



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MATTHEW LEE WIENER  
Acting Chairman  
Vice Chairman  
Executive Director

March 16, 2020

Via Regulations.gov

Mr. Russell T. Vought  
Acting Director  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503

Re: OMB–2019–0006, Improving and Reforming Regulatory Enforcement and Adjudication, Public Rulemaking Procedures

Dear Mr. Vought:

I offer this comment on behalf of the Office of the Chairman of the Administrative Conference of the United States (ACUS), an independent agency within the executive branch. *See* 5 U.S.C. § 591 *et seq.* Insofar as this comment sets forth views not contained in ACUS’s formal recommendations, they reflect only the views of the Office of the Chairman.

No federal agency has devoted more attention than ACUS to improving administrative adjudication. ACUS has issued dozens of recommendations and undertaken still more studies on this subject—always, in the language of its authorizing statute, “to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.” 5 U.S.C. § 591(a). The recommendations reflect non-partisan consensus among the representatives of the many federal agencies who appoint members to ACUS and the forty or so public members (leading law professors, practitioners, and other experts) who together comprise ACUS’s Assembly. *See* 5 U.S.C. § 593.

Below I have identified, summarized, and provided website links to the ACUS recommendations responsive to particular questions in OMB’s request. (Selected recommendations of particular relevance to the request appear in the Appendix.) As it considers ways to improve and reform administrative adjudication, OMB may also find useful the many reports and sourcebooks ACUS has commissioned—among them [Federal Administrative Adjudication Outside the Administrative Procedure Act \(2019\)](#) (hereinafter *Adjudication Sourcebook*), written by Professor Michael Asimow, as well ACUS’s recently revised [Model Adjudication Rules](#) (2018). A complete list of all of ACUS’s adjudication-related resources appears at [www.acus.gov/adjudication](http://www.acus.gov/adjudication).

An initial technical explanation about the recommendations may be helpful. Some of the responses below distinguish between adjudications governed by the formal hearing provisions of the Administrative Procedure Act, *see* 5 U.S.C. §§ 554, 556–557, and adjudications not governed by those provisions but in which an evidentiary hearing is legally required. (I refer to the former as “APA adjudications” and the latter as “non-APA adjudications.”) I have drawn the distinction because it is explicit or implicit in some ACUS recommendations. Nearly all of ACUS’s early recommendations on adjudication covered only APA adjudications. All but one of its recent recommendations on adjudication cover both. This is the result of ACUS’s growing recognition that non-APA adjudications, which today outnumber APA adjudications, are often as formal (that is, trial-like) as APA adjudications and, with some exceptions, should be conducted using the same or similar procedures. *See* [Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act](#), 81 Fed. Reg. 94,314 (Dec. 23, 2016). Many of ACUS’s specific recommendations on APA adjudications are equally applicable to non-APA adjudications, and many of the best practices in Recommendation 2016-4 apply similarly to APA adjudications.

“Non-APA adjudication,” as used here, does not include adjudications in which an evidentiary hearing is not legally required. ACUS has not, for the most part, addressed the procedures appropriate in such informal adjudications. It would be difficult to adopt many cross-cutting recommendations applicable to informal adjudications because they differ so much from program-to-program, especially with respect to the formality of their proceedings. *See* [Adjudication Sourcebook](#), *supra*, at 89–98. That said, some of the recommendations cited here—especially those relating to public-disclosure of adjudication rules—may be equally applicable to at least certain informal adjudications.

### **Independence and Impartiality of Agency Adjudicators**

*OMB’s request asks whether adjudicators “sometimes lack independence from the enforcement arm of the agency” and “[w]hat reform(s) would adequately separate functions and guarantee an adjudicator’s independence.”*

APA adjudications are already subject to a separation-of-functions requirement relating to administrative law judges (ALJs). *See* 5 U.S.C. § 554(d)(2). [Recommendation 2016-4](#) asks agencies to establish a similar requirement in non-APA adjudications. *See* Recommendation 2016-4, *supra*, at 4 (§ 3). That includes prohibiting adversarial personnel “from serving as a decisionmaker or staff advising or assisting the decisionmaker in that same case” or “furnishing ex parte advice or factual materials to a decisionmaker or staff who advise or assist decisionmakers.” *Id.*

Two ACUS recommendations urge agencies to adopt hiring procedures so that they hire only adjudicators—whether the adjudicators are ALJs, in APA adjudications, or non-ALJ adjudicators (or administrative judges), in non-ALJ adjudications—who will act impartially and maintain the appearance of impartiality. *See* [Recommendation 2019-9, Recruiting and Hiring Agency Attorneys](#), at 10 (§ 22), 84 Fed. Reg. 71,355 (Dec. 27, 2019); [Recommendation 2019-2](#),

*Agency Recruitment and Selection of Administrative Law Judges*, at 5 (§ 4), 84 Fed. Reg. 38,930 (Aug. 8, 2019).

A related recommendation seeks to enhance the impartiality, and thereby public confidence in, agency adjudications by asking agencies to adopt litigant-enforceable rules providing for the recusal of adjudicators whose impartiality might reasonably be questioned. *See Recommendation 2018-4, Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2,139 (Feb. 6, 2019). That recommendation emphasizes that enforcement proceedings may warrant especially strong recusal rules to preserve the appearance of impartiality. *See id.* at 5 (§ 3.b). Many agencies now have no recusal rules. They rely only on generally applicable government ethics rules that, while important, do not address impartiality generally and are not enforceable by litigants in the context of particular adjudications. *See id.* at 3. ACUS has commissioned a forthcoming report that will identify and catalogue existing agency recusal rules. It will be an important resource for agencies that wish to adopt their own.

### **Rules of Evidence**

*OMB's request asks what rules "guard against hearsay and/or weigh reliability and relevance" in agency adjudications and whether "the Federal Rules of Evidence create a fairer evidentiary framework."*

The APA requires that agencies "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). Consistent with this requirement, ACUS has recommended that, in APA adjudications, agencies "clearly confer on presiding officers discretion to exclude unreliable evidence." *Recommendation 86-2, Use of Federal Rules of Evidence in Federal Agency Adjudications*, at 2 (§ 2), 51 Fed. Reg. 25,642 (July 16, 1986); and that, in non-APA adjudications, agencies "allow an opportunity for rebuttal, which can take the form of cross-examination of an adverse witness as well as additional written or oral evidence," *Recommendation 2016-4, supra*, at 8 (§ 24).

ACUS has also recommended that, in APA adjudications, agencies rely on Rule 403 of the *Federal Rules of Evidence* to exclude relevant evidence whose probative value is outweighed by other factors, including wasting time. *See Recommendation 86-2, supra*, at 2 (§ 2).

As for the *Federal Rules of Evidence* generally, ACUS has recommended to Congress that it not mandate their use in APA adjudications. *See Recommendation 86-2, supra*. Some agencies' procedural regulations do require adherence to, or otherwise provide for reliance on, the *Federal Rules of Evidence*. Nothing in Recommendation 86-2 discourages the practice.

### **Procedures in Agency Adjudication**

*OMB's request asks whether there are "certain types of proceedings that, due to exigency or other causes, warrant fewer procedural protections than others."*

ACUS has recognized that, in non-APA adjudications, the best practices for some types of cases may not be "applicable or desirable" for others. *Recommendation 2016-4, supra*, at 2.

Hence it has encouraged agencies to adopt procedural rules that achieve a favorable balance of decisional accuracy, administrative efficiency, and procedural fairness tailored to the objectives and features of particular adjudicative programs. *See id.* at 3.

In an earlier recommendation, ACUS set forth the factors Congress should consider in deciding whether ALJs appointed under the APA rather than non-ALJ adjudicators be used in particular adjudications. *See* [Recommendation 92-7](#), *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,760 (Dec. 29, 1992). The use ALJs would be most appropriate in adjudications, Recommendation 92-7 states, that involve a “[s]ubstantial impact on personal liberties or freedom”; “[o]rders that carry with them a finding of criminal-like culpability”; the “[i]mposition of sanctions with substantial economic effect”; or “[d]etermination of discrimination under civil rights or other analogous laws.” *Id.* § A.1. *Accord* Am. Bar. Ass’n, Resolution 113 (July 10–11, 2000).

