



Hidden Signals: Creating Transparency in Agency Guidance

Written by William C. Duncan | March 2026

I. Introduction

In 2023, when the State of Utah stopped using humorous messages on highways to encourage driver safety, a local [newspaper wondered](#) if disapproval from the Federal Highway Administration might have been a factor in the decision. It turns out that the state just felt a change would be helpful and found an [alternative outlet](#) for humor in the state department of transportation's X account. News reports point to similar experiences in [Arizona](#) and [New Jersey](#).

Where did these states get the idea that the federal government was trying to stop their road sign fun?

The answer is that the (1,161-page) 11th edition of the [Manual on Uniform Traffic Control Devices for Streets and Highways](#), published by the U.S. Department of Transportation's Federal Highway Administration, included new language:

A CMS [changeable message sign] should not be used to display a traffic safety campaign message if doing so could adversely affect respect for the sign. Messages with obscure or secondary meanings, such as those with popular culture references, unconventional sign legend syntax, or that are intended to be humorous, should not be used as they might be misunderstood or understood only

by a limited segment of road users and require greater time to process and understand.

After Arizona officials expressed concern with the new language, a spokesperson for the agency pointed out that the manual language was just "guidance," not an explicit ban.

These stories illustrate a serious issue with constitutional and practical significance: the practice of federal agencies providing guidance to states and others whom the agencies regulate.

This report describes agency guidance and its legal and practical significance, including legal concerns about its use. It will then describe recent efforts by the national and state governments to respond to these concerns, particularly related to increasing the transparency of this guidance, before concluding with some recommendations.

II. Agency Guidance

It is easiest to understand agency guidance in relation to the formal lawmaking done by administrative agencies. The [Administrative Procedure Act](#), enacted in 1946, lays out the process by which agencies can promulgate regulations. The legislation gives agencies authority to create binding "rules," and to adjudicate disputes based on these rules. An important feature of [these rules](#) is that an

agency is required to provide notice of a proposed rule, typically through publication in the Federal Register, the daily publication of the federal government. Then, the agency must provide time for comments from “interested persons.” This is the statutory route for agencies to create rules to bind the public.

It is not, however, the only way that agencies actually influence those they regulate. There is another, non-statutory route agencies use. This is usually referred to as guidance. Since it does not comply with the notice and comment requirement of the Administrative Procedure Act, it is not technically legally binding. A simple way to think of it is that, in its regulatory work, the formal role of an agency is to enforce formal regulations created pursuant to authority delegated to it by Congress. In doing so, though, leaders and employees of the agency will have many opportunities to explain to other employees, regulated entities (businesses, states, private individuals, etc.), and the public generally what actions it considers to be required by or compliant with the regulations or the statutes they are promulgated to enforce. These explanations make up agency guidance.

The U.S. Department of Justice (DOJ) [defines](#) a “guidance document” as “a statement of general applicability issued by an agency to inform the public of its policies or legal interpretations.” It gives examples of “interpretive memoranda and manuals, policy statements, opinion letters of general applicability, and other similar materials.” The DOJ excludes from its definition “internal policies and guidelines” and “litigation filings,” though these can be relied on by agencies to define guidance they offer, so that exclusion may be too limiting. The category could even be broadened [to include](#) “scattered assurances, letters, emails, and mere conversations.”

A [careful report](#) on the issue, commissioned by the Administrative Conference of the United States, provides a

more comprehensive definition and some perspective on the scope of federal guidance:

Guidance comes in an endless variety of labels and formats, depending on the agency: advisories, circulars, bulletins, memos, interpretive letters, enforcement manuals, fact sheets, FAQs, highlights, you name it. Nobody knows exactly how much guidance there is, because it is not comprehensively collected anywhere, but its page count for any given agency is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even two hundred.

The fact that this large body of directions is not collected in one place and is thus difficult to quantify or even access has led [critics](#) to describe it as “[regulatory dark matter](#).”

