

EASING THE GUIDANCE DOCUMENT DILEMMA AGENCY BY AGENCY: IMMIGRATION LAW AND *NOT REALLY* BINDING RULES

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Immigration law relies on rules that bind effectively, but not legally, to adjudicate millions of applications for immigration benefits every year. This Article provides a blueprint for immigration law to improve its use of these practically binding rules, often called guidance documents. The agency that adjudicates immigration benefit applications, United States Citizenship and Immigration Services (USCIS), should develop and adopt its own Good Guidance Practices to govern how it uses guidance documents. This Article recommends a mechanism for reform, the Good Guidance Practices, and tackles many complex issues that USCIS will need to address in creating its practices. The recommended reforms promote increased accessibility, transparency, and fairness for immigration law stakeholders, including unrepresented parties.

This Article also contributes to the larger administrative law debate about guidance documents. Guidance documents present a conundrum for administrative law because they have powerful positive and negative features. Because the Administrative Procedure Act does not require agencies to consider public input in the crafting of these rules, agencies may respond more quickly and flexibly than notice and comment rulemaking would allow. On the other hand, an agency policy statement (a type of guidance document that explains an agency's current thinking on a particular issue) is effectively binding even though it is not legally binding. Applicants are free to argue in an adjudication that a different approach should apply. Yet, stakeholders tend to follow the rule announced in the policy statement as if it were legally binding. Thus, there is a practically binding effect without the opportunity for notice and comment.

In developing a prescription for USCIS, this Article concludes that the best approach to reforming agency use of guidance documents is an agency-by-agency approach. It rejects a one-size-fits-all approach in favor of the opportunity for each agency to formalize its own practices. Such tailored reform recognizes that every agency is different, with its own guidance culture and communities of stakeholders. This approach is designed to ease the negative effects of guidance documents while maximizing their positive features.

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INTRODUCTION

Gabriela's parents brought her to the United States from Mexico when she was two years old. She crossed the U.S. border on her father's back without inspection or permission. Her family settled into a precarious yet hopeful life in the United States. As Gabriela grew, she knew nothing of life other than as a child of the United States. She made life-long friends, did well in school, and was completely absorbed in American culture. She knew little of Mexico. In high school, she met a boy named Harry, who was born in the United States and therefore a U.S. citizen since birth. Harry and Gabriela started dating.

When Gabriela was eighteen years old, the Obama Administration announced a new program that would stay removal (deportation) for individuals who, like Gabriela, arrived as children and do not have legal status in the United States.¹ Through the program, she was granted deferred action, which did not give her legal status but did give her permission to remain and work in the United States for two years.² During those two years, Gabriela and Harry often talked about getting married. It would be a marriage of love, with the added benefit of granting Gabriela a long-term, legal future in the United States. Yet, could the marriage actually help Gabriela's immigration situation?

Gabriela's situation presents an extremely complicated scenario. To become a lawful permanent resident, or a "green card" holder, one must either adjust status within the United States or travel abroad to process at a U.S. consulate.³ Gabriela may not adjust her status because she was never inspected or admitted into the United States when she crossed the border without permission as a child.⁴

1. See *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., www.uscis.gov/childhoodarrivals (last updated July 2, 2013) [hereinafter *Childhood Arrivals*]. At the time of writing, Congress is about to debate major immigration reform legislation. See *Border Security, Economic Opportunity, and Immigration Modernization Act*, S. 744, 113th Cong. (2013). Even if this legislation becomes law and changes immigration law, Gabriela's story and the other examples discussed throughout this Article would remain powerful examples of how immigration law has relied, and likely will continue to rely, on guidance documents.

2. See *Childhood Arrivals*, *supra* note 1. The DACA program is founded on informal agency documents.

3. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 512 (7th ed. 2011).

4. 8 U.S.C. § 1255(a) (2006). At this point, United States Citizenship and Immigration Services (USCIS) will not treat a grant of deferred action as an admission into the United States. Under a developing practice, however, it may be possible for Gabriela to obtain advance parole, which is permission to travel abroad. If she travels abroad under advance parole and is admitted into the United States upon her return, she might be eligible to adjust her status. *In re Arrabally*, 25 I. & N. Dec. 771 (BIA 2012).

That leaves the option of traveling abroad to a U.S. consulate, which is potentially dangerous for Gabriela. Those who have more than 180 days of unlawful presence in the United States are inadmissible for three years.⁵ If Gabriela has more than 180 days of unlawful presence and leaves the United States, even for consular processing, she may not return for three years.⁶

Therefore, it is crucial to know how much unlawful presence Gabriela has accrued. Calculating unlawful presence requires familiarity with more than statutes and regulations. It requires a close understanding of agency policy. According to a federal statute, no time spent under the age of eighteen counts as unlawful presence.⁷ However, the statute is silent as to whether time spent in deferred action status counts as unlawful presence. There is an agency memorandum that states that time spent in deferred action status does not count toward unlawful presence.⁸ The memorandum is the work product of United States Citizenship and Immigration Services (USCIS), a unit of the Department of Homeland Security.⁹ If the rule announced in the memorandum is followed, then Gabriela accrued unlawful presence from the day she turned eighteen until the day she was granted deferred action. She may not have accrued more than 180 days of unlawful presence, and it may be safe to pursue consular processing.

USCIS adjudicates applications for immigration benefits, such as a petition for lawful permanent residence status for a spouse of a U.S. citizen.¹⁰ USCIS's operations are massive. It adjudicates about 30,000 applications per day.¹¹ USCIS heavily relies on its own guidance documents, such as the unlawful presence memorandum, to conduct its adjudications.¹²

USCIS is not alone in its reliance on guidance documents. The proper use of agency guidance documents, or sub-regulatory rules,

5. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006). For those with one year or more of unlawful presence, the bar jumps to ten years. *Id.* § 1182(a)(9)(B)(i)(II).

6. If she has one year or more of unlawful presence, she faces a ten-year bar. *See id.*

7. *Id.* § 1182(a)(9)(B)(iii)(I).

8. Memorandum from Donald Neufeld on Unlawful Presence, Acting Assoc. Dir. Domestic Operations Directorate, U.S. Citizenship & Immigration Services 42 (May 6, 2009) [hereinafter Unlawful Presence Memo]. USCIS is engaged in an effort to transform its agency memoranda into a centralized Policy Manual. *See USCIS Policy Manual*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/policymanual/HTML/PolicyManual.html> (last updated June 10, 2013). At the time of writing, the unlawful presence memorandum has not been integrated into the Policy Manual.

9. Unlawful Presence Memo, *supra* note 8.

10. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., A DAY IN THE LIFE OF USCIS (May 2010), available at <http://www.uscis.gov/USCIS/AboutUs/day-in-the-life.pdf>.

11. *Id.*

12. *See infra* Part I.B.

is subject to much debate across administrative law.¹³ These are agency rules, such as policy statements, which are not the product of notice and comment rulemaking.¹⁴ Under notice and comment rulemaking procedures, an agency publishes notice of a proposed rule in the Federal Register, invites and considers comments on the proposal, and then publishes a final rule.¹⁵ The Administrative Procedure Act does not require an agency to consider public input in the crafting of guidance documents.¹⁶ Thus, the procedures used to create guidance documents are less formal than notice and comment rulemaking procedures.

Agency use of guidance documents is on the rise.¹⁷ Thus, major decisions hinge on the application of a rule that is not the product of notice and comment, but rather exists in the form of information presented in a memorandum from an agency official. The formulation of the memo is often a mystery because the memo simply appears and announces the agency's perspective on a particular issue.¹⁸ Adjudicators look to these memoranda when deciding whether to grant benefits.

One widely recognized concern about agency use of policy memoranda is that the memoranda tend to bind practically without the procedural protections of notice and comment rulemaking.¹⁹ Although notice and comment rulemaking results in a legally binding rule, a policy statement rule contained in a memorandum is not legally binding.²⁰ Consequently, a regulated party may argue for a different rule to apply in any adjudication, and the agency is free to change the rule. A regulated party, however, probably will feel pressure to follow the rule contained in the policy statement because the agency is expressing its enforcement plans, and following the

13. See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 331 (2011).

14. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 569–71 (2012). Notice and comment rulemaking is also sometimes called informal rulemaking. *Id.*

15. *Id.*

16. *Id.*

17. See generally Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 695 (2007) (discussing the controversy surrounding broader use of informal agency guidance materials); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–99 (2007) (describing the volume of informal agency materials as “massive”).

18. Family, *supra* note 14.

19. 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); Seidenfeld, *supra* note 13, at 343.

20. See Family, *supra* note 14.

rule presents the path of least resistance.²¹ Also, a lower-level agency adjudicator probably will follow the rule announced by superiors. Practically speaking, the policy statement rule operates the same as a legally binding rule. Difficulty in accessing judicial review of guidance documents only exacerbates concerns about the practically binding effect.²²

In addition to concerns about a binding effect, there are concerns about guidance documents that are more specific to USCIS's operations. First, USCIS guidance documents are inaccessible. Although guidance documents are present on USCIS's website, there is not enough direction to these documents for applicants to know to look at them.²³ Moreover, USCIS does not provide adequate explanation of the role of these guidance documents in adjudication, either legally or practically. Recognizing a need for greater accessibility, USCIS has recently initiated the creation of a centralized policy manual to replace the unorganized hodge-podge of guidance documents that currently exists.²⁴ A centralized policy manual is an improvement, but it is not yet clear whether USCIS will provide better direction to the policy manual or a better explanation of its significance.

Second, the process for formulating guidance documents has been opaque. Although there have been some recent improvements, many questions remain about how guidance documents are created. Third, USCIS has used guidance documents to alter major adjudicatory standards. This creates a ground-shifting problem where the legal rules appear to have little stability. Fourth, USCIS has failed to set clear expectations for the effect of guidance documents before its administrative appellate body, which adds to the confusion about the effect of guidance documents. These problems are compounded by the fact that USCIS has underused notice and

21. This is especially relevant in immigration law. For some categories of benefits, the majority of applicants are not represented. *See id.* at 568. An unrepresented applicant probably is not cognizant of the nature of guidance-based rules and may see any rule as simply a binding rule. Even if an applicant is represented, the costs of challenging a guidance-based rule may be prohibitive.

22. *See* Johnson, *supra* note 17, at 712 (explaining that challenging guidance documents is difficult because courts do not view guidance documents as final agency action, which is a prerequisite for review under the Administrative Procedure Act and is influential in any ripeness analysis); Seidenfeld, *supra* note 13, at 343 (describing how guidance documents "are generally not reviewable when issued"); Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371 (2008) (discussing challenges to obtaining judicial review of guidance documents).

23. *See infra* Part I.A.

24. *See infra* Part I.A.

comment rulemaking. There is a heavy reliance on sub-regulatory rules coupled with insufficient emphasis on making regulations.²⁵

Harry and Gabriela's situation illustrates USCIS's problems with accessibility. For example, it is likely that Harry would proceed without legal representation to petition for a green card for Gabriela because over seventy percent of those who file the applicable form do not have representation.²⁶ Harry and Gabriela may find their way to the USCIS website looking for information. There, they may find a brochure titled: "I am a U.S. Citizen. How Do I . . . Help My Relative Become a U.S. Permanent Resident?"²⁷ This brochure provides some basic information about the application process. Harry and Gabriela know that Gabriela does not have legal status in the United States, and the brochure will leave them wondering whether that matters. The brochure acknowledges that it is basic. It advises: "For more information, or the law and regulations, please visit our website."²⁸

The problem is that Harry and Gabriela lack the legal training to delve into the complex reality of immigration law via the USCIS website.²⁹ While the brochure mentions "law and regulations," immigration rules actually come in the form of statutes, regulations, and informal agency guidance documents. Although statutes and regulations are more visible,³⁰ agency guidance documents exist in the shadows. In fact, the brochure does not even mention guidance documents. It is doubtful that Harry or Gabriela would know to look for a fifty-one-page memorandum discussing unlawful presence, or any other repository of agency policy.³¹ Even if one of them found agency policy, would they understand its effect? Would

25. See *infra* Part I.B.

26. For Form I-130, Petition for Alien Relative, Form G-28 accompanied only twenty-seven percent of receipts during Fiscal Year 2011. See Family, *supra* note 14, at 568 & n.4. Form G-28 indicates representation either by an attorney or a non-attorney accredited representative. See 8 C.F.R. § 292.1(a)(4) (2011).

27. U.S. CITIZENSHIP AND IMMIGRATION SERVS., I AM A U.S. CITIZEN: HOW DO I . . . HELP MY RELATIVE BECOME A U.S. PERMANENT RESIDENT? (Jan. 2013), available at <http://www.uscis.gov/USCIS/Resources/A1en.pdf>.

28. *Id.* at 3.

29. See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 551-63 (2011) (discussing the harshness, complexity, and opacity of immigration law).

30. While immigration statutes and regulations are still complex and harsh, they are at least more visible than guidance documents. Statutes and regulations are published regularly and predictably in widely distributed public sources, and USCIS references them in its publications. See *supra* note 28 and accompanying text.

31. Unlawful Presence Memo, *supra* note 8.

Harry and Gabriela be able to decipher one of the most challenging aspects of administrative law: the role and effect of agency guidance documents?³²

Beyond accessibility, issues exist even if Harry and Gabriela have attorney representation and presumably have more access to relevant guidance documents. A seasoned attorney would know that USCIS often relies on guidance documents to provide the standards for adjudication, but also would know that guidance documents are not legally binding on the agency.³³ New guidance documents may appear at any time, changing the agency's outlook. Therefore, an attorney may give advice to Harry and Gabriela, but that advice would rest on shifting ground.