### **Production of Evidence Favorable to Respondents**

*OMB’s asks whether agencies should “be required to produce all evidence favorable to the respondent” and “[w]hat rules and/or procedures would ensure the expedient production of all exculpatory evidence.”*

ACUS has recommended that, in non-APA adjudications, agencies allow adjudicators to permit discovery in appropriate circumstances, [Recommendation 2016-4](#), *supra*, at 6 (§ 10)—“through depositions, interrogatories, and other methods . . . used in civil trials,” *id.*— and “permit parties to inspect unprivileged materials in agency files that are not otherwise protected,” *id.* at 6 (§9). ACUS has provided agencies with model discovery rules. *See* [Model Adjudication Rules](#), *supra*, §§ 230–32.

### **Public Accountability**

*OMB’s request asks whether agencies are “accountable to the public in the context of enforcement and adjudications” and, if not, how agencies can “create greater accountability.”*

ACUS has emphasized in several recommendations the need for transparency and public-disclosure as an important component of accountability. That begins, as ACUS has recommended in the context of non-APA adjudications, with the publication in the *Federal Register* and *Code of Federal Regulations* of “all important procedures and practices that affect persons outside the agency.” [Recommendation 2016-4](#), *supra*, at 9–10 (§ 28). Those regulations and many other key adjudication-related materials—including guidance documents, practice manuals, and decisions— should appear on agency websites. ACUS has issued two recommendations that guide agencies in doing so. *See* [Recommendation 2018-5](#), *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); [Recommendation 2017-1](#), *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017); *see also* [Recommendation 2016-4](#), *supra*, at 9–10 (§§ 27–29); [Recommendation 89-8](#), *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989). ACUS also suggested that agencies adopt and design electronic case-management systems to facilitate public access to case filings and decisions, *see*

[Recommendation 2018-3](#), *Electronic Case Management in Federal Administrative Adjudication*, at 1 (§ 1), 7 (§ 5.b), 83 Fed. Reg. 30,686 (June 29, 2018), and it has recommended that agencies adopt and make available on their websites procedures governing the use and preservation of internet sources on which adjudicators rely, *see* [Recommendation 2019-6](#), *Independent Research by Agency Adjudicators in the Internet Age*, at 6–8 (§§ 3–7), 84 Fed. Reg. 71,350 (Dec. 27, 2019).

As this Administration has recognized, agency guidance documents play an especially critical role in enforcement and adjudication. *See* Exec. Order No. 13,892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 84 Fed. Reg. 55,239 (Oct. 9, 2019); *see also* Exec. Order No. 13,891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55,235 (Oct. 9, 2019). ACUS has addressed this subject in two respects that relate to OMB’s question about accountability.\*

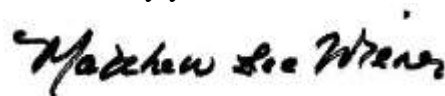
First, ACUS has provided detailed recommendations as to how agencies should make guidance documents readily accessible to the public on their websites. *See* [Recommendation 2019-3](#), *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019). These recommendations align with Executive Order 13,891 in many key respects. Agencies will find in them best practices that may assist agencies in complying with that Order and otherwise ensuring easy public access to their materials.

Second, ACUS has recommended that agencies consider providing for public input on guidance documents—whether before and after their adoption, as circumstances dictate—and it has suggested specific ways for agencies to do so. *See* [Recommendation 2019-1](#), *Agency Guidance Through Interpretive Rules*, at 7–11 (§§ 8–10, 13–14), 84 Fed. Reg. 38,927 (Aug. 8, 2019); [Recommendation 2017-5](#), *Agency Guidance Through Policy Statements*, at 10–11 (§§ 9–12), 82 Fed. Reg. 61,734 (Dec. 29, 2017).

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The Office of the Chairman would welcome any questions OMB may have about the above-cited or other ACUS materials on adjudication. Please have OMB staff direct any questions to Jeremy Graboyes, Deputy Research Director, at [jgraboyes@acus.gov](mailto:jgraboyes@acus.gov).

Sincerely yours,



Matthew Lee Wiener

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\* The second two recommendations cited below address other critical aspects of guidance documents—including how they should be used, and not used—that do not concern the question OMB has posed. The President’s executive orders align with those recommendation in key respects, most notably in the orders’ requirement that agencies do not treat guidance documents as legally binding on members of the public.

## APPENDIX

### Selected Recommendations of the Administrative Conference of the United States

Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019)

Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019)

Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2,142 (Feb. 6, 2019)

Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2,139 (Feb. 6, 2019).

Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017)

Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017)

Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016)





## **Administrative Conference Recommendation 2019-3**

### **Public Availability of Agency Guidance Documents**

**Adopted June 13, 2019**

Among their many activities, government agencies issue guidance documents that help explain their programs and policies or communicate other important information to regulated entities and the public. Members of the public should have ready access to these guidance documents so that they can understand how their government works and how their government relates to them. Agencies should manage their guidance documents consistent with legal requirements and principles of governmental transparency and accountability.

Guidance documents can take many forms.<sup>1</sup> They include what the Administrative Procedure Act (APA) calls “interpretative rules” and “general statements of policy,” which are two types of rules that are not required to undergo the notice-and-comment procedures applicable to legislative rules.<sup>2</sup> They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies.<sup>3</sup> When managing

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<sup>1</sup> To allow agencies flexibility to manage their varied and unique types of guidance documents, this Recommendation does not seek to provide an all-encompassing definition of guidance documents. This Recommendation is addressed, at a minimum, to those guidance documents required by law to be published in the *Federal Register* and any other guidance document required by law to be made publicly available. *See infra* notes 4–7 and accompanying text.

<sup>2</sup> Interpretative rules and general statements of policy are “rules” under the APA. *See* 5 U.S.C. §§ 551(4), 553. Although the APA does not define these two terms, the *Attorney General’s Manual on the Administrative Procedure Act* defines “interpretative rules” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers,” and “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

<sup>3</sup> *See* Cary Coglianesi, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents>.



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the public availability of agency information in implementing this Recommendation, agencies should be clear about what constitutes guidance and what does not.

Several laws require agencies to make at least certain guidance documents available to the public. The Federal Records Act requires agencies to identify “records of general interest or use to the public that are appropriate for public disclosure, and . . . post[] such records in a publicly accessible electronic format.”<sup>4</sup> The Freedom of Information Act (FOIA) requires that agencies publish “statements of *general* policy or interpretations of *general* applicability formulated and adopted by the agency” in the *Federal Register*.<sup>5</sup> FOIA also requires that agencies “make available for public inspection in an electronic format . . . [specific] statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*,” as well as “administrative staff manuals and instructions to staff that affect a member of the public.”<sup>6</sup> Finally, Congress has occasionally enacted agency-specific requirements for posting guidance documents online. For example, the Food and Drug Administration is required to “maintain electronically and update and publish periodically in the *Federal Register* a list of guidance documents” and to ensure that “[a]ll such documents [are] made available to the public.”<sup>7</sup>

The Administrative Conference has recommended that various types of guidance documents be made available online. Recommendation 2017-5, *Agency Guidance Through*

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<sup>4</sup> 44 U.S.C. § 3102.

<sup>5</sup> 5 U.S.C. § 552(a)(1)(D) (emphasis added). To the extent that the documents an agency considers guidance would fall within any of the nine FOIA exceptions, such as “records or information compiled for law enforcement purposes,” 5 U.S.C. § 552(b)(7), agencies would not be required to disclose them.