III. Examples of Agency Guidance

It’s easier to understand the nature of agency guidance with examples. In 1992, Professor Robert Anthony [cataloged](#) dozens of examples from reported cases, including:

- “The Administrator of the Occupational Safety and Health Administration (OSHA) spoke at a labor union convention and followed up with a document captioned ‘interpretive rule and general statement of policy,’ to the effect that employers would be charged with discrimination unless they paid wages to union representatives who accompanied OSHA personnel conducting inspections of the employers’ premises, despite the absence of any such provision in the Occupational Safety and Health Act.”
- “The Bureau of Indian Affairs (BIA) denied general assistance benefits to full-blooded unassimilated Indians who lived near but not on their reservation. The Bureau had issued its restrictive eligibility policy only through a BIA manual, not a legislative rule.”

- “Class action plaintiffs were threatened with reduction in food stamps under USDA interim rules, issued without notice or opportunity for comment, that implemented a statutory change in the definition of ‘household.’”
- In August 2023, the Centers for Medicare & Medicaid Services (CMS) at HHS sent [a letter](#) to an administrator in Hawaii’s Department of Human Services expressing “concerns that your average call center wait time and abandonment rate” for those seeking Medicaid and Children’s Health Insurance Program information were too long. The average wait time was seven minutes. CMS recommended “that you review call center data and operations to assess what changes are needed to meet increased demand and ensure accessibility to your call center.” It then describes “strategies to address long wait times and dropped calls” like “hiring and training more staff; contracting for additional vendor services, extending call center hours, and/or automating systems to triage calls based on the type of assistance needed and to provide answers to frequently asked questions.”
- In October 2023, the DOJ released a [Q&A document](#) that it said “complements and supplements, but does not supersede” previous guidance on how state and local governments can comply with the Americans with Disabilities Act (ADA) in the programs it offers to provide individuals with disabilities employment opportunities. The document details what these governments must do to ensure job programs “enable individuals with disabilities to interact with non-disabled people to the fullest extent possible.” For instance, it lists six things public entities “should” do to “ensure that individuals have accurate information about integrated employment opportunities sufficient to make meaningful decisions about where to receive employment services.”
- In 2023, three federal agencies, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, issued [a document](#) called “Principles for Climate-Related
- “Class action plaintiffs were threatened with reduction in food stamps under USDA interim rules, issued without notice or opportunity for comment, that implemented a statutory change in the definition of ‘household.’”

Well-known recent examples include:

- In May 2016, the DOJ and the Office for Civil Rights at the U.S. Department of Education issued a “Dear Colleague Letter” on transgender students. After reciting the fact that compliance with Title IX and its implementing regulations is required for receipt of federal funding, the [letter says](#) the two agencies “interpret Title IX to require that” when a student “assert[s] a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity.” The letter then describes school policies that must be adopted or modified, including school records, use of names or pronouns, athletics, restroom use, etc. The letter was later rescinded by the next administration.
- In August 2023, the Office of Civil Rights at the U.S. Department of Health and Human Services (HHS) sent [a letter](#) to state Health Officials saying that to avoid discrimination in providing Medicaid services, “States are required to take reasonable steps to provide meaningful language access for individuals with limited English proficiency.” The letter lists “[r]easonable steps to provide meaningful language access” such as translating documents, “oral language assistance from a qualified interpreter” who “should understand the intricacies of Medicaid, CHIP, Marketplace plans, and, if applicable, the Basic Health Program enrollment.” All of these services “must be provided free of charge and in a timely manner.”

Financial Risk Management for Large Financial Institutions.” As the Center for Practical Federalism [notes](#), these agencies are “primarily tasked with supervising the liquidity of savings held by federally regulated banks, ensuring adherence to sound monetary policy.” Notwithstanding, the principles document directed large financial institutions to adopt policies around climate change and environmental risk that would have, at best, only the most tenuous connection to their fiscal soundness. When a new presidential administration came into office, the agencies [rescinded](#) the prior guidance.

- In January 2024, the DOJ filed a “[Statement of Interest](#)” in a federal lawsuit in Georgia over services offered to a prisoner. The filing was submitted “to clarify the proper interpretation” of the ADA as it relates to gender dysphoria. The filing says that the ADA requires a prison to provide “gender affirming surgery.” A few months later, the DOJ relied on this interpretation to issue [a finding](#) that the Utah Department of Corrections had discriminated against a prisoner seeking similar procedures.
- Just before President Biden left office, for instance, the U.S. Department of Education [published guidance](#) that requires schools to ensure that male and female athletes benefit in the same way from the money earned by college athletes for their endorsements or sponsorships. In practice, this means that the department announced that it had new authority to determine whether endorsements and similar earnings by athletes are being handled fairly by universities. So, if a popular female athlete at a university gets a lucrative sponsorship, the department could decide that the school is engaged in illegal discrimination if it does not ensure a similar amount of support is going to male athletes at the school.