While Harry and Gabriela's situation shows the drawbacks of agency use of sub-regulatory rules, guidance documents do have positive attributes. For example, because policy memoranda are formulated without the time and effort of notice and an opportunity for public comment, an agency may react more quickly and flexibly than notice and comment would allow.³⁴ Policy memoranda also serve as less formal and politically visible means to communicate with the public, including regulated parties.³⁵ Additionally, a guidance document such as a policy memorandum provides more notice than if the alternative is no communication from the agency, or if communication is only in the form of case-by-case adjudication.³⁶

The conundrum presented is this: is there a way for USCIS to continue to benefit from the positives while minimizing the negatives? Concerns about guidance documents have led scholars and organizations to propose changes to how agencies formulate guidance documents. These reform proposals usually approach the issue with a broad brush by imagining widespread reform. For example, one proposal would require the use of notice and comment rulemaking any time an agency binds the public, even if only practically.³⁷ Other proposals would implement additional procedural obligations on agencies that wish to rule by memo.³⁸ In response,

32. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (referring to this area of the law as "enshrouded in considerable smog"); John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893, 893 (2004) ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

33. *See Family*, *supra* note 14.

34. *Id.* at 578–79.

35. *Id.*

36. *Id.*

37. *See Anthony*, *supra* note 19.

38. *See infra* Part II.A.1.

critics have argued that imposing additional obligations on the use of guidance documents would only ossify agency use of these rules.³⁹ As a result, agency activity would become even less transparent because agencies either would communicate less often or would engage in more individualized adjudications as opposed to rulemaking.⁴⁰

In a previous article, I analyzed how the controversy over guidance documents in administrative law generally manifests in immigration law.⁴¹ That article explains how USCIS has acknowledged some of the challenges it faces with respect to its use of guidance documents and has taken initiative to begin to address those problems.⁴² This Article proposes that USCIS continue on its path of innovative self-regulation⁴³ and formalize its policies on its use of sub-regulatory rules by adopting Good Guidance Practices. At the same time, the intricacies of guidance reform within USCIS are a springboard to discuss the broader question of guidance reform in administrative law. This Article proposes that the best approach to guidance reform is an agency-by-agency approach.

This Article calls for USCIS to adopt Good Guidance Practices to govern how USCIS develops and uses guidance documents. USCIS would create its Good Guidance Practices through notice and comment rulemaking. These Good Guidance Practices should accomplish at least three tasks: (1) increase accessibility by defining the term “guidance document,” by explaining the significance of guidance documents in a way that is easily understood, and by making USCIS guidance itself more available; (2) formalize policies that encourage participation in the development of guidance documents; and (3) create a positive guidance document culture, both externally and internally, by increasing transparency and by implementing internal control mechanisms.

In assigning these tasks to USCIS, this Article favors a self-regulatory approach. This approach lessens concerns about the ossification of guidance documents by allowing USCIS to develop its own practices organically from within and then to formalize those practices. It also lessens the incentive for agencies to turn away from guidance documents altogether by allowing an agency like USCIS to lead the development of the rules that will govern its use of guidance documents. At the same time, internally developed

39. See *infra* Part II.A.1.

40. Johnson, *supra* note 17, at 697; Seidenfeld, *supra* note 13, at 367.

41. See Family, *supra* note 14.

42. *Id.*

43. See M. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).

Good Guidance Practices are capable of easing USCIS's problematic guidance document practices. This approach acknowledges that additional controls are needed but strikes a balance between the need for reform and the need to preserve the positives of sub-regulatory rules.

Such a self-regulatory method also allows for tailored guidance reform that incorporates the particular needs and circumstances of USCIS. Diverse agencies have different communities of stakeholders, different tasks to accomplish, and unique guidance cultures. Examining USCIS's troubles with guidance documents reveals that a one-size-fits-all approach to guidance reform is not the best approach. This Article recommends an agency-by-agency approach that allows for bottom-up, decentralized reform.

Part I summarizes the major problems related to USCIS's use of guidance documents, discusses what might motivate USCIS to rely on guidance documents, and lays out USCIS's guidance reforms thus far. Part II provides a blueprint for immigration guidance reform and argues for USCIS to adopt its own Good Guidance Practices. In formulating reform for USCIS, Part II also explores the implications for administrative law generally.

I. GUIDANCE DOCUMENTS AND IMMIGRATION LAW

In discussing USCIS's use of guidance documents, it is important to recognize two distinct groups: immigration law experts and unrepresented parties. Immigration law experts are immigration attorneys and advocacy groups. Unrepresented parties are individuals who lack experience with immigration law and who use USCIS's services only occasionally. For certain immigration categories, unrepresented parties make up the majority of those applying for benefits.⁴⁴

USCIS's use of guidance documents affects these two groups in different ways. For immigration experts, there is some confusion over the effect of agency pronouncements contained in guidance documents and the related problem of the unsteadiness of shifting ground. The experts are not sure if the rules in current guidance documents will be the rules tomorrow. At an even more fundamental level, however, unrepresented parties are left in the dark as to the mere existence of guidance documents and are not provided

44. See Family, *supra* note 14, at 568, app. at 618 (documenting for Fiscal Year 2011: a forty-seven percent representation rate for Form I-485, a thirteen percent representation rate for Form N-400, and a twenty-seven percent representation rate for Form I-130).

adequate information about why guidance documents are important.

This Part explores how USCIS's treatment of guidance documents is lacking and acknowledges USCIS's recognition that it needs to improve. USCIS is engaged in an ongoing effort to review and repackage its guidance documents.⁴⁵ Currently, however, USCIS does not adequately explain what guidance documents are, their effects, or how it formulates them. USCIS's use of guidance documents is also problematic because USCIS has underused notice and comment rulemaking, has altered major adjudicatory standards through guidance documents, and has failed to set clear expectations for the effect of guidance documents before its administrative appellate body. Despite the drawbacks of guidance documents, USCIS is clearly motivated to use them. This Part also hypothesizes what might push USCIS to rule by *not really* binding guidance documents.

A. *Confused Presentation, Faulty Explanation, and Opaque Formulation*

The status quo is that USCIS operates under a mass of guidance documents that are not particularly visible. Immigration experts eventually find out about the latest guidance documents, but the information circulates predominately through established networks. For example, the American Immigration Lawyers Association (AILA) publishes information about guidance documents on its website for fee-paying members, and there are well-established immigration law news publications, list-serves, and blogs that circulate the guidance documents to expert audiences.⁴⁶

However, there is little to no effort to educate unrepresented parties about guidance documents. USCIS receives applications from a substantial number of individuals who are not represented in some capacity.⁴⁷ An added complication for unrepresented parties is that they may not even know to look for a guidance document or that such a thing even exists. USCIS must take care to

45. See *USCIS Policy Manual*, *supra* note 8.

46. See, e.g., VISAS, GREENCARD AND CITIZENSHIP, ILW.COM, <http://www.ilw.com/> (last updated Aug. 21, 2013); *Legal Newsroom: Immigration Law*, LEXISNEXIS, <http://www.lexisnexis.com/community/immigration-law/> (last visited August 21, 2013); Angelo Paparelli, NATION OF IMMIGRATORS, <http://www.nationofimmigrants.com/> (last updated Aug. 18, 2013); *Recent Postings*, AILA INFO.NET, <http://www.aila.org/RecentPosting/RecentPostingList.aspx> (last visited August 21, 2013).

47. See *Family*, *supra* note 14, at 568, app. at 618.

make sure the information contained in its guidance documents is accessible to its less sophisticated users.

As a part of its policy reform efforts, USCIS is engaged in an effort to present its guidance in a new, centralized source called the Policy Manual. In place of a hodge-podge collection of memoranda, the manual will present agency policy by subject in a more organized form. At the time of writing, the manual is not yet complete, but its first stages are available on the USCIS website.⁴⁸

Historically, USCIS has posted some of its guidance documents on its website, but these documents have been obscured in a section of the website called “Laws,” with no effective explanation of what they are for or what they do.⁴⁹ Although the creation of the Policy Manual is an improvement in that it holds the promise of better, more centralized organization, it is unclear whether the manual will improve visibility or whether it will provide better context. Based on the website’s current design, one needs to know to look for policy to find policy. There is little explanation that policy exists or how it is different from statutes and regulations.⁵⁰ There is no mechanism in place to guide an unrepresented party, such as Gabriela, to understand why she might need to find policy.

Information about guidance documents should not be disjointed from the “Forms” sections or the other methods of accessing information that describes substantive immigration categories. For

48. See *USCIS Policy Manual*, *supra* note 8.

49. *Immigration Policy and Procedural Memoranda*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Laws” hyperlink; then follow “Policy Memoranda” hyperlink) (last updated Jan. 22, 2013).

50. Under “Laws,” a visitor to the website may click on “Policy Memoranda,” (assuming that the visitor is aware of a need to click on it) and will read this explanation: “This page provides access to various policy and procedural memoranda which gives guidance to USCIS adjudicators in their work of processing applications and petitions for immigration benefits while still protecting national security.” *Id.* Alternatively, the visitor may click on “Immigration Handbooks, Manuals and Guidance,” and will find this explanation:

This page provides access to those handbooks and manuals that have been approved for release to the public. Additional manuals will be published once they have been cleared for release, and these will be noted below. We have also added, via the link “Policy Memoranda” on the left, access to released policy and procedural memoranda.

Immigration Handbooks, Manuals, and Guidance, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Laws” hyperlink; then follow “Immigration Handbooks, Manuals, and Guidance” hyperlink) (last updated Jan. 7, 2013). Additionally, the “Laws” page explains: “The USCIS LAWS section provides information on laws, regulations and interpretations controlling immigration and the work of the immigration-related components of the Department of Homeland Security.” *Laws*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Laws” hyperlink) (last updated July 5, 2013). It does not, however, explain how each of these sources (laws, regulations and interpretations) are different and how “interpretations” do not control in the same way as a law or regulation.

example, when one accesses the page for Form I-485, the Application to Register Permanent Residence or Adjust Status, there should be links to the relevant laws, including guidance documents, on the same page.⁵¹ USCIS should do the heavy lifting to point visitors to all of the rules applicable to specific immigration categories or applications.

The “Related Links” references on the pages of each immigration form are incomplete. As an example, Form I-130 is the first step to petition for a family member for lawful permanent residence, or a “green card.”⁵² Harry would use this form to petition for Gabriela. While the form itself is dedicated to establishing a recognized relationship, the ultimate determination whether the relative will obtain lawful permanent resident status will turn on the foreign national’s admissibility.⁵³ Guidance documents related to inadmissibility should be linked here. An approved I-130 itself does not grant legal status, but surely an individual spending \$420 to file the form will want to know about the guidance documents that will shape the final outcome.⁵⁴ Additionally, a page titled “Green Card Eligibility” does reference the issue of admissibility, but not in detail, and does not address the existence or role of guidance documents.⁵⁵ It states only that “Congress has set the grounds of inadmissibility, and they may be referenced in Section 212 of the Immigration and Nationality Act,” but makes no reference to guidance documents (or regulations, for that matter).⁵⁶

Even if unrepresented applicants are able to access USCIS’s guidance documents, they may not be familiar with the role of guidance documents in administrative law. USCIS needs to better explain the effect of these documents. Better education about the nature of guidance documents affects both immigration experts and unrepresented parties. For immigration experts, a clearer explanation from the agency would set more accurate and consistent

51. *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Forms” hyperlink; then follow “Application to Register Permanent Residence or Adjust Status” hyperlink) (last updated June 6, 2013).

52. *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Forms” hyperlink; then follow “Petition for Alien Relative” hyperlink) (last updated July 5, 2013).

53. See 8 U.S.C. § 1182 (2006).

54. There is also no discussion of admissibility in the instructions accompanying Form I-130. *I-130, Petition for Alien Relative*, *supra* note 52.

55. *Green Card Eligibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Green Card” hyperlink; then follow “Green Card Processes and Procedures” hyperlink; then follow “Green Card Eligibility” hyperlink) (last updated Mar. 30, 2011).

56. *Id.*

expectations about the stability of guidance-based rules. For unrepresented parties, USCIS should be more transparent about the nature of guidance-based rules, including that the rules may change between when an application is filed and its adjudication, or between when an initial application is adjudicated and an application to extend that immigration status is submitted.⁵⁷

At the time of writing, USCIS's explanation of the effect of guidance documents is found in its Adjudicator's Field Manual (Field Manual), which the Policy Manual will eventually replace.⁵⁸ In its Adjudicator's Field Manual, which is available to the public, USCIS explains a difference between correspondence and policy:

It is important to note that there is a distinction between "correspondence" and "policy" materials. Policy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material. On the other hand, correspondence is advisory in nature, intended only to convey the author's point of view. Such opinions should be given appropriate weight by the recipient as well as other USCIS employees who may encounter similar situations. However, such correspondence does not dictate any binding course of action which must be followed by subordinates within the chain of command.⁵⁹

According to the Field Manual, "policy" includes statutes and regulations, field manuals, operations instructions, precedent decisions, and memoranda bearing the label "P" for policy.⁶⁰ Examples of correspondence include non-precedent decisions and memoranda not bearing the label "P."⁶¹

The Field Manual uses terminology that is inconsistent with the Administrative Procedure Act (APA). Under the APA, statutes and regulations are legally binding and are not of the same class as sub-regulatory documents, such as manuals and policy memoranda.⁶²

57. *See infra* Part I.B.

58. *See USCIS Policy Manual, supra* note 8.

59. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 3.4(a) (2012), available at <http://www.uscis.gov/portal/site/uscis> (search "Adjudicator's Field Manual") [hereinafter FIELD MANUAL].

60. *Id.*

61. *Id.*

62. *See Family, supra* note 14.