<sup>6</sup> 5 U.S.C. § 552(a)(2). “Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a ‘FOIA Library.’” U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 6 (2019 ed.), available at [https://www.justice.gov/oip/foia-guide/proactive\\_disclosures/download](https://www.justice.gov/oip/foia-guide/proactive_disclosures/download); see also E-Government Act, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 44 U.S.C. 3501 note) (requiring agencies, to the extent practicable, to publish online documents that FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies to produce a “small entity compliance guide” for some legislative rules and post those guides “in an easily identified location on the website of the agency”).

<sup>7</sup> 21 U.S.C. § 371(h)(3).





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*Policy Statements*, provided that “[a]ll written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found.”<sup>8</sup>

Recommendation 2019-1 includes identical language directing agencies to do the same for interpretive rules.<sup>9</sup> Similarly, Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to “provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications.”<sup>10</sup>

Although many agencies do post guidance documents online, in recent years concerns have emerged about how well organized, up to date, and easily accessible these documents are to the public. At various times, the Office of Management and Budget (OMB) has instructed agencies on their management of guidance documents.<sup>11</sup> The United States Government Accountability Office has conducted an audit that highlights the management challenges associated with agency dissemination of guidance documents online.<sup>12</sup> Several legislative proposals have been introduced (but not enacted) to create standards for public disclosure of guidance documents.<sup>13</sup>

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<sup>8</sup> Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 12, 82 Fed. Reg. 61,728, 61,737 (Dec. 29, 2017).

<sup>9</sup> Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, \_\_\_ Fed. Reg. \_\_\_.

<sup>10</sup> Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

<sup>11</sup> For example, OMB Bulletin 07-02 directs Executive Branch departments and agencies to provide a current list of significant guidance documents in effect on their websites. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); Office of Mgmt. & Budget, Memorandum No. M-07-07, *Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices”* (Jan. 18, 2007), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf>; see also Office of Mgmt. & Budget, Memorandum No. M-19-14, *Guidance on Compliance with the Congressional Review Act* (Apr. 11, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> (calling upon both executive and independent regulatory agencies to send certain pre-publication guidance materials to the Office of Information and Regulatory Affairs).

<sup>12</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015).

<sup>13</sup> The most notable of the pending legislation would require agencies to publish guidance documents on their websites and a centralized website selected by OMB. See Guidance Out of Darkness Act, S. 380, 116th Cong.



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Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance documents are available), (b) currency (whether guidance documents are up to date), (c) accessibility (whether guidance documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).

With these principles in mind, this Recommendation calls on agencies to consider opportunities for improving the public availability of their guidance documents. Each agency must decide which guidance documents to post online and how to present them in a manner that will ensure their availability and usefulness for regulated parties and the public. The Recommendation provides best practices to guide agencies to make their guidance documents more publicly available. These best practices are intended to be adaptable to fit agency-specific circumstances.<sup>14</sup> The Administrative Conference notes that each agency is different, and the practices outlined in this Recommendation may be employed with flexibility as necessary (perhaps based on factors such as an agency's internal structures, available resources, types and volume of documents, the parties it regulates, and its end users) so that guidance documents are made available to the public in a logical and suitably comprehensive manner.

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(2019); S. REP. NO. 116-12 (2019); Guidance Out of Darkness Act, H.R. 4809, 115th Cong. (2018); H.R. REP. NO. 115-972 (2018); *see also* H.R. 2142, 116th Cong. (2019) (requiring the creation of a centralized website for small business compliance guides). For other legislation, see Coglianese, *supra* note 3, at 6–7.

<sup>14</sup> For example, even the term “agency” as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 11 (2d ed. 2018), *available at* <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition>.



## RECOMMENDATION

### Procedures for Managing Guidance Documents

1. Agencies should develop written procedures pertaining to their internal management of guidance documents.
  - a. The procedures should include:
    - i. a description of relevant categories or types of guidance documents subject to the procedures; and
    - ii. examples of specific materials not subject to the procedures, as appropriate.
  - b. The procedures should address measures to be taken for the:
    - i. development of guidance documents, including any opportunity for public comment;
    - ii. publication and dissemination of draft or final guidance documents; and
    - iii. periodic review of existing guidance documents.
  - c. Agency procedures should indicate the extent to which any of the measures created or identified in response to Paragraph 1(b) should vary depending on the type of guidance document or its category, as defined by any provisions in agency procedures responsive to Paragraph 1(a).
2. All relevant agency staff should receive training in agencies' guidance document management procedures.
3. Agencies should develop and apply appropriate internal controls to ensure adherence to guidance document management procedures.
4. To facilitate internal tracking of guidance documents, as well as to help members of the public more easily identify relevant guidance documents, agencies should consider assigning unique identification numbers to guidance documents covered by their written guidance procedures. Once a guidance identification number has been assigned to a guidance document, it should appear on that document and be used to refer to the



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document whenever it is listed or referenced on the agency's website, in public announcements, or in the *Federal Register* or the *Code of Federal Regulations*.

5. Using appropriate metrics, agencies should periodically review their guidance document management procedures and their implementation in order to assess their performance in making guidance documents available as well as to identify opportunities for improvement.
6. Agencies should provide opportunities for public feedback on their efforts to promote the public availability of their guidance documents.

### **Guidance Documents on Agency Websites**

7. Agencies should maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating access to those documents.

Such guidance document webpages should include:

- a. Agencies' written guidance document management procedures pursuant to Paragraph 1, if developed;
- b. Plain language explanations (sometimes known as "explainers") that define guidance documents, explain their legal effects, or give examples of different types of guidance documents;
- c. A method for users to find relevant guidance documents, which might include:
  - i. Comprehensively listing and indexing agency guidance documents;
  - ii. Displaying links to pages where guidance documents are located, which could be organized by topic, type of guidance document, agency subdivision, or some other rubric; or
  - iii. A dedicated search engine; and
- d. Contact information or a comment form to facilitate public feedback related to potentially broken links, missing documents, or other errors or issues related to the agency's procedures for the development, publication, or disclosure of its guidance documents.



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8. Agencies should provide the public with access to a comprehensive set of its guidance documents—either on the dedicated guidance document webpage or other webpages—in accordance with its written procedures.
  - a. Agency websites should include, at minimum, (1) all guidance documents required by law to be published in the *Federal Register* and (2) all other guidance documents required by law to otherwise be made publicly available.
  - b. Guidance documents should generally be made available in downloadable form.
  - c. Links to downloadable copies of agencies' Small Entity Compliance Guides—issued in accordance with the Small Business Regulatory Enforcement Fairness Act<sup>15</sup>—should be provided.
  - d. Agency websites should include relevant information for each guidance document, such as its title, any corresponding regulatory or statutory provision that the guidance document relates to or interprets (if applicable), the date of issuance, and any assigned identifying number.
  - e. Agencies should keep guidance documents on their websites current. To the extent a website contains obsolete or modified guidance documents, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance document.
9. Although not every agency website will have the same population of users, agency websites should be designed to ensure that they are as helpful to the end user as possible. In particular, agencies should ensure:
  - a. Simple words, such as “guidance,” are used in describing webpages that discuss or list guidance documents;

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<sup>15</sup> Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).



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- b. Agency guidance document webpages are easy to find from their website's home page, through such techniques as a linked tab or entry in a pull-down menu;
  - c. The search engine on agency websites works effectively for finding relevant guidance information;
  - d. Guidance documents, when listed on webpages, are displayed in a manner that helps the public find a particular document, by using such techniques as indexing, tagging, or sortable tables; and
  - e. Websites displaying guidance documents are kept up to date, with any broken links fixed and any amended or withdrawn documents clearly labeled as such.
10. To make guidance documents accessible to users who are searching for information elsewhere on agency websites, agencies should strive to ensure that clearly labeled links to all guidance documents related to specific rules, issues, or programs are easily found in the corresponding section of the website where users are likely to find that information especially helpful.