IV. How Guidance Impacts States

The problem with agency guidance is that although it is not legally binding it often operates in practice as if it is, [because it](#) “often evokes a significant change in behavior by those the agency regulates.” In the example from Arizona noted in the introduction, the agency spokesperson had to explain that the state could still use humorous highway signs, even though government officials assumed they could not based on “guidance” comments in a manual published by a federal agency.

It is not hard to see why this would be the case in practice. The DOJ [has explained](#) that guidance tells those who are regulated and the public how an agency is likely to apply its rules. Thus, these actors would reasonably expect that ignoring the guidance is risky.

The Administrative Conference of the United States (ACUS) [explains that](#) “the costs and risks” of not following guidance sometimes “are simply too high,” so regulated parties “follow the policy statement’s approach even if in theory they might be legally free to choose a different course.”

This may be because a regulatory scheme requires “a regulated party to obtain prior approval from an agency to obtain essential permissions or benefits.” Similarly, “a regulated party” evaluated by an agency “under a legal regime with which perfect compliance is practically unachievable” has an incentive “to cultivate a reputation with the agency as a good-faith actor by following even non-binding guidance.”

A regulated party that might be subject “to the possibility of enforcement proceedings that entail prohibitively high costs regardless of outcome” or could result in “sanctions so severe that the party” believes the risk of adjudication would not justify failing to follow the agency’s guidance.

In this [latter instance](#), “the regulated party cannot expect, without prohibitive risk, meaningful examination and adjudication of the accusation by an official distinct from the enforcement personnel. This situation creates a strong incentive to avoid being accused in the first place.” ACUS also notes that regulators may feel they should “inflexibly” apply guidance to avoid charges of favoritism towards a party that seeks to comply with a regulation without following the guidance.

Other factors that make compliance with guidance likely even when it is not binding include the [incentive created](#) when an agency provides funding to a regulated party. Also, a regulated party, particularly if it is large, may have employees charged with [ensuring compliance](#) with regulations “whose backgrounds, socialization, and career incentives arguably give them an especially strong incentive to maintain good relations with the agency and therefore to follow guidance.”

In other words, federal agency guidance has the practical effect of being as influential as legally binding statutes, without having gone through the same legislative review process. It is, effectively, lawmaking by administrative decree rather than legislative intent.

To use a practical example, consider a broad statute like [Title IX](#), which prohibits discrimination based on sex in education. Universities regulated by the U.S. Department of Education likely want to avoid discriminatory practices and certainly want to avoid a finding by the agency that it has engaged in them. Thus, when the agency adopts a [policy interpretation](#) that says that in enforcing the law it will look to see if the proportion of male and female athletes is comparable to the proportion of men and women in the student body, a school is likely to adopt that goal rather than wait to argue in court that it sees equality in athletic opportunities differently.

There is some dispute over whether [agencies intend](#) to treat guidance as binding or whether those interacting with the agency (or even agency officials) believe the guidance is binding for the practical reasons just described, [even if](#) the agency does not formally press that claim. There is no dispute, however, that agencies and those they regulate do act as if the guidance is binding.

V. Objections to Guidance

This reality raises serious legal and practical concerns.

Perhaps the most obvious is that, whether intentionally or not, when agency guidance has the effect of constraining behavior, it operates as a law that is at odds with the statutory authority of administrative agencies. Though there are [serious objections](#) to any executive branch lawmaking, even if one were to accept that agencies can make binding law, the only legal route for doing so is in accordance with the Administrative Procedure Act. As important as this is, it is only the beginning.