Therefore, it is odd that the Field Manual names statutes and regulations as types of “policy.”⁶³ In addition, the Field Manual explains that some guidance documents, such as memoranda bearing the label “P,” are binding on the agency.⁶⁴ This seems to contradict the APA, since policy statements do not have the force of law.⁶⁵ Moreover, placing “P” memoranda in the same category as statutes gives the impression that the memoranda are of equal weight to statutes and regulations, thus giving the impression that they have binding effect. To further complicate matters, the Introduction to the Field Manual states, “Important Notice: Nothing in the [Field Manual] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”⁶⁶ This language seems aimed at discouraging public reliance on anything in the Field Manual, which is confusing from a stakeholder’s perspective because the Field Manual states that some of the information in the Field Manual is binding on the agency.

Regardless of whether there is some way to justify USCIS’s explanation of the effect of its guidance documents,⁶⁷ USCIS is only compounding confusion in an area that is inherently complex. This area of law is confounding even for experienced judges and administrative lawyers.⁶⁸ In immigration law, where representation rates are very low for certain types of applications,⁶⁹ USCIS must make sure its explanations of its rules are transparent and comprehensible.

There is also a lack of transparency in the formulation of USCIS guidance documents. Prior to 2010, there was no established method to engage the public in formulating guidance documents.⁷⁰ The creation process occurred behind the scenes, where select immigration experts may have been involved or received clues that a new memorandum was in development.

63. See FIELD MANUAL, *supra* note 59.

64. *Id.* The explanation included in the new policy manual only adds confusion. It states that “[t]he USCIS Policy Manual contains the official policies of USCIS and must be followed by all USCIS officers in the performance of their duties.” *USCIS Policy Manual*, *supra* note 8.

65. See Family, *supra* note 14.

66. FIELD MANUAL, *supra* note 59.

67. See Geoffrey Forney, *The AAO and USCIS Policy Memoranda*, 16 BENDER’S IMMIGR. BULL. 821, 828 (2011).

68. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108 (D.C. Cir. 1993).

69. See Family, *supra* note 14, at 568, app. at 618.

70. *Id.* at 610–15.

In May 2010, USCIS began to post draft memoranda for comment on its website.⁷¹ This initiative is part of a broader effort to improve public engagement.⁷² Under the Draft Memorandum for Comment program, USCIS posts a draft memorandum on its website and invites comments.⁷³ USCIS is issuing both draft memoranda and interim memoranda for comment through this program.⁷⁴

The explanation of the process on USCIS's website contains the following disclaimers:

USCIS seeks your input on the draft policy memoranda listed below. These memos are drafts of proposed or revised guidance to USCIS Field Offices and Service Centers. They are not intended as guidance for the general public, nor are they intended to create binding legal requirements on the public. Until issued in final form, the draft memos do not constitute agency policy in any way or for any purpose . . .

In a continued effort to promote transparency and consistency in our operations, USCIS will periodically post policy memos for public comment to assist USCIS in improving immigration services. USCIS will not post memos containing information that is law enforcement sensitive, confidential or otherwise protected from disclosure under the Freedom of Information Act. USCIS is not required to solicit public comment on the draft policy memos under the Administrative Procedure Act. This informal comment process does not replace any statutory or other legal requirement for public comment on agency action.⁷⁵

Comments are submitted by email and must be submitted before the closing date posted on the draft document, which is usually

71. *Id.*

72. *Id.* USCIS is also seeking comment on operational proposals and templates for certain adjudicatory actions. Additionally, USCIS is holding conference calls with stakeholders on trending topics. *Upcoming National Engagements*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow "Outreach" hyperlink) (last updated July 24, 2013).

73. *Draft Memorandum for Comment*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow "Outreach" hyperlink; then follow "Feedback Opportunities" hyperlink; then follow "Draft Memoranda for Comment" hyperlink) (last updated Feb. 14, 2013).

74. *Id.* As the transition to the Policy Manual continues, USCIS will continue to issue draft guidance. *See Questions and Answers, USCIS-American Immigration Lawyers Association (AILA) Meeting*, U.S. Citizenship & Immigration Services 5–6 (Apr. 11, 2013).

75. *Draft Memorandum for Comment*, *supra* note 73.

about fifteen to thirty days after the draft is posted.⁷⁶ The USCIS website does contain a section called “Feedback Updates,” which lists the number of comments received, but there is no detailed analysis of the comments.⁷⁷ As of July 2012, USCIS had posted forty-three memoranda for comment on its website.⁷⁸

While the draft memorandum for comment procedure does increase transparency, it still leaves much in the shadows. How USCIS decides which memos will be posted for comment is not clear, nor is it clear what happens to the comments received in response to the posting. While USCIS does explain that it will not post memoranda “containing information that is law enforcement sensitive, confidential or otherwise protected from disclosure under the Freedom of Information Act,” there is no explanation on the website about how USCIS decides whether to seek input on memoranda that do not fall under that prohibition.⁷⁹ Finally, because the program is not formalized and is mere policy itself, there is no guarantee that the program will exist tomorrow.

The draft memorandum for comment is an important advancement for immigration law.⁸⁰ The self-regulatory spirit behind the concept influences this Article’s recommendations. This Article calls for the draft memorandum for comment process to mature into a more formalized and transparent feature of immigration law.

B. Lack of Notice and Comment Rules, Unexpected Change, and Confusion in Administrative Appeals

USCIS over-relies on sub-regulatory rules.⁸¹ There are significant immigration law issues that have no notice and comment rules at their foundation. For these issues, guidance documents supply the rules.

76. See *Feedback Updates*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Outreach” hyperlink; then follow “Feedback Opportunities” hyperlink; then follow “Draft Memoranda for Comment” hyperlink; then follow “Feedback Updates” hyperlink) (last updated July 18, 2013).

77. *Id.*

78. *Id.*

79. *Draft Memorandum for Comment*, *supra* note 73.

80. See *Family*, *supra* note 14, at 610–15.

81. In Fiscal Year 2011, USCIS issued forty-one policy memoranda. U.S. CITIZENSHIP & IMMIGRATION SERVS., FISCAL YEAR 2011 HIGHLIGHTS REPORT 7–8, available at <http://www.uscis.gov/USCIS/About%20Us/Budget,%20Planning%20and%20Performance/USCIS%20Fiscal%20Year%202011%20Highlights%20Report.pdf> (last visited Aug. 21, 2013). During that same fiscal year, it issued only three notices of proposed rulemaking, one interim rule, and five final rules. *Id.* at 5–7. However, USCIS did seek public input through a variety of notices placed in the Federal Register. *Id.*

One of these issues governed by guidance documents is the statutory concept of unlawful presence, which, if operational, can separate family members for up to ten years.⁸² Also, only policy memoranda, not regulations, address the Child Status Protection Act (CSPA).⁸³ The CSPA can freeze a child's age so that the child does not "age out" and become ineligible.⁸⁴ The implementation of the CSPA raises complicated questions, including how to calculate the date on which the child's age froze and questions of retroactivity.⁸⁵ The application of unlawful presence and the eligibility of children are concerns that cut across all categories of admission, including those family-based categories where representation rates are low.

This foundational reliance on guidance documents occurs in an atmosphere where there may be unexpected and sudden changes to the policies contained in guidance documents. It is not uncommon to find major changes to adjudicatory standards in new guidance documents. The appearance of a new memorandum has caused "shock by memo" in the immigration world, as immigration law experts have struggled to understand the new approach. Attorneys have scrambled to help clients understand which rules may apply to a petition or application that was filed months (or years) ago under a different memorandum.⁸⁶

USCIS released a memorandum in 2010 that changed the adjudication standards for a category called H-1B and created an uproar among the immigration law expert community.⁸⁷ H-1B is a temporary legal immigration category for highly skilled workers.⁸⁸ This 2010 memorandum was met with high levels of frustration and exasperation from the immigration law expert community.⁸⁹ It

82. Unlawful Presence Memo, *supra* note 8. There are a handful of regulations that address some narrow unlawful presence issues but no regulation that generally addresses its meaning.

83. Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified as amended in scattered sections of 8 U.S.C.).

84. See MARY A. KENNEY, AM. IMMIGRATION LAW FOUND., UPDATED PRACTICE ADVISORY ON THE CHILD STATUS PROTECTION ACT (2004), available at http://www.aifl.org/lac/pa/lac_pa_010504.pdf.

85. *Id.*

86. Various processing times at the USCIS service centers may be found on the USCIS website. *USCIS Processing Time Information*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last visited August 20, 2013).

87. Memorandum from Donald Neufeld on Employer-Employee Relationship, Acting Assoc. Dir. Domestic Operations Directorate, U.S. Citizenship & Immigration Services 42 (Jan. 8, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/HIB%20Employer-Employee%20Memo010810.pdf> [hereinafter Employer-Employee Memo]; see Family, *supra* note 14, at 599-604.

88. 8 U.S.C. § 1101(a)(15)(H)(i)(B) (2006).

89. Family, *supra* note 14, at 599-604.

contained a new understanding of the employer-employee relationship that affected eligibility under the category.⁹⁰ In the same year, USCIS released a policy memorandum addressing the evidence needed to support an application for a green card under the extraordinary ability category.⁹¹ Immigration law experts viewed the new memo as changing the eligibility requirements.⁹² Not only experts questioned the new approach, but employers also made “a plea to simply understand the rules.”⁹³

The implementation of the Employment-Based Fifth Preference (EB-5) category has been notoriously unpredictable.⁹⁴ The category has been undersubscribed, which is unusual for immigration law.⁹⁵ In this category, those who make an investment in the United States (usually a one million dollar minimum) and create at least ten jobs are eligible to receive lawful permanent residence.⁹⁶ Over the years, however, USCIS has vacillated among the types of investment arrangements it will condone as qualifying under the category, abandoning existing policy memoranda in the process.⁹⁷

Compounding the confusion over the staying power and reliability of USCIS pronouncements are concerns about the way the agency’s appellate adjudicatory body treats agency sub-regulatory rules. This confusion mirrors a larger debate over what the effect of such rules should be in an administrative appellate setting.⁹⁸ When the appellate body treats a policy statement as binding, then the appellate body has contradicted the nature of policy statements.⁹⁹ In fact, it is an indication that the agency intended the rule to be

90. *Id.* Further illustrating the roller-coaster nature of policy change by memo, USCIS released a document titled “Questions and Answers” on March 12, 2012, which appears to backtrack on some portions of the Neufeld Memo. *Questions and Answers: USCIS Issues Guidance Memorandum on Establishing the “Employee-Employer Relationship” in H-1B Petitions*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 12, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3d015869c9326210VgnVCM10000082ca60aRCRD>.

91. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM: EVALUATION OF EVIDENCE SUBMITTED WITH CERTAIN FORM I-140 PETITIONS, Dec. 22, 2010, *available at* <http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>.

92. CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, RECOMMENDATIONS TO IMPROVE THE QUALITY IN EXTRAORDINARY ABILITY AND OTHER EMPLOYMENT-BASED ADJUDICATIONS 6 (2011).

93. *Id.*

94. Family, *supra* note 14, at 605–07.

95. See CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2011 25 (2011), *available at* <http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf>.

96. 8 U.S.C. § 1153(b)(5) (2006).

97. See Family, *supra* note 14, at 604–07.

98. See *id.*

99. *Id.* at 608.

legally binding.¹⁰⁰ When a court reviews the agency's implementation of a policy memorandum to judge whether the agency appropriately did not give notice and seek comment, the court may look to whether the agency treated the policy statement as legally binding.¹⁰¹ When an administrative appellate body abandons a policy statement rule and adopts a different rule, however, that leaves applicants and immigration law experts feeling as though the ground has shifted. The adoption of a different rule creates more uncertainty about which rules apply today and which rules may apply tomorrow.

One example of this uncertainty occurred in another major temporary worker category, L-1B. In addressing one of the category's statutory requirements, USCIS's Administrative Appeals Office (AAO) refused to follow a long-standing memorandum.¹⁰² Immigration law experts complained that the AAO "ignored" the guidance, and to these experts, the guidance was the only rule available.¹⁰³ Regardless of whether the AAO was legally permitted or required to do so, the AAO left the impression that the rules had suddenly shifted, and that reliance was risky. Because guidance documents are a major source of rules, the inability to rely on USCIS's pronouncements affects the standards at the core of many adjudications. As a result, the Office of Citizenship and Immigration Services Ombudsman has recommended that USCIS engage in notice and comment rulemaking to create more consistent and predictable rules for the L-1B category.¹⁰⁴

In addition, the AAO has played a role in the uncertainty in the implementation of the EB-5 program. In the 1990s, the AAO refused to follow policy memoranda that had grown to "govern" the program.¹⁰⁵ These AAO decisions even applied retroactively, meaning that those who made investments under the pre-existing policy memoranda then found themselves operating under a completely new set of rules. Investments that were once tolerated were no

100. *See id.* at 604–07.

101. *See, e.g.*, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006); *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003); *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999); *American Bus Ass'n. v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

102. GST Technical Servs., WAC 07 277 53214, 19–21 (Admin. Appeals Office Jul. 22, 2008).

103. Austin T. Fragomen, Jr. & Bo Cooper, *The Shifting Sands of L-1B Specialized Knowledge*, in 42ND ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 225, 234 (2009).

104. *Teleconference Recap: The Adjudication of L-1B "Specialized Knowledge" Worker Petitions—How Is It Working for You?*, U.S. DEP'T OF HOMELAND SEC., available at <http://www.dhs.gov/files/publications/cisomb-telecon-adjudication-l-1b-worker-petitions.shtm> (last visited August 20, 2013).