### **Public Notice of Guidance Documents**

11. Agencies should undertake affirmative measures to alert interested members of the public to new and revised guidance documents. Such measures could include, among other things, establishing public email distribution lists to disseminate alerts about new or revised guidance documents, using social media to disseminate guidance documents and related information, having agency staff speak about guidance documents at relevant conferences or meetings, or preparing printed pamphlets or other hard-copy documents. Even when not required to do so by law, agencies should consider publishing information about new or revised guidance documents in the *Federal Register*.
12. Agencies should consider providing descriptive references (such as links, if possible) to relevant guidance documents in appropriate sections of the *Code of Federal Regulations*, stating where the public can access the documents.





## **Administrative Conference Recommendation 2019-1**

### **Agency Guidance Through Interpretive Rules**

**Adopted June 13, 2019**

The Administrative Procedure Act (APA) exempts policy statements and interpretive<sup>1</sup> rules from its requirements for the issuance of legislative rules, including notice and comment.<sup>2</sup> The *Attorney General's Manual on the Administrative Procedure Act* defines “general statements of policy” as agency statements “issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>3</sup> The *Manual* similarly defines “interpretive rules” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>4</sup> Because of the commonalities between policy statements and interpretive rules, including their advisory function, many scholars and government agencies have more recently adopted the umbrella term “guidance” to refer to both interpretive rules and policy statements.<sup>5</sup>

The Administrative Conference has issued several recommendations on policy statements.<sup>6</sup> The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*

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<sup>1</sup> In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

<sup>2</sup> 5 U.S.C. § 553(b)(A).

<sup>3</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-final-report>.

<sup>6</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 1992-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 1976-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).



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*Statements*, offers best practices to agencies regarding policy statements. The Recommendation advises agencies not to treat policy statements as binding on the public and to take steps to make clear to the public that policy statements are nonbinding. It also suggests measures agencies could take to allow the public to propose alternative approaches to those contained in a policy statement and offers suggestions on how agencies can involve the public in adopting and modifying policy statements.<sup>7</sup>

During the discussion of Recommendation 2017-5, the Assembly considered whether to extend the recommendations therein to interpretive rules. The Assembly decided against doing so, but it expressed its views that a follow-on study addressing interpretive rules would be valuable.

This project takes up that charge. Policy statements and interpretive rules are similar in that they lack the force of law<sup>8</sup> and are often issued without notice-and-comment proceedings, as the APA permits. This similarity suggests that, as a matter of best practice, when interested persons disagree with the views expressed in an interpretive rule, the agency should allow them a fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the practice that Recommendation 2017-5 already prescribes in the case of policy statements.<sup>9</sup> The benefits to the public of according such treatment, as well as the potential costs to agencies of according it, are largely the same regardless of whether a given guidance document is concerned with law, policy, or a combination of both.<sup>10</sup>

Recommendation 2017-5 provided that “[a]n agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may

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<sup>7</sup> See Recommendation 2017-5, *supra* note 6, ¶ 9.

<sup>8</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citing the ATTORNEY GENERAL’S MANUAL, *supra* note 3)).

<sup>9</sup> Recommendation 2017-5, *supra* note 6, ¶ 2; see also Recommendation 1992-2, *supra* note 6, ¶ II.B.

<sup>10</sup> See Blake Emerson & Ronald M. Levin, Agency Guidance Through Interpretive Rules: Research and Analysis 33–34 (May 28, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-through-interpretive-rules-final-report>.



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form an independent basis for action in matters that determine the rights and obligations of any member of the public.”<sup>11</sup> Although the same basic idea should apply to interpretive rules, the concept of “binding” effect can give rise to misunderstanding in the context of those rules, for several reasons.

First, interpretive rules often use mandatory language when the agency is describing an existing statutory or regulatory requirement. Recommendation 2017-5 itself recognized the legitimacy of such phrasing.<sup>12</sup> For this reason, administrative lawyers sometimes describe such rules as “binding.” That common usage of words, however, can lead to confusion: it can impede efforts to make clear that interpretive rules should remain nonbinding in a different sense, i.e., that members of the public should be accorded a fair opportunity to request that such rules be modified, rescinded, or waived.

Second, discussions of the circumstances in which interpretive rules may or may not be “binding” bring to mind assumptions that stem from the case law construing the rulemaking exemption in the APA.<sup>13</sup> Courts and commentators have disagreed about whether, under that case law, interpretive rules may be binding on the agency that issues them.<sup>14</sup> Despite this diversity of views, officials interviewed for this project did not express the view that they would categorically deny private parties the opportunity to seek modification, rescission, or waiver of an interpretive rule. In this Recommendation, the Administrative Conference addresses only best practices and expresses no opinions about how the APA rulemaking exemption should be construed. Nevertheless, assumptions derived from the APA background can divert attention from consideration of what sound principles of administration require, which this Recommendation does address.

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<sup>11</sup> Recommendation 2017-5, *supra* note 6, ¶ 1.

<sup>12</sup> *Id.* ¶ 5; *accord* Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,440 (Jan. 25, 2007).

<sup>13</sup> *See* 5 U.S.C. § 553(b)(A).

<sup>14</sup> Emerson & Levin, *supra* note 10, at 20–23; Parrillo, *supra* note 5, at 23–25; *see also* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).



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Third, administrative lawyers currently differ on the question of whether interpretive rules are effectively rendered “binding” when they are reviewed in court under the *Auer v. Robbins*<sup>15</sup> standard of review, which provides that an agency’s interpretation of its own regulation becomes of “controlling weight” if it is not “plainly erroneous or inconsistent with the regulation.”<sup>16</sup> The question of whether interested persons should be able to ask an agency to modify, rescind, or waive an interpretive rule does not intrinsically have to turn on what level of deference the courts would later accord to the agency’s interpretation. Indeed, the possibility of judicial deference at the appellate level (under *Auer* or any other standard of review) may augment the challenger’s interest in raising this interpretive issue at the agency level.<sup>17</sup> Even so, the doctrinal debate over whether an interpretive rule is or is not “binding” under *Auer* can direct attention away from these practical considerations.

For these reasons, the Administrative Conference has worded the initial operative provisions of the Recommendation so that it avoids using the phrase “binding on the public.” Instead it urges that agencies not treat interpretive rules as setting independent standards for action and that interested persons should have a fair opportunity to seek modification, rescission, or waiver of an interpretive rule. In substance, this formulation expresses positions that largely correspond with prescriptions that Recommendation 2017-5 made regarding policy statements, but it does so without implicating unintended associations that the word “binding” might otherwise evoke.

What constitutes a fair opportunity to contest an interpretive rule will depend on the circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of

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<sup>15</sup> 519 U.S. 452 (1997).

<sup>16</sup> *Id.* at 461; compare *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (stating that because of “judge-made doctrines of deference . . . [a]gencies may now use [interpretive] rules not just to advise the public, but also to bind them”), with *id.* at 1208 n.4 (opinion of the Court) (“Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.”). The Supreme Court is currently considering whether to overrule *Auer* in *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari). For reasons explained in the text, the present recommendations do not depend on which view of *Auer* one favors, or on what the Court may decide in *Kisor*.

<sup>17</sup> See Emerson & Levin, *supra* note 10, at 25.



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factors can deter affected persons from contesting guidance documents with which they disagree; these factors operate in approximately the same manner regardless of whether a policy statement or interpretive rule is involved.<sup>18</sup> Agencies that design procedures for requesting reconsideration or modification of both types of guidance should be attentive to circumstances that affect the practical ability of members of the public to avail themselves of the opportunity to be heard. The mere existence of an opportunity to contest an interpretive rule through an internal appeal may not be enough to afford a “fair opportunity” because of the very high process costs that pursuing such an appeal could entail.

At the same time, agencies should also consider governmental interests such as the agency’s resource constraints and need for centralization.<sup>19</sup> For example, an agency should be able to deal summarily with requests that it finds to be obstructive, dilatory, or otherwise tendered in apparent bad faith. It should not be expected to entertain and respond in detail to repetitive or frivolous challenges to the agency’s position. Additionally, Paragraph 3 recognizes that the need for coordination of multiple decision makers in a given program may justify requiring lower-level employees to adhere to the agency’s interpretive rules.

