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Additional Guidance on Agency Documents Related to Regulations

I. Guidance Documents

Guidance documents are a narrow category of material which are utilized as a tool to ease the public's compliance with a given regulation. These documents allow the public to gain a firmer understanding of the agency's current approach to, or interpretation of, law and/or describes how and when the agency will exercise discretionary functions. R.I. Gen. Laws § 42-35-1(9). A guidance document should be linked to a specific regulation or set of regulations. A guidance document will provide direction to the regulated public to assist in their accordance with the requirements, prohibitions or sanctions within the regulation and provide understanding of the agency's enforcement of the regulation. A guidance document must be tied to a specific regulation or set of regulations, not generally applied.

Guidance documents should not concern the internal management of an agency (including intragovernmental or interagency memorandums, directives, and communications so long.) Note that if an internal policy or procedure of an agency impacts the private right or procedure available to the public, it should be promulgated in regulation. *Id.*; *see also* R.I. Gen. Laws §42-35-1(19)(i)-(ii). Classifying language that affects the rights of an individual or that otherwise meets the statutory definition of a regulation as a guidance document may open an agency to litigation. If there is any doubt as to whether a document constitutes a regulation or a guidance document, the agency should err on the side of promulgating the document as a regulation.

II. Guidance versus Regulation: What is the Difference?

The key difference between a regulation and a guidance document is that a regulation carries with it the full force of law. A regulation “implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency” and is legally enforceable. R.I. Gen. Laws § 42-35-1(19). Regulations are made when the legislature has granted an agency the authority to promulgate binding rules in order to carry out a certain law. *See Mills v. Bordeleau*, 517 A.2d 600, 602 (R.I. 1986), *citing Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 488 A.2d 676, 679 (R.I. 1985). Guidance documents are produced by agencies in order to assist the public in understanding the agencies interpretation of that binding rule.

III. Declaratory Orders

The APA provides a mechanism for a member of the public to petition an agency for a declaratory order clarifying how the agency interprets a statute they administer or in what manner a rule, guidance document or other order will be applied to that petitioner. R.I. Gen. Laws §42-35-8. The agency must respond to the petition within sixty days. R.I. Gen. Laws §42-35-8(c).

IV. Non-Regulatory Materials

It is important to understand that guidance documents and declaratory orders have a specific purpose, enshrined by statute, as described above. There are other materials such internal policies and procedures or communication documents which should not be considered “guidance documents”. Internal human resources documents, like an employee internet policy for example, are not guidance documents. These types of policies regulate only the inner workings of the agency itself and do not impact the general public. Communication documents such as informational signage or pamphlets are also not guidance documents, since their purpose is merely to educate the public on a subject matter. In contrast, guidance documents educate the public on the specific issue of how a regulation will be interpreted or applied by an agency.