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# A Call to Replace the APA's Notice-and-Comment Exemption for Guidance Documents

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## INTRODUCTION

The seventy-fifth anniversary of the Administrative Procedure Act (APA) has ushered in an opportunity not only to celebrate the APA's successes but also to remedy its shortcomings in promoting uniformity, fairness, and public participation across the administrative state.[1] Passed in the wake of the New Deal's significant expansion of federal agencies, the APA was a "hard-fought compromise"[2] between liberal interests in swift, efficient, and unencumbered agency implementation of government programs and conservative desires to rein in agency power and protect individual and business rights.[3] The APA provides for agency procedures, public information, and judicial review of agency actions.[4] It is all at once the "bill of rights,"[5] the "quasi-constitution,"[6] and the "bible"[7] for the modern regulatory state.

Among the APA's hallmarks was a first-time mandate for federal agencies to engage the public before issuing substantive rules.[8] Agency rules address policy matters that lie "at the heart of political discourse" and often require agency staff to make

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[1] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

[2] Stuart Shapiro & Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 141, 145 (2016).

[3] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680 (1996).

[4] S. REP. NO. 79-752, at 7 (1945).

[5] *See* Shepherd, *supra* note 3, at 1558.

[6] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004).

[7] James Hunnicut, Note, *Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules As Binding Law*, 41 B.C. L. REV. 153, 156 (1999).

[8] Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 573 (1977). The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

value judgments.[9] Substantive rules govern the business of regulated entities and often impact the daily lives of ordinary citizens.[10] Fairness and public participation are lost when Congress delegates legislative authority to agencies for rulemaking because, unlike legislatures, agency officials are not elected, deliberate in private, and are not directly accountable to the public.[11] The APA restores democratic ideals and safeguards to the public interest by allowing vested parties to engage in informed discussion of agency proposals, provide data the agency may not have otherwise accessed, and offer a more complete picture of the consequences that may flow from agency decisions.[12] Ultimately, public input equips agencies to produce better rules and execute their legislated functions fairly, impartially, and in a reasoned manner; it is central to the democratic legitimacy of the administrative state.[13]

The APA's informal rulemaking procedures in § 553, commonly referred to as "notice-and-comment"[14] rulemaking, require federal agencies to give the public notice of proposed rules, invite interested parties to comment, adopt in final rules "a concise general statement of their basis and purpose" after considering public comments, and publish final rules in the *Federal Register* at least thirty days before their effective date.[15] Today, issuance of legally binding agency rules dwarfs new federal statutes.[16] For example, between 2005 through 2015, federal agencies published in the *Federal Register* an estimated

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[9] Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 724 (2016); *see also* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1347–48 (2011).

[10] *See* Kadie Martin, Comment, *So Much to Comment on, So Little Time: Notice-and-Comment Requirements in Agency Informal Rulemaking Under the Administrative Procedure Act*, 61 B.C. L. REV. E-SUPPLEMENT II.-132, II.-132 (2020) (noting that federal agency decision-making affects American lives); Susan Webb Yachee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. OF POL. SCI. 37, 39 (2019) (discussing how regulations impact American lives); Mendelson, *supra* note 9, at 1347 (exemplifying how agency rulemakings involve value-laden judgments).

[11] S. DOC. NO. 77-8, at 101-02 (1941); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

[12] *Bowen*, 834 F.2d at 1044; S. DOC. NO. 77-8, at 101–02; *see* Asimow, *supra* note 8, at 574–75; Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 538 (2012).

[13] S. DOC. NO. 77-8, at 101–02; Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 796 (2021).

[14] Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 1 (1994).

[15] 5 U.S.C. §§ 553(b)–(d). Formal rulemaking procedures are set in §§ 556–57 and not addressed in this note.

[16] D.A. Candeub, *Preference and Administrative Law*, 72 ADMIN. L. REV. 607, 608 (2020).

36,890 final rules as compared to Congress, in the same period, enacting 2,003 statutes.[17]

Section 553(b)(A) exempts from notice-and-comment two categories of rules: "interpretative rules" and "general statements of policy."[18] Interpretive[19] rules provide agency interpretations of statutes and regulations, and policy statements offer an agency's current view on future policy proposals.[20] Over time, the administrative law community coined the term "guidance" as a catch-all for both types of agency rules that fall within the exemption.[21] Under the APA, rules promulgated with notice-and-comment, so-called "legislative rules," have the "force and effect of the law," while guidance documents do not.[22] The APA's wholesale exemption of guidance documents from preadoption notice-and-comment curtails public review of rules that merely offer insight and assistance on statutes, regulations, and agency positions without binding the public.[23]

Although the distinction between a guidance document and a legislative rule is facially clear—one is legally binding and the other is not—in practice, application of § 553(b)(A) is murky.[24] The conceptually clear distinction is blurred because guidance documents and legislative rules often have similar objectives, such as interpreting a statute, and, intentionally or not, they frequently have the same practical effects on the public.[25] Efforts to clarify this distinction have generated elusive new terminology, confusing judicial tests, and even debate on

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[17] *See id.* at 628 (compiling data on rulemaking and legislative activity from 2005 through 2015).

[18] 5 U.S.C. § 553(b)(3)(A). The provision requires all exempted rules to be published or served but does not set a minimum notice period. §§ 553(b)(3)(A), (d). The exemption also applies to "rules of agency organization, procedure, or practice." § 553(b)(3)(A).

[19] This note uses the commonly used "interpretive" rather than "interpretative."

[20] *See* U.S. DEP'T OF JUSTICE, *supra* note 1, at 30 n.3.

[21] Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 269 (2018).

[22] *See* U.S. DEP'T OF JUSTICE, *supra* note 1, at 30 n.3; *see also* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001) (describing the distinction between legislative and nonlegislative rules).

[23] Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383 (1985).

[24] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("The term 'interpretative rule,' or 'interpretive rule,' is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate."); Levin, *supra* note 21, at 265 (determining whether a rule was subject to notice-and-comment may be the "single most frequently litigated and important issue of rulemaking procedure before the federal courts today"); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547–48 (2000) (compiling words courts have used to refer to the distinction between legislative rules and interpretative rules: "fuzzy," "tenuous," "blurred," "baffling," and "enshrouded in considerable smog").

[25] *See* Asimow, *supra* note 23, at 383–84.

whether scholars and lawmakers should continue to differentiate interpretive rules and policy statements.[26]

Consequently, federal agencies have turned to using the notice-and-comment exemption to issue rules without public input.[27] In doing so, agencies strip vested stakeholders of their right to participate in administration at the critical moment before "law and policy crystallize" and contravene the legislative purposes undergirding the APA.[28] The problem of administrative "[l]aw [being] made, without notice and comment, without public participation, and without publication" has garnered the attention of all three branches of government and legal scholars.[29]

Congressional efforts to amend the APA to address the problem of agencies binding the public without notice-and-comment have failed. In turn, lawmakers, academics, and practitioners have proposed variations of a seemingly simple fix—mandate or encourage agencies to solicit public input before issuing guidance documents. This note characterizes these proposals as overlays on the § 553(b)(A) exemption because none of the proposals for preadoption notice-and-comment for guidance documents alter the applicability or availability of the underlying exemption.

Scholarly analyses of the overlay proposals have assessed the merits of preadoption notice-and-comment for guidance documents across four categories: (1) consistency with the APA's intent, (2) administrative burden and efficiency, (3) quality and effectiveness of the end product, and (4) agency accountability. However, there is limited empirical evidence backing the documented understandings of the benefits and trade-offs in each category.[30]

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[26] *See* Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENVTL. & ADMIN. L. 243, 249–50 (2020) (elusiveness of the term "guidance"); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 78–100 (Am. Bar Ass'n, 6th ed. 2018) (describing judicial tests); Funk, *supra* note 22, at 1324 (disagreement over whether interpretive rules and policy statements should be distinguished).

[27] *See infra* text accompanying notes 39 and 42.

[28] *See* Asimow, *supra* note 8, at 574–75.

[29] Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1020 (D.C. Cir. 2000); *see* Transcript of Oral Argument at 13–14, 16, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015) (No. 13-1041) (Justices Kagan and Sotomayor noting that agencies are using guidance documents as law); Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L. J. 782, 785–86 (2010) (discussing scholars and policymakers devoting attention to improper use of guidance documents).

[30] Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 58 (2019) ("[T]he literature on the proposal is mainly theoretical, without much empirical understanding of how these participatory arrangements work when they are tried, or what their consequences are."); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 663 (2017) ("Much more work needs to be done to address agency guidance, including more extensive empirical analysis . . . ."); Cass R. Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 503–04 (2016) ("[T]he

This note chips away at this empirical evidence gap through a case study of a novel preadoption notice-and-comment mandate for binding guidance documents that Congress enacted for the Federal Transit Administration (FTA). Enacted in 2005, the mandate at 49 U.S.C. 5334(k) requires the FTA to undertake notice-and-comment for policy statements, interpretive rules, and other guidance documents that impose a binding obligation on the public. The case study reveals that Congress implemented § 5334(k) in response to transit industry concerns about substantive policy changes FTA implemented through guidance documents without public input. While the case study validated many of the potential benefits of preadoption notice-and-comment for guidance documents noted in literature, it also reveals the mandate failed to stop FTA from circumventing notice-and-comment for binding guidance.

This note argues the failure occurred because the mandate did not address the root problem, which is the § 553(b)(A) exemption itself. The FTA has continued to use the exemption as an escape hatch when doing so best serves agency or political interests. In short, the case study demonstrates that so long as the exemption remains law in its current form, it will undermine any overlay fixes.

Importantly, this note does not endorse the complete elimination of the exemption without a replacement. Agency discretion to waive notice-and-comment for legitimate guidance documents is necessary for federal agencies and the regulated community alike because guidance documents are integral to efficient government administration. Rather, this note advocates for replacing the provision with clear and concrete direction to agencies on the appropriate circumstances for issuing guidance without notice-and-comment.

Based on the case study findings, this note offers four preliminary considerations for such a replacement provision: (1) exempt documents based on the practical impacts of their contents, (2) clearly define the characteristics and limits of exempt documents, (3) allow the public to petition an agency to reconsider its designation of a document as exempt, and (4) add teeth to address noncompliance.

Part I of this note details the problem of federal agencies misusing guidance, summarizes the overlay proposals, and synthesizes the arguments for and against the overlay fixes across

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question is whether the benefits of requiring public comments outweigh the costs of producing fewer firm policy statements . . . . a careful empirical investigation would be necessary to answer the tradeoff question.").

four categories: (1) consistency with the APA's intent, (2) administrative burden and efficiency, (3) quality and effectiveness, and (4) agency accountability. Part II presents the case study, including background on the FTA and the § 5334(k) mandate, the case study methodology, a discussion of Congress's reasons for enactment, and an evaluation of the merits of the approach in light of the four categories presented in Part I. Part III recaps the findings and offers preliminary considerations for an appropriate § 553(b)(A) replacement. Finally, this note's conclusion offers thoughts on future research.

