

FINAL WORD ↪ BY RICHARD A. WILLIAMS

Guidance on Guidance

MEMO

To: All Americans
From: Federal Regulators
RE: Guidance

We thought it was time we provided some guidance on guidance. As you know, we have thousands of guidances, although some of them supersede other guidances and it's really up to you to know which ones represent our current guidance.

Let us be absolutely clear about one thing: draft guidance is not current guidance. Draft guidance only represents our current thinking about what our guidance might be.

Now, many of you have been wondering how our current thinking could represent what *all of us* are thinking. Let us clear up that confusion right now. Our current thinking is actually done by one person—not the same person each time, of course—but it represents “our” current thinking in the sense that we, or at least some of us, believe at that particular moment that the person appointed to think for us is the best choice to do our current thinking for us. Get it?

You might wonder what are you supposed to do with guidance? Good question. Let's clear that up. The short answer: do absolutely nothing. You are not required to do anything with guidance. It's not a regulation; it's just guidance. However, if you don't follow the guidance, you will get a warning letter for not following our guidance, and boy you sure don't want to receive one of those. Your boss will ask you why you didn't follow the guidance and you will reply, to his disgust, that you didn't have to follow the guidance because

it says so right in the top paragraph of the guidance.

In fact, we don't have to follow our own guidance, as we make perfectly clear in every guidance that we put out. And it's true, we don't follow our guidance. In fact, we resent anyone telling us what to do, particularly us. Well, not us exactly, but the person who wrote our guidance. Just who does he think he is? Telling us what we can and cannot do and then immediately following that up with saying we will not be bound by this guidance. The nerve.

That covers guidance pretty well. Now how about that draft guidance?

If you are not required to follow guidance, then for God's sake please never, ever, ever follow draft guidance, as that is only our current thinking. In fact, it expires the very second we write it because we are constantly in a regulatory fever and we have already thought of making you do something else. In fact, what kind of an idiot would act on draft guidance when it is perfectly obvious that we are (or rather the appointed person to think for us is)

already thinking something different? In fact, we have already appointed someone else to do our current thinking for us. What's wrong with you?

You may think that acting on guidance gives you a “safe harbor” from regulations. Nope, it doesn't because we are not bound by guidance, by draft guidance, by Congress, or by any deity that we don't recognize. In fact, the Supreme Court has ruled, in godlike fashion, that we deserve deference. Of course, we *deserve* deference—we are “We.” Whether you call us an agency, a bureau, or whatever, we are the Alpha and Omega of government.

One kind of safe harbor that we absolutely love (laughing about) is “enforcement discretion.” We often write about it in guidance or, better yet, draft guidance. You are bound by force of law to comply with our regulations unless we exercise enforcement discretion. And we *love* enforcement discretion meetings.

We do want to be clear that this memo is what we are thinking about guidance today, but it is only a draft. It is our current thinking and we would like comments on it, as we do on all draft guidance. But please don't bother commenting on it because we are already drafting a new draft guidance. If you do comment on it, know that you are only bothering us, you idiot, and you will pay dearly for it. R



RICHARD A. WILLIAMS was formerly director for social sciences at the Center for Food Safety and Applied Nutrition at the U.S. Food and Drug Administration and vice president for policy at the Mercatus Center at George Mason University.