A. Constitutional Objections

The U.S. Constitution [makes clear](#): “All legislative Powers herein granted shall be vested in a Congress of the United States.” That encompassing modifier does not leave any lawmaking power for the other branches. The government can [create a binding](#) “legal obligation only . . . through acts of Congress and decisions of the courts.” By vesting legislative power in Congress, it cannot be divested from Congress or vested elsewhere. This reality ensures that the most significant power to create legal obligations, through enactment of laws, is secured to the branch of government elected to do so. By contrast, “regulatory conditions undercut the elective basis of [lawmaking] power.” Agency lawmaking “displace[s] public representative self-government not . . . with agency edicts.” Of course, presidents are also elected, but to [execute](#) rather than make laws.

The most common response to this objection is that agencies make binding rules pursuant to authority delegated by Congress. If this were possible, it would still not provide justification for agency guidance, which is made through an informal double delegation, from Congress to agencies to make rules and then to agency personnel to add to the rules glosses that constrain the public. At this stage, the already tenuous link to electoral consent becomes so attenuated as to be negligible.

Related to this problem is the [concentration of powers](#) in administrators. When executive branch agencies take on legislative tasks, they still retain the executive responsibilities. Thus, they not only make binding rules but also enforce them, a practice at odds with the constitutional separation of government responsibilities. (The APA also grants [adjudicatory authority](#) to agencies, making the concentration of power complete.)

Finally, administrative lawmaking, through rules and guidance, is in practice at odds with the [constitutional design](#) of providing “few and defined” powers to the federal government while reserving “numerous and indefinite” powers to the state governments. The “[federalist structure](#) of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society” and “it makes government more responsive.” Agency rulemaking and guidance [undercut](#) this separation and dilute its intended benefits.

As the examples noted above make clear, agency guidance is often directed at state agencies. Thus, through guidance, federal agencies can, in effect, commandeer state officials to pursue federal priorities and even require, or at least pressure them to spend local taxpayer money to hire employees to carry out functions identified by the agencies and to ensure compliance with a large mass of directives, formal and informal. As noted in section II, state citizens

are likely to be unaware that this federal guidance exists, much less what it requires and why.

B. Practical Objections

The practice of using guidance that is effectively binding impacts agencies, regulated entities, and even the intended beneficiaries of the guidance in the general public. Many of the problems actually arise from the perceived benefits of guidance, such as speed and flexibility.

Professor Anthony [notes that](#) the ease of providing guidance as contrasted with notice and comment rulemaking fosters a “tendency to overregulate.” Guidance “eas[es the agency’s] work . . . in several undesirable ways. It escapes the delay and the challenge of allowing public participation in the development of its rule. It probably escapes the toil and the discipline of building a strong rulemaking record. It escapes the discipline of preparing a statement of the basis and purpose justifying the rule. It may also escape APA publication requirements.” This hurts the agency itself, by depriving it of or limiting the input and perspectives it needs to function well. When the agency does reach outside to [seek input](#) on guidance, it is likely to “include those who are frequent communicators with the agency” because of “time and resource constraints upon the agency.” These are likely to be those whom the agency regulates but also advocacy organizations with a specific interest in the agency’s work. Rather than needed perspective, the agency may find itself in an echo chamber.

This, of course, affects not only the agency but those they regulate. Without [notice and comment](#) requirements, “the agency has no obligation to seek outside views, disclose data, or respond to comments. Some agencies indeed seek no public input at all on guidance documents.” Thus, those affected by the guidance cannot insert needed insights into the process even though they will be effectively bound by, or at least strongly constrained to follow, it. Without transparency about the reasoning and influences on [the](#)

[guidance](#), “[a]ffected members of the public are likely to be confused or misled about the reach and legal quality of the standards the agency has imposed.”

Even when a regulated entity is willing to push back on guidance, they [may not be able](#) to since “a guidance document may not be considered final agency action or ripe for review at the time it is issued, especially if the document expressly disclaims a binding effect.”

While affected parties do not have to be included in the formulation of guidance, practical reasons make their participation more likely than another important category, the intended beneficiaries of agency action. “Because of direct contact with regulated entities in permitting, licensing, inspection, and enforcement matters, an agency, as a rule, will know and have more regular relationships with regulated entity groups” and so may seek their guidance while “regulatory beneficiaries are relatively diffuse and unorganized, compared with regulated entities, and thus will have fewer resources and less ability to find out about a guidance before it is finalized or to obtain executive or Congressional oversight.”