## I. THE PROBLEM & PROPOSED OVERLAY PROPOSALS

This Part briefly details why agency use of guidance documents as legislative rules is problematic and summarizes fixes proposed in scholarly literature and across the executive and legislative branches. It concludes with a summary of the literature evaluating these approaches as synthesized into four categories that are then used as the case study framework in Part II.

### *A. The Problem with Agencies Using Guidance Documents as Legislative Rules*

The term "guidance" encompasses a wide array of materials, such as advice letters, advisory statements, memoranda, frequently asked questions, staff manuals, bulletins, and directives.[31] While no government-wide inventory or systematic count of guidance documents exists, the universe is vast and likely outnumbers regulations.[32] Although the APA broadly focuses on engaging the public, the end users of guidance documents, as well as legislative rules, are generally a smaller subset of the public at large.[33] Subgroups include directly regulated entities, state or local government recipients of federal funds agencies distribute, and, less frequently, indirect beneficiaries that do not have a relationship with the agency.[34]

The prevalence of guidance documents, on one hand, reflects the significant value these documents hold for federal agencies and

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[31] *See* Coglianese, *supra* note 26, at 252; Parrillo, *supra* note 30, at 59.

[32] *See* Parrillo, *supra* note 30, at 59 ("The total page count of guidance issued by any given agency is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even two-hundred."); STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 115th CONG., SHINING LIGHT ON REGULATORY DARK MATTER 4 (2018) (More than 13,000 guidance documents were issued between 2008 and 2018.).

[33] *See* Asimow, *supra* note 23, at 418.

[34] Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414–15 (2007).

interested parties alike. As interpretive tools, guidance documents "fill the gaps, resolve ambiguities, and reduce abstractions" in legislative rules.[35] For agency staff, guidance documents can provide day-to-day direction necessary for uniform, efficient, and predictable implementation of agency policies.[36] They also provide agencies flexibility, as the documents can be modified more easily than legislative rules to respond to new issues, changing legal doctrines, or policy changes.[37] Guidance documents can valuably assist in understanding agency requirements, often without the need to consult agency staff, as agencies can write the documents in more accessible language than codified legislative rules.[38]

Conversely, the volume of guidance documents might be the byproduct of agencies issuing legally binding rules as guidance documents to avoid the costs and delays of legislative rulemaking.[39] The judiciary's aggressive interpretations of § 553(b) procedures, Congress' layering of hybrid rulemaking procedures, and presidential administrations asserting oversight through executive orders have complicated the APA's

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[35] *See* Asimow, *supra* note 23, at 385.

[36] *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 809–10 (2001); Mendelson, *supra* note 34, at 409; Asimow, *supra* note 23, at 385.

[37] Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 351 (2009); Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 671–72 (2008).

[38] NICHOLAS R. PARRILLO, FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 28, 30–31 (Oct. 12, 2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/H554-ZK7Z]; *see* Mantel, *supra* note 37, at 351–52; Asimow, *supra* note 8, at 529.

[39] *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, 1317–18 (1992) (explaining benefits of avoiding legislative rulemaking process); Mendelson, *supra* note 34, at 408–09 (citing criticisms in case law and scholarly literature of agencies using guidance documents to circumvent rulemaking); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 343 (2011) ("[A]n agency might exploit the practically binding potential of policy statements to induce compliance with a policy that the agency believes is likely to succumb to political or legal opposition were it adopted using notice-and-comment procedures."); Leslie M. MacRae & Kenneth E. Nicely, *Break the Rules and Run an Industry: Guidance Manuals More Destructive of the Rule of Law Than Bad Accounting*, 11 U. BALT. J. ENVTL. L. 1, 24 (2003) ("The use of guidance manuals and policy statements is a convenient way for federal and state agencies to avoid rule-making procedures."); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166 (2000) (asserting that agencies are "avoiding 'ossification' . . . by increased use of 'interpretative rules' and 'policy statements'"); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) ("Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations."). *See generally* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65 (2015) (analyzing "when and why administrative agencies avoid rulemaking procedural requirements").

straightforward procedures.[40] This burden associated with notice-and-comment is termed the "ossification" of rulemaking procedures.[41] Notably, there is limited and inconsistent empirical evidence that agencies intentionally use guidance documents as a nefarious end-run around notice-and-comment.[42]

Regardless of an agency's intent, use of guidance documents as binding rules issued without public input is a problem. The approach erodes the distinction between legislative and nonlegislative rules and makes law without the oversight and procedural safeguards that protect the public from arbitrary agency decisions.[43] Agencies' misuse of guidance documents may circumvent judicial checks due to the finality requirement for judicial review of agency actions under the APA § 704 and the ripeness doctrine.[44]

In addition, even a technically nonbinding agency policy or guidance will prompt conformance to avoid "costly, time-consuming, and usually futile challenges."[45] The public is left vulnerable to changes in legally binding policy without the warning or protection that would have been available if the agency had properly administered the policy as a legislative rule.[46]

### *B. Preadoption Notice-and-Comment Overlays as a Fix*

Congress has proposed several reforms to § 553(b)(A). An initial congressional proposal in the mid-1960s failed to gain traction, with some scholars interpreting it as a repeal of the exemption.[47] Subsequent reform proposals have focused on

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[40] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992); *see* Mantel, *supra* note 37, at 386–88.

[41] *See* McGarity, *supra* note 40, at 1386.

[42] *See, e.g.*, PARRILLO, *supra* note 38, at 165 (discussing how the high costs of notice-and-comment can be an obstacle to agency participation); STAFF. OF H.R. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, *supra* note 32, at 1; H.R. REP. NO. 106-1009, at 1 (2000) (a congressional investigation found "some guidance documents were intended to bypass the rulemaking process"); Raso, *supra* note 29, at 787 (concluding that agency abuse of non-legislative rulemaking has been overstated).

[43] *See* Mendelson, *supra* note 34, at 407–09; Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3432–33.

[44] 5 U.S.C. § 704 (limiting judicial review to final agency actions). Courts may deem guidance documents not final for purposes of judicial review because guidance may be changed more easily than legislative rules, state an agency's tentative position on an issue, or lack the legal force necessary to create legal consequences or determine the rights or obligations of regulated entities or grant recipients. *See* Seidenfeld, *supra* note 39, at 375–79; LUBBERS, *supra* note 26, at 460–62. Similarly, an agency action that is not final under APA § 704 will not be ripe for review as the ripeness analysis incorporates finality question. Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 713 (2007).

[45] *See* Asimow, *supra* note 23, at 384; *see also* Mendelson, *supra* note 34, at 400.

[46] *See* Stuart Shapiro, *Agency Oversight As "Whac-A-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POLICY 523, 533–34 (2014).

[47] *See* Asimow, *supra* note 8, at 575–76.

amending the APA to clarify the notice-and-comment exemption and limit agency misuse of guidance documents.[48]

The Regulatory Accountability Act of 2017 was the most recent congressional reform proposal.[49] The Act proposed to codify the term "guidance" as an "agency statement of general applicability, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue."[50] The bill would have replaced the APA § 553 informal rulemaking procedures and notice-and-comment exemption with two new procedures—one for rules and one for guidance.[51] The Act passed the House but not the Senate.[52]

In the absence of an enacted change to the APA itself, other fixes that move agencies toward employing preadoption notice-and-comment for guidance documents have emerged. These proposals can be grouped generally as "overlay" fixes because they are added on top of the underlying exemption; none alter the applicability or availability of § 553(b)(A). Some overlay fixes call for an across-the-board mandate for notice-and-comment.[53] Notably, however the Administrative Conference of the United States (ACUS), an independent federal agency charged with promoting improvements in administrative processes and procedures,[54] has cautioned against a government-wide mandate of notice-and-comment unless "confined to the most extraordinary documents" to avoid unintended adverse consequences.[55]

Congress has overlaid statutory mandates for notice-and-comment for the US Food and Drug Administration (FDA) and the US Department of Health and Human Services (HHS). Under the Food and Drug Modernization Act of 1997, Congress codified the FDA's Good Guidance Practices (GGPs), a set of procedural rules the FDA had developed previously for guidance documents.[56] The GGPs require preadoption public review and comment "for guidance documents that set forth initial

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[48] For summaries of Congressional reform proposals through the 1990s, see Asimow, *supra* note 23, at 417–21; Mendelson, *supra* note 34, at 401; and Hunnicutt, *supra* note 7, at 185–87.

[49] Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (1st. Sess. 2017).

[50] *Id.* § 102(18).

[51] *Id.* § 103(b).

[52] The Regulatory Accountability Act of 2017 passed the House on January 11, 2017 and was introduced in the Senate on April 26, 2017. H.R. 5; S. 951, 115th Cong. (2d. Sess. 2017).

[53] *See* Parrillo, *supra* note 30, at 66.

[54] *See* LUBBERS, *supra* 26, at xxi; *About ACUS*, ACUS, https://www.acus.gov/administrative-conference-united-states-acus [https://perma.cc/KFE8-UANZ].

[55] ACUS, Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,728, 61,735 (Dec. 29, 2017).

[56] *See* Food and Drug Modernization Act of 1997, Pub. L. No. 105-115, § 405, 111 Stat. 2296, 2368 (1997) (codified at 21 U.S.C. § 371(h)).

interpretations of a statute or regulation, changes in interpretation or policy that are of more than a minor nature, complex scientific issues, or highly controversial issues."[57]

In 1986 and 1987, Congress amended the Medicare Act to require that the HHS employ notice-and-comment for certain Medicare regulations.[58] Congress imposed this requirement to counter HHS relaxing its historical voluntary commitment to notice-and-comment for regulations.[59] As amended, the Medicare Act requires public notice and a 60-day comment period for any "rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare]."[60] The Supreme Court recently held in 2019 that this statutory language did not incorporate the APA's notice-and-comment exemption for interpretive rules and policy statements. Thus, in the terminology of this note, the Medicare Act imposes a notice-and-comment overlay for certain HHS guidance documents.

The executive branch has also taken to clarifying the appropriate uses of administrative guidance. The Office of Management and Budget's (OMB) Final Bulletin for Agency Good Guidance Practices, issued during the Bush administration and still in effect today, borrows from the FDA's GGPs and requires federal agencies to undertake notice-and-comment for "economically significant guidance documents."[61] Most significantly, economically significant guidance documents include those that "[l]ead to an annual effect on the economy of $100 million

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[57] 21 U.S.C. § 371(h)(1)(C)(i). *See* LUBBERS, *supra* note 26, at 98–99 (background on FDA's GGPs with footnote citations to additional sources for commentary); Hunnicutt, *supra* note 7, at 177–85 (overview and analysis of the GGPs).

