

Obscured guidance from federal agencies creates an accountability gap. What can the state do?

By William C. Duncan, Sutherland Institute – December 11, 2024

Article Highlights

- Although federal agencies were briefly directed to disclose the guidance they give to those they regulate, they are currently not required to make that guidance public.
- Sutherland Institute recently testified to the Utah Legislative Federalism Commission about the need for transparency in guidance provided by federal agencies to state and local governments in Utah.
- In addition to promoting transparency of federal agency guidance, Sutherland will soon issue an audit of Utah laws regarding federalism, including a list of ways the state can improve.

With the upcoming change in presidential administrations may come a change in the way that federal administrative agencies interact with those they regulate. One element in this regulation is referred to as “guidance” documents or “subregulatory guidance.” This refers to a range of agency publications describing how the federal agency understands the obligations of those it regulates (such as state and local agencies, schools, businesses, etc.). This guidance includes letters from the agency to a regulated entity, agency handbooks that direct agency officials in how they carry out their regulatory responsibilities, official submissions by the agency in court proceedings involving the agency, and many other sources.

This guidance is not legally binding in the way that formal rules (adopted by the agency through a procedure laid out in [federal law](#)) are. It is still highly influential because those who are subject to regulation by federal agencies have a strong incentive to conform to the agency’s view of what they ought to do so as to promote a good relationship with the agency and its officials and, at the very least, avoid possible litigation if the regulated entity chooses to ignore the guidance.

In 2019, President Donald Trump issued an [executive order](#) to agencies requiring them, among other things, 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.”

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.

This means that currently an agency can issue guidance without the public being aware of what it is communicating to the government or private organizations it regulates. By extension, it means that elected lawmakers do not always know what state and local government officials are being asked to do by federal officials. This lack of transparency creates an accountability gap in the function of government where important decisions may be impacted by factors unknown to the elected representatives of those who are affected by those decisions.

On November 19, 2024, Stan Rasmussen, Sutherland Institute's vice president for government affairs, and I testified in the Utah Legislature's [Federalism Commission](#) about this issue and what the state of Utah can do in response.

The [testimony to the commission](#) noted that agency guidance is created without an open, public process even though it can impact government and business in significant ways. Rather than hoping another executive order restores some transparency, the state itself could act to promote openness about what the federal government is suggesting states do. This allows legislatures, in particular, to learn whether the federal government is encouraging state agencies to take actions at odds with state policies. Private organizations can also look at this guidance and bring details to the attention of lawmakers.

We noted that the Tennessee Department of Education is [required to disclose](#) all guidance they receive from the U.S. Department of Education and make it publicly available. Thus, there is some limited precedent for state-based calls for accountability.

We proposed the Utah Legislature consider a bill to ensure that federal agency guidance issued to Utah government agencies be made publicly available so policymakers and citizens are aware of what federal agencies are directing state and local governments to do.

Utah has already enacted a number of measures to promote its independence and protect against federal administrative agency overreach. In fact, it is currently [ranked first](#) among the states in this regard by the [Center for Practical Federalism](#).

Sutherland Institute will soon be releasing a first-of-its-kind report on the health of federalism in the state. This "federalism audit" examines the factors used by the Center for Practical Federalism in depth and lists ways Utah could better protect its ability to fulfill its critical role in the constitutional system.

<https://sutherlandinstitute.org/obscured-guidance-from-federal-agencies-creates-an-accountability-gap-what-can-the-state-do/>