105. Family, *supra* note 14, at 604–07.

longer. This phenomenon left some unable to complete processing to become a full-fledged lawful permanent resident, leaving them in immigration limbo.¹⁰⁶

C. Motivation

Given the problematic nature of USCIS's use of guidance documents, it is worthwhile to hypothesize why USCIS may rely on guidance documents. Contemplating potential motivating forces will influence proposed solutions and also serves as a reminder that guidance documents do have positive attributes. In the absence of a formal explanation from USCIS about why it chooses to govern by guidance document, this Section posits what might motivate USCIS to do so.

While it is not possible to determine definitively what motivates USCIS to use guidance documents in the absence of further study, it is possible to generate a list of likely influences.¹⁰⁷ For example, there are internal practical concerns, such as the time investment and financial cost of notice and comment rulemaking. Agencies do not have unlimited resources, either in terms of money or time. At times USCIS may need to move quickly, and at other times financial cost may drive the agency to use guidance documents. There are other potential influences, such as varying levels of emphasis on rulemaking from different agency leaders and the view that guidance documents are more insulated from judicial review.¹⁰⁸

Guidance-based rules are also more flexible than notice and comment rules.¹⁰⁹ Because guidance rules are not binding, the agency has room to maneuver as circumstances or understandings change.¹¹⁰ A notice and comment rule is more set in stone because an agency must formulate another notice and comment rule to change it.¹¹¹ While that means a notice and comment rule is more stable and predictable, it also means that the agency has a decreased ability to change course.

106. *See id.*

107. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1442–45 (2004) (discussing what might motivate agencies to choose one policymaking form over another).

108. For example, a judge dismissed a lawsuit challenging the change in H-1B policy mentioned in Part I.B. *See* *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240 (D.D.C. 2010).

109. *See* William Funk, *A Primer on Legislative Rules*, 53 ADMIN. L. REV. 1321, 1323 (2001); Mendelson, *supra* note 17, at 408.

110. *See* Mendelson, *supra* note 17, at 408.

111. *Nat'l Family Planning v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992).

Internal and external political concerns may also influence USCIS to use guidance-based rules. USCIS is located within the Department of Homeland Security (DHS), and DHS holds rulemaking authority over USCIS.¹¹² To engage in notice and comment rulemaking, USCIS must therefore garner the attention of the much bigger Department of Homeland Security. DHS must agree to raise USCIS's rulemaking agenda to the top of the department's priorities. Rulemaking within the Department of Homeland Security also requires coordination with other immigration agencies within DHS, such as Immigration and Customs Enforcement (ICE). The outlook of USCIS, as the only benefits-granting entity within DHS, may clash with the positions of an enforcement entity like ICE. In addition, avoiding notice and comment rulemaking may lessen the need to solicit input from other agencies or the Office of Management and Budget (OMB). Externally, USCIS may believe that proceeding by guidance document lessens visibility to Congress, the public, and to other executive branch entities, thus decreasing the risk of political backlash.¹¹³

There may also be more topic-specific considerations, such as how many individuals will be affected, the complexity of the area, the time frame for implementation, and whether the topic is already the subject of notice and comment regulation. Of course, USCIS is not required to justify its choice of proceeding by guidance document by explaining its motivation.¹¹⁴ However, it would be understandable to proceed by guidance document when USCIS needs to quickly communicate information, if the topic only affects a small number, or if the issue is already thoroughly governed by regulations and the guidance document merely provides detail.

For example, USCIS recently used a variety of sub-regulatory documents, such as brochures and responses to frequently asked questions, to announce how it would implement the deferred action program for childhood arrivals.¹¹⁵ This program allows qualifying individuals, like Gabriela, to apply for a stay of removal for two years. The Obama Administration announced the new program on June 15, 2012, and the program began accepting applications on August 15, 2012.¹¹⁶ A two-month time frame demands the use of guidance documents, but continued reliance on

112. 8 U.S.C. § 1103(a)(3) (2006).

113. This lack of visibility may favor foreign nationals. There are guidance documents that contain interpretations favorable to foreign nationals.

114. See Magill, *supra* note 107, at 1425.

115. See *Childhood Arrivals*, *supra* note 1.

116. *Id.*

such documents as the program matures will raise concerns.¹¹⁷ Also, this is an extremely politically sensitive topic,¹¹⁸ which may motivate a move towards the use of guidance documents.

Although USCIS understandably relied on guidance documents to implement the deferred action program quickly, anecdotally it is hard to make out a predictable pattern. For example, USCIS used notice and comment rulemaking to formulate a potentially politically sensitive new adjudication method that affects individuals with unlawful presence.¹¹⁹ For other areas, it has never formulated notice and comment rules and has ruled by memo for years, even after the need for quick action is long past.¹²⁰ The explanation may be that the weight of different factors varies depending on the circumstances. Consistent with the general lack of transparency, there is simply too little information available to explain confidently why USCIS follows one course over the other.

What is clear, however, is that there are strong forces that push USCIS to use guidance documents. An agency like USCIS needs guidance documents in its arsenal. The tasks delegated to USCIS are very intricate and fast moving. It is unreasonable to expect USCIS to administer the immigration laws without the flexibility and efficiency of sub-regulatory rules. It is fair, however, to challenge USCIS to do better and to ease its troubles with guidance documents. The next Part provides a way forward.

II. BLUEPRINT FOR IMMIGRATION GUIDANCE REFORM

Reforming agency use of guidance documents is a complex process. The goal is to reduce the undesirable attributes of guidance documents without neutering their positive characteristics. Guidance documents are useful because they are nimble.¹²¹ They are troublesome, however, because they are practically binding without the procedural protections of notice and comment.¹²² The dilemma is that increasing procedural protections may make the process too

117. A lawsuit was filed challenging the use of guidance documents to formulate the program. *See Crane v. Napolitano*, Civ. No. 3:12-cv-03247-O (N.D. Tex. Jan. 4, 2013).

118. Opponents of the program have called it a “backdoor amnesty.” *See* Antonio Olivo & Brian Bennett, *Young Immigrants Prepare to File for Legal Status Today*, CHI. TRIB., Aug. 15, 2012, at 10.

119. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103, 212).

120. *See infra* Part I.B.

121. *See supra* note 34 and accompanying text.

122. *See supra* notes 19–22 and accompanying text.

cumbersome. If the process is too burdensome, agencies may seek out even less formal and less transparent means to set rules.

To ease this dilemma, this Part reviews the debate over guidance reform and emphasizes how most suggestions for reform adopt a blanket approach, treating all agencies the same. In contrast, this Part advances an agency-by-agency approach. As an example of tailored guidance document reform, this Part discusses the development of the Food and Drug Administration's (FDA) Good Guidance Practices. Finally, this Part adopts and adapts the Good Guidance Practices mechanism for immigration law.

A. Good Guidance Practices and the Need for Agency-by-Agency Reform

This Section describes the general conundrum surrounding guidance reform. Instead of a broad-brush approach, this section advocates for an agency-by-agency approach to ease the dilemma. The agency-by-agency approach should be implemented through a mechanism already used by FDA. FDA has developed its own, individualized Good Guidance Practices.¹²³ Although FDA has its own unique characteristics and history of guidance challenges, an examination of FDA's experience demonstrates that the mechanism is beneficial for agency-by-agency guidance reform. It provides a structure for reform but leaves a significant amount of the substance of reform open to individual agencies.

1. The Guidance Reform Debate

Agency use of guidance documents raises concern about the practically binding effects of such documents in the absence of procedural protections. Assuaging those concerns by importing procedural protections into the development of agency guidance documents also creates anxiety, however.¹²⁴ These competing anxieties lead to the conclusion that sub-regulatory rules may present an impossible problem. Proposed procedural obligations that would dull the drawbacks of guidance documents threaten the flexibility and efficiency that makes guidance documents so desirable. Moreover, additional procedural obligations might push an agency to

123. See *infra* Part II.A.3.

124. See *supra* notes 19–22 and accompanying text; *infra* notes 139–40 and accompanying text.

abandon guidance documents to some extent. An agency may begin to rely on other methods for creating adjudicatory standards, such as turning to heavier reliance on case-by-case adjudication, which is less transparent than issuing guidance documents. The best solution is a compromise mechanism that allows for more structured use of guidance documents, does not tax agencies too much, respects agency governance, and allows for differences among agencies.

Efforts to reform agency use of guidance documents are not new.¹²⁵ Since at least the 1960s, legislators, scholars, and influential organizations, such as the Administrative Conference of the United States (ACUS), have developed proposals to reform agency use of guidance documents.¹²⁶ Most of these proposals suggest some kind of additional opportunity for public input that falls short of notice and comment rulemaking.¹²⁷ For example, ACUS has proposed instituting a post-adoption opportunity for public comment.¹²⁸

In 2007, President George W. Bush's Office of Management and Budget (OMB) developed broad guidance reform.¹²⁹ OMB established widespread "Good Guidance Practices," or rules to govern how agencies use guidance documents.¹³⁰ Although President Obama revoked the executive order tied to OMB's Good Guidance Practices, the Practices themselves were not rescinded.¹³¹ The debate over this OMB reform provides a good window into the debate over guidance reform.

125. This Article focuses on reforms aimed at changing the rules that govern how agencies formulate guidance documents. For discussion of various approaches that courts take to determine if agencies have properly invoked exemptions from informal rulemaking under the APA, see Family, *supra* note 14, at 571–78.

126. See Family, *supra* note 14, at 581–82.

127. *Id.*

128. *Id.*

129. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). Also, there have been legislative guidance document reform proposals. See, e.g., Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. § 4 (2011) (requiring cost benefit analysis in the formulation of guidance documents); *Senate Bill Would Codify Benefit-Cost Analysis and Add Guidance Procedures*, REGBLOG (Mar. 25, 2011), <http://www.law.upenn.edu/blogs/regblog/2011/03/senate-bill-would-codify-benefit-cost-analysis-and-add-guidance-procedures.html> (discussing the Clearing Unnecessary Regulatory Burdens (CURB) Act).

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

131. President Obama rescinded an executive order tied to the Good Guidance Practices, Executive Order 13,422, but OMB review of significant guidance documents apparently remains. See Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009); Memorandum from Peter R. Orszag on Guidance for Regulatory Review, Dir., Office of Mgmt. & Budget (Mar. 4, 2009) (explaining that President Obama "restored the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007" and that "[d]uring this

OMB's Good Guidance Practices delineate "significant guidance documents" and "economically significant guidance documents."¹³²

A significant guidance document is one that:

[M]ay reasonably be anticipated to: (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, 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.¹³³

An economically significant guidance document is a type of significant guidance document that may "lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy or a sector of the economy"¹³⁴

For significant guidance documents, the OMB Good Guidance Practices call for internal clearance procedures, restrictions on deviations, and drafting practices.¹³⁵ In addition, there must be "adequate procedures for public comments" and procedures to address complaints.¹³⁶ For significant guidance documents, a pre-adoption opportunity to comment is not required, and agencies do not need to respond to comments.¹³⁷ For economically significant guidance documents, however, pre-adoption comments coupled with an agency response are required.¹³⁸

Opponents to OMB's Good Guidance Practices have argued that imposing additional procedural obligations on agencies in formulating guidance documents would make those documents "less

period, [OMB] reviewed all significant proposed or final agency actions, including significant policy and guidance documents"); *see also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 89 (5th ed. 2012).

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

133. *Id.* at 3439. There are exceptions to the definition. *Id.*

134. *Id.*

135. *See id.* at 3436–38.

136. *Id.* at 3437.

137. *See id.* at 3437–38.

138. *See id.* at 3438.

attractive to agencies.”¹³⁹ According to this perspective, increased procedural obligations “are likely to discourage agencies from issuing any guidance at all, to slow the release of guidance or to encourage agencies to rely more heavily on adjudication as a means of announcing new policies.”¹⁴⁰ Proponents, on the other hand, have argued that the OMB Good Guidance Practices were meant to address concerns about fairness, specifically “the need for greater transparency, opportunity for comment, and accountability in issuing guidance.”¹⁴¹ A third reaction to increased procedures adopts a more nuanced approach. This approach acknowledges that agencies will still have incentives to issue guidance documents in the face of additional procedures, but insists that any additional procedures be meaningful.¹⁴²

The proposal for USCIS to formulate its own, agency-specific Good Guidance Practices is cognizant of this debate and acknowledges that the competing arguments have merit. Agency use of guidance documents does raise concerns of fairness, yet guidance documents must not become too cumbersome,¹⁴³ and procedural reform must be meaningful. This proposal favors an agency self-regulatory approach to reduce concerns about ossification.¹⁴⁴

This proposal for USCIS also incorporates a consideration often overlooked in the debate over guidance reform. The debate often

139. See Johnson, *supra* note 17, at 726. In a later article, however, Professor Johnson advocated for a requirement that agencies accept comments on significant guidance documents without an obligation to respond to comments. Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 498 (2012).

140. Johnson, *supra* note 17, at 726. Professor Johnson has explained that reliance on adjudication has “unfortunate effects,” such as excluding stakeholders from policy formation, which in turn leads to less information available to an agency. *Id.* at 731. In addition, policy announced through a decision in an individual case is less visible and lacks the fair warning of notice. *Id.*

141. Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 YALE J. ON REG. 103, 108 (2008).

142. Mendelson, *supra* note 17, at 402–03, 434–52 (“Procedural reform would not necessarily condemn us to a world of ‘secret’ agency law.”).

143. Seidenfeld, *supra* note 13, at 332 (acknowledging that a lack of stakeholder participation and judicial review may lead to abuse of guidance documents, but arguing that giving agencies a freer hand regarding guidance documents is preferable).

144. The existence of ossification is debated, but since the perception of ossification plays such a prominent role in the debate over guidance documents, concerns about ossification are addressed here. See Stephen M. Johnson, *Ossification’s Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008) (examining EPA rules to determine whether notice-and-comment rulemaking has in fact been ossified and finding that the claims of ossification require more conclusive research); Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010) (finding evidence suggesting that agencies do not use guidance documents to avoid rulemaking).

takes place in terms of agencies in general. This proposal challenges a blanket approach and argues for greater flexibility and tailoring of guidance reform agency by agency.

