Abolishing the Uniform Guidelines: Be Careful What You Wish For

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The Uniform Guidelines on Employee Selection Procedures (Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor, & Department of Justice, 1978) were published for the purpose of “establishing a uniform federal position in the area of prohibiting discrimination in employment practices on the grounds of race, color, religion or national origin” (p. 38290). As such, the Uniform Guidelines have fulfilled a unique role in the enforcement of Title VII of the 1964 Civil Rights Act. Given this unique role, the Uniform Guidelines as a whole were not intended to be completely aligned with scientific knowledge or research. True enough, the Uniform Guidelines state that “the provisions of these Guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures” (Section 5c). It would be inappropriate, however, to assume that the Uniform Guidelines as a whole should be completely consistent with or even relevant to matters of scientific interest and research. It follows then that a call such as the one made by McDaniel, Kepes, and Banks (2011) for rescinding or overhauling the Uniform Guidelines is unwarranted, misguided, and impractical given the social, political, and legal maelstrom such an effort would cause. This commentary will provide arguments against attempting to rescind or overhaul the Uniform Guidelines. I suggest that a more appropriate approach would be precise technical revisions only where necessary.

Is There Sufficient Need to Rescind or Overhaul the Uniform Guidelines?

To assess the question of rescinding or overhauling the Uniform Guidelines, one must first ask: What would be gained? What would be the purpose of such effort? A number of thoughts come to mind. Would the purpose be solely to make the Uniform Guidelines consistent with scientific research embodied in the Standards for Educational and Psychological Testing (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999) and the Principles for the Validation and Use of Personnel Selection Procedures (SIOP, 2003)? This would appear to be illogical and not even feasible given the cross purposes of the three documents. The stated purpose of the Uniform Guidelines is to prohibit employment discrimination. The purpose of the Standards is to “provide criteria for the evaluation of tests, testing practices, and the effects of test use” (Standards, p. 2). The purpose of the Principles on the other hand is “to be aspirational and to
facilitate and assist the validation and use of selection procedures” (Principles, p. 2).

A more complete explication of the purpose of each document is shown in Table 1. When one compares the three documents, it is apparent that they do not have the same purposes at all. As an example, the Uniform Guidelines are intended to affect organizational policies and practices in a manner that results in the elimination of employment discrimination. One purpose of the Uniform Guidelines is clearly to address public policy regarding the use of tests and other selection procedures. The Standards are not intended to address public policy or address legal or regulatory requirements regarding the use of tests. Therefore, it is reasonable to conclude that any attempt to overhaul the Uniform Guidelines based on the Standards would require a shift in the application of the Standards to address legal and regulatory matters relevant to eliminating employment discrimination. I would venture that such a shift in application would not even be feasible because reaching consensus on general scientific questions is much less difficult than converting scientific principles into law.

A similar problem arises if one were to attempt to overhaul the Uniform Guidelines based on the Principles. The Principles “is not intended to be mandatory” (Principles, p. 2). It is difficult to see how the Principles could be interpreted in a manner

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**Table 1. Purpose of the Standards, Principles, and Uniform Guidelines**

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<th>Standards for Educational and Psychological Testing</th>
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<td>• The Standards makes no attempt to provide psychometric answers to questions of public policy regarding the use of tests. In general, the Standards advocates that, within feasible limits, the relevant technical information be made available so that those involved in policy decisions may be fully informed.</td>
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<td>• The Standards do not attempt to repeat or incorporate the many legal or regulatory requirements that might be relevant to the issues it addresses. In some areas, such as the collection, analysis, and use of test data, and results for different subgroups, the law may both require participants in the testing process to take certain actions and prohibit those participants from taking other actions.</td>
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<td>• Where it is apparent that one or more standards or comments address an issue on which established legal requirements may be particularly relevant, the standard, comment, or introductory material may make note of that fact. Lack of specific reference to legal requirements, however, does not imply that no relevant requirement exists.</td>
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<th>Principles for the Validation and Use of Personnel Selection Procedures</th>
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<td>• The Principles is intended to be consistent with the Standards.</td>
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<td>• Federal, state, and local statutes, regulations, and case law regarding employment decisions exist. The Principles is not intended to interpret these statutes, regulations, and case law, but can inform decision making related to them.</td>
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<tr>
<td>• This document is intended to be aspirational and to facilitate and assist the validation and use of selection procedures. It is not intended to be mandatory, exhaustive, or definitive, and may not be applicable to every situation.</td>
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<th>Uniform Guidelines on Employee Selection Procedures</th>
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<td>• The Uniform Guidelines are intended to establish a uniform federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin.</td>
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<td>• The fundamental principle underlying the Uniform Guidelines is that employer policies or practices that have an adverse impact on employment opportunities of any race, sex, or ethnic group are illegal under Title VII and the executive order unless justified by business necessity.</td>
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<td>• A selection procedure which has no adverse impact generally does not violate Title VII or the executive order. This means that an employer may usually avoid the application of the guidelines by use of procedures that have no adverse impact.</td>
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that would address matters of law or even regulatory intent. Again this is because crafting consensus around the aspirational goal of moving a professional community toward its highest ideals is less difficult than developing consensus around conversion of those ideals into practical applications such as prohibiting employment discrimination.