This exclusion can have severe impacts. As but one example, a [recent editorial](#) of three oncologists noted that “a new interpretation of the Medicare Physician Self-Referral Law that appeared in a Medicare Frequently Asked Questions bulletin posted in 2021” meant that some physicians could no longer “deliver medications to their patients by mail or courier” or even dispense medication to a caregiver who came to pick it up. This situation resulted from agency guidance intended to prevent physicians referring to entities they have financial interest in but which did not take into consideration “medically integrated pharmac[ies] . . . embedded within an oncology center of excellence” to allow “for close pharmacist engagement through the entire patient journey, from pretreatment through treatment monitoring, and therefore a multidisciplinary team approach.”

C. Fiscal Concerns

In November 2025, Utah’s Federalism Commission, a legislative committee responsible for ensuring that respective state and federal responsibilities are respected in all Utah government actions, held hearings on federal burdens on state budgets. The testimony was bracing. Three expert witnesses described how federal funding for social welfare and other programs far outpaces the money available to the national government. Thus, the federal government has begun, and will likely accelerate the [process of](#), shifting the financial responsibility for these programs to the states. State reliance on federal funds for revenue makes them [vulnerable](#) when the federal government is overextended or cannot operate (as in recent shutdowns).

In its November 2025 hearing, the Utah Federalism Commission discussed federal guidance. In a period of just over six months, state agencies [had received](#) thirty guidance letters from the federal government. Some of the letters merely provided information (such as about higher education research projects) or focused on technical issues (like how certain reports are to be filed). In some cases, though, the guidance implicates state authority or requires the state to do something it would not do but for the guidance.

For example, requiring the state to make special efforts to comply with federal demands that are likely to require additional staffing. Thus, even though the state legislative and executive branches have established priorities and made appropriations accordingly, federal direction, even when it is not law, can unsettle that. In these situations, the costs of compliance will be passed to state taxpayers, either directly or indirectly, as when the state foregoes other policies it would pursue absent the mandate derived from guidance.

In the mid-2010s, the U.S. Department of Education encouraged states to adopt Common Core standards and incentivized that decision. A report by the Pioneer Institute, the American Principles Project, and the Pacific Research Institute of California [found that](#) adoption cost states and the District of Columbia “nearly \$16 billion over seven years.” The costs include “the price of familiarizing educators with the new standards, obtaining textbooks and instructional materials aligned with the standards, and necessary technology infrastructure upgrades” as well as “ongoing support of the enhanced technology infrastructure and the introduction of new assessments that are currently under development.”

Another [study](#), commissioned by the National Center for Environmental Economics at the U.S. Environmental Protection Agency, looked at a sample of environmental regulations and associated guidance directed to states and found that state and federal agencies often struggle to estimate likely costs of guidance. Though the report did not focus on this factor, it included costs of guidance, which, in some estimates, showed millions of dollars for each of the federal rules and associated guidance imposed by the EPA.

A series of “Dear Colleague letters” from the U.S. Department of Education describing what the agency believes schools should do to be in compliance with federal law, sent over the period of a decade on race, [sex](#), and [gender identity](#) discrimination, describe in detail how schools will have to adjust their operations and perhaps even facilities to comply with agency interpretations of the federal laws that prohibit discrimination in education.

A school conscientiously trying to comply will need to change reports, record systems, train faculty and staff, hire new personnel, and be prepared to make significant expenditures of time and money to deal with formal and informal legal challenges from students and parents who are the intended beneficiaries of the guidance. None of

these actions will come without high financial costs. This, of course, is in addition to any constitutional and policy concerns raised by the direction from the Department.

Other examples of compliance costs passed on to states include the numerous reports that states are required to submit to comply with federal guidance, such as in the use of [COVID funding](#), changes in procedures, as with [wildfire response](#), and indirect costs created by activities funded by [federal grants](#). In the past few years, Utah has received federal guidance that would impose costs to the state in providing [health care](#) to inmates and in providing more [extensive services](#) to individuals with disabilities.