The recommendations below pertaining to public participation in the formulation of interpretive rules closely track the public participation provisions of Recommendation 2017-5. The recommendations here have been modified to reflect differences between interpretive rules and statements of policy.

Paragraphs 12 through 15 set forth principles that agencies should consider in determining whether and how to invite members of the public to suggest alternative approaches or analyses to those spelled out in interpretive rules. These paragraphs are largely drawn from corresponding provisions in Recommendation 2017-5. Interpretive rules that lend themselves to alternative approaches include those that lay out several lawful options for the public but do not purport to be exhaustive. They may also include rules that, in setting forth decisional factors that

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<sup>18</sup> Parrillo, *supra* note 5, at 25.

<sup>19</sup> See Emerson & Levin, *supra* note 10, at 38–41.



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are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules speak at a general level, leaving space for informal adjustments and negotiation between the agency and interested persons<sup>20</sup> about how the rule should be applied. On the other hand, certain kinds of interpretive rules, such as those in which an agency has determined that a statutory term has only one construction (e.g., rules that take the view that certain conduct is categorically required or forbidden), do not lend themselves to such flexible treatment.<sup>21</sup>

### RECOMMENDATION

#### Recommendations Applicable to All Interpretive Rules

1. An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.
2. An agency should afford members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule. In determining whether to modify, rescind, or waive an interpretive rule, an agency should give due regard to any reasonable reliance interests.
3. It is sometimes appropriate for an agency, as an internal agency management matter, to direct some of its employees to act in conformity with an interpretive rule. But the agency should ensure that this does not interfere with the fair opportunity called for in Paragraph 2. For example, an interpretive rule could require officials at one level of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a higher level can authorize a modification, rescission, or waiver of that rule. Agency review should be

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<sup>20</sup> This Recommendation uses “interested person” rather than “stakeholder,” which Recommendation 2017-5, *supra* note 6, uses. The Conference believes that “interested person” is more precise than “stakeholder” and that “stakeholder,” as used in Recommendation 2017-5, should be understood to mean “interested person.”

<sup>21</sup> See Emerson & Levin, *supra* note 10, at 42–44.





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available when officials fail to follow interpretive rules they are properly directed to follow.

4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that the rule expresses the agency's current interpretation of the law but that a member of the public will, upon proper request, be accorded a fair opportunity to seek modification, rescission, or waiver of the rule.
5. An interpretive rule should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement, or the language is addressed to agency employees and will not interfere with the fair opportunity called for in Paragraph 2.
6. An agency should make clear to members of the public which agency officials are required to follow an interpretive rule and where to go within the agency to seek modification, rescission, or waiver from the agency.
7. An agency should instruct all employees engaged in an activity to which an interpretive rule pertains that, although the interpretive rule may contain mandatory language, they should refrain from making any statements suggesting that an interpretive rule may not be contested within the agency. Insofar as any employee is directed, as an internal agency management matter, to act in conformity with an interpretive rule, that employee should be instructed as to the expectations set forth in Paragraphs 2 and 3.
8. When an agency is contemplating adopting or modifying an interpretive rule, it should consider whether to solicit public participation, and, if so, what kind, before adopting or modifying the rule. Options for public participation include meetings or webinars with interested persons, advisory committee proceedings, and invitation for written input from the public with or without a response. In deciding how to proceed, the agency should consider:
  - a. The agency's own procedures for adopting interpretive rules.
  - b. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated persons (regulatory beneficiaries and other interested persons) may offer different information than regulated



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persons and that non-regulated persons will often have no meaningful opportunity to provide input regarding interpretive rules other than at the time of adoption.

- c. The likely increase in rule acceptance from broadening participation, keeping in mind that non-regulated persons will often have no opportunity to provide input regarding interpretive rules other than at the time of adoption, and that rule acceptance may be less likely if the agency is not responsive to input from interested persons.
  - d. Whether the agency is likely to learn more useful information by having a specific agency proposal as a focal point for discussion, or instead having a more free-ranging and less formal discussion.
  - e. The practicability of broader forms of participation, including invitation for written input from the public, keeping in mind that broader participation may slow the adoption of interpretive rules and may diminish resources for other agency tasks, including issuing interpretive rules on other matters.
9. If an agency does not provide for public participation before adopting or modifying an interpretive rule, it should consider offering an opportunity for public participation after adoption or modification. As with Paragraph 8, options for public participation include meetings or webinars with interested persons, advisory committee proceedings, and invitation for written input from the public with or without a response.
10. An agency may make decisions about the appropriate level of public participation interpretive rule-by-interpretive rule or by assigning certain procedures for public participation to general categories of interpretive rules. If an agency opts for the latter, it should consider whether resource limitations may cause some interpretive rules, if subject to pre-adoption procedures for public participation, to remain in draft for substantial periods of time. If that is the case, agencies should either (a) make clear to interested persons which draft interpretive rules, if any, should be understood to reflect current agency thinking; or (b) provide in each draft interpretive rule that, at a certain time after publication, the rule will automatically either be adopted or withdrawn.



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11. All written interpretive rules affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found. Interpretive rules should also indicate the nature of the reliance that may be placed on them and the opportunities for modification, rescission, or waiver of them.

### **Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches or Analyses**

12. Interpretive rules that lend themselves to alternative approaches or analyses include those that lay out several lawful options for the public but do not purport to be exhaustive. They may also include rules that, in setting forth decisional factors that are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules speak at a general level, leaving space for informal adjustments and negotiation between the agency and interested persons about how the rule should be applied. Paragraphs 1-11 above apply with equal force to such rules. However, with respect to such rules, agencies should take additional steps to promote flexibility, as discussed below.
13. Agencies should afford members of the public a fair opportunity to argue for lawful approaches or analyses other than those set forth in an interpretive rule, subject to any binding requirements imposed upon agency employees as an internal management manner. The agency should explain that a member of the public may take a lawful approach different from the one set forth in the interpretive rule, request that the agency take such a lawful approach, or request that the agency endorse an alternative or additional analysis of the rule. The interpretive rule should also include the identity and contact information of officials to whom such a request should be made. Additionally, with respect to such rules, agencies should take further measures to promote such flexibility as provided in Paragraph 14.
14. In order to provide a fair opportunity for members of the public to argue for other lawful approaches or analyses, an agency should, subject to considerations of practicability and



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resource limitations and the priorities described in Paragraph 15, consider additional measures, including the following:

- a. Promoting the flexible use of interpretive rules in a manner that still takes due account of needs for consistency and predictability. In particular, when the agency accepts a proposal for a lawful approach or analysis other than that set forth in an interpretive rule and the approach or analysis seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected interested persons, to officials likely to hear the argument, and to members of the public, subject to existing protections for confidential business or personal information.
- b. Assigning the task of considering arguments for approaches or analyses other than those in an interpretive rule to a component of the agency that is likely to engage in open and productive dialogue with persons who make such arguments, such as a program office that is accustomed to dealing cooperatively with regulated parties and regulatory beneficiaries.
- c. When officials are authorized to take an approach or endorse an analysis different from that in an interpretive rule but decline to do so, directing appeals of such a refusal to a higher-level official.
- d. Investing in training and monitoring of personnel to ensure that they: (i) treat parties' ideas for lawful approaches or analyses that are different from those in an interpretive rule in an open and welcoming manner; and (ii) understand that approaches or analyses other than those in an interpretive rule, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them.
- e. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support approaches or analyses different from those in an interpretive rule and to provide feedback to the agency on whether its officials are giving reasonable consideration to such proposals.



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15. Because measures to promote flexibility (including those listed in Paragraph 14) may take up agency resources, it will be necessary to set priorities for which interpretive rules are most in need of such measures. In deciding when to take such measures, the agency should consider the following, bearing in mind that these considerations will not always point in the same direction:
- a. An agency should assign a higher priority to an interpretive rule the greater the rule's impact is likely to be on the interests of regulated parties, regulatory beneficiaries, and other interested parties, either because regulated parties have strong incentives to comply with the rule or because the rule practically reduces the stringency of the regulatory scheme compared to the status quo.
  - b. An agency should assign a lower priority to promoting flexibility in the use of a rule insofar as the rule's value to the agency and interested persons is primarily consistency rather than substantive content.