[58] *See* Omnibus Budget Reconciliation Act of 1986, Pub L. No. 99-509 § 9321, 100 Stat 1874, 2017-18 (1986) (codified at 42 USC § 1395hh); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 4035(b)(2), 101 Stat 1330-55, 1330-78 (1987) (codified at 42 USC § 1395hh(a)(2)).

[59] Azar v. Allina Health Servs., 139 S. Ct. 1804, 1808–09 (2019). HHS's involvement was voluntary because its regulations were exempt as a public benefit program under § 553(a)(2), which exempts from notice-and-comment "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." *Id.* at 1808; 5 U.S.C. § 553(a)(2).

[60] *Allina Health*, 139 S. Ct. at 1811. The Supreme Court's holding in *Allina Health* has been criticized for failing to provide guidance on the reach of the notice-and-comment requirement the Medicare Act imposed. *See, e.g.*, Josh Armstrong, *Necessary "Procedures": Making Sense of the Medicare Act's Notice-and-Comment Requirement*, 87 U. CHI. L. REV. 2175, 2177–78 (2020).

[61] OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007); s*ee* LUBBERS, *supra* note 26, at 98; Parrillo, *supra* note 30, at 63–64.

or more."[62] Under the Trump administration, in 2017, then-Attorney General Jeff Sessions issued a memo to the Department of Justice prohibiting the improper use of guidance documents to bind the public.[63] In addition, Executive Order 13891, which has since been revoked by President Biden, required federal agencies to establish regulations governing the issuance of guidance documents to curtail use of guidance documents for binding rules.[64]

Most other overlay fixes discussed in scholarly literature have proposed specific conditions or circumstances that would trigger an agency to employ preadoption notice-and-comment consistent with § 553 for certain guidance documents. Proposed triggers have included where a guidance document (1) will have a "significant impact,"[65] (2) imposes "binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures,"[66] (3) is "important,"[67] (4) "intends to impose a binding obligation,"[68] and (5) "substantially enlarge[s] the jurisdiction exercised by the agency or substantially changes the obligations or entitlements of private parties."[69] Some have also endorsed postadoption comment opportunities, often as a secondary measure to preadoption efforts.[70]

### *C. Literature Review of Arguments For and Against the Overlay Fixes*

A fair amount of literature assesses the preadoption notice-and-comment overlay proposals for guidance documents. This note synthesizes the discussions into four categories: (1) consistency with the APA's intent, (2) administrative burden and efficiency, (3)

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[62] OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3439.

[63] ATT'Y GEN. JEFF SESSIONS, MEMORANDUM FOR ALL COMPONENTS: PROHIBITION ON IMPROPER GUIDANCE DOCUMENTS 1 (2017), https://www.justice.gov/opa/press-release/file/1012271/download [https://perma.cc/WKV4-F6HR].

[64] Exec. Order No. 13,891, 84 Fed. Reg.55,235, 55,235 (Oct. 9, 2019) ("Promoting the Rule of Law Through Improved Agency Guidance Documents"); Exec. Order No. 13,992, 86 Fed. Reg. 7049, 7049 (Jan. 20, 2021) ("Revocation of Certain Executive Orders Concerning Federal Regulation").

[65] ACUS, RECOMMENDATION 76-5, INTERPRETIVE RULES OF GENERAL APPLICABILITY AND STATEMENTS OF GENERAL POLICY 1 (1976), https://www.acus.gov/sites/default/files/documents/76-5.pdf [https://perma.cc/TNJ2-AJR3]; AM. BAR ASS'N, RECOMMENDATION, ADMINISTRATIVE LAW AND REGULATORY PRACTICE, REPS. NO. 129C 1 (1993), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/federal02.pdf [https://perma.cc/B26L-V255].

[66] ACUS, Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103, 30,104 (July 8, 1992).

[67] *See* Mendelson, *supra* note 34, at 444.

[68] Robert A. Anthony, *"Well, You Want the Permit, Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN L. REV. 31, 34 (1992).

[69] *See* Anthony, *supra* note 39, at 1315.

[70] *See* Mantel, *supra* note 37, at 391–92 (summarizing proposals for "postadoption notice-and-comment").

quality and effectiveness of the end product, and (4) agency accountability. The summary of the literature by category below serves as an analytical framework for the case study in Part II.

1. Consistency with the APA's Intent

This category considers the extent to which preadoption notice-and-comment furthers or conflicts with the APA's intent. Proponents argue that imposing a notice-and-comment period is consistent with the APA because the 79th Congress did not intend for the exceptions to be an absolute bar on notice-and-comment; rather, agencies were to employ preadoption public participation procedures for otherwise exempt documents where useful to the agencies or beneficial to the public.[71] According to this view, imposing notice-and-comment simply reinforces the idea that the APA was meant to serve as a safeguard against agencies binding the public without their prior notice or input.[72]

On the other hand, the 79th Congress did envision a place for nonlegislative rules and streamlined the promulgation procedures to encourage agencies to use them.[73] The point of guidance documents is to inform the public without the delays and costs of preadoption notice-and-comment.[74] Congress recognized the content and need for nonlegislative rules would vary such that it made sense to leave notice and public procedures to agency discretion.[75] By imposing notice-and-comment, guidance documents may become so legitimate that they approach replacing legislative rulemaking altogether, especially if there is no requirement that agencies employ legislative rulemaking for some policies.[76]

2. Administrative Burden and Efficiency

Section 553 notice-and-comment procedures come with costs: "the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them."[77] The rulemaking process overall has become quite burdensome in the view of some scholars.[78] As discussed below, the debate under the administrative burden

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71 S. REP. NO. 79-752, at 13.
72 H.R. REP. NO. 106-1009, at 1.
73 S. DOC. NO. 79-248, at 18 (1946).
74 *See* Parrillo, *supra* note 30, at 62; Asimow, *supra* note 8, at 575–76.
75 S. DOC. NO. 79-248, at 18.
76 *See* Parrillo, *supra* note 30, at 72–74.
77 ACUS, Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. at 30,102.
78 *See supra* Section I.A.

and efficiency category centers on the extent of the resources necessary to undertake notice and comment for guidance documents and the potential for adverse consequences.

The argument against preadoption notice and comment is that the costs are substantial and would yield adverse consequences.[79] The most concerning of these consequences is the suggestion that costs could deter agencies from issuing guidance altogether in favor of more individualized communications.[80] This shift to more informal guidance is seen as problematic because an ad hoc approach is likely to lead to inconsistent and unpredictable guidance, depriving agency staff and the public of legitimate guidance documents that provide uniform clarity on statutes and regulations.[81]

Other adverse consequences include reduced agency productivity as agencies divert resources to accommodate the burden of preadoption notice-and-comment.[82] In addition, agencies might elect to publish guidance documents in draft form indefinitely when consensus cannot be reached or to avoid the preadoption process altogether.[83] This would then compound the reliance concerns surrounding guidance documents as agency staff are generally not bound to draft documents.[84]

Proponents argue that voluntary notice-and-comment on guidance, though more costly than other informal forms of outreach, is less costly than actual legislative rulemaking because it is not generally subject to the congressional and presidential requirements known to have ossified the rulemaking process and due to limited availability of preenforcement judicial challenge.[85] Further, while imposing notice-and-comment might lead to fewer documents, it simply is not possible that agencies would choose to eliminate guidance documents altogether.[86] As noted by the late Professor Robert A. Anthony, "[A]gencies exist solely to serve the public . . . The costs of observing the law and fair procedure are bedrock obligations that cannot legitimately be slighted simply

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[79] *See* Asimow, *supra* note 23, at 403–06; Mantel, *supra* note 37, at 393–95.

[80] *See* Mantel, *supra* note 37, at 393–94.

[81] *See id.*; Shapiro, *supra* note 46, at 536–37; Parrillo, *supra* note 30, at 71–72; Asimow, *supra* note 23, at 403–06.

[82] *See* Mantel, *supra* note 37, at 395–96.

[83] ACUS, Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 Fed. Reg. at 61,736; *see* Parrillo, *supra* note 30, at 72–74.

[84] *See* Mendelson, *supra* note 34, at 410.

[85] *See* Parrillo, *supra* note 30, at 69–70. For discussion of ossification, see *supra* text accompanying notes 40–41. For background on why preenforcement judicial review is a challenge, see *supra* note 44.

[86] *See* Mantel, *supra* note 37, at 393–95.

because an agency might lack adequate resources or prefer to direct them elsewhere."[87]

3. Quality and Effectiveness of the End Product

This factor focuses on the degree to which preadoption notice-and-comment enhances or reduces the quality and effectiveness of guidance documents. Advocates argue that preadoption notice-and-comment will encourage guidance documents that are "well informed, respected, and understood."[88] Public input expands the agency's information base for policymaking and can offer pertinent information and criticism from parties that an agency may not have otherwise consulted.[89] Participatory measures might generate alternatives to agency proposals that more efficiently achieve agency objectives.[90] Feedback could help the agency address potential implementation challenges that might not have been apparent until after issuance.[91] Further, advocates note a more transparent process contributes to more widespread buy-in and higher degrees of public trust.[92]

The counterargument is, in practice, there would be few opportunities for preadoption notice-and-comment to enhance the utility of guidance documents.[93] The vast majority of nonlegislative rules would generate no public interest at all because they are insignificant, of primarily internal importance to the agency, indisputably valid, or noncontroversial.[94] In addition, an open public process may thwart the agency's objectives by inviting resistance that may not have otherwise materialized if the agency had simply issued the guidance with no public input.[95]

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[87] *See* Anthony, *supra* note 39, at 1379.

[88] Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1488–89 (1992); *see* Mantel, *supra* note 37, at 398–99; Asimow, *supra* note 23, at 426; Asimow, *supra* note 8, at 529.

[89] Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U.L. REV. 173, 185–86 (1997); *see* Anthony, *supra* note 39, at 1373–74; John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 904–05 (2004).

[90] *See* Pierce, *supra* note 24, at 550; Johnson, *supra* note 44, at 734–35.

[91] *See* Parrillo, *supra* note 30, at 70; Asimow, *supra* note 23, at 402–03; *see also* Shapiro, *supra* note 46, at 534.

[92] *See* Rossi, *supra* note 89, at 185–86; Parrillo, *supra* note 30, at 70–71; Johnson, *supra* note 44, at 734–35.

[93] *See* Asimow, *supra* note 23, at 403.

[94] *See id.*

[95] *See* Parrillo, *supra* note 30, at 70.