2. An Agency-by-Agency Approach Using Good Guidance Practices

Many efforts to solve the guidance reform conundrum take a blanket approach, suggesting solutions that would apply across the board.¹⁴⁵ Thinking about guidance reform within USCIS suggests that a narrower approach is appropriate. Instead of searching for a one-size-fits-all solution, guidance reform is best pursued through an agency-by-agency approach. This approach, while still insisting on improved development and use of guidance, allows each individual agency space to self-regulate by developing its own Good Guidance Practices. By allowing each agency to develop its own guidance reform, each agency may do so with the goal of calibrating the reform in a way that is “just right” for the agency. The agency could aim to ease problems without subjecting itself to overwhelming obligations. Thus, this approach acknowledges that guidance reform may look different depending on the agency.

Professor Stephen Johnson has suggested amendments to the Administrative Procedure Act that would require all agencies, “to the extent practicable, necessary and in the public interest,” to “provide opportunities for timely and meaningful public participation” when developing guidance documents.¹⁴⁶ Although these amendments would apply across the board, Professor Johnson’s proposal represents a more flexible approach in that each agency would be left to determine how it would incorporate public participation within the broad standards. The agency-by-agency approach advanced in this Article is similar in spirit to Professor Johnson’s proposal, but is more specific both in terms of advancing a preferred mechanism and in terms of the level of detail that agencies would be required to provide to stakeholders.

145. See, e.g., Mendelson, *supra* note 17 (discussing guidance reform in the context of administrative agencies in general); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343 (2009); Anthony, *supra* note 19.

146. Johnson, *supra* note 17, at 697. Professor Johnson’s proposal would also amend the APA “to tie the level of deference accorded to the agencies to the procedures used by the agency to adopt the guidance.” *Id.*

The proposal to institute Good Guidance Practices within USCIS relies on agency self-regulation, which does occur.¹⁴⁷ The proposal borrows from FDA's Good Guidance Practices, which, as described below, were first instituted within the agency and then received congressional blessing.¹⁴⁸ Since the adoption of its Good Guidance Practices, FDA has continued to innovate in the area of guidance.¹⁴⁹ Also, formalized Good Guidance Practices for USCIS would be an extension of self-regulation already undertaken by USCIS.

Agency initiative and control over guidance reform development are important because both the agency and its stakeholders should be invested in the new guidance practices. Both the agency and stakeholders should be involved in creating the practices. Such a ground-up approach holds the promise of ownership, which may promote agency internal compliance as well as stakeholder buy-in.

Agency initiative is also important because a ground-up process holds the promise of tailoring Good Guidance Practices to each agency. Not every agency uses guidance documents in the same way, and problems with agency use of guidance documents do not manifest uniformly. Additionally, the composition and characteristics of agency stakeholders differ across agencies.

USCIS's use of guidance documents and the nature of USCIS's stakeholders differ from those of other agencies. For example, USCIS's stakeholders include a large number of unrepresented parties and individual applicants.¹⁵⁰ For certain categories, the majority of applicants do not have representation.¹⁵¹ The lack of representation is compounded by the extreme complexity of the law.¹⁵² These characteristics should factor into the nature of USCIS's Good Guidance Practices, as further described in the next section. To those regulated, USCIS is a Goliath with almost supernatural powers to make major life-altering decisions, such as whether a married couple like Gabriela and Harry will be able to live together. A one-guidance-reform-fits-all approach might not take into consideration

147. See Magill, *supra* note 43, at 866 ("observers of the administrative state will agree that such self-regulatory measures pop up everywhere"); see also Dorit Rubinstein Reiss, *Account Me In: Agencies in Quest of Accountability*, 19 J.L. & POL'Y 611 (2011) (collecting case studies of agencies seeking accountability).

148. See Magill, *supra* note 43, at 866 (describing FDA Good Guidance Practices as a "well-known example of procedural self-regulation").

149. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., FOOD AND DRUG ADMINISTRATION REPORT ON GOOD GUIDANCE PRACTICES: IMPROVING EFFICIENCY AND TRANSPARENCY (2011).

150. Family, *supra* note 14, at 568.

151. *Id.*

152. See Family, *supra* note 29.

that there are agencies, like USCIS, that mainly regulate unrepresented individuals in a deeply personal way.

Good Guidance Practices might look different for USCIS. For example, in terms of accessibility, USCIS has different goals than another agency whose regulated constituents are more consistently sophisticated. Similarly, although USCIS may share some characteristics with other agencies—such as the U.S. Department of Veterans Affairs (VA), which also engages in mass benefits adjudication with individual applicants—these similarities are not a guarantee of identical guidance reform needs. While the front-line “raters” at VA do rely on a vast array of guidance documents to measure disability,¹⁵³ guidance challenges at VA have different characteristics. For example, one prominent issue for VA is whether decisions of the United States Court of Appeals of Veterans Claims are translated adequately into the manuals for front-line raters.¹⁵⁴ Also, VA’s Office of General Counsel has undertaken a project to re-write its regulations to make them more accessible.¹⁵⁵ While there will be shared concerns, problems with guidance documents manifest in different ways at different agencies. Therefore, it is desirable to have a guidance reform mechanism that is flexible enough to incorporate differences.

A further factor illustrating the differing circumstances of agencies is that USCIS is a fee-funded agency.¹⁵⁶ USCIS’s budget request for Fiscal Year 2011 included \$2.4 billion in user fees.¹⁵⁷ Thus, regulated parties fund USCIS’s adjudication services. While the accessibility and transparency of guidance documents should not depend on whether the agency’s services are taxpayer or fee-funded, the need for more formal guidance practices is even stronger when regulated parties face difficulty in accessing and understanding the guidance they have directly funded.

The downsides of a blanket approach are illustrated when viewing the OMB Good Guidance Practices through the lens of USCIS.

153. Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 210 (2009).

154. See, e.g., *Chandler v. Shinseki*, 24 Vet. App. 23, 26 (2010) (reviewing a VA guidance document “purported to apply” a CAVC decision). See also Michael P. Allen, *The Law of Veteran’s Benefits 2008–2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1, 52 (acknowledging tension between the Veterans Court and the Secretary of Veterans Affairs).

155. William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA’s Regulation Rewrite Project*, 61 ADMIN. L. REV. 407 (2009).

156. WILLIAM A. KANDEL & CHAD C. HADDAL, CONG. RESEARCH SERV., RL34040, U.S. CITIZENSHIP AND IMMIGRATION SERVICES’ IMMIGRATION FEES AND ADJUDICATION COSTS: PROPOSED ADJUSTMENTS AND HISTORICAL CONTEXT 2 (2010) (explaining that USCIS receives over eighty percent of its funds from user fees).

157. *Id.* at 5.

USCIS's self-regulation, through the draft memorandum for comment process, is providing for more public input than if USCIS solely followed OMB's Good Guidance Practices. As explained above, the OMB Good Guidance Practices define "significant guidance" and then a subset of "economically significant guidance."¹⁵⁸ Recall that under the OMB Good Guidance Practices, pre-adoption comments are required only for those guidance documents that would "lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy or a sector of the economy."¹⁵⁹ Any guidance rules that do not meet the \$100 million mark or that do not have an adverse affect are exempt. While there is no detailed explanation for how USCIS decides whether to issue a draft memorandum for comment, its frequent use of the technique suggests that the standard is not as high as the OMB standard.¹⁶⁰ It may be that for some agencies a cut-off such as the one proposed in the OMB document is a good fit. Calculating the economic effect of immigration, however, is complex, and there may be rules that would not adversely affect the economy in a substantial way but would prove to be extremely significant to an individual applying for an immigration benefit.¹⁶¹

Furthermore, USCIS's compliance with the OMB scheme is uncertain. USCIS's website does contain a section titled "Significant Guidance," which states that "this page provides access to significant and economically significant guidance documents."¹⁶² The most recent document listed, however, is dated January 2008.¹⁶³ It is not clear whether USCIS has not issued a significant or economically significant guidance document since then or if it is no longer corraling such documents on its website.

Finally, an agency-by-agency approach may reduce the need for judicial review to enforce an agency's Good Guidance Practices.¹⁶⁴

158. See Final Bulletin for Agency Good Guidance Practices, *supra* note 129.

159. *Id.* at 3435.

160. See *supra* note 79 and accompanying text.

161. For example, it would be difficult to calculate the effect on the economy of the unlawful presence guidance document. Even if its effect could be calculated, the OMB Good Guidance Practices are written from a perspective that discounts the humanitarian interests inherent in immigration law. See Final Bulletin for Agency Good Guidance Practices, *supra* note 129.

162. *Significant Guidance*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow "Laws" hyperlink; then follow "Significant Guidance" hyperlink) (last updated Mar. 16, 2010).

163. *Id.*

164. It is an open question how courts would or could enforce agency compliance with its self-regulatory measures, such as Good Guidance Practices. For example, guidance practices formulated as a legislative rule may be more amenable to judicial review than restrictions on guidance practices contained in a policy memorandum. See Magill, *supra* note 43, at 869–82

Agency development of Good Guidance Practices may incorporate self-regulating enforcement mechanisms, such as opportunities for stakeholder feedback and internal mechanisms such as a Good Guidance Officer. This approach, of course, assumes that an agency is invested in its guidance practices and honestly wants to implement them. A need for an external enforcement mechanism like judicial review may become necessary, but at this point that need is not clear.

3. FDA's Good Guidance Practices and Lessons for Immigration Law

The story of the evolution of FDA's Good Guidance Practices sets a mechanism for agency-by-agency guidance reform. This is not to suggest that FDA's circumstances are identical to USCIS's challenges or any other agency's challenges. The Good Guidance Practices mechanism is flexible enough to allow for tailoring. FDA's experiences also illuminate the major challenges of developing the substance of Good Guidance Practices; they reveal the difficult questions that USCIS will need to address when implementing its own practices.

FDA adopted and implemented its own Good Guidance Practices after opportunities for public comment. The Good Guidance Practices establish a more transparent and effective method of communicating with stakeholders about the nature and effect of guidance documents, as well as provide formal opportunities for participation in the creation of guidance.¹⁶⁵

These Good Guidance Practices became a part of the Code of Federal Regulations in 2000.¹⁶⁶ In the regulation, FDA defined the term "guidance documents," addressing both the purpose of guidance documents, which is to "describe the agency's interpretation of or policy on a regulatory issue," as well as giving examples of common agency guidance topics.¹⁶⁷ FDA also excluded certain types of agency communications from the term, including speeches, media interviews, and communications to individuals or

(discussing the application of the *Accardi* principle to guidance documents). This Article reserves the question of judicial review as an enforcement mechanism in favor of focusing on the promise of agency initiative, including stakeholder policing and internal agency mechanisms.

165. *See* 21 C.F.R. § 10.115 (2012).

166. *Id.*

167. *Id.* § 10.115(b).

firms.¹⁶⁸ In addition to defining the term, the regulation also obligates FDA to post a list of all agency guidance documents on the internet.¹⁶⁹

FDA also answered the question, “are you or FDA required to follow a guidance document?”¹⁷⁰ The answer is “no,” with an explanation that guidance documents are not legally binding but represent the agency’s “current thinking.”¹⁷¹ The regulation also explains that regulated parties “may choose to use an approach other than the one set forth in a guidance document.”¹⁷² That alternative, however, “must comply with the relevant statutes and regulations.”¹⁷³ In regard to internal FDA decision-making, the regulation states that “FDA employees may depart from guidance documents only with appropriate justification and supervisory concurrence.”¹⁷⁴ FDA also created “standard elements” for each guidance document, including that it clearly be labeled a guidance document, that it “prominently display a statement of the document’s nonbinding effect,” and that it not include “mandatory language such as ‘shall,’ ‘must,’ ‘required,’ or ‘requirement.’”¹⁷⁵

The Good Guidance Practices also memorialize FDA’s process for creating guidance documents, including specific measures for participation. FDA created two levels of guidance documents. A Level 1 guidance document is one that (1) “set[s] forth initial interpretation of statutory and regulatory requirements,” (2) “set[s] forth changes in interpretation or policy that are of more than a minor nature,” (3) “include[s] complex scientific issues,” or (4) “cover[s] highly controversial issues.”¹⁷⁶ A Level 2 guidance document “set[s] forth existing practices or minor changes in interpretation or policy.”¹⁷⁷

For Level 1 documents, FDA may informally seek public input while drafting the document. After FDA completes the draft, it will publish a notice in the Federal Register that the draft is complete, make the draft publicly available on the internet, and provide for public comment on the draft. After the period for public comment, FDA then will review the comments and incorporate them into a

168. *Id.*

169. *Id.* § 10.115(n).

170. *Id.* § 10.115(d).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* § 10.115(i).

176. *Id.* § 10.115(c)(1).