## **Administrative Conference Recommendation 2018-5**

### **Public Availability of Adjudication Rules**

**Adopted December 13, 2018**

Every year, federal agencies conduct hundreds of thousands of adjudications.<sup>1</sup> In order to participate meaningfully in adjudications, persons appearing before federal agencies must have ready online access both to the key materials associated with these adjudications (including prior decisions) and the procedural rules governing them. Administrative Conference Recommendation 2017-1 addresses the former set of materials, urging agencies to provide online access to the key documents associated with adjudications.<sup>2</sup> This Recommendation deals with the latter set of materials. It sets forth best practices to assist agencies in making their procedural rules available online and in organizing those materials in a way that is accessible to and comprehensible for the public and persons appearing before agencies, consistent with 5 U.S.C. §§ 552(a)(1), (a)(2), and other applicable provisions of law.<sup>3</sup>

A number of different sources create procedural rules that govern agency adjudications. At the very least, these sources include: (a) the Due Process Clause of the Constitution's Fifth Amendment; (b) the adjudication provisions of the Administrative Procedure Act (APA);<sup>4</sup> (c) agency or program-specific statutes that set forth rules for particular types of adjudications; (d) agency-promulgated rules of procedure with legal effect; (e) agency precedents as set forth in

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<sup>1</sup> See Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

<sup>2</sup> See Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

<sup>3</sup> Another ongoing Administrative Conference project addresses the online availability of agency guidance documents. Admin. Conf. of the U.S., *Public Availability of Agency Guidance*, <https://www.acus.gov/research-projects/public-availability-agency-guidance>. This recommendation deals only with the limited class of those documents relating to adjudication procedure.

<sup>4</sup> 5 U.S.C. §§ 554–58.





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decisions by agency officials authorized to engage in final agency action;<sup>5</sup> (f) adjudicator-specific practice procedures applicable across multiple cases, such as standing orders; and (g) agency-specific forms that persons appearing before an agency are required to use.

In addition, many agencies have issued guidance documents and explanatory materials that help persons appearing before agencies navigate the adjudicative process and guide agency adjudicators and other agency officials.<sup>6</sup> These documents and materials usually take the form of policy statements and other forms of agency guidance, that, if not published, cannot be used to the disadvantage of persons appearing before the agency.<sup>7</sup>

Under existing law, agencies, with some limited exceptions, are required to publish rules of procedure with general applicability and legal effect in the *Federal Register* and to codify such rules in the *Code of Federal Regulations*,<sup>8</sup> and those rules in turn are required to be published on the agency websites.<sup>9</sup> Generally, agencies have some discretion over how to organize these materials on their websites.

A review of existing agency websites reveals that agency practices vary widely. Some provide access on their websites to all relevant statutes, rules of practice, precedents, standing orders, forms, and guidance documents and explanatory materials, whereas others publish few or none of these things. Of those that do publish such documents and materials, some identify the sources of law from which the rules derive and clearly delineate between agency-promulgated rules of procedure with legal effect and (non-binding) guidance documents, whereas others do

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<sup>5</sup> *Id.* § 704. Decisions of the Supreme Court may also be considered a binding source of law. Whether lower-court decisions are binding is not addressed here.

<sup>6</sup> To facilitate ease of understanding, an agency should tailor explanatory materials to meet the needs of the members of the public who typically appear before it. Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

<sup>7</sup> 5 U.S.C. §§ 552(a)(1)-(2); but see *id.* § 552(a)(1) (providing that an individual that has “actual and timely notice” of a requirement may be bound thereby even if the document was not published).

<sup>8</sup> 5 U.S.C. § 552(a)(1); 44 U.S.C. §§ 1505(a)(2), 1510(a); 1 C.F.R. §§ 5.2(c), 5.5, 5.9.

<sup>9</sup> See, e.g., E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).



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not. Finally, some websites are much more effective than others in organizing these materials and placing them in a logical location on the agency website such that they are easily accessible.

This Recommendation offers best practices to optimize agencies' online presentation of procedural rules for agency adjudications. Implementation of these best practices will benefit not only individuals appearing before agencies, who need ready access to procedural rules in order to proceed effectively, but also agencies, which, among other things, have an interest in ensuring that non-binding explanatory materials are clearly labeled as such. These best practices will also advance the purpose of the E-Government Act and recent amendments to the Freedom of Information Act, which expand affirmative disclosure by federal agencies and ensure that key agency documents are made available.<sup>10</sup>

### **RECOMMENDATION**

The following recommendations offer best practices for agencies to consider as they seek to make procedural rules publicly available and to present those rules and related materials in a way that is accessible to and comprehensible for the public and persons appearing before agencies:

1. Agencies should provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications, including as relevant: (a) the provisions of the Administrative Procedure Act relating to adjudication (5 U.S.C. §§ 554–58); (b) statutory provisions providing procedural rules for adjudication; (c) agency-promulgated rules of procedure with legal effect; (d) guidance documents and explanatory materials relating to adjudicative procedures, including guides designed for persons appearing before an agency and agency adjudicators (e.g., manuals, bench books), excepting those covered by a Freedom of Information Act exemption that the agency intends to invoke; and (e) agency-specific forms that individuals must use. Agencies should also consider, as appropriate, providing

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<sup>10</sup> E-Government Act of 2002, § 206, (amending 44 U.S.C. § 3501); FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (amending 5 U.S.C. § 552(a)(2)).



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access to adjudicator-specific practice procedures applicable across multiple cases, such as standing orders.

2. In providing access to the materials pursuant to Paragraph 1, agencies should present the materials in a clear, logical, and comprehensive fashion. One way to do so is to display the materials published under Paragraph 1 in an easy-to-read table. An example appears in the Appendix. When possible, agencies should prominently delineate between binding and nonbinding materials.
3. Agency-promulgated rules of procedure with legal effect should be accessible on agency websites in one easily searchable file. The rules should include a table of contents listing the rule titles. The rule titles should be hyperlinked to the rule text. The numbering system in the searchable file should mirror the *Code of Federal Regulations'* (CFR) numbering system and provide a link to the official version of the CFR.
4. When an agency's mission consists exclusively or almost exclusively of conducting adjudications, the agency should link to its materials published under Paragraph 1 on the agency's homepage. When conducting adjudications is merely one of an agency's many functions, the agency should link to its rules and guidance from a location on the website that is both dedicated to adjudicatory materials and logical in terms of a person's likelihood of finding the documents in the selected location, such as an enforcement or adjudications page. Examples appear in the Appendix.
5. Agencies should consider providing access on their websites to explanatory materials aimed at providing an overview of relevant agency precedents that apply the rules of procedure. Explanatory materials should link to applicable statutes, rules of procedure, and adjudicative precedents relating to adjudication procedures.



## APPENDIX

### Paragraph 2

Paragraph 2 reads in part, “[i]n providing access to the materials pursuant to Paragraph 1, agencies should present the materials in a clear, logical, and comprehensive fashion. One way to do so is to display the materials published under Paragraph 1 in an easy-to-read table.” The “Legal Authorities” page of the Office of Medicare Hearings and Appeals’ website (an office within the Department of Health and Human Services) demonstrates such a table.<sup>11</sup>

- The Appeals Process** -
- Level 1 Appeals
- Level 2 Appeals
- Level 3 Appeals (OMHA)
- Level 4 Appeals
- Level 5 Appeals
- Legal Authorities**
- Case Processing Manual
- Filing an Appeal** +
- About OMHA** +
- Contact OMHA**

### Legal Authorities

The current Medicare appeals process was established by various statutes and implementing regulations. The table below lists some of the statutes and regulations that govern the appeals process for Medicare claims and entitlement, Medicare Advantage organization determination, and Medicare prescription drug coverage determination appeals, as well as select OMHA and Centers for Medicare & Medicaid (CMS) program guidance.