4. Agency Accountability

This factor considers whether preadoption notice-and-comment fosters greater agency accountability to the public and elected officials. Proponents argue that it can protect the public from arbitrary agency decisions and serve as informal oversight that makes the agency accountable to the public.[96] Notice-and-comment presents an opportunity for the president and Congress to influence the nonlegislative rules issued by the agency and discourages attempts at over-regulation or bureaucratic overreach.[97] Section 553(b) would require agencies to account for the interests of the affected public, "exercise due care in [] factfinding[,] make rational policy choices," and "guard against imprudent administrative policies and political 'deals' that advance narrow, private interests over the common good."[98]

Arguments in favor of overlay fixes also cite the potential for overlay fixes to minimize the risk of agency capture. Agency capture is the theory that agencies become beholden to the entities they were tasked with regulating and end up as their de facto agents.[99] Overlay fixes may reduce the risk of "agency capture" as agencies could no longer solely rely on informal opportunities for feedback from influential interest groups or regulated entities.[100] Agencies might be more legitimized by using the increased participation to deflect criticisms that they are biased in their reception of comments.[101]

The counter position is that agencies may not realize accountability benefits given the high discretion agencies retain during the notice-and-comment period.[102] The consequences for agency failure to adhere to the § 553 procedures are unclear.[103] Agencies could choose, for example, to limit the details and data disclosed for public comment. Such a course of action would run counter to § 553 and related judicial interpretations and potentially reduce the value and effectiveness of the comment

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[96] H.R. REP. NO. 106-1009, at 1; *see also* Manning, *supra* note 89, at 904–05; Rossi, *supra* note 89, at 182.

[97] *See* Pierce, *supra* note 24, at 550; Anthony, *supra* note 39, at 1373–74.

[98] *See* Mantel, *supra* note 37, at 400–03; H.R. Rep. No. 106-1009, at 1; *see also* Manning, *supra* note 89, at 904–05.

[99] Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1, 30 (2020); Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 188 (1996).

[100] *See* Johnson, *supra* note 44, at 702–03; Rossi, *supra* note 89, at 184; Mantel, *supra* note 37, at 392–93.

[101] *See* Parrillo, *supra* note 30, at 71.

[102] *See* Mendelson, *supra* note 34, at 410.

[103] *See* Asimow, *supra* note 8, at 582.

process for the agency and interested parties.[104] Another counterargument is the concern that imposing preadoption notice-and-comment on agencies might actually disrupt informal processes already in place to support guidance documents, particularly if agencies forego issuing guidance documents to circumvent comment procedures.[105] A reduced capacity of agencies to make policy at all may inadvertently delegitimize the agency in the eyes of key segments of the public.[106]

Finally, regarding agency capture, it is widely known that larger regulated entities and well-organized stakeholder groups, such as interest organizations and business entities, are often the dominant, if not only, respondents to agency comment requests.[107] Regulatory beneficiaries, and smaller regulated entities tend not to comment due largely to the time, financial cost, and expertise often needed to review and respond to highly technical rules and agency reasoning.[108]

The following case study evaluates the merits of the arguments for and against preadoption notice-and-comment for guidance documents summarized in this section.

## II. CASE STUDY APPROACH AND FINDINGS

This Part of the note introduces the FTA and the notice-and-comment mandate at the core of the case study and then presents the case study methodology. Case study findings are then presented, beginning with background on the mandate and a discussion of the merits of the arguments for and against preadoption notice-and-comment by each of the four categories presented in Section I.C.

### *A. The FTA and the Preadoption Notice-and-Comment Mandate*

The FTA is one of nine modal administrations within the U.S. Department of Transportation (USDOT).[109] The president appoints and the Senate confirms the FTA Administrator.[110]

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[104] *See* Mendelson, *supra* note 34, at 410; Parrillo, *supra* note 30, at 69–70.

[105] *See* Parrillo, *supra* note 30, at 69.

[106] *See id.* at 71–72.

[107] *See* Sant'Ambrogio & Staszewski, *supra* note 13, at 812.

[108] *See* Mendelson, *supra* note 9, at 1357–59; Yachee, *supra* note 10, at 45–46; Pierce, *supra* note 99.

[109] *About FTA*, FTA, https://www.transit.dot.gov/about-fta [https://perma.cc/HCU8-4CBN].

[110] *Id.*

Unlike many federal agencies, the FTA's primary function is to render financial assistance; a statute limits its regulatory role.[111] Congress has authorized FTA to distribute up to $108 billion, roughly 20 billion annually, in federal fiscal years 2022 through 2026 for new transit systems and improvement, maintenance, and operations of existing systems in all fifty states, the District of Columbia, and U.S. territories.[112] Examples of the FTA's limited regulatory function include safety oversight, authority to regulate in cases of national defense and national or regional emergency, and oversight of certain statutory requirements for federal grant eligibility, such as drug and alcohol testing.[113] The agency also provides technical assistance, planning support, policy development, and technology research.[114]

Congress enacted a statutory mandate for the FTA to employ preadoption notice-and-comment in 2005 that remains law today:

> (k) Agency Statements.
>
> (1) In general.-The Administrator of the Federal Transit Administration shall follow applicable rulemaking procedures under section 553 of title 5 before the Federal Transit Administration issues a statement that imposes a binding obligation on recipients of Federal assistance under this chapter. (2) Binding obligation defined.-In this subsection, the term "binding obligation" means a substantive policy statement, rule, or guidance document issued by the Federal Transit Administration that grants rights, imposes obligations, produces significant effects on private interests, or effects a significant change in existing policy.[115]

While this provision requires policy statements, interpretive rules, and other guidance documents that impose a binding obligation to undergo notice-and-comment, all other statements the FTA deems not to meet this condition remain

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[111] Telephone Interview with Richard Steinmann, Retired Senior Advisor to the Administration, Federal Transit Administration (Oct. 16, 2020) (notes on file with author). Federal law has prohibited FTA from directly regulating the operations of or fares, tolls, and other charges set by any transit system since 1964. Urban Mass Transportation Act, Pub. L. No. 88–365, § 9(f) (1964) (codified at 49 U.S.C. § 5334(b)(1)).

[112] Press Release, FTA, U.S. Department of Transportation Announces Key Priorities, Funding for Public Transportation Under the Bipartisan Infrastructure Law (Nov. 15, 2021), https://www.transit.dot.gov/about/news/us-department-transportation-announces-key-priorities-funding-public-transportation [https://perma.cc/YQU9-TCLS]; FTA, THIS IS FTA 1, https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/This%20is%20FTA.pdf [https://perma.cc/N32E-6UWV].

[113] 49 U.S.C. § 5334; Telephone Interview with Former FTA Staffer (Nov. 9, 2020) (notes on file with author).

[114] *See* FTA, *supra* note 112.

[115] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, Title III, § 3032(b)(4), 119 Stat. 1544, 1626–27 (2005) (codified as amended at 49 U.S.C. § 5334(k)).

exempt under § 553(b)(A).[116] The FTA's experience in implementing the provision presents an opportunity to explore the merits of preadoption notice-and-comment as an overlay on the § 553(b)(A) exemption.

### *B. Case Study Approach*

This case study had two research objectives. The first was to determine why Congress enacted the provision. Notably, aside from Congress's statutory mandate to the FDA and HHS discussed in Section I.B, 49 U.S.C. § 5334(k) is the only congressional mandate for preadoption notice-and-comment for guidance documents in current law.[117] The second research objective was to validate the findings across the four categories in the literature review discussed in Section II.C above—(1) consistency with the APA's intent, (2) administrative burden and efficiency, (3) quality and effectiveness, and (4) agency accountability—and evaluate effectiveness of the mandate in light of the congressional objectives gleaned from the first research objective.

The case study centered on interviews of individuals knowledgeable about the provision and its implementation. The author identified interviewees with varied perspectives on the development and implementation of the provision, including members of Congress, FTA staff, and regulated entities. The author interviewed two former FTA staffers, one congressional staff member, and two members of the regulated industry that had personal experience with the development and/or early implementation of the provision. A former FTA staffer who currently serves as a consultant for various regulated entities independently reviewed the case study findings.

Desktop research of historical legislation, legislative history, U.S. Government Accountability Office reports, Congressional Research Service reports, Transit Cooperative Research Program reports, newspaper articles, the FTA's website, and other publicly available regulatory materials such as *Federal Register* notices, FTA guidance documents, and, where applicable, docketed industry comments, substantiated or supplemented interview findings.

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[116] 5 U.S.C. § 553(b)(A).

[117] Based on the author's search of the U.S. Code.

### C. *Findings Part 1: Why Congress Enacted the Provision*

From its inception in 1964 through the 1980s, the FTA operated with limited legislative rules, and Congress, grant recipients, and transit industry advocacy groups accepted the approach for three reasons.

First, FTA's rulemaking was generally benign and noncontroversial because it largely provided technical assistance to FTA regional office staff and grant recipients on grant development and reimbursements.[118] Second, the FTA had traditionally employed informal methods of soliciting input from recipients through outreach to industry groups and discussions with recipients at conferences and other forums.[119] Finally, the best FTA staffers were known to, regardless of written guidance, work with grantees towards getting to yes.[120] Nonlegislative guidance combined with informal outreach enabled this flexibility.

In the 1980s, the FTA began to implement policy changes through guidance documents that were perceived as "moving the goal post" for transit agencies and states to secure grant funds that Congress had charged the FTA to distribute.[121] Discussed below are the controversial changes to FTA Circulars and the FTA's New Starts program that interviewees pointed to as precipitating the 2005 statutory mandate.

#### 1. FTA Implements New Maintenance Requirements Without Public Input

Circulars are the FTA's primary guidance document for most grant programs. Historically, Circulars were technical documents outlining the basics of grant development and reimbursement.[122] In June 1985, the FTA, then the Urban Mass Transit Administration (UMTA), imposed a substantive policy change via a Circular.[123] Amidst the Reagan Administration's concerns that transit agencies were failing to adequately maintain buses, UMTA set uniform standards for bus useful life and spare ratios that all recipients had to meet as a condition for certain formula funds.[124] While UMTA introduced the standards as mere

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118 *See* Interview with Richard Steinman, *supra* note 111.

119 *See id.*

120 *See* Telephone Interview with then-APTA Staff Member (Oct. 9, 2020).

121 *See* Interview with Richard Steinman, *supra* note 111.

122 *See id.*

123 *See id.*; Interview with then-APTA Staff Member, *supra* note 120.