177. *Id.* § 10.115(c)(2).

final guidance document, which will be available on the internet.¹⁷⁸ FDA is not required to respond to comments.¹⁷⁹ Under this process, the document is not implemented before the opportunity for public participation.¹⁸⁰ There is an exception, however, that allows FDA to implement a Level 1 guidance document prior to receiving public comment. If “prior public participation is not feasible or appropriate,” then FDA will post the guidance document and seek public comment after implementation.¹⁸¹

There is no pre-implementation opportunity for public comment on Level 2 guidance documents, however. Instead, FDA is obligated to post the guidance document on the internet, to implement it, and then to seek post-implementation comments.¹⁸²

Additional opportunities for public participation include an invitation to suggest ideas for new guidance documents and a request for proposals to revise or withdraw existing guidance documents.¹⁸³ FDA’s Good Guidance Practices also envision a role for the public in ensuring compliance. The regulation invites reports of noncompliance to supervisors or to the agency ombudsman.¹⁸⁴ There are also provisions mandating training for agency employees as well as for monitoring the development of agency guidance documents.¹⁸⁵

Public input played a role in formulating FDA’s Good Guidance Practices. A citizen petition by Indiana Medical Device Manufacturers Council, Inc. inspired the practices.¹⁸⁶ The petition was motivated, at least in part, by a fear that if Congress implemented new restrictions on developing notice and comment regulations, FDA “may be tempted to expand even further its practice of announcing significant new rules without the benefit of notice and comment rulemaking.”¹⁸⁷ FDA met with the Indiana Medical Device Manufacturers Council “to discuss ideas” that would ultimately turn into guidance practices.¹⁸⁸ In 1996, after that meeting, FDA published a notice in the Federal Register that contained a detailed

178. *Id.* § 10.115(g)(1).

179. *See id.* § 10.115(g).

180. *See id.* § 10.115(g)(1).

181. *Id.* § 10.115(g)(2).

182. *See id.* § 10.115(g)(4).

183. *See id.* § 10.115(f).

184. *Id.* § 10.115(o).

185. *Id.* § 10.115(l).

186. 61 Fed. Reg. 9181, 9182 (Mar. 7, 1996). *See also* Citizens Petition, Ind. Med. Device Manufacturers Council, Inc. (May 2, 1995) (on file with author). The Indiana Medical Device Manufacturers Council, Inc. filed a petition under the APA to “request that FDA halt its practice of developing new rules without adequate public participation and announcing them through improper means such as speeches, warning letters, and draft guidance.” *Id.*

187. 61 Fed. Reg. 9181, 9182 (Mar. 7, 1996).

188. *Id.* *See also* Citizens Petition, *supra* note 186.

proposal intended to govern its use of guidance documents.¹⁸⁹ The agency solicited comments and held a public meeting.¹⁹⁰ It then responded to the feedback through a further notice in the Federal Register in 1997, where it published a final, non-codified version of the Good Guidance Practices.¹⁹¹

Congress recognized the need for FDA's Good Guidance Practices in the Food and Drug Modernization Act of 1997.¹⁹² In the Act, Congress formalized the standards that FDA had set for itself.¹⁹³ Additionally, Congress required FDA to issue its Good Guidance Practices in the form of a regulation.¹⁹⁴ In early 2000, in response to that congressional directive, FDA published a proposed rule in the Federal Register that closely tracked its 1997 published notice establishing the Good Guidance Practices.¹⁹⁵ FDA accepted comments on its proposed rule and responded to them later in the year when it issued its final rule.¹⁹⁶ The final rule, as codified, is as described above.

The implementation of FDA's Good Guidance Practices, however, has not quelled all concerns among FDA stakeholders about guidance documents.¹⁹⁷ A 2005 study conducted to capture stakeholder impressions of FDA's use of guidance documents and stakeholder responses to a 2011 FDA proposal to improve its own

189. See 61 Fed. Reg. 9181 (Mar. 7, 1996). The petition had requested that FDA establish written procedures to control its use of guidance documents. 61 Fed. Reg. 15080, 15080 (Apr. 4, 1996).

190. See 61 Fed. Reg. 9181, 9181 (Mar. 7, 1996) (soliciting public comments); 61 Fed. Reg. 15080, 15080 (Apr. 4, 1996) (announcing a public meeting).

191. The Food and Drug Administration's Development, Issuance and Use of Good Guidance Documents, 62 Fed. Reg. 8961 (Feb. 27, 1997).

192. Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (codified in scattered sections of 21 U.S.C.). The accompanying Senate report noted that FDA's "increasing reliance on policy statements" had caused problems, including the unavailability of guidance documents themselves, inconsistency in application, and a lack of a formalized method to adopt or amend guidance documents. S. REP. NO. 105-43, at 26 (1997). The Act became law on November 21, 1997, months after FDA had published its final version of the Good Guidance Practices in the Federal Register. Food and Drug Administration Modernization Act of 1997.

193. 21 U.S.C.A. § 371(h) (West 2012). The law calls for FDA to implement its Level 1/Level 2 guidance document public participation plan, as well as its provisions regarding the composition and availability of guidance documents. See *id.* Congress also seconded the need for internal controls and clear instruction as to the effect of guidance documents. See *id.*

194. *Id.*

195. See 65 Fed. Reg. 7321 (Feb. 14, 2000).

196. 65 Fed. Reg. 56,468, 56,468 (Sept. 19, 2000).

197. See, e.g., Lars Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 905 (2008).

guidance practices give a sense of stakeholder reaction to the implementation of the Good Guidance Practices.¹⁹⁸ Common concerns include a time delay between the issuance of draft guidance documents and their finalization, a lack of transparency regarding how draft guidance documents are formulated, and a perception that public comments on draft guidance documents rarely sway the agency to change course.¹⁹⁹ However, there have been recognized improvements. For example, stakeholders have acknowledged an increase in consistency and transparency regarding the agency's substantive intentions, as opposed to transparency in formulating draft guidance documents.²⁰⁰

In the 2005 study,²⁰¹ those regulated by FDA reported that they follow guidance documents "as if they were legally binding,"²⁰² thus supporting concerns about the practically binding effect of guidance documents. The study found that the practically binding effect is influenced by regulated parties' reported desire for consistency and clarity.²⁰³ Regulatory parties are looking for a rule to rely on, no matter its form. In this sense, the Good Guidance Practices are a success; they are perceived as providing greater consistency and clarity as to the agency's substantive intentions.²⁰⁴ The stakeholders seem to be able to identify the rules.

The transparency and clarity of the rule development process was more open to question.²⁰⁵ Some stakeholders felt as though they knew how to be informed about the development of new FDA guidance.²⁰⁶ Others found the process to be "opaque."²⁰⁷ The study reported that draft guidance documents "often are viewed by industry as mostly final."²⁰⁸ Regulated parties questioned whether comments on draft guidance documents effected change.²⁰⁹ The study also uncovered concern about a time delay, "often for years,"

198. Erica Seiguer & John J. Smith, *Perception and Process at the Food and Drug Administration: Obligations and Trade-offs in Rules and Guidances*, 60 *FOOD & DRUG L.J.* 17, 29 (2005); *see also*, Food and Drug Administration Report on Good Guidance Practices: Improving Efficiency and Transparency, 76 *Fed. Reg.* 82,311 (Dec. 30, 2011).

199. *See* Seiguer & Smith, *supra* note 198, at 29; *see also* Food and Drug Administration Report on Good Guidance Practices, *supra* note 198.

200. *See* Seiguer & Smith, *supra* note 198, at 29.

201. *See id.* The authors conducted semi-structured interviews with agency officials and stakeholders. *See id.*

202. *Id.*

203. *Id.* at 29–30.

204. *See id.*

205. *See id.* at 30–31.

206. *Id.* at 30.

207. *Id.*

208. *Id.*

209. *See id.*

between the release of certain draft guidance documents and the issuance of final guidance documents.²¹⁰ During the long interim, the draft documents “come to represent final guidance.”²¹¹

In 2011, FDA issued and solicited comments on a report about its own Good Guidance Practices that contained suggestions for improving efficiency and transparency.²¹² The comments received reveal a few themes similar to those uncovered by the study: a perception that public comments on draft guidance documents are not always meaningful, a concern about a lack of transparency in the formulation of draft guidance documents, and dissatisfaction with time lags between the issuance of draft guidance documents and finalization.²¹³

Several responses included recommendations that FDA should be more transparent about how it formulates draft guidance, including agenda setting, and its process to finalize a draft guidance document.²¹⁴ In addition, several responses suggested a greater role for regulated parties in the formulation of draft guidance.²¹⁵ Requiring an agency response to comments on draft guidance documents was also mentioned,²¹⁶ as well as a recommendation to withdraw draft guidance documents that are not finalized “within a reasonable time period.”²¹⁷

In its 2011 report, FDA discussed a practice of encouraging stakeholders to submit completed draft guidance documents, rather than just ideas for guidance documents, to the agency for consideration.²¹⁸ This idea received some favorable comments.²¹⁹ One

210. *Id.* at 31.

211. *Id.*

212. See Food and Drug Administration Report on Good Guidance Practices, *supra* note 198; U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 149.

213. See Letter from Bradley Merrill Thompson, Combination Product Coal (Feb. 27, 2012); Letter from Cook Group (Feb. 24, 2012); Letter from Andrew J. Emmett, Managing Dir., Biotechnology Indus. Org. (Feb. 28, 2012); Letter from Gail Rodriguez, Exec. Dir., Med. Dir. Imaging & Tech. Alliance (Mar. 2, 2012); Letter from Novo Nordisk, Inc. (Feb. 14, 2012); Letter from Roche (Feb. 28, 2012); Letter from Sharon A. Segal, Vice President, Advanced Med. Tech. Ass’n (Feb. 28, 2012).

214. See Letter from Cook Group, *supra* note 213; Letter from Andrew J. Emmett, *supra* note 213; Letter from Gail Rodriguez, *supra* note 213; Letter from Roche, *supra* note 213; Letter from Sharon A. Segal, *supra* note 213.

215. See Letter from Novo Nordisk, Inc., *supra* note 213; Letter from Roche, *supra* note 213; Letter from Gail Rodriguez, *supra* note 213; Letter from Sharon A. Segal, *supra* note 213; Letter from Bradley Merrill Thompson, *supra* note 213.

216. See Letter from Andrew J. Emmett, *supra* note 213; Letter from Bradley Merrill Thompson, *supra* note 213.

217. Letter from Roche, *supra* note 213.

218. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 149, at 5, 7.

219. Letter from Novo Nordisk, Inc., *supra* note 213; Letter from Bradley Merrill Thompson, *supra* note 213.

industry organization suggested, however, that FDA does not meaningfully incorporate guidance suggestions from outside parties.²²⁰ The organization stated that “FDA cannot realistically expect industry groups to go through the enormous time and effort to develop and submit a proposed guidance document when they seem to generate so little response by the Agency.”²²¹ To improve the process, this organization suggested that FDA formally track proposals for guidance documents and allow for public comment on the proposals, along with instituting timely substantive responses to the proposals.²²²

Congress stepped into the fray again in 2012 through its amendments to the Food, Drug and Cosmetic Act.²²³ In those amendments, Congress specifically required that FDA apply its Good Guidance Practices to “notice to industry” letters issued regarding medical devices.²²⁴ This provision was enacted to prohibit FDA from avoiding the Good Guidance Practices by issuing even more informal communications.²²⁵

The development and implementation of FDA’s Good Guidance Practices contains five important lessons for immigration law. One lesson is that Good Guidance Practices should be tailored to fit a particular agency. FDA and USCIS are different in many ways, including what they regulate and who applies for benefits from each agency. The problems with guidance documents will manifest in different ways in different agencies. The concept of creating Good Guidance Practices on an agency-by-agency basis is flexible enough to incorporate differences. A second lesson is that formalizing guidance practices can promote consistency, clarity, and stability. This includes greater transparency about what an agency is about to do. The third lesson is that procedural transparency, in other words understanding the procedures surrounding the development of guidance documents, is also important. A fourth lesson is that the issuance of guidance practices is not an end to reform efforts. The practices themselves will evolve, especially as weaknesses in the practices are exposed. Finally, the fifth lesson is that some stakeholders, most likely immigration law experts, will push continuously

220. See Letter from Bradley Merrill Thompson, *supra* note 213, at 6.

221. *Id.* at 13.

222. See *id.*

223. See Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112–144, 126 Stat. 993 (2012) (codified in scattered sections of 21 U.S.C.).

224. 21 U.S.C.A. § 371(h)(1)(C)(ii) (West 2012).

225. 1 Food and Drug Admin. § 4:24.50 (2013). The issue of whether the Good Guidance Practices apply to certain types of FDA documents is not new. See K.M. Lewis, *Informal Guidance and FDA*, 66 FOOD & DRUG L.J. 507, 524 (2011) (discussing advisory opinions).

for greater participation rights, especially if the opportunities to participate already afforded do not appear to be meaningful. These lessons are integrated into the next section, which proposes Good Guidance Practices for USCIS.

B. Good Guidance Practices for Immigration Law

USCIS's use of guidance documents is problematic, yet improved by outreach efforts such as the draft memorandum for comment. This Section examines how USCIS could progress further by developing its own Good Guidance Practices. Guidance reform is a complex topic with pitfalls and valid concerns about implementing restrictions on an agency's use of guidance documents. Therefore, this Section proceeds cautiously, acknowledging what is positive and negative about guidance reform. This Section highlights some difficult choices USCIS will need to make in developing its practices and recommends paths to follow.

As described above, although FDA and USCIS are distinct agencies, immigration law may borrow and learn from FDA's experiments and experiences, keeping in mind the idiosyncratic circumstances of USCIS. FDA's Good Guidance Practices are not perfect, but the mechanism is promising when it comes to easing the guidance document dilemma in immigration law. Agency use of guidance documents is a problem for which there may not be a perfect solution. Even anticipating unavoidable imperfections, this Article concludes that USCIS should adopt Good Guidance Practices as a means to alleviate its troubles with guidance documents. Good Guidance Practices are a valuable tool to improve guidance practices while keeping an eye on ossification and other concerns about guidance reform.

Borrowing from FDA's Good Guidance Practices, USCIS should use notice and comment rulemaking to develop its own Good Guidance Practices. Through this regulatory process, USCIS should, at a minimum, accomplish three goals: (1) increase accessibility by defining the term "guidance document," by explaining the significance of guidance documents in a way that is easily understood, and by making the documents themselves more available; (2) formalize policies that encourage participation in the development of guidance documents; and (3) create a positive guidance document culture both externally and internally by increasing transparency and by implementing internal control mechanisms.