Some of the costs associated with compliance might be appropriate uses of state resources, if they are consistent with policy adopted by the state’s elected representatives and can be balanced with other budgetary demands. Mandates arising from federal guidance, though, do not require, and may even displace these priorities and impose counterproductive or unnecessary costs.

VI. Efforts to Mandate Transparency

Given these concerns, it is surprising that there has been little formal effort to constrain the use of agency guidance, and even then, the efforts have been modest. The most successful efforts took place in the first administration of President Donald Trump, so we are likely to see a renewed focus on this issue throughout his second term. In addition, some states are attempting to address agency guidance from the perspective of recipients.

A. Federal Actions

In October 2019, President Trump issued [Executive Order 13,891](#). The stated intent of the order was to “ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations.”

The [order](#) suggests that agencies “have sometimes used” guidance “inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA.” It also argues that, “[e]ven when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply.” Finally, it notes “the public frequently has insufficient notice of guidance documents, which are not always published in the Federal Register or distributed to all regulated parties.”

The [order](#) proposed as a general policy that agencies should be required to “[1] treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, [2] take public input into account when appropriate in formulating guidance documents, and [3] make guidance documents readily available to the public.”

In regard to the transparency policy, the [order](#) requires federal agencies to create a “single, searchable, indexed database” on the agency’s website “that contains or links to all guidance documents in effect from such agency or component. The website shall note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.” If an agency did not comply, the order said that “[n]o agency shall retain in effect any guidance document without including it in the relevant database” which suggests that undisclosed guidance could be considered invalid.

The executive [order](#) then directs agencies to review current guidance documents and “rescind those guidance documents that it determines should no longer be in effect.” Finally, it directs agencies to make regulations “to set forth processes and procedures for issuing guidance documents” including clear notice that they are not binding, and providing for a process for the agency to

receive petitions from the general public to withdraw or amend the guidance.

Many agencies [complied](#): “By the end of President Trump’s administration, thirty-one agencies had promulgated thirty-two guidance regulations.”

On the first day of President Joe Biden’s administration, however, the president [revoked](#) this order so that agencies would no longer have to make their guidance documents publicly available. His order said agencies “shall promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing” the prior executive order. On January 20, 2025, President Donald Trump [rescinded](#) this rescission on the first day of his second term.

B. State Actions

In its 2024 legislative session, Tennessee’s Legislature became the first state to [address transparency](#) in federal agency guidance. It mandated disclosure by the state department of education of “interpretations and directives from the United States Department of Education regarding the implementation of department rules that provide guidance to this state.” The guidance will be submitted to legislative committee chairs, the speaker of each house of the Legislature, and the members of the joint government operations rule review committees.

In 2025, Utah became the first state to enact a comprehensive transparency requirement. After [discussions](#) in its legislative Federalism Commission about the need for state and local officials to make publicly available the guidance they receive from federal agencies, the Legislature [enacted a law](#) that required state agencies to share with the Legislature and make publicly available online guidance they receive from federal regulators.

In 2026, the Utah Legislature adopted a [supplemental bill](#) that extends the transparency requirement to the Utah

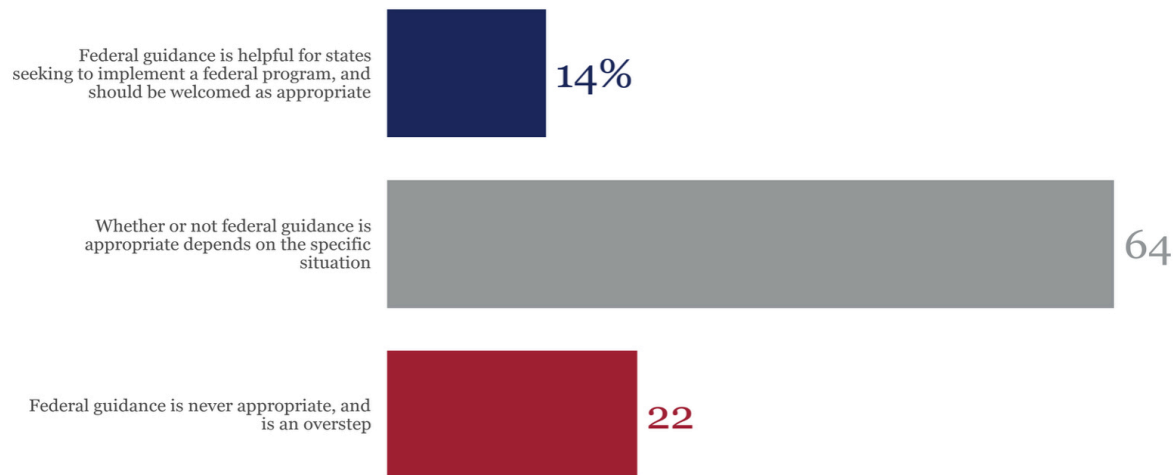
Board of Education and asked the agencies to provide, along with the guidance.