124 U.S. GOV'T ACCOUNTABILITY OFFICE, (FORMERLY GEN. ACCOUNTING OFFICE), RCED-83-67, REPORT TO THE SECRETARY OF TRANSPORTATION, DOT NEEDS BETTER ASSURANCE THAT TRANSIT SYSTEMS ARE MAINTAINING BUSES 2 (1983).

guidelines, the Circular required applicants to certify compliance to receive grant funds, relying on the grantee's compliance certifications and grant agreements for enforcement.[125]

The pivotal policy change generated controversy because much of the transit industry believed useful life and spare ratios could not be regulated under a single standard that did not account for "unique and different operational, environmental, and political factors that affect optimal fleet size at each transit agency" and operating life of a bus.[126] UMTA knew the industry's objections from a prior notice-and-comment effort for a rulemaking on bus maintenance requirements that UMTA withdrew before responding to comments and reaching a final rule.[127]

The transit industry believed UMTA had set the new requirements without considering public concerns, despite UMTA publicly declaring the contrary.[128] Thus, the fact that the Circulars had "every effect as a regulation" but were issued as nonlegislative rules became a problem.[129] Interviewees noted the FTA was not deliberately attempting to avoid rulemaking.[130] It was just how the FTA had always done things.[131]

### 2. The FTA Implements Policy Changes to New Starts Program Without Public Input

The New Starts program, which exists today as the Capital Investment Grants (CIG) program, is the FTA's largest discretionary grants program, offering grants for new or expanded fixed guideway transit projects. New Starts funds continue to support a significant portion of U.S. transit systems; at the writing of this note, there were at least fifty-one projects actively seeking $19 billion across the CIG program.[132] A highly competitive program that often completes funding for local

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[125] TRANSP. RESEARCH BD., TRANSIT COOP. RESEARCH PROGRAM SYNTHESIS OF TRANSIT PRACTICE 11, SYSTEM-SPECIFIC SPARE BUS RATIOS, APPENDIX A 41; *see* Interview with then-APTA Staff Member, *supra* note 120; Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

[126] *See* TRANSP. RESEARCH BD., *supra* note 125, at 38.

[127] Maintenance Requirements; Withdrawal of Advance Notice of Proposed Rulemaking, 47 Fed. Reg. 37,599 (Aug. 26, 1982).

[128] UMTA – Legislative Program for Transit: Hearing Before the Subcomm. on Surface Transp. of the Comm. on Pub. Works & Transp. H.R., 99th Cong. (May 23, 1985) (statement of Ralph L. Stanley, Administrator, Urban Mass Transportation Administration).

[129] *See* Interview with then-APTA Staff Member, *supra* note 120.

[130] *See* Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113; Interview with then-APTA Staff Member, *supra* note 120.

[131] *See* Interview with Richard Steinman, *supra* note 111.

[132] FTA, ANNUAL REPORT ON FUNDING RECOMMENDATIONS, FISCAL YEAR 2021, TABLE 2A (2020), https://www.transit.dot.gov/sites/fta.dot.gov/files/2020-07/FY21-Annual-Report-on-Funding-Recommendations.pdf [https://perma.cc/H4HZ-QBPV].

transit projects that would not otherwise be realized, New Starts has traditionally generated a high degree of political influence and interest. The executive and legislative branches both have a decision-making role for this program; in fact, they share input on New Starts more than any other transportation program.[133]

Like other grant programs, the FTA traditionally governed New Starts using guidance documents.[134] In 1976, UMTA issued the first policy statements on its New Starts funding distribution principles.[135] By the end of the 1980s, UMTA, the transit industry, and Congress had a collaborative, iterative, and largely accepted workflow for developing program requirements and incorporating public input.[136] UMTA would use policy statements to try new program requirements and receive informal feedback from interested parties.[137] UMTA would effectively use the policy statements to manage the supply and demand for New Starts funds.[138] Congress would then enact those elements of the policy statements that proved effective.[139] FTA, under the George W. Bush administration, implementing changes to the New Starts program without public input was out of sync with this established practice.

Most controversially, in March 2005, the FTA issued a Dear Colleague letter advising project sponsors that the FTA would only recommend for funding those projects scoring a medium or higher on the cost-effectiveness criterion.[140] The notice separately requested comments on five noncontroversial technical proposals.[141] In April 2005, the FTA issued a follow-up Dear Colleague letter (2005 Dear Colleague) that incorporated

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[133] BIPARTISAN POLICY CTR., NATIONAL TRANSPORTATION POLICY PROJECT, NEW STARTS: LESSONS LEARNED FOR DISCRETIONARY FEDERAL TRANSPORTATION FUNDING PROGRAMS 5 (2010).

[134] *See* Interview with Richard Steinman, *supra* note 111; Interview with then-APTA Staff Member, *supra* note 120.

[135] CONG. RESEARCH SERV., R42921, PUBLIC TRANSPORTATION NEW STARTS PROGRAM: BACKGROUND 10 (2013); TRANSP. RESEARCH BD., TRANSIT COOP. RES. PROGRAM, LEGAL HANDBOOK FOR THE NEW STARTS PROCESS 3 (The Nat'l Acads. Press 2010), https://doi.org/10.17226/22970 [https://perma.cc/XY5K-EM9M].

[136] *See* Interview with Richard Steinman, *supra* note 111.

[137] *See id.*

[138] Technical Review of Case Study Findings by Donald J. Emerson, Senior Vice President, Technical Fellow, U.S. Advisory Services–Planning Strategy & Grants, WSP USA & former Chief, Analysis Division, FTA (Nov. 23, 2021) (notes on file with author).

[139] *See id.*

[140] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-674, REPORT TO CONGRESSIONAL COMMITTEES, PUBLIC TRANSPORTATION, OPPORTUNITIES EXIST TO IMPROVE THE COMMUNICATION AND TRANSPARENCY OF CHANGES MADE TO THE NEW STARTS PROGRAM 23 (2005).

[141] *Dep'ts of Transp., Treasury, the Judiciary, Hous. & Urban Dev., & Related Agencies Appropriations: Hearing Before the Comm. on Appropriations*, 109th Cong. 467 (2005) (statement of the American Public Transportation Association).

comments on the five technical proposals and affirmed the administration's intent to prioritize cost-effectiveness without requesting public input despite unsolicited comments strongly opposing the change.[142]

All interviewees vividly recalled the 2005 Dear Colleague and highlighted three reasons for the surrounding controversy. First, the FTA's action departed from the longstanding practice of soliciting informal feedback through policy statements and the FTA's promulgation of New Starts regulations with notice-and-comment under recent transportation legislation.[143] Second, the 2005 Dear Colleague's controversial change to cost-effectiveness would render nearly sixty percent of projects actively seeking New Starts grants ineligible for funding.[144] Related, there was wide disagreement over the cost-effectiveness metric itself: "cost per hour of user benefit compared with a baseline 'best bus' alternative."[145] The baseline 'best bus' alterative was subjective and difficult to apply consistently and reaching agreement took considerable time and negotiation.[146] Finally, the transit industry viewed the change as a political maneuver to further a Bush administration policy preference for bus rapid transit over rail.[147] The cost-effectiveness measure was a challenge for rail projects due to the emphasis on demonstrating travel time savings relative to a project's cost.[148] Heavy focus on the cost-effectiveness measure would skew "the New Starts program away from certain types of transit modes and projects, such as streetcar systems."[149]

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[142] FTA, Dear Colleague Letter: Changes to the New Starts Rating Process (Apr. 29, 2005).

[143] Telephone Interview with Jeffrey F. Boothe, President, Boothe Transit Consulting, LLC and Chair, Capital Investment Grants Working Group (Oct. 15, 2020) (notes on file with author); *see* Interview with Richard Steinman, *supra* note 111; Telephone Interview with then-APTA Staff Member, *supra* note 120.

[144] FTA, FTA-TBP10-2005-1, ANNUAL REPORT ON FUNDING RECOMMENDATIONS FISCAL YEAR 2006 (2005) (Table 2-C FY 2006 Project Justification Rating shows FTA rated 10 of the 17 projects lower than Medium on cost-effectiveness.).

[145] *See* Review of Case Study Findings by Donald J. Emerson, *supra* note 138.

[146] *Id.*

[147] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 140, at 3; *see* Interview with Jeffrey F. Boothe, *supra* note 143; Interview with then-APTA Staff Member, *supra* note 120; Telephone Interview with Homer Carlisle, Prof'l Staff Member, Comm. on Banking, Hous. & Urban Affairs, U.S. Senate (Oct. 19, 2020) (views expressed by Mr. Carlisle during the interview reflect his own recollections and opinions and do not necessarily reflect the opinions and positions of his office or his employing senator on any issue).

[148] *See* Interview with Jeffrey F. Boothe, *supra* note 143.

[149] CONG. RESEARCH SERV., R41442, PUBLIC TRANSIT NEW STARTS PROGRAM: ISSUES AND OPTIONS FOR CONGRESS 4 (2010); Cliff Henke, *New Starts Moves Continue Rail Favoritism over BRT*, METRO MAG. (Feb. 9, 2010), https://www.metro-magazine.com/10008167/new-starts-moves-continue-rail-favoritism-over-brt [https://perma.cc/C7PV-HN66]; Lisa Chiu, *From earmark to disappearmark: Bush administration policy shift cut funding for congressional projects*, SUNLIGHT FOUND. (May 4, 2010), https://s

During this period, an interest group offered to fund litigation against the FTA to challenge restrictions under the CIG program, but the lawsuit never materialized because no recipient that would have individual standing was willing to sue the FTA.[150] Recipients who rely on FTA funds could not afford "being dead to [the] FTA" or potentially face retaliation in their day-to-day interactions with FTA staff.[151] Without viable plaintiffs, the interest group abandoned the suit.[152]

Therefore, the only recourse to address the FTA's moves away from consensus-based policymaking through informal consultation with industry to unilateral policy-setting through Circulars and Dear Colleague letters was a direct appeal to Congress.

3. The § 5334(k) Provision Is Enacted

Two influential industry associations, the American Public Transportation Association (APTA) and the New Starts Working Group (NSWG), led transit industry efforts to lobby Congress to legislate notice-and-comment for "any FTA substantive policy statement whether issued as guidance, policy, regulatory interpretation or as a 'Dear Colleague' letter" at least ninety days before becoming effective.[153] Both the changes to the New Starts program and the industry's dissatisfaction with substantive changes in the Circulars spurred these efforts.[154] Congressional committees were also independently expressing concerns regarding the FTA's lack of transparency in the New Starts evaluation and ratings process.[155]

With the goal of precluding similar FTA actions in the future, Congress enacted the preadoption notice-and-comment mandate now codified at 49 U.S.C. 5334(k).

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unlightfoundation.com/2010/05/04/earmark-disappearmark-policy-shift/ [https://perma.cc/975Q-RK4P].

150 *See* Interview with Jeffrey F. Boothe, *supra* note 143.

151 *Id.*

152 *Id.*

153 *See id.*; Interview with Richard Steinman, *supra* note 111; American Public Transportation Association, Recommendations on Reauthorization of the Transportation Equity Act for the 21st Century (Sept. 22, 2002); *Stakeholder Proposals for the Reauthorization of the Surface Transportation Programs: Hearing Before the Subcomm. on Highways and Transit of the Comm. on Transp. & Infrastructure*, 107th Cong. 144 (2002) (statement of the American Public Transportation Association).

154 *See supra* Sections II.C.1–2.

155 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 140, at 28.

### *D. Findings Part 2: Validity of Discussions in Literature*

The case study research validated many of the points summarized in Section II.C on the merits of notice-and-comment for guidance documents, as discussed below.

