by agency	163.27	188.85
Agency Use of Guidance Documents	Ratio of nonlegislative rules to legislative rules	8.57	25.29
Time in Office	Cumulative years of presidential service	4.64	2.03
Divided Government	0=President and Congress are of the same political party 1=President and Congress are of a different political party	0.64	0.49
Court Challenge	Number of cases in which the agency was a named party	112.18	138.09
Congressional Oversight	Number of congressional hearings in which the agency was listed in the title	47.89	30.00
Presidential Approval	Agency PART Score Effective=1 Moderately Effective=2 Adequate=3 Ineffective=4	2.41	0.40

¹⁷⁷. All variables are measured annually. For all variables except Presidential Approval, N=55. For Presidential Approval, N=44.