A Sutherland Institute/Y2 Analytics survey suggests that these laws are supported by Utahns. The survey of a representative sample of likely Utah voters found that while 64% believe federal agency guidance may or may not be appropriate based on specific context, an overwhelming majority believe such guidance should be made public (57% say transparency is “extremely

important” while 27% say it is “very important” and 11% that it is “moderately important”).

The survey also found that strong majorities would support “a law requiring state officials to analyze compliance costs for federal guidance and report that information to state lawmakers and the public” (36% “extremely supportive,” 35% “very supportive,” and 20% “somewhat supportive”).

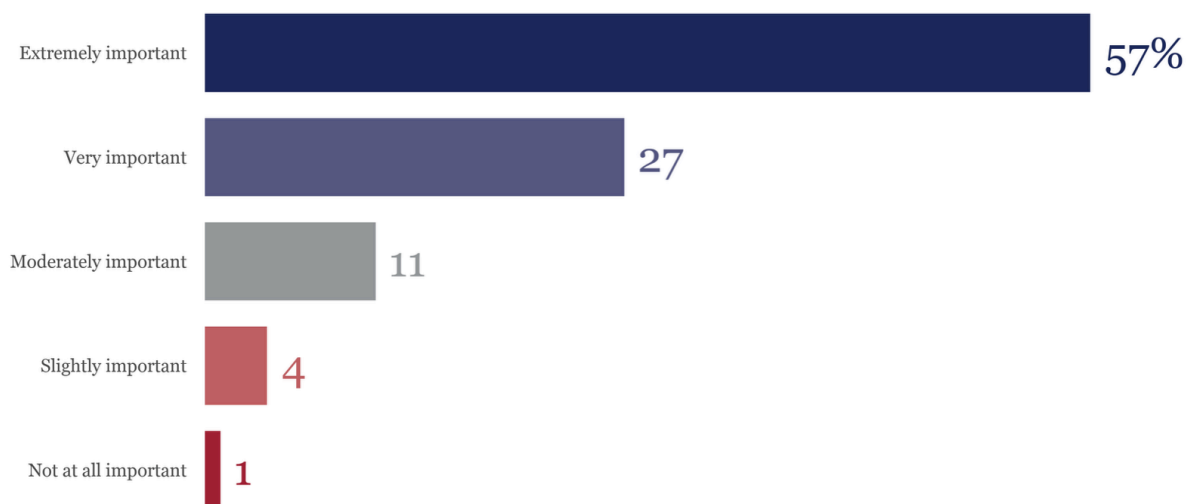
Federal Guidance



Q: Which of the following best describes your position on federal guidance? (n = 1085)