#### 1. Consistency with the APA's Intent

The case study provided some support for the theory that the § 5334(k) mandate furthers the APA's intent. For the public benefit, the Circulars currently published on the FTA's website underwent notice-and-comment.[156] In addition, the New Starts program began issuing guidance documents for notice-and-comment in 2006.[157] Finally, the FTA's guidance documents benefitted from public feedback.[158]

The FTA experience provided limited support for the counterarguments on consistency with the APA's intent. Interviewees raised the concern of the FTA doing procedure for procedure's sake where the changes were not controversial or when binding elements of guidance documents could not be severed from the nonbinding elements for notice-and-comment.[159] However, there was no indication that the mandate so legitimized nonlegislative rulemaking that it replaced legislative rules altogether.[160] This could have been because Congress effectively provided a safeguard by continuing to require the FTA to promulgate legislative rules where appropriate.[161] Additionally, the FTA retained discretion, as the APA intended, to invoke the § 553(b)(A) exemption and avoid the burden of notice-and-comment procedures for nonbinding guidance.[162]

#### 2. Administrative Burden and Efficiency

The case study showed the scholarly literature did not overstate the costs of overlaying notice-and-comment. The burden

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[156] *Final Circulars*, FTA, https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/final-circulars [https://perma.cc/J672-ZFCL]; *see also* Notice of Policy Statement for Implementation of Notice and Comment Procedures for Documents Imposing "Binding Obligations," 70 Fed. Reg. 70,111 (Nov. 21, 2005).

[157] Notice of Availability of Guidance on New Starts Policies and Procedures and Request for Comments, 71 Fed. Reg. 3149 (Jan. 19, 2006).

[158] *See supra* Section I.C.3.

[159] *See* Interview with then-APTA Staff Member, *supra* note 120.

[160] *See id.*; Interview with Homer Carlisle, *supra* note 147; Interview with Jeffrey F. Boothe, *supra* note 143; Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

[161] *See generally* 49 U.S.C. §§ 5301–5340. For discussion of difference between legislative and nonlegislative rules, see *supra* text accompanying notes 19–26.

[162] U.S.C. 49 § 5334(k).

of added notice-and-comment was substantial and delayed guidance document issuance.[163] The notice-and-comment requirement takes considerable time to carry out and has sometimes hindered FTA's ability to respond to changing policy and legislation in a timely manner, particularly for CIG guidance.[164] This was particularly concerning when the guidance, even if binding, was noncontroversial, as in those cases quick distribution of guidance for recipients to digest statutory and regulatory requirements and know what the FTA expects of them before they commit to compliance outweighed a drawn-out notice-and-comment process.[165]

Another concern was that the § 5334(k) mandate subjected routine, noncontroversial portions of Circulars to rigorous review, as there was no way to prune those items that were policy-setting versus those that were merely technical assistance.[166] This was no small problem given the size of the FTA's Circulars, which sometimes reach one to two hundred pages.[167]

In addition, the FTA legal staff took on a larger role in reviewing the technical portions of the document than they would have without notice-and-comment.[168] This shift in policy development responsibilities from policy staff to legal staff affirms a finding that Professor Jerry L. Mashaw and David L. Harfst observed in a study of rulemaking at the National Highway Traffic Safety Administration (NHTSA).[169] As with the FTA and § 5334(k), NHTSA's general counsel's office took on more responsibility when NHTSA adjusted its rulemaking process to better withstand external scrutiny.[170]

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[163] Interview with then-APTA Staff Member, *supra* note 120; *see* Interview with Richard Steinman, *supra* note 111.

[164] *See* Review of Case Study Findings by Donald J. Emerson, *supra* note 138. FTA has not updated its CIG policy guidance since 2016, more than five years ago, even with two changes in administration. *Id.* FTA issued a Request for Information (RFI) in summer 2021, *see* Request for Information Concerning the Capital Investment Grants Program, 86 Fed. Reg. 37,402, 37,403 (July 15, 2021), but completing notice-and-comment and the other technical steps necessary to reach final updated guidance could easily take a year or more, particularly in light of the need to reconcile the guidance with the recent transportation authorization, the Bipartisan Infrastructure Law, enacted in the Infrastructure Investment and Jobs Act. *Id.*; *see also* Press Release, FTA, *supra* note 112. Guidance and statute are effectively out of sync, leaving FTA staff and grantees in a bit of a quandary about how to administer the program. *Id.*

[165] *See* Interview with Richard Steinman, *supra* note 111; Interview with then-APTA Staff Member, *supra* note 120.

[166] *See* Interview with Richard Steinman, *supra* note 111; Interview with then-APTA Staff Member, *supra* note 120; Interview with Former FTA Staffer, *supra* note 113.

[167] *See* Interview with Richard Steinman, *supra* note 111; Interview with then-APTA Staff Member, *supra* note 120; Interview with Former FTA Staffer, *supra* note 113.

[168] *See* Interview with Richard Steinman, *supra* note 111.

[169] JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 84 (2018).

[170] *Id.*

Notably, although former FTA staff lamented the time, cost, and resources added to guidance document issuance and admitted that the FTA staff was initially taken aback by the new requirement, the administrative burden did not appear to be as significant a drawback for three reasons. First, FTA staff realized the merits of the comment process early, many of which are discussed in Sections III.D.3 and III.D.4.[171] Second, the FTA's position that making certain minor changes to guidance documents did not trigger the § 5334(k) requirement for notice-and-comment made complying with the mandate less burdensome than expected.[172]

Third, the burden of notice-and-comment for guidance documents is lighter than the burden for legislative rules.[173] As an example, the Regulatory Analyses and Notifications section of a September 2020 *Federal Register* notice of an FTA final amended rule addressed seventeen oversight requirements, including eleven Executive Orders, seven statutes, and one USDOT regulation.[174] This is as compared to an FTA final amended Circular published one month earlier that did not include an analysis under any of these sections, although it was subject to a subset of the same 17 requirements.[175]

Former FTA staff did, however, caveat the last point.[176] They differentiated nonsignificant from significant guidance, as the latter raised the administrative burden by requiring Office of Management and Budget review and, depending on the nature of the rule and political interest, White House clearance.[177] Further, while the burden from external reviews varied, internal FTA reviews and executive clearances of notice-and-comment on guidance documents, significant or not, were nearly identical and subject to the same level of rigorous review as legislative rules.[178]

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[171] *See* Interview with Richard Steinman, *supra* note 111.

[172] *Id.* FTA's recent Circulars include the following language on amendments "FTA reserves the right to update this circular to reflect changes in other revised or new guidance and regulations that undergo notice and comment without further notice and comment on this circular." *See, e.g.*, FTA, AWARD MANAGEMENT REQUIREMENTS, FTA C 5010.1E ii (2018), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/fta-circulars/58051/5010-1e-circular-award-management-requirements-7-16-18.pdf [https://perma.cc/R8YU-BBMN].

[173] *See* Interview with Former FTA Staffer, *supra* note 113.

[174] Project Management Oversight, Final Rule, 85 Fed. Reg. 59,672, 59,677–79 (Sept. 23, 2020).

[175] Notice of Issuance of Final Circular: Guidance on Joint Development, 85 Fed. Reg. 49,715 (Aug. 14, 2020) (circular complied with a subset of the 7 statutory requirements but was not required to publish its analysis.).

[176] *See* Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

[177] *See* Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113. The requirement referenced is from the Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3439–40.

[178] *See* Interview with Former FTA Staffer, *supra* note 113.

Finally, none of the significantly adverse consequences of the increased administrative burden anticipated in literature occurred.[179] Interviewees did not know of any case where the FTA forewent issuing guidance altogether due to the notice-and-common burden.[180] There was no evidence the mandate constrained FTA staff or reduced agency productivity.[181] The FTA typically received the most comments on significant issues that staff would have otherwise focused on for guidance development, so staff responsibilities were not demonstrably affected.[182]

3. Quality & Effectiveness of the End Product

The case study showed that § 5334(k) undoubtedly enhanced the quality and effectiveness of the final guidance documents. Former FTA staff echoed many of the benefits proponents cite, as summarized in Section II.C.3. Although FTA staff had applied their expertise and significant forethought in developing the proposed guidance documents, the public input provided new and, sometimes, better information and perspective.[183] The process created, in some ways, a more helpful and reliable stream of comment because, prior to the § 5334(k) mandate, the staff heavily relied on informal outreach that may not have always reached the broadest audience and such outreach required ad hoc planning and coordination.[184] Further, the process reduced postissuance stakeholder challenges and agency effort as the FTA received constructive feedback upfront.[185]

As noted previously, sometimes the FTA had to issue noncontroversial documents for comment, but, contrary to what opponents of a preadoption notice-and-comment mandate might expect, these instances occurred infrequently.[186]

4. Agency Accountability

Under this category, while progress was made, the case study overwhelmingly validated the arguments against the preadoption notice-and-comment mandate discussed in Section I.C.4.

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[179] *See supra* Section I.C.2. for discussion of the potential adverse consequences.

[180] *See* Interview with then-APTA Staff Member, *supra* note 120; Interview with Homer Carlisle, *supra* note 147; Interview with Jeffrey F. Boothe, *supra* note 143; Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

[181] *See* Interview with Richard Steinman, *supra* note 111.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *See supra* Section I.C.3.

Public accountability is critical for FTA guidance documents because of the nature of the relationship between FTA and its funding recipients.[187] Recipients commit in grant agreements to comply with the required provisions in guidance documents and, as a practical matter, do not have a choice.[188] While the grant agreement is technically a mutually agreed upon contract, in practice it is not negotiated; it is a take-it-or-leave-it scenario for recipients.[189] With these dynamics, the guidance documents—or certain provisions in them—end up as de facto binding.[190]

Preadoption notice-and-comment enhanced public accountability by virtue of providing recipients the opportunity to comment on binding guidance documents that they may not have otherwise been given the opportunity to review. In the case of the CIG program, for example, some commenters use the notice-and-comment process to try to shape the guidance in ways that will favor their particular projects.[191] Former FTA staff noted the internal review of comments for guidance documents was rigorous.[192] And, where the industry felt heard, it was a win.[193]

However, there have been significant instances of the FTA's noncompliance with the § 5334(k) mandate. Most interviewees cited the example of FTA's controversial implementation of binding policy changes to the CIG program without public input, much like the changes discussed in Section III.C.2 that precipitated the § 5334(k) mandate.[194] Notably, presidential policy priorities and preferences generally drove these instances of noncompliance.[195]

For example, in June 2018, the FTA issued a Dear Colleague letter (2018 Dear Colleague) that announced policies the regulated industry viewed as significant changes to the CIG

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[187] *See* Interview with Former FTA Staffer, *supra* note 113; *see also supra* Section II.A.

[188] *See* Interview with Former FTA Staffer, *supra* note 113. Along with the grant agreement, recipients commit to complying with FTA's Master Agreement, which requires compliance with guidance and grants FTA authority to take enforcement action on the basis of such guidance, except as FTA otherwise communicates in writing. FTA, MASTER AGREEMENT 15 (2021), https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-02/FTA-Master-Agreement-v28-2021-02-09.pdf [https://perma.cc/7W95-ZPPD].