Table 1 shows rather clearly why attempting to overhaul the Uniform Guidelines based on the Standards or Principles would not be feasible, useful, or even desirable. The documents are too dissimilar in intent. Given the legal deference afforded the Uniform Guidelines, it stands to reason that major revisions are feasible only to the extent that they do not materially alter the legal intent of the document, which is to prohibit employment discrimination. It would appear that the conflicting purposes of the Uniform Guidelines, Standards, and Principles significantly reduce the likelihood of major changes that would meet the criterion.

Some would argue that the real objective of overhauling the Uniform Guidelines is to make employment selection procedures easier to defend in court. Whether true or not, this would certainly be the perception of many. Why would SIOP want to be associated with such a perception, particularly if the likelihood of positive outcomes from this effort would be dubious at best? An equally likely perception is that the intent of this effort is to roll back prohibitions against employment discrimination. This is not as far fetched as it might seem. Given that neither the Standards nor the Principles is designed to address employment discrimination, there is no guarantee that an overhaul of the Uniform Guidelines based on these documents would be devoid of unforeseen loopholes that might lessen the effectiveness of the antidiscrimination provisions of Title VII of the 1964 Civil Rights Act. Here again, one has to ask why SIOP would want to get involved in a legal, social, and political firestorm such as this.

The best reason for SIOP to join an effort to address inconsistencies between the Uniform Guidelines and current scientific knowledge and best practices would be to better ensure substantive, informed, and unbiased evaluation of employment selection procedures. This would be an appropriate endeavor for SIOP to undertake. However, this could be achieved without overhauling or rescinding the Uniform Guidelines. A brief discussion of feasibility is in order before I explain why this is the case.

The Feasibility of Rescinding or Overhauling the Guidelines

Who Would Have Responsibility?

If an effort was made to overhaul the Uniform Guidelines, who would have responsibility for this effort? Would responsibility lie with the Equal Employment Opportunity Commission (EEOC)? Perhaps, responsibility should be given jointly to the EEOC, the United States Department of Labor’s Office of Federal Contract Compliance, and the United States Justice Department. What about SIOP and other divisions of the American Psychological Association? What would be their role? Why not place responsibility with all of these organizations? To take it a step further, why should direct involvement be limited to only these organizations? Even if these were the only organizations involved, who would make up the body of individuals with direct responsibility for spearheading the project and on what authority? These individuals would have to make critical decisions regarding the purpose, content, and proper interpretation of the “new” guidelines. What areas of expertise must they have to accomplish this, and who would decide?

The Major Stakeholders

Even if an appropriate group could be convened to spearhead an effort to overhaul the Uniform Guidelines, there would no doubt be a lengthy list of stakeholders vying to influence the process and the outcome. When the current Uniform Guidelines were drafted in 1977, comments
were received from over 200 organizations, including civil rights groups, organizations representing state and local governments, major industrial and building trades unions, and organizations representing persons with disabilities, to mention just a few. Any attempt to make major revisions to the Uniform Guidelines would attract an even larger array of stakeholders today. This might greatly reduce the likelihood of consensus regarding any aspect of "revised guidelines."