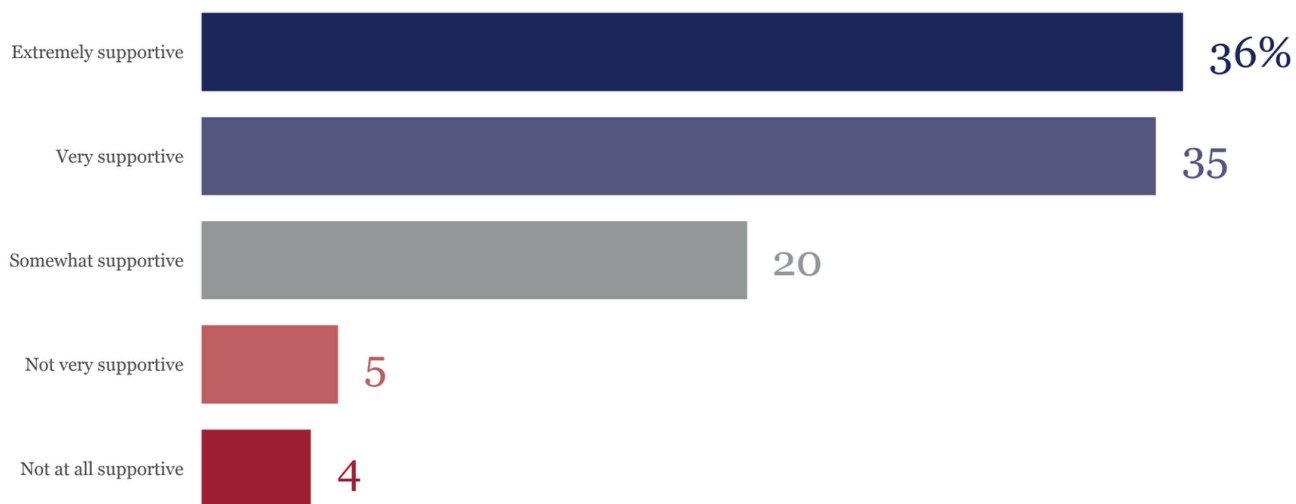
Importance of Making Federal Guidance Public



Q: How important is it to you that federal guidance be made public? (n = 1085)



Support for Federal Guidance Cost-Analysis Legislation



Q: How supportive would you be of a law requiring state officials to analyze compliance costs for federal guidance and report that information to state lawmakers and the public? (n = 1085)



The rationale for the state efforts to secure greater transparency is that it will allow elected officials in federal and state governments to know what agencies are directing regulated entities and the public to do. At the federal level, this can allow for better oversight. At the state level, it is perhaps even more critical since state officials are often the ones being “guided.” State legislators would certainly want to know that the state officials whose work they direct are being asked to make expenditures of public money. School boards will want to know that the principals they oversee are being asked to change policies on private facilities on campus.

The question of fiscal impact is particularly important. Recent [changes to](#) federal programs mean that states are likely to face the choice of shouldering a greater burden of funding entitlement programs or having their citizens lose services that were paid for by the federal government – which really can’t sustain their responsibility because of overwhelming budget deficits.

With the kind of information provided by Utah’s transparency laws, lawmakers and citizens can understand the nature of federal agency demands on their local and state officials and the source of some of the government actions that impact their lives and the state’s budget. This will allow them to interact more fruitfully and, where appropriate, push back when they feel that would be in their best interest. Such pushback could change the current incentive structure that largely presses for unquestioning compliance rather than constructive engagement with agency guidance.

There are some significant limitations on how much transparency can accomplish. Even if agency guidance is available, reading and assessing it will not be easy. Interest groups, state legislators and officials, scholars, and others will need to provide context to make the information practically accessible. Mere transparency will not, in itself, ameliorate the problems of quasi-binding guidance or rein in agency overreach, much less restore constitutional guidelines, but without it, all of these aims are extremely unlikely to be seriously pursued, much less achieved.

Conclusion

The serious concerns with federal agencies binding those they regulate through guidance lacking legal authority, thereby imposing regulatory and fiscal burdens on the state and its taxpayers, suggest a need for significant reform. This brief report has only described one modest response to these concerns – transparency about the nature of the guidance and its costs. Specifically, federal agencies should make the guidance they provide more broadly accessible and make it clearer when doing so that

the guidance is not legally binding. At the same time, states should work to make their own citizens aware of the guidance given to those states by federal agencies and the costs of that guidance.

This, of course, will not address the underlying constitutional and practical concerns with the use of guidance. That will require broad and sustained effort. Eventually, federal agency practices should be confined within constitutional bounds. Transparency, though, is an important first step.



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William (Bill) C. Duncan is Sutherland Institute's Constitutional Law & Religious Freedom Fellow. He formerly worked in the Law and Religion Program at the Catholic University of America's Columbus School of Law and has taught college courses on religion and law. Bill has submitted briefs on constitutional issues in the U.S. Supreme Court, 10 federal courts of appeals, eight state supreme courts, and other venues, including in important religious liberty cases.