[189] *See* Interview with Former FTA Staffer, *supra* note 113.

[190] *Id.*

[191] Review of Case Study Findings by Donald J. Emerson, *supra* note 138.

[192] *See* Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

[193] *See* Interview with Richard Steinman, *supra* note 111.

[194] *See* Interview with Homer Carlisle, *supra* note 147; Interview with Jeffrey F. Boothe, *supra* note 143; Interview with Former FTA Staffer, *supra* note 113.

[195] *See* Interview with Homer Carlisle, *supra* note 147; Interview with Jeffrey F. Boothe, *supra* note 143; interview with Former FTA Staffer, *supra* note 113.

program without industry input.[196] First, the FTA emphasized geographic diversity as a factor considered in funding decisions and asserted that this disclosure was not a change, but simply an effort to be transparent.[197] The letter also asserted that, contrary to prior long-established practice, the FTA would consider federal loans as part of the federal share of the project cost when evaluating projects and determining the maximum amount of CIG funds for which they qualified.[198] This change would effectively reduce the amount of CIG funds project sponsors using federal loans for the local share could receive.[199]

The FTA issued the 2018 Dear Colleague letter following a June 2018 email to project sponsors of changes to risk assessments.[200] The FTA was moving forward with risk assessments earlier in a project's development, when there was less design completed and, thus, more uncertainty regarding project elements.[201] Relatedly, the FTA was also increasing the risk probability threshold it uses to assess reasonableness of project contingencies from P50 to P65.[202] The change would generate higher project costs and increase the amount of local funds needed for a grant.[203] A congressional study estimated the increased probability threshold would increase projects costs for the transit agencies that participated in the study by a total of $650 million.[204] Although the FTA justified the changes as

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[196] *See* Interview with Homer Carlisle, *supra* note 147; Interview with Jeffrey F. Boothe, *supra* note 143.

[197] FTA, Dear Colleague Letter: Capital Investment Grants Program (June 29, 2018).

[198] *Id.*; *see* Interview with Jeffrey F. Boothe, *supra* note 143.

[199] *See* Interview with Jeffrey F. Boothe, *supra* note 143.

[200] *See id.* FTA uses risk assessments to determine the "reasonableness of a project sponsor's cost and schedule." *Frequently Asked Questions*: *Capital Investment Grants*, FTA, https://www.transit.dot.gov/faq?combine=&term_node_tid_depth=2586 [https://perma.cc/4FQL-F72L]. As part of the risk assessment, FTA reviews the reasonableness of the cost and schedule assumptions and sets an appropriate level of contingency in light of potential risks to the project's completion on schedule and within budget. *See id.*

[201] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-512, REPORT TO CONGRESSIONAL COMMITTEES, CAPITAL INVESTMENT GRANTS PROGRAM: FTA SHOULD IMPROVE THE EFFECTIVENESS AND TRANSPARENCY OF ITS REVIEWS 14 (2020). *See* Interview with Jeffrey F. Boothe, *supra* note 143; Interview with Homer Carlisle, *supra* note 147.

[202] *See* Interview with Jeffrey F. Boothe, *supra* note 143; Interview with Homer Carlisle, *supra* note 147. The change from P50 to P65 effectively increases the probability that potential cost impacts identified in the risk assessment will occur from 50 percent to 65 percent. *FTA Fact Sheet: Updated Risk Assessment Process for Capital Investment Grants Projects* (July 2018), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/funding/grant-programs/capital-investments/117256/fta-cig-risk-assessment-process-fact-sheet-06-27-18.pdf [https://perma.cc/Y47Y-6BAE].

[203] *See* Interview with Jeffrey F. Boothe, *supra* note 143.

[204] H. Staff Memo, Memo to Members, Subcomm. on Highways and Transit from Majority Staff, Subcomm. on Highways and Transit, Comm. on Transp. & Infrastructure H.R., Oversight of the Federal Transit Administration's Capital Investment Grant Program 2 (July 16, 2019).

necessary to address project schedule delays and budget overruns, the transit industry viewed the 2018 Dear Colleague letter as a political maneuver by the Trump administration to create barriers to CIG grants in furtherance of the President's preference for eliminating the CIG program completely.[205]

Interviewees also cited cases where the FTA did not alter its view on controversial positions despite strong industry opposition during notice-and-comment.[206] One interviewee emphasized this course of action was within FTA's discretion so long as the comments were considered.[207] On a related note, another interviewee declared that § 5334(k) had not made any difference, as the FTA is not putting out for notice-and-comment anything that the FTA would not have otherwise offered for public comment through more informal means.[208]

For accountability to elected officials, § 5334(k) was effective in providing Congress a guardrail to hold the FTA politically accountable for controversial policy decisions implemented without public input.[209] With it, of course, came Congress's traditional arsenal of methods to hold agencies accountable.[210] These strategies included demanding the FTA explain and justify decisions not to employ notice-and-comment for guidance documents, as congressional staff have done several times since 2005.[211] If FTA does not respond to requests by stakeholders or Congress to revisit a controversial policy that was implemented without public comment, Congress may choose to overrule FTA through the legislative process.[212]

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[205] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-512, REPORT TO CONGRESSIONAL COMMITTEES, CAPITAL INVESTMENT GRANTS PROGRAM: FTA SHOULD IMPROVE THE EFFECTIVENESS AND TRANSPARENCY OF ITS REVIEWS (2020); *see* Interview with Jeffrey F. Boothe, *supra* note 143; Press Release, House Comm. on Transp. & Infrastructure, New Committee Analysis of Capital Investment Grant Program Shows Project Approval Time More Than Doubled Under Trump Administration, Costing Transit Agencies Hundreds of Millions of Dollars (July 16, 2019), https://transportation.house.gov/news/press-releases/new-committee-analysis-of-capital-investment-grant-program-shows-project-approval-time-more-than-doubled-under-trump-administration-costing-transit-agencies-hundreds-of-millions-of-dollars_ [https://perma.cc/485L-NPPW].

[206] *See* Interview with Jeffrey F. Boothe, *supra* note 143; Interview with then-APTA Staff Member, *supra* note 120.

[207] *See* Interview with Former FTA Staffer, *supra* note 113.

[208] *See* Interview with Jeffrey F. Boothe, *supra* note 143.

[209] *See* Interview with Homer Carlisle, *supra* note 147.

[210] *Id.*

[211] *Id.*

[212] *Oversight of the Federal Transit Administration's Implementation of the Capital Investment Grant Program: Hearing Before the Subcomm. on Highways & Transit*, H.R. 116th Cong. 8–9 (2019) (statement of Paul P. Skoutelas, President & CEO, American Public Transportation Association) (example of advocacy and public interest organization requesting Congress take action to overrule a controversial FTA policy), https://www.apta.com/wp-content/uploads/APTA-TESTIMONY-TI-HT-Subc.-Hearing-re-FTAs-CIG-Implementation-07.16.2019.pdf [https://perma.cc/E3YY-CTJU].

Following the 2018 Dear Colleague letter and email to project sponsors, APTA, on behalf of its members, called for FTA's policy to be changed through legislative action and cited the lack of consultation with the public transit industry as problematic.[213]

Through the FFY 2018 and FFY 2019 appropriations bills, Congress limited the FTA to administering the CIG program under "the procedural and substantive requirements of section 5309 of title 49, United States Code, and of section 3005(b) of the Fixing America's Surface Transportation Act" and explicitly prohibited the FTA from moving forward with "the implementation or furtherance of new policies detailed in the [2018] 'Dear Colleague' letter."[214] The next section summarizes the overarching findings from the case study, as distilled from the above discussion.

## III. SUMMARY AND RECOMMENDATIONS

### *A. Summary of Findings*

The FTA experience with § 5334(k) shows the overlay approach certainly has merits. Overlay fixes restore consistency with the APA's intent for rulemaking by establishing an opportunity for the public to weigh in on rules that impose rights or obligations on regulated entities or the public at large, while continuing to offer agencies streamlined procedures where appropriate. Upfront public input also proved beneficial in improving the quality and effectiveness of guidance documents.

Although the case study underscored the substantial administrative burden of preadoption notice-and-comment, the burden did not yield the adverse consequence of agencies foregoing written guidance. Further, there was no evidence that the § 5334(k) mandate reduced the FTA's productivity by shifting focus away from the agency's core work or forcing the diversion of staff resources from other important tasks. Finally, the mandate fostered greater FTA accountability to Congress. The provision gave Congress an effective tool for identifying and addressing instances of the FTA circumventing public input on binding rules.

Where the overlay fix failed, however, is significant and negates its benefits. The fix failed to adequately enhance public accountability of the FTA's decisions. The FTA continued to invoke § 553(b)(A) to circumvent notice-and-comment on binding guidance

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[213] *Id.*

[214] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Division G, Title I, 133 Stat 13, 422–23 (2019). Note the industry and Congressional staff understood the reference to the 2018 Dear Colleague letter to also include the changes announced in the June 2018 email to project sponsors.

documents.[215] One cannot overlook the FTA's 2018 Dear Colleague as a full circle return to the 2005 Dear Colleague and surrounding controversy that precipitated § 5334(k). The very actions that Congress and the transit industry had sought to curtail repeated thirteen years later. And, notably, just as the Obama Administration nullified the 2005 Dear Colleague letter in January 2010, so has the Biden Administration rescinded the 2018 Dear Colleague.[216]

This continued use of the APA exemption is not unexpected when one considers the FTA's historical use of it.[217] The FTA has traditionally employed the § 553 exemption to administer statutory programs and regulatory requirements.[218] The practices are ingrained in FTA's operations and, until the policy changes became controversial issues, were accepted and unquestioned practice.[219] Overlaying a new and separate requirement for notice-and-comment when the § 553(b)(A) exemption is still available to the FTA as a legitimate option will understandably fail, as the FTA falls back on longstanding and legal practice.[220] As noted by one of the interviewees, the best way to fix the underlying problem would have been to address the exemption itself.[221]

In sum, the case study shows that overlay approaches are inadequate. They fail to rectify the root problem of agencies using the § 553 exemption as an escape hatch. Just as the FTA has done, other agencies may continue to utilize the § 553 exemption as support and justification for circumventing notice-and-comment when it suits the interests of an agency or, particularly in FTA's case, a presidential administration.

### *B. Recommendations*

This note does not recommend wholesale elimination of the § 553 exemption without a replacement. Agency discretion to waive notice-and-comment rulemaking when appropriate for federal agencies and the regulated community alike is integral to

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[215] *See supra* Section II.D.4.