The Standards are currently undergoing revision. It is anticipated that the Principles may have to be revised to make them consistent with the latest edition of the Standards when it is published. As neither document is intended to address matters of public policy, one would have to assume that both would require reinterpretation or even additional revision to address this issue. This would have to occur before addressing the question of how to use them to revamp the current Uniform Guidelines. The core objective of both the Standards and the Principles is to inform but not dictate policy. How would this be reconciled with the requirement that the revamped Uniform Guidelines continue to enforce prohibitions against employment discrimination? For example, the Uniform Guidelines require an employer to conduct a search for valid alternatives with less adverse impact even if a selection procedure has been demonstrated to be valid. This provision is clearly designed to influence public policy. How would this provision be addressed based on the Standards or the Principles?

**Proposed Deficiencies in the Guidelines**

A number of inconsistencies among the Uniform Guidelines, Standards, and Principles have been identified as deficiencies by the authors of the focal article. Two of these proposed deficiencies will be discussed here for purposes of illustration. In the focal article the authors propose that a major deficiency in the Uniform Guidelines is the assumption of situational specificity and focus on local validation studies. This has been a major concern of many practitioners and researchers since publication of the Uniform Guidelines in 1978. The primary argument is that scientific research has proven via validity generalization and meta-analytic methods that variability in validity coefficients across different settings is largely if not wholly due to sampling error (inadequate sample size) or statistical artifacts such as criterion unreliability. Therefore, the situational specificity of validity coefficients is a myth. Three points can be made in rebuttal: (a) There is far less inconsistency among the three documents than acknowledged by the authors of the focal article, (b) there is credible scientific evidence refuting the proposition that situational specificity is a myth, and (c) situational specificity as defined in the Uniform Guidelines encompasses validity and adverse impact that is in fact situation specific. Each of these points is discussed below.

Although the Uniform Guidelines do not adequately reflect current scientific research regarding the transferability of criterion-related validity evidence across settings, there is sufficient acknowledgement of the relevant methodology to allow meta-analytic findings to be used to support the use of selection procedures across settings based on validity evidence gathered in a given setting. Table 2 shows a direct comparison among the Standards, Principles, and Uniform Guidelines on the subject of using the results of criterion-related validity studies across settings. Far from excluding this approach, the Uniform Guidelines indicate specifically when it would be appropriate to use criterion-related validity evidence in this manner. Three requirements must be met. First, the original validity study must in fact provide sufficient evidence of validity. Second, similarity must be shown between the jobs in the original validation study and those in the new setting. It seems logical that this requirement could also be met by showing similarity between performance criteria or job components across settings. Finally,
there must be a study of the fairness of the selection procedure in both settings. To be sure, the Uniform Guidelines do not reflect advancements in meta-analytic methods in this area, but this hardly warrants revamping the entire document. In addition, I have found that getting a court to accept extant research in this area or any other area is relatively straightforward in terms of direct testimony and can be done by simply pointing out those areas where the Uniform Guidelines may be dated. One has to acknowledge, however, that the Uniform Guidelines completely misconstrue the meaning of fairness in light of current thinking and research and confuse it with test bias. However, this too can be overcome by simply addressing it with the court if necessary or using other means to call attention to it. In terms of affecting court decisions, revamping the Uniform Guidelines with regard to situational specificity is not essential.

Current scientific literature on criterion-related validation clearly indicates that validity coefficients are to some degree situation specific. The Principles indicate that generalization of validity evidence can be supported by (a) generalized validity inferences from a given situation and (b) a compelling argument for its applicability to the situation of interest. The word “compelling” is instructive because it suggests that the appropriateness of relying on criterion-related validity evidence from one setting to support use of a selection procedure in a different setting is not a foregone conclusion. The credibility interval for validity coefficients can vary substantially. Steel et al. (2010) contend that variability in validity coefficients across settings...
is one of the primary reasons for utilizing more refined validity generalization strategies such as synthetic validity or job component validity. Validity coefficients can vary widely depending upon the predictor composite and criterion measure used (Schmidt & Hunter, 1998). Murphy and Shiarella (1997) found for example that the 95% confidence interval for validity coefficients can range from .20 to .78 depending on the weight given to components of the predictor composite and the criterion measure. Thus, the concept of situational specificity is far from myth and warrants careful consideration when assessing the application of validity evidence across situations.

