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Regulating Through Guidance

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I. *Introduction*

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000)(striking down emissions monitoring guidance as a legislative rule requiring notice and comment).

Concern about whether agencies are properly observing the notice-and-comment requirements of the APA has received significant attention in the federal arena of administrative law for a long time. Somewhat recently in 2007, the Office of Management and Budget ("OMB") adopted a Bulletin entitled "Agency Good Guidance Practices," which included the above quote from *Appalachian Power*.[1] The "guidance" in "Good Guidance Practices" refers to agency statements that explain or interpret their rules and governing statutes, or "guidance documents," but which were not adopted after notice and comment rulemaking procedures.

In addition, there may often be more legal force to agency guidance statements than meets the eye. Federal agency guidance may attain a status of deference by the courts under the *Auer*

[1]https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices-2007-01-25/E7-1066

doctrine[2] or some sort of respect under *Skidmore*.[3] Texas courts also afford some deference or "serious consideration" to state agency interpretations, but have not expressly adopted the federal deference doctrines.[4]

The concept of judicial deference to agency interpretations is related to this topic, because agency interpretations and agency guidance are essentially the same thing. This paper will focus more on action by the executive branch. A good discussion of action by the judicial branch concerning deference to agency guidance was presented in last year's seminar by Shane Pennington and Evan Young in their paper The End of the Dance? The *Chevron* Two-Step and New Directions for Administrative Law.

This paper attempts to provide an introduction into regulation by guidance and some overview of recent developments in the federal arena, with insight into the legal status of Texas agency guidance documents.

II. *Regulation by Guidance*

"Regulation by Guidance" is a term that on its face is an oxymoron, a conjunction of terms having opposite meanings. "Regulations" have the force and effect of law, while "guidance" has, well, the force and effect of guidance, but not of law. In practice, however, federal guidance often has been intended and applied as if it was legally binding. And applying the *Auer* doctrine, federal courts may defer to guidance statements, thereby elevating their legal

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[2] *Auer v. Robbins*, 519 U.S. 452 (1997)

[3] *Skidmore v. Swift*, 323 U.S. 134 (1944)

[4] *R.R. Comm'n of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011)(commission's construction was reasonable, and thus entitled to deference); *Texas Citrus Exch. v. Sharp*, 955 S.W.2d 164, 168 (Tex. App. -- Austin, 1997)(giving due deference to the interpretation placed upon the provision by the agency).

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