USCIS has acknowledged that its use of guidance documents needs reform.²²⁶ It has implemented the draft memorandum for comment procedure, is engaged in the creation of a new Policy Manual, and has engaged in other outreach efforts novel to immigration law.²²⁷ These efforts, while laudable, are lacking because they are a la carte and not a part of a formal and disciplined program to improve USCIS's handling of guidance documents for the long term.

USCIS needs to acknowledge that it must formalize its standards. To achieve this goal, USCIS should use notice and comment rulemaking. USCIS should begin by creating a formal pre-notice development process. It should engage both immigration experts and unrepresented parties²²⁸ in developing its proposed Good Guidance Practices. This could be accomplished through a notice in the Federal Register to solicit ideas about the practices USCIS should adopt or the problems it should address. It could also be accomplished through meetings, teleconferences, or webinars.

Once USCIS develops draft Good Guidance Practices and places a notice in the Federal Register of its proposed Good Guidance Practices, it should seek further input. In addition to responses to the Federal Register notice of proposed rulemaking, USCIS should proactively seek comments from a wide range of stakeholders, including immigration experts and unrepresented parties. These meetings not only would inform USCIS in its development of Good Guidance Practices, but also would present USCIS with the opportunity to explain what guidance documents are and their effect. Once comments are collected, USCIS should publish its new Good Guidance Practices in a final rule. The final rule should be prominently displayed and easily accessible on USCIS's website from a variety of locations.

The process of developing Good Guidance Practices should be open-minded, but USCIS should aim to propose Good Guidance Practices that meet the basic goals of accessibility (including visibility) and comprehension. It should also formalize by regulation methods for participation. Finally, it should aim to create a positive guidance culture by increasing transparency and by implementing internal control mechanisms.

Currently, USCIS guidance documents are not accessible, both in the simple sense that the documents are hard to find and in the

226. See *supra* Parts I.A–B.

227. See *Draft Memorandum for Comment*, *supra* note 73; *USCIS Policy Manual*, *supra* note 8.

228. USCIS should limit its outreach to those who have completed proceedings before USCIS to avoid any potential conflicts of interest.

more complex sense that if found, their significance is unclear. This problem affects unrepresented parties the most. To increase accessibility and comprehension, USCIS should make its guidance documents easily and meaningfully accessible. The design of USCIS's website must reflect the practical prominence of guidance documents. Not only must all guidance documents be available on the website, but USCIS must also link to the Good Guidance Practices and to particular guidance documents liberally throughout the website.²²⁹ USCIS must not expect either unrepresented parties or immigration law experts to find guidance documents buried in a corner; USCIS must link to those documents everywhere they are applicable. There must be a shift from thinking about guidance documents as insider information to thinking about guidance documents as essential information that must be explained and accessible, especially to unrepresented parties like Gabriela.

USCIS should also provide a definition of guidance documents in its Good Guidance Practices and should explain the role of guidance documents in USCIS adjudications. In the proposed Good Guidance Practices, USCIS could explain guidance documents in the following way:

USCIS relies on different types of rules when adjudicating petitions and applications. Some types of rules are legally binding, while others are not. "Legally binding" means that both USCIS and the public must adhere to the rule in any adjudication.

Statutes are created by Congress and are found in the United States Code. Statutes are legally binding on both USCIS and the public.

USCIS may create regulations under the direction of Congress. Unless an exception applies or USCIS opts to implement more formal procedures, to create a regulation, USCIS must publish a notice of proposed rulemaking containing a proposed rule, accept comments on the proposed rule, and then announce a final regulation. Final regulations are found in the Code of Federal Regulations. Regulations are also legally binding on both USCIS and the public.

229. The new Policy Manual links to benefit forms that fall within a particular topic, but there must be more direction to the Policy Manual from other sections of the website that are more likely to be entry points, especially for unrepresented parties. See *USCIS Policy Manual*, *supra* note 8.

USCIS often relies on more informal documents to formulate rules to guide its adjudications. Frequently referred to as “guidance documents,” these materials are prepared by USCIS leadership, primarily for use by USCIS staff to adjudicate petitions and applications. These materials often address issues or details not addressed by statutes and regulations. These guidance documents are influential in USCIS adjudications. Often statutes and regulations do not address many important legal questions that arise in adjudications. The adjudication of a petition or application may depend on a rule presented in a guidance document.

Unlike statutes and regulations, these guidance documents are not legally binding. That means neither USCIS nor the public is bound to the information in the guidance document. Instead, these materials represent direction to lower-level adjudicators on the agency’s outlook on a particular unanswered question. USCIS, an applicant, or a petitioner may argue during an adjudication that a different rule should apply. This is a major difference between statutes and regulations, on the one hand, and guidance documents on the other. Individuals are free to argue that a different rule should apply, but it is up to USCIS to decide if the suggested rule complies with existing statutes and regulations.

By proposing this or similar language, USCIS would be taking a much more straightforward approach to guidance documents. This type of language would at least alert unrepresented parties to the existence of guidance documents, their effects, and their importance. Even for immigration law experts, the language is much clearer as to the legal effect of guidance documents and eliminates the confusion caused by USCIS’s current placement in the Adjudicator’s Field Manual of some guidance documents in the same category as statutes and regulations.²³⁰

In the Good Guidance Practices, USCIS also should be forthright and acknowledge the practically binding effect of guidance documents. To alleviate the effect, it should clarify that lower-level adjudicators are bound to the rules expressed in guidance documents unless a supervisor agrees that a deviation is necessary due to

230. See *supra* notes 58–66 and accompanying text.

extraordinary circumstances.²³¹ At the same time, it should emphasize that because a guidance document is not legally binding, USCIS management is free to change its outlook by issuing a new or revised guidance document. USCIS should recognize that when management changes its outlook by jumping from guidance document to guidance document, it destabilizes USCIS's adjudicatory process. USCIS should include the following or similar language in its Good Guidance Practices:

While guidance documents are not binding on USCIS or the public, USCIS recognizes that the public often views the positions expressed in those documents as practically binding. That is, affected individuals may tend to follow the rule expressed in a guidance document despite the individual's right to challenge the rule in an adjudication. To accommodate this phenomenon, USCIS employees must abide by the positions taken by USCIS management in guidance documents unless in an extraordinary circumstance the employee obtains supervisory permission to depart from the position. Because the guidance document is not legally binding, however, USCIS management remains free to change its outlook on a particular issue. The public is free to use the participation procedures established here to urge USCIS management to adopt a different position.

USCIS also recognizes that, while its positions in guidance documents are not legally binding on the agency, when an agency issues a new guidance document that changes its position on an issue, it causes uncertainty in adjudication. To alleviate this phenomenon, USCIS is formalizing its draft memorandum for comment procedure. By posting notice of proposed changes to existing guidance documents, there will be advanced notice of possible changes to adjudicatory standards.

In addition, USCIS should directly address the effect of guidance documents before the AAO, the appellate administrative body, in

231. USCIS appears to be moving in this direction through the Policy Manual. The description of the manual states that the manual "must be followed by all USCIS officers." *See USCIS Policy Manual*, *supra* note 8. This approach does raise the question whether the agency intends the rule to be legally binding if it requires adjudicators to follow it. This concern, however, needs to be balanced against worries about the ground-shifting problem. Perhaps if the authority to change is limited to management, the ground-shifting problem is eased while still retaining the agency's authority to change its outlook.

its new Good Guidance Practices.²³² USCIS should explain the hierarchy among AAO decisions and USCIS management, which currently is not clear.²³³ Stakeholders may wonder who has the final word when it comes to whether USCIS will follow a guidance document. USCIS should explain that, under the Administrative Procedure Act, AAO—a unit of USCIS—is not bound by guidance documents because such materials are not legally binding on USCIS or the public.²³⁴

USCIS should voluntarily narrow that authority, however. The Good Guidance Practices should establish that AAO will consider certain factors in determining whether to apply a rule expressed in a guidance document versus a different approach. According to Professor Charles Koch, an entity like AAO “should be mindful of the effect policy pronouncements have on the public.”²³⁵

For example, if a memo-based rule is before AAO, AAO should consider whether the rule is long-standing and whether notice and comment regulations exist. If the current understanding is long standing, that should factor against AAO changing the agency’s approach. AAO should recognize the reliance interests inherent in a long-standing guidance rule, rather than reprimanding stakeholders for following it.²³⁶ If there are no notice and comment regulations and USCIS has chosen to govern by memo, that choice should factor against AAO changing the agency’s approach as well. A lack of notice and comment regulations should be a signal to AAO that USCIS is ruling by memo and that it needs to take special

232. Currently, AAO does not hear appeals of USCIS denials of family-based petitions. *See* LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 50–52 (2012), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>. Those appeals are heard by the Board of Immigration Appeals, which is a part of the Department of Justice. *Id.* Whether the Department of Justice would respect USCIS’ Good Guidance Practices is an open question. The Administrative Conference of the United States has recommended further study whether jurisdiction over these family-based appeals should be transferred to AAO. ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012–3: IMMIGRATION REMOVAL ADJUDICATION 14 (2012), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Recommendation-2012-3-Immigration-Removal-Adjudication.pdf>.

233. *See* Family, *supra* note 14, at 585–86, 604–10.

234. USCIS should also consider structural reform to elevate the position of AAO within the organization to clarify that AAO adjudicators are of the same decision-making level as USCIS management. An elevated AAO would send a signal that it is part of USCIS management.

235. Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 718 (2005) (explaining that administrative judges “should feel some pressure to follow a pronouncement’s language”).

236. *See* Family, *supra* note 14, at 608.

care and recognize the reality of applying for benefits in an atmosphere of memo-based rules. Nonetheless, AAO does need the flexibility to change guidance rules. After all, memo-based rules are not legally binding on the agency.²³⁷

To formalize participation, USCIS should formalize its current draft memorandum for comment procedure, but with greater transparency and predictability. As discussed previously, the draft memorandum is an important innovation for immigration law.²³⁸ However, the existence of the draft memorandum for comment process is not an excuse to abandon notice and comment rulemaking.²³⁹ Instead, the draft memorandum for comment process should be seen as a method to alleviate some of the negative aspects of adjudicating based on guidance. Even if USCIS accelerates and increases its use of notice and comment rulemaking, there will always be a need for guidance.²⁴⁰ Therefore, it is necessary to take a closer look at the draft memorandum for comment procedure and to consider improvements.

There are two main drawbacks to the current draft memorandum for comment procedure. First, the procedure has not been formalized and could disappear tomorrow if current or future management determine it not to be a priority for USCIS.²⁴¹ Therefore, USCIS should formalize the process through new Good Guidance Practices. Second, the process itself is opaque and unpredictable. There is little information available about or established criteria for determining when USCIS will choose to issue a draft memorandum and seek comment or when it will forgo the process.²⁴² USCIS, as FDA did, should commit itself to always issuing a draft memorandum and providing for a pre-implementation opportunity for comment in certain circumstances. Borrowing from FDA's structure, USCIS should commit to this pre-implementation opportunity for comment for all guidance documents that (1) make changes to existing guidance, unless the changes are minor or (2) present initial guidance on statutory or regulatory requirements.

As there will be a need to issue guidance quickly in some circumstances, USCIS should create an exception for itself, as FDA did, to seek comment on a guidance document after implementation if circumstances demand it. The expectation should be, however, that

237. See *supra* note 20 and accompanying text.

238. See *supra* notes 71–80 and accompanying text.

239. See Family, *supra* note 14, at 610–15.

240. See *id.*

241. See *supra* notes 71–80 and accompanying text.

242. See *supra* notes 71–80 and accompanying text.

the lion's share of guidance documents would receive pre-implementation comment. USCIS currently issues interim memoranda for comment, which are effective immediately, but USCIS seeks post-implementation comment. USCIS's use of the interim memorandum for comment thus far highlights the need for Good Guidance Practices. As of July 2012, USCIS issued twenty-seven interim memoranda for comment versus thirteen draft memoranda for comment.²⁴³ This suggests that USCIS is favoring the post-implementation opportunity to comment. There needs to be more formal direction from USCIS as to when the interim memorandum for comment is an appropriate course.²⁴⁴

Another complex issue USCIS will need to resolve in developing its Good Guidance Practices is whether it should obligate itself to respond to comments received on draft memoranda. As a part of the current process, USCIS only lists the number of comments received in its feedback updates. This issue should be explored, but there are strong factors that caution against requiring USCIS to respond to comments.²⁴⁵

Responding to comments is time consuming²⁴⁶ and may delay the issuance of final guidance. In a more perfect world, USCIS would not be relying on guidance documents so heavily, and there would be more opportunities to comment as a part of informal rulemaking, with its requirement for USCIS to respond to comments. If that is the ultimate goal, then the guidance comment process should not be weighed down with an obligation to respond to comments. Also, it is possible that an obligation to respond to comments would discourage USCIS from using the draft memorandum for comment process or would push USCIS away from guidance documents altogether.

While there are strong factors cautioning against an obligation to respond to comments, a lack of agency response to participation can cause those engaged in the process to lose faith. Even if the

243. See *Feedback Updates*, *supra* note 76.

244. Similarly, USCIS would need to consider its forms of communication that are even less formal than a policy memorandum. For example, USCIS issues "Questions & Answers" documents that it provides "to help anticipate applicants' questions regarding a particular issue." See *USCIS Questions & Answers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow "News" hyperlink; then follow "Questions and Answers" hyperlink) (last updated Nov. 14, 2011).

245. See Mantel, *supra* note 145, at 390–400 (discussing the positives and negatives of requiring an agency to respond to comments received on guidance documents and proposing that agencies be required to solicit comments on guidance but respond to those comments only with a concise supporting statement). *But see* Mendelson, *supra* note 17, at 448 (expressing concern that, if responses are not required, agencies will not "meaningfully engage the comments it receives").