Medicare Part	Statute*	Implementing Regulations	Select Program Guidance
Medicare Part A and Part B fee-for-service claim, entitlement, and certain premium initial determinations	<a href="#">Social Security Act § 1889</a> (42 U.S.C. 1395ff)	<a href="#">42 C.F.R. part 405, subpart I</a> (§§ 405.1000–405.1063 for ALJ appeals)	<a href="#">OMHA Case Processing Manual</a> (Division II for Part A/B appeals, Division V for entitlement and certain premium appeals)
	QIO Appeals Only <a href="#">Social Security Act § 1155</a> (42 U.S.C. 1320c-4)	QIO Appeals Only <a href="#">42 C.F.R. part 478, subpart B</a> (§ 478.40 for ALJ appeals)  IRMAA Appeals Only <a href="#">20 C.F.R. §§ 418.1301–418.1355</a> (§ 418.1350 for ALJ appeals)	<a href="#">Medicare Claims Processing Manual, CMS Pub'n 100-04, Ch. 29 - PDF</a> (§§ 330–330.6 for ALJ appeals)
Medicare Part C Medicare Advantage and competitive health plan organization determinations	<a href="#">Social Security Act § 1852(g)</a> (42 U.S.C. 1395w-22(g))	<a href="#">42 C.F.R. part 422, subpart M</a> (§§ 422.600–405.612 for ALJ appeals)  <a href="#">42 C.F.R. part 417, subpart Q</a>	<a href="#">OMHA Case Processing Manual</a> (Division III for Part C appeals)  <a href="#">Medicare Managed Care Manual, CMS Pub'n 100-16, Ch. 13 - PDF</a> (§§ 100–100.2 for ALJ appeals)
	<a href="#">Social Security Act § 1976(c)(5)(B)</a> (42 U.S.C. 1395mm(c)(5)(B))		
Medicare Part D plan sponsor coverage determinations and certain premium determinations	<a href="#">Social Security Act § 1860D-4</a> (42 U.S.C. 1395w-104)	42 C.F.R. part 423, <a href="#">subparts M and U</a> (§§ 423.1968–423.2063 for ALJ appeals)  IRMAA Appeals Only <a href="#">20 C.F.R. §§ 418.2301–418.2355</a> (§ 418.2350 for ALJ appeals)	<a href="#">OMHA Case Processing Manual</a> (Division IV for Part D appeals)  <a href="#">Prescription Drug Benefit Manual, CMS Pub'n 100-18, Ch. 18</a> (§§ 90–90.4 for ALJ appeals)

\*Statutory citations are given to the Social Security Act, as amended, with United States Code (U.S.C.) equivalents as parentheticals. However, please note that the online version of the U.S.C. may be more current



<sup>11</sup> DEP’T. OF HEALTH & HUM. SERVS., LEGAL AUTHORITIES, <https://www.hhs.gov/about/agencies/omha/the-appeals-process/legal-authorities/index.html?language=es> (last visited Oct. 22, 2018).



## Paragraph 4

Paragraph 4 reads in part, “[w]hen an agency’s mission consists exclusively or almost exclusively of conducting adjudications, the agency should link to its materials published under Paragraph 1 on the agency’s homepage.” The Occupational Safety and Health Review Commission’s (OSHRC) website demonstrates how an agency can link to the procedural materials published from an agency’s home page.<sup>12</sup>

The screenshot shows the homepage of the Occupational Safety & Health Review Commission. The header includes the OSHRC logo, the text 'OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION', and a search bar. A navigation menu contains links for Home, About, Rules, Guides, Decisions, FOIA, Privacy, Budget, and Publications. The main content area is divided into three columns. The left column is titled 'ABOUT THE COMMISSION' and contains a paragraph describing the agency's role as an independent federal agency providing administrative trial and appellate review. The middle column features a photograph of a wooden gavel resting on an open book. The right column is titled 'FEATURED RESOURCES' and contains a vertical list of blue buttons with white text: 'Open Government', 'OSHRC E-Filing Instructions & User Guide', 'Decisions', 'FAQ's', 'Administrative Law Judge Practices', 'FOIA', 'Press Releases', and 'Publicaciones En Espanol'. Below this list is a 'Sign Up for Alerts' button. At the bottom of the page, there is a section titled 'LATEST NEWS & INFORMATION' with three news items, each with a 'Read More' link.

Paragraph 4 also reads in part, “[w]hen conducting adjudications is merely one of an agency’s many functions, the agency should link to its rules and guidance from a location on the website that is both dedicated to adjudicatory materials and logical in terms of a person’s likelihood of finding the documents in the selected location, such as an enforcement or

<sup>12</sup> OCCUPATIONAL SAFETY & HEALTH REV. COMM’N, HOME, <https://www.oshrc.gov> (last visited Oct. 22, 2018).



adjudications page.” The Federal Trade Commission’s (FTC) website demonstrates how an agency can link to the published materials from an enforcement page.<sup>13</sup>

The screenshot shows the Federal Trade Commission's website. At the top, there is a navigation bar with links for 'Contact', 'Stay Connected', 'Privacy Policy', and 'FTC en español'. Below this is a search bar. The main navigation menu includes 'ABOUT THE FTC', 'NEWS & EVENTS', 'ENFORCEMENT', 'POLICY', 'TIPS & ADVICE', and 'I WOULD LIKE TO...'. The 'ENFORCEMENT' page is active, showing a sidebar with links to various enforcement-related topics. The main content area features a header 'Enforcement' and a sub-header 'Enforcement' with an image of a bookshelf. The text describes the FTC's role in enforcing federal consumer protection laws and federal antitrust laws. At the bottom, there is a footer with additional navigation links and contact information for the FTC.

<sup>13</sup> FED. TRADE COMM’N, ENFORCEMENT, <https://www.ftc.gov/enforcement> (last visited Oct. 22, 2018).





## **Administrative Conference Recommendation 2018-4**

### **Recusal Rules for Administrative Adjudicators**

**Adopted December 13, 2018**

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication. Recusal serves two important purposes. First, it helps ensure that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of recusal is reflected in the Due Process Clause, as well as statutory, regulatory, and other sources of recusal standards. Second, the recusal of adjudicators who may appear partial helps inspire public confidence in adjudication in ways that a narrow focus on actual bias against the parties themselves cannot.<sup>1</sup> Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.<sup>2</sup> Unlike with federal judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of administrative adjudication.

In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the case of actual bias.<sup>3</sup> This Recommendation builds upon Recommendation 2016-4 by addressing the need for agency-specific recusal rules that consider the full range of actual and apparent bias.

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<sup>1</sup> Louis J. Virelli, III, *Recusal Rules for Administrative Adjudicators* (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.

<sup>2</sup> See 28 U.S.C. § 455(a) (2012); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989), available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj>. Both require recusal by federal adjudicators when their “impartiality might reasonably be questioned.”

<sup>3</sup> Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.<sup>4</sup> It also covers appeals from those adjudications. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when determining rules for the recusal of agency heads.

Recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency and that allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 for agencies to consider in fashioning their own recusal rules. The parenthetical explanations accompanying these factors show how different features of an agency's administrative scheme may affect the stringency of those rules.

Recusal rules also provide a process for parties to petition their adjudicator to recuse in the event he or she does not elect to do so sua sponte. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for appeal of those decisions within the agency. Such appeals are typically conducted by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of appeal increases the reliability and accuracy of recusal

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<sup>4</sup> In the context of Recommendation 2016-4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. §§ 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation addresses both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 2* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.



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determinations and helps ensure the consistency and effectiveness of the work assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must provide parties with a written explanation of their recusal decisions.<sup>5</sup> Finally, agencies could provide for the publication of recusal decisions. Both written explanations and publication of recusal decisions increase transparency and thus the appearance of impartiality.