[216] *See* FTA, Dear Colleague New Starts and Small Starts Project, 2010 WL 673778, at *1 (Jan. 13, 2010); FTA, Dear Colleague Rescinds June 29, 2018 Capital Investment Grants Program Letter (Feb. 16, 2021), https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-02/fta-dear-colleague-letter-capital-investment-grants-02-16-21.pdf [https://perma.cc/RH3G-Z2SE].

[217] *See supra* Section II.D.4.

[218] FTA may have also employed the exemption in § 553(a) for early non-legislative rules. The provision exempts from notice-and-comment matters related to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). USDOT waives applicability of this exemption to FTA through regulation. 49 C.F.R. § 5.3.

[219] *See supra* Section II.C.

[220] *See supra* Section II.D.4.; 5 U.S.C. § 553(b)(A).

[221] *See* Interview with Former FTA Staffer, *supra* note 113.

government efficiency.[222] Rather, this note argues that the provision needs to be replaced with one that provides clear and specific direction to agencies on the appropriate circumstances for issuing a nonlegislative rule. Below are a series of preliminary considerations for a workable provision.

### 1. Exempt Documents Based on the Practical Impacts of Their Requirements

Any replacement provision for § 553(b)(A) should waive notice-and-comment based on the rule's impact rather than an agency's intent or the document's label. For example, on the FTA's webpage for Dear Colleague letters, the FTA notes that the "FTA's Dear Colleague letters are provided as guidance," but the FTA did not issue a single document for notice-and-comment, despite including policy changes that were arguably binding under § 5334(k), including the 2018 Dear Colleague.[223] Any new provision should preclude such loopholes.

The § 5334 provision appropriately focused the determination of whether the FTA should employ notice-and-comment on the impact of the guidance documents.[224] Specifically, the provision called for notice-and-comment when guidance documents impose a binding obligation by "grant[ing] rights, impos[ing] obligations, produc[ing] significant effects on private interests, or effect[ing] a significant change in existing policy."[225]

While a useful definition, interviewees noted additional clarification would be valuable, particularly on the term "binding."[226] For example, technical guidance for how to develop a grant could be considered binding under the definition, even though this type of guidance is the very type of noncontroversial guidance that makes sense to exempt.[227] Further, the final two elements in the definition of binding obligation in § 5334(k)—"produces significant effects on private interests, or effects a significant change in existing policies"—imply a requirement of notice-and-comment not necessarily because a document is

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[222] *See supra* Section I.A.

[223] *Administrator Dear Colleague Letters*, FTA, https://www.transit.dot.gov/regulations-and-guidance/policy-letters/administrator-dear-colleague-letters [https://perma.cc/246B-WLGB].

[224] 49 U.S.C. 5334(k).

[225] *Id.*

[226] *See* Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

[227] *See* Interview with Richard Steinman, *supra* note 111; Interview with Former FTA Staffer, *supra* note 113.

binding in the traditional sense, but because the document rises to a level of importance to warrant these procedures.[228]

Now, of course, this recommendation for clarity must be balanced with the reality that a statute, by its nature, can only contain so much specificity. A middle ground might be to direct agencies to develop legislative rules for guidance documents that clearly delineate cases, such as technical guidance for grants, that are appropriately considered nonbinding.

### 2. Clearly Define the Characteristics and Limits of Exempt Documents

The FTA experience with § 5334(k) revealed further erosion of the murky distinction between a legislative rule and a nonlegislative rule. The FTA's response to a comment on the first Circular the agency issued for guidance is a small—but nonetheless illuminating—example of this dynamic. A commenter noted that the FTA should not move forward with changing the name of the Circular from "Grant Management Guidance" to "Grant Management Requirements" because the Circular, despite undergoing notice-and-comment, is technically a guidance document without the force of law.[229] In the FTA's response, the agency dismissed the comment by responding "the requirements in the circular are based on existing regulation."[230] The FTA's response implied the document produced was a nonlegislative rule, but FTA changing the name of the document demonstrated intent to make the rule binding.

The guidance documents that the FTA issued under § 5334, that is, those that underwent notice-and-comment by virtue of imposing binding requirements, leave open a number of questions:

- Is the FTA now permitted to bind the public using the guidance document?
- If so, does the guidance document carry the force of law?
- Should it matter that the guidance document was not subject to all the reviews imposed on legislative rules?
- Is it appropriate to retain the guidance label?

To be effective, any new provision must clearly define the types and limits on the use of documents that fall within the

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[228] 49 U.S.C. § 5334(k).

[229] Letter from Metropolitan Transportation Authority, State of N.Y. to FTA (Jan. 4, 2008) (FTA docket no. FTA-2007-29122).

[230] Grant Management Guidance, 73 Fed. Reg. 56,892, 56,893 (Sept. 30, 2008).

exemption to eliminate this confusing and circular grey area. A new provision, in addressing the wide variety of agency actions, would have to carefully tread the line between providing concrete guidance and becoming too cumbersome.

### 3. Permit the Public to Petition for Reconsideration of an Agency's Designation of a Document as Exempt

There will undoubtedly be instances when the public and an agency disagree on whether a guidance document should be exempt. The FTA's Oversight Procedures (OPs) present an example of this dynamic in practice.[231] The OPs are a set of documents that guide "Project Management Oversight contractors and others on the FTA's review process, deliverables, and reporting requirements."[232] They are an area of concern for recipients, as the FTA's oversight consultants use the OPs to assess a recipient's compliance with the FTA's requirements.[233] In response to a statement that FTA should issue the OPs for public comment, FTA noted that OPs are contractual documentation for the FTA's contractors and not guidance for recipients.[234] Thus, a public review and comment process is not required.[235] One interviewee added that OPs serve the important purpose of providing uniform guidance to FTA's contractors, and public review would effectively provide a second or third opportunity for recipients to challenge a substantive provision and could severely compromise FTA's ability to be timely with its oversight.[236] Arguably, however, the FTA's position is at odds with the § 5334 provision if the OPs do, albeit indirectly, impose checks that exceed or do not conform with existing law and restrict access to the grant funds that Congress authorized.

A reformed exemption must provide the public with an opportunity to challenge an agency determination that a guidance document falls within or outside of any future exemption. Such a provision would be akin to the APA's current allowance for individuals to petition for "issuance, amendment, or repeal of a rule."[237] Admittedly, this proposal on its face is rife with controversy. It cuts at a core tension in administrative law

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[231] *See* Interview with then-APTA Staff Member, *supra* note 120.

[232] *Project Management Oversight Procedures*, FTA, https://www.transit.dot.gov/regulations-and-guidance/project-management-oversight-procedures [https://perma.cc/6FT9-GF9D].

[233] *See* Interview with then-APTA Staff Member, *supra* note 120.

[234] Project Management Oversight, Final Rule, 85 Fed. Reg. 59,672, 59,677 (Sept. 23, 2020).

[235] *Id.*

[236] *See* Interview with Former FTA Staffer, *supra* note 113.

[237] 5 U.S.C. § 553(e).

between agency efficiency and procedural fairness.[238] Agencies need freedom to use their expertise to act and not be questioned by the public or, even, elected officials. However, the ability of agencies to escape this sort of scrutiny contributes to the problem at the heart of this note.

4. Add Teeth to Address Noncompliance

The FTA experience with § 5334(k) reveals the need for an appropriate check to enforce noncompliance.[239] This is particularly important for guidance documents where judicial challenge is not a viable option because regulated entities believe it is not in their best long-term interest to litigate or justiciability doctrines otherwise bar judicial review.[240]

Congress implemented § 5334(k) as a check on FTA guidance documents, and with it came Congress's traditional arsenal of methods to hold an agency accountable.[241] In addition to the methods Congress employed in response to the 2018 Dear Colleague letter, Congress could also consider oversight hearings or the Congressional Review Act (CRA).[242] Enacted in 1996, the CRA requires federal agencies to send rules, as defined under the APA, to both houses of Congress and the Comptroller General for review before the rules take effect.[243] Within sixty days, Congress may issue a joint resolution to disapprove the rule, even if "for wholly political reasons."[244] The CRA, however, is a blunt and not always helpful tool because if Congress overturns a rule, the CRA prohibits agencies from further rulemaking on the subject.[245]

Adding teeth above and beyond the strategies that Congress can already employ is not so easily done, as interviewees acknowledged.[246] Adding too many teeth could incentivize agencies to stop or limit issuance of written guidance documents

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[238] Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1153 (5th Cir. 1984) (discussing the tension between "agency efficiency and public input" in notice-and-comment rulemaking).

[239] *See* Interview with Jeffrey F. Boothe, *supra* note 143.

[240] See *supra* text accompanying note 44 for more information on finality and ripeness. See also text accompanying notes 150–152 for example of challenges finding an appropriate would-be plaintiff with standing to sue.

[241] *See* Interview with Homer Carlisle, *supra* note 147.

[242] *See supra* Section II.D.4.; Pub. L. No. 104-121, §§ 251–253, 101 Stat. 847, 868–74 (codified at 5 U.S.C. §§ 801–808); Interview with Homer Carlisle, *supra* note 147.

[243] 5 U.S.C. § 801(a)(1)(a).

[244] 5 U.S.C. § 801(a)(3); William Funk, *The Attack on Administrative Regulation*, 42 VT. L. REV. 427, 431–32 (2018).

[245] 5 U.S.C. § 801(b)(2); *see* Funk, *supra* note 244, at 432; Interview with Homer Carlisle, *supra* note 147.

[246] *See* Interview with Homer Carlisle, *supra* note 147; Interview with Former FTA Staffer, *supra* note 113.

altogether.[247] The adding of too much teeth is arguably an accurate characterization of the ossification of rulemaking.[248]

## CONCLUSION

The § 553(b)(A) exemption has carved out an opportunity for federal agencies to routinely evade the controls Congress put in place to give the public a say in rules that impact their legal rights or obligations. Remedies short of full replacement will never fully address this problem. So long as the exemption is law, agencies will have an escape hatch to misuse guidance documents as legislative rules. It is time to move past overlay fixes and replace the exemption.

Fortunately, there are many useful starting points for a replacement. This note's preliminary recommendations are based solely findings from the FTA experience with § 5334(k).[249] The FTA experience also highlights the special interests of grantmaking agencies that APA reforms must take into account. More broadly, a replacement should incorporate lessons learned from Congress's unsuccessful 2017 Regulatory Accountability Act and other overlay fixes discussed in Section I.B of this note, as well as the great body of ongoing scholarly discussion.[250]

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[247] *See* Interview with Homer Carlisle, *supra* note 147.

[248] See *supra* Section I.A. for discussion of the ossification of rulemaking.

[249] Future research should engage a broader set of interviewees, including current and additional former FTA staff.

[250] For example, see generally Notice & Comment, *Symposium on Federal Agency Guidance and the Power to Bind*, YALE J. ON REG., https://www.yalejreg.com/topic/symposium-on-federal-agency-guidance-and-the-power-to-bind/ [https://perma.cc/7JZU-P8EQ].

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