246. See Mantel, *supra* note 145, at 390–400.

comments are meaningful to USCIS, stakeholders may not get that message. FDA's experience illustrates this phenomenon, and immigration law experts have expressed this concern regarding the current draft memorandum for comment process.²⁴⁷ This is a concern that must be balanced against efficiency concerns. Perhaps the solution is that USCIS should respond to comments in some circumstances. For example, if USCIS receives repeat comments, that may be a signal to respond in a way that the agency deems appropriate (keeping in mind transparency and accessibility as goals). Another possibility is that USCIS could release redlined versions of all final documents, showing any changes made. USCIS could also, as it has done in the past, release revised draft memoranda for comment as it works through a particularly complex issue.²⁴⁸

What information might redlined comparisons reveal? A comparison of eleven sets of USCIS draft and final memoranda for comment showed that there were more than stylistic changes in eight of the eleven sets.²⁴⁹ The non-stylistic changes often provide significant elaboration that did not exist in the draft, such as describing how the new rule or interpretation would apply in certain circumstances or addressing other details overlooked in the draft.²⁵⁰ If USCIS provided redlined versions, these types of changes would be more readily apparent. Redlined versions may not concretely tie changes to particular comments, but would reveal that the process has some effect.

A lack of a requirement to respond to comments would be more acceptable if USCIS would engage in more notice and comment rulemaking. To maintain pressure on the need for more notice and comment based rules, USCIS should consider requiring itself to accompany each draft memorandum for comment with an explanation of why it chose to issue a guidance document versus

247. See CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 95, at 5–6.

248. See, e.g., *USCIS Issues Revised Draft EB-5 PM and Holds Stakeholder Engagement to Discuss It*, 89 INTERPRETER RELEASES 127 (2012).

249. A comparison of the documents is on file with the author. See also *Feedback Updates*, *supra* note 76.

250. For example, the final policy memorandum addressing requests to expedite an application for a waiver of inadmissibility explicitly mentions examples of reasons to grant a waiver that were not included in the draft policy memorandum. USCIS, PM-602-0038, REQUESTS TO EXPEDITE ADJUDICATION OF FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY, FILED BY INDIVIDUALS OUTSIDE THE UNITED STATES (2011), available at http://www.uscis.gov/USCIS/Laws/Memoranda/2011/May/Expedited_I601_PM_Approved_5-9-11.pdf; Comparison of Draft and Final Versions of Requests to Expedite Adjudication of Form I-601, Application for Waiver of Grounds of Inadmissibility (on file with author).

engaging in notice and comment rulemaking.²⁵¹ While the agency is not legally obligated to explain its thinking in this respect,²⁵² such self-regulation will assist internal compliance and will allow the public to gain a sense of what motivates USCIS to choose one course over the other.

FDA's experience reveals that its stakeholders want a meaningful opportunity to comment.²⁵³ Along these lines, FDA appears to be encouraging stakeholders to submit fully formed draft guidance documents.²⁵⁴ The need to balance meaningful participation with a need for the agency to maintain its integrity as the regulator is an important lesson for USCIS here. Meaningful participation is important, but USCIS must take care to not let outsiders steer the ship. Stakeholders (probably immigration law experts in this context) likely will push continuously for greater participation rights.²⁵⁵ At some point, though, a line does exist between participation and domination. USCIS could seek proposals for areas where guidance documents or revisions are needed, but USCIS should be the author of its guidance documents.

USCIS should also establish formal internal controls. It should establish, through its Good Guidance Practices, a high-ranking position of Good Guidance Officer to serve as an internal monitor of the agency's use of guidance documents. The Officer would operate as a guidance ombudsman open to receiving comments from stakeholders about how USCIS is faring. The Officer would also monitor USCIS's compliance with the Good Guidance Practices, as well as suggest areas where notice and comment rulemaking would be desirable.

Good Guidance Practices are worth pursuing because they can improve consistency, clarity, and stability when it comes to guidance documents, as FDA's experience shows.²⁵⁶ USCIS's use of guidance documents needs to be more consistent, clear, and stable. While pursuing these practices, USCIS should be transparent about its procedures for developing the practices and the procedures that

251. See Magill, *supra* note 107, at 1425 (discussing a potential, broader, obligation for agencies to "articulate an intelligible justification" for policymaking choices). *But see* Seidenfeld, *supra* note 13, at 366–69 (critiquing Magill's suggestion).

252. See Magill, *supra* note 107, at 1410 ("While the broader principle is not explicitly recognized, an agency is generally free to choose among all of its available policymaking forms and, as long as the agency respects the elements of the form it has chosen, its choice of preferred form will not be directly evaluated by courts.").

253. See *supra* Part II.A.3.

254. See *supra* note 218 and accompanying text.

255. As FDA's experience reveals, stakeholders continuously push for greater participatory rights. See *supra* Part II.A.3.

256. See *supra* notes 199–218 and accompanying text.

USCIS will use in implementing the practices. Finally, USCIS should remember that stakeholders likely will always push for greater participatory rights. At this point, more participation is needed, but USCIS should not obligate itself to recognize all of the participatory rights requested.²⁵⁷

What are some of the potential downsides to the course advanced here? Prominent concerns include whether agency self-regulation is effective, whether reform should require an agency to respond to comments on draft guidance documents, whether increased procedures will result in ossification, and whether a more robust guidance document development process will reduce agency incentives to use notice and comment rulemaking.²⁵⁸

There is healthy skepticism about whether a self-regulatory approach will achieve measurable positive change in agency use of guidance documents.²⁵⁹ For example, Professor Nina Mendelson has questioned, from the perspective of regulatory beneficiaries, whether such self-regulation can “ensure that the agency will meaningfully engage the comments it receives” if no response to comments on guidance is required.²⁶⁰ Professor Mendelson also has raised concerns about a lack of evidence demonstrating that FDA’s Good Guidance Practices have changed the substance of FDA guidance or that FDA complies with its own Good Guidance Practices.²⁶¹ In addition, Professor Mark Seidenfeld has argued that an agency’s obligation to explain its choice of policymaking would lack teeth because judicial review of guidance documents is not immediately available.²⁶²

FDA’s study and the comments in response to FDA’s report show that regulated parties subject to FDA’s Good Guidance Practices share Professor Mendelson’s concern about whether agencies truly

257. Developing Good Guidance Practices leaves open the possibility for even more ambitious reform. At a fundamental level, accessibility should be improved, and there should be efforts to formalize participation and to create a more positive guidance culture. Yet, the agency-by-agency approach leaves open the possibility for more. For example, one issue that affects USCIS adjudications is that the guidance landscape can change during processing delays. *Supra* note 86 and accompanying text. In developing Good Guidance Practices, USCIS could consider a commitment to apply a guidance rule that was in place at the time of application, unless a pre-established reason to change positions exists.

258. *See supra* Part II.A.1.

259. *See, e.g.*, Mendelson, *supra* note 17, at 448.

260. *Id.*

261. *See id.*

262. *See* Seidenfeld, *supra* note 13, at 366.

digest and are influenced by comments on guidance documents.²⁶³ Immigration experts also have expressed this concern.²⁶⁴ Requiring USCIS to respond to comments, however, might upset a delicate balance. The trick is to open up the guidance development process, but not so much that guidance documents lose their positive features or become so undesirable that agencies stop using them. A requirement to respond to comments on draft memoranda decreases the flexibility and efficiency of guidance documents. In place of responses to comments, features such as a Good Guidance Officer, release of redlined final versions, and a self-imposed requirement for USCIS to justify its decision to proceed by memo may make participation more meaningful without imposing too many procedural obligations on the agency. Moreover, if USCIS sees similar comments on an issue, USCIS may choose to respond in some way. USCIS should be sensitive to this inevitable concern during the development of its Good Guidance Practices.

Concerns about enforcement are valid as well. Agency self-regulation does happen, however, and this self-regulatory approach holds enough promise to merit action.²⁶⁵ After all, USCIS has already voluntarily implemented the draft memorandum for comment procedure and created the new policy manual.²⁶⁶ It has engaged in an ambitious public engagement effort and has decided to review its guidance documents. Additionally, since the status quo is that it is difficult to obtain judicial review of guidance documents,²⁶⁷ the move to Good Guidance Practices does not sacrifice any judicial review. Moving to guidance practices promises other improvements, such as increased accessibility and participation.

The concern about ossification is that Good Guidance Practices may weigh down guidance documents too much.²⁶⁸ If issuing guidance documents becomes too cumbersome, agencies may look to even more informal methods to express the agency's outlook in order to escape the restrictions of guidance practices.²⁶⁹ Also, agencies might communicate less and therefore provide less notice of their outlooks in order to avoid more demanding rules for guidance documents.²⁷⁰ Guidance documents are preferable to no

263. See Seiguer & Smith, *supra* note 198, at 30; Food and Drug Administration Report on Good Guidance Practices, *supra* note 198.

264. See CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, *supra* note 95, at 6.

265. See *supra* note 147 and accompanying text.

266. See *Draft Memorandum for Comment*, *supra* note 73; *USCIS Policy Manual*, *supra* note 8.

267. See *supra* note 22.

268. See *supra* notes 139–42 and accompanying text.

269. See Seidenfeld, *supra* note 13, at 367.

270. See Johnson, *supra* note 17; Seidenfeld, *supra* note 13, at 367.

information on a particular topic. Presumably, agency silence would make adjudication by front line officers less stable. Guidance documents are also preferable to rules developed through whatever issues happen to be litigated (potentially by unrepresented parties in the immigration context). Any fix to the guidance problem must not render guidance documents so unattractive to agencies that the advantages of notice, flexibility, and efficiency are lost.

There is some evidence that increased guidance procedures may weigh down the process. For example, FDA stakeholders have complained that there can be very long time lags between the issuance of draft and final guidance documents.²⁷¹ That leaves draft guidance documents in a sort of limbo, with their own type of practically binding effect. USCIS itself has exhibited some version of this phenomenon. Of the forty-three memoranda it had posted as a part of its draft memorandum for comment procedure through July 2012, eleven had not been finalized in over a year.²⁷²

It is doubtful, however, that a perfect solution to the guidance document dilemma exists. It is more an exercise of finding the best imperfect solution, rather than finding a panacea. A proposal for USCIS to develop its own Good Guidance Practices does alleviate some concerns about ossification because the mechanism allows for each agency to have a say in fashioning what its own practices will demand. If USCIS creates its own Good Guidance Practices, it should do so with an awareness that it needs to maintain what is positive about guidance documents. It needs to increase participation in a way that recognizes that at some point participation may make the process untenable. Also, there is a point where outside participation becomes inappropriate. USCIS must remain the regulator. In addition, the educational opportunity presented by creating Good Guidance Practices should be leveraged to help stakeholders better understand why USCIS relies on guidance documents and why the availability of guidance as a policymaking tool is important.

A further concern is that the development and implementation of Good Guidance Practices may push an agency further away from notice and comment rulemaking. If issuing guidance documents becomes too comfortable, an agency may not bother with notice and comment. This concern helps to illuminate the difficult nature of the guidance document dilemma. The reality is that USCIS currently is relying on guidance documents to do the work of

271. See *supra* notes 210–11 and accompanying text.

272. USCIS posts updates to its website as it proposes and moves forward with draft guidance documents. See *Feedback Updates*, *supra* note 76.

regulations. It is important to ease the problems of current practice, but to do so with the long-term goal of increased notice and comment rulemaking in mind.

If USCIS would adopt Good Guidance Practices along the lines proposed here, an unrepresented applicant like Gabriela would be in a much better position to be aware of and understand the rules, including the *not really* binding rules, which apply to her application for benefits. A visit to the USCIS website would be more fruitful because the website would explain the concept of guidance documents as well as their legal effect. Applicable guidance documents would be highlighted and clearly indicated. Immigration experts would benefit from formalized procedures for participation, increased stability, and a more positive guidance culture within USCIS. Importantly, these improvements could take place without neutering the positive aspects of guidance documents. This self-regulatory approach holds the promise of easing immigration law's guidance document dilemma and should be implemented.

CONCLUSION

USCIS's problems with sub-regulatory rules, or guidance documents, call out for the agency to adopt Good Guidance Practices. While a cure-all for any agency's guidance woes may be out of reach, carefully formulated guidance practices would ease a significant amount of what ails immigration law in this area.

After considering the input of stakeholders, including unrepresented parties and immigration law experts, USCIS should develop Good Guidance Practices that will increase accessibility to guidance documents, solidify and expand participation in the formulation of guidance documents, and create a positive guidance culture. This will not be easy, and USCIS will face several critical decisions in formulating guidance practices. At a basic level, USCIS must be more forthright about its use of guidance documents. It must highlight their existence and effect. It must also be more transparent about how guidance documents are created and why USCIS chooses to proceed by guidance document. More complex are the questions surrounding participation, such as whether USCIS should be obligated to respond to comments on draft guidance documents. This Article suggests that generally, the answer is no. USCIS should, however, commit to a pre-implementation opportunity to comment on draft versions of all guidance documents that make significant changes to existing guidance or present initial guidance on statutory or regulatory requirements.

Studying the need for USCIS Good Guidance Practices has implications for the more general debate over guidance reform in administrative law. It suggests that an agency-by-agency, self-regulatory approach holds promise for alleviating concerns about sub-regulatory rules without neutering their positive qualities or completely discouraging agency use of guidance documents. The agency-by-agency approach acknowledges that guidance reform should be tailored to the agency. Agencies may adopt Good Guidance Practices that meaningfully increase participation in formulating guidance documents without rendering the process too cumbersome. The proposal for reform presented in this Article aims to ease the guidance document dilemma one agency at a time.