It is important to distinguish adjudicative recusal rules and procedures from the ethics rules promulgated by the Office of Government Ethics (OGE).<sup>6</sup> As an initial matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules prohibit employees from participating in certain matters when they have a conflict of interest or an appearance of a conflict. Adjudicative recusal rules focus on how an agency, acting through its adjudicators and appeal authorities, decides who will hear certain cases in a manner that ensures the integrity and perceived integrity of adjudicative proceedings. Adjudicative recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need to have clear guidance as to what they may or may not do. Adjudicative recusal rules, by contrast, tend to be much more open-ended and standard-like. They are focused on maintaining both actual impartiality and the appearance of impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association.

The enforcement mechanism is also different. If an adjudicator, like other employees, participates in a matter in violation of an ethics rule, the adjudicator can be subject to discipline. In contrast, if an adjudicator decides not to recuse him or herself in a case where he or she should have been recused, even if the adjudicator would not be subject to discipline, the decision not to

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<sup>5</sup> 5 U.S.C. § 555(e) (2012).

<sup>6</sup> The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. App.) established the Office of Government Ethics to provide “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” OGE’s *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.



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recuse could be appealed under whatever process the agency has established. In addition, the recusal process can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself sua sponte.

Under current law, an agency that wishes to supplement its ethics rules must, of course, do so through the OGE supplemental process.<sup>7</sup> Under that process, agencies, with the concurrence of OGE, may promulgate ethics rules that supplement existing OGE rules. This Recommendation, in contrast, focuses exclusively on a set of recusal rules an agency may wish to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

### RECOMMENDATION

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA), as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but not to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.
2. Agency rules should, consistent with ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*,<sup>8</sup> provide for the recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in ACUS Recommendation 2016-4, including:
  - a. Improper financial or other personal interest in the decision;
  - b. Personal animus against a party or group to which that party belongs; or
  - c. Prejudgment of the adjudicative facts at issue in the proceeding.

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<sup>7</sup> See Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.105.

<sup>8</sup> 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:
  - a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);
  - b. Whether the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);
  - c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);
  - d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and
  - e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).
4. Agency rules should include provisions identifying considerations that do not, on their own, warrant recusal and specifying situations in which recusal is not required or is presumptively not required.



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5. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and internal agency appeal.
6. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions must provide written explanations of their recusal decisions. In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications and adjudicative personnel.
7. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.



## **Administrative Conference Recommendation 2017-5**

### **Agency Guidance Through Policy Statements**

**Adopted December 14, 2017**

General statements of policy under the Administrative Procedure Act (hereinafter policy statements) are agency statements of general applicability, not binding on members of the public, “issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>1</sup> Interpretive rules are defined as rules or “statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>2</sup> Both policy statements and interpretive rules are exempt from the APA’s requirements for the issuance of legislative rules (including notice and comment)<sup>3</sup> and are often referred to as “guidance” or “guidance documents” (although usage varies). This Recommendation, however, covers only policy statements, not interpretive rules; nevertheless, many of the recommendations herein regarding flexible use of policy statements may also be helpful with respect to agencies’ use of interpretive rules.

Over the years, the Conference has issued several recommendations pertaining to policy statements. Recommendation 76-5 states that agencies should provide for public participation in the formulation of policy statements (and of interpretive rules) depending on the impact of the statement in question and the practicability of participation.<sup>4</sup> Recommendation 92-2 recognizes

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<sup>1</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 553(b)(A).

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976). Additional prior Conference recommendations pertaining to policy statements and agency guidance more broadly, apart from others referenced specifically in this preamble,





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the value of policy statements but expresses concern about policy statements “that are intended to impose binding substantive standards or obligations upon affected persons” notwithstanding the legal requirement that they be nonbinding on the public, and it advises agencies to establish flexible procedures that allow members of the public a fair opportunity to argue for approaches different from those set forth in a policy statement.<sup>5</sup> The Conference has now decided, twenty-five years after Recommendation 92-2, to update its recommendations on the formulation and use of policy statements in light of current administrative experience.<sup>6</sup>

Policy statements are important instruments of administration across numerous agencies, and are of great value to agencies and the public alike. Compared with adjudication or enforcement, policy statements can make agency decisionmaking faster and less costly, saving time and resources for the agency and the regulated public. They can also make agency decisionmaking more predictable and uniform and shield regulated parties from unequal treatment, unnecessary costs, and unnecessary risk, while promoting compliance with the law.<sup>7</sup> Compared with legislative rules, policy statements are generally better for dealing with conditions of uncertainty and often for making agency policy accessible, especially to regulated parties who lack counsel. Further, the provision of policy statements often takes less time and resources than legislative rulemaking, freeing up the agency to, for instance, take other action within its statutory mission. In pursuit of benefits such as these, agencies may use policy

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include Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 16, 2015); and Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014).

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992).

<sup>6</sup> The Conference commissioned a study that resulted in interviews with 135 individuals across agencies, industry, and non-governmental organizations (NGOs), which are the basis for this Recommendation. See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-final-report>.

<sup>7</sup> See *id.* at 28–30; see also Admin. Conf. of the U.S., Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973) (“Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determination in various types of agency action, either through published decisions, general rules or policy statements other than rules.”).



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statements to bind some agency employees to the approach of the policy statement,<sup>8</sup> so long as such employees are not bound in a manner that forecloses a fair opportunity for the public or employee to argue for approaches different from those in the policy statement or seek modification of the policy statement.<sup>9</sup>

Despite their usefulness to both agencies and the public, policy statements are sometimes criticized for coercing members of the public as if they were legislative rules, notwithstanding their legally nonbinding status. Recommendation 92-2 defined this problem in terms of an agency's *intent* to use policy statements to bind the public, which may imply that the problem is one of agency bad faith. While agency intent to make a policy statement binding, if shown, would deserve criticism and correction, a focus on intent is often inadequate for understanding and addressing the phenomenon of binding policy statements. This Recommendation supplements Recommendation 92-2 by addressing other reasons why members of the public may feel bound by what they perceive as coercive guidance.

There are several kinds of reasons why members of the public sometimes find they have no practical escape from the terms of a policy statement. First are those that are not of the making of an agency or its officials. Specifically, modern regulatory schemes often have structural features that tend to lead *regulated parties* to follow the policy statement's approach even if in theory they might be legally free to choose a different course, because the costs and risks associated with doing so are simply too high. This is often the case if statutes or regulations (a) require a regulated party to obtain prior approval from an agency to obtain essential permissions or benefits; (b) subject a regulated party to repeated agency evaluation under a legal regime with which perfect compliance is practically unachievable, incentivizing the

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<sup>8</sup> See Recommendation 92-2, *supra* note 5; Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) (“[A]gency employees should not depart from significant agency guidance documents without appropriate justification and supervisory concurrence.”); *id.* at 3437 (“[W]hile a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking.”).

<sup>9</sup> See Final Bulletin for Agency Good Guidance Practices, *supra* note 8, 72 Fed. Reg. at 3440.



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party to cultivate a reputation with the agency as a good-faith actor by following even non-binding guidance; or (c) subject the regulated party to the possibility of enforcement proceedings that entail prohibitively high costs regardless of outcome, or can lead to sanctions so severe that the party will not risk forcing an adjudication of the accusation. Meanwhile, a policy statement can operate on *beneficiaries* of a statute or legislative rule as if it were a legislative rule by effectively depriving them of the statute or legislative rule's protection. This can occur if the policy statement promises to treat regulated parties less stringently than the statute or legislative rule requires, effectively freeing those parties to shift their behavior in a direction that harms beneficiaries. Similarly, in its focus on regulatory beneficiaries and regulated parties, an agency policy statement may induce conduct harmful to other interested parties.

Second, there are a number of reasons why agencies themselves may naturally tend to be somewhat inflexible with respect to their own policy statements. Even though these reasons are more within an agency's or its officials' control than those discussed above, this lack of