

A Tale of Two Guidances—New Principal Deputy Associate Attorney General Claire McCusker Murray Speaks on DOJ Efforts to Rein in Subregulatory Guidance

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There are two kinds of guidances, [according to](#) recently appointed Principal Deputy Associate Attorney General Claire McCusker Murray, which should be treated quite differently.¹ Her explanation is worth quoting at length:

The key is to distinguish between two categories of guidance, the part that mirrors what the law requires and everything else. The rest might include, for example, language suggesting obligations that go beyond what the law requires, language that represents the agency's interpretation of an ambiguity in a statute or regulation, or language where the agency is recommending "best practices." For the first category, the response is simple: you'll want to ensure that your business practices are consistent with the portion of the guidance that mirrors binding law. For everything else, that's where you make a good faith risk calculation—really, a business decision, informed by a legal assessment—about whether to follow an agency's subregulatory guidance, which may be persuasive, or whether to take another lawful approach that differs from the guidance.

She also noted that "When you add deference doctrines like *Auer* into the mix, there's a real risk that guidance can, practically speaking, end up having the same effect as regulation." As a result, "Unless and until the Supreme Court charts a new course with respect to *Auer* deference in *Kisor v. Wilkie* this Term, an important part of that good faith risk calculation will be informed by your legal team's analysis of whether the guidance at issue is likely to be accorded deference."

We appreciate that Murray used the term "subregulatory guidance" to refer to guidance documents ranging from "Dear Colleague" letters to "Frequently Asked Questions" to bulletins to other informal guidance statements. Observing that critics have called this litany of materials "regulatory dark matter," Murray emphasized that under our separation of powers "subregulatory guidance isn't law—it's just paper."

Murray's remarks on subregulatory guidance continue the welcome effort we have seen from some banking regulators to limit the use of guidance that goes beyond sources of law—statutes and regulations—as the basis of formal or informal enforcement actions. Much work remains, but we are hopeful that the DOJ's efforts will influence government agencies to better conform their enforcement efforts with the separation of powers and the rule of law.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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¹ Principal Deputy Associate Attorney General Murray delivered her remarks earlier this week at the Compliance Week Annual Conference in Washington, D.C.