The Uniform Guidelines embrace the fundamental principles that employers should investigate or look for selection procedures that are valid and minimize adverse impact. This provision is aimed at preventing employers from unnecessarily relying on selection procedures that disproportionately screen out particular subgroups when alternatives are available. Even if one were to accept the premise that validity coefficients are not situation specific, which is in fact incorrect, assessing or comparing the level of validity and adverse impact across employment settings is clearly situation specific. Thus, situational specificity as defined by the Uniform Guidelines encompasses more than variability in validity coefficients. The difference in definitions is the direct result of the divergent purposes of the Uniform Guidelines, Standards, and Principles.

A second deficiency in the Uniform Guidelines pointed out in the focal article is “the assumption that adverse impact is a fault of a test and not a reflection of real population differences in subgroup abilities and skills.” In point of fact both the Principles and the Standards recognize that subgroup differences resulting from the use of a test or selection procedure can threaten validity if such differences are the result of bias or contamination such as construct irrelevant variance. Newman, Hanges, and Outtz (2007) offer an example by showing that residual variance in predictor scores unrelated to the criterion can be related to race.

The two supposed deficiencies just discussed illustrate that an overhaul of the Uniform Guidelines may not result in the outcomes anticipated by some. As an example, a more complete discussion of validity generalization and meta-analysis techniques would not necessarily result in a more favorable assessment of cognitive ability tests, which some assume would be the case. Ironically, the use of meta-analytic methods has revealed that other assessment tools or combinations of tools can result in validity equal to, if not higher than that for cognitive ability tests and produce less adverse impact (Bobko, Roth, & Potosky, 1999; Schmitt, Chan, Sheppard, & Jennings, 1997). The research on alternatives to cognitive abilities tests spans almost 3 decades and began with the thought that few alternatives existed (Reilly & Chao, 1982). One could argue that meta-analytic methods have provided a foundation for comparing selection procedures on validity and adverse impact, and these methods came about at least in part because of the Guidelines (Outtz, 2011a,b). This research has allowed us to move beyond merely describing subgroup differences on various selection procedures to suggestion of a theory of why adverse impact occurs (Outtz, 1998; Outtz & Newman, 2010).

Summary

Abolishing or overhauling the Uniform Guidelines would be an inappropriate objective (particularly for SIOP) for a number of reasons including the following:

• The stated purpose of the Uniform Guidelines is to “prohibit discrimination in employment practices on grounds of race, color, religion, sex, or national origin.” Why should SIOP take the lead or participate in an effort to abolish such a document? In my opinion it would be a public relations nightmare.
Many provisions of the *Uniform Guidelines* are unrelated to scientific research, and they should be. Therefore, why abolish or revamp the entire document?

If the *Uniform Guidelines* were abolished or overhauled, what would be the replacement? There is no readily available or feasible process for replacing the *Uniform Guidelines* (e.g., too many stakeholders with competing or conflicting interests).

Even if the *Uniform Guidelines* were abolished or revamped, the case law generated by them would remain.

Some provisions of the *Uniform Guidelines* (e.g., the search for alternatives) have been the impetus for major advances in employment selection research. Again, why abolish or revamp the entire document?

The appropriate goal of a revision of the *Uniform Guidelines* should be to better ensure substantive, informed, unbiased evaluation of employment selection procedures. Here are several less intrusive and more feasible suggestions for achieving this goal:

- SIOP should prepare position papers that address key provisions of the *Uniform Guidelines* that warrant more careful interpretation in light of current scientific research and standards of best practice.
- SIOP should lobby federal enforcement agencies to adopt these position papers, respond to them, or produce their own.
- SIOP should be more active in employment litigation to inform courts of current scientific research and standards of accepted professional practice. The goal would be to obtain court opinions that address and clarify key technical provisions of the *Uniform Guidelines*.

All three of the suggestions above can be pursued simultaneously. SIOP’s approach to informing the professional community with regard to the validation and use of employment selection procedures has been “spot on,” and we should be proud of it. SIOP has spearheaded scientific research that has proven invaluable in estimating the true validity of various selection procedures. This research has contributed greatly to the body of knowledge aimed at increasing our understanding of how to minimize adverse impact. True enough, there is more work to be done, however, revamping the *Uniform Guidelines* would not be a wise use of time or resources.

**References**


