



## DEPARTMENT OF JUSTICE LIMITS USE OF GUIDANCE DOCUMENTS IN ACE CASES

### FEBRUARY 2018

On January 25, 2018, Associate Attorney General Rachel Brand issued a memorandum to all United States Attorneys and the Heads of the Department of Justice's Litigating Components instructing them that, effective immediately for all Affirmative Civil Enforcement (ACE) cases, Department litigators may not use noncompliance with agency guidance documents as a basis for proving violations of applicable law. Brand issued the directive in her role as the Chair of the Department of Justice's Regulatory Reform Task Force.

Brand's memorandum follows Attorney General Jeff Sessions' announcement on November 16, 2017, that government agencies are prohibited from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process. In her memorandum the Associate Attorney General noted that the Department should not treat a party's noncompliance with a guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. However, guidance documents may still be used to explain or paraphrase legal mandates contained in existing statutes or regulations. They may also be used as evidence that a party who read the guidance document had the requisite knowledge of the regulation.

Brand's directive reflects the Attorney General's position that guidance documents cannot create binding requirements that do not already exist by statute or regulation and that the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules.

## LINKS:

### Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (1/25/08)

<https://www.justice.gov/file/1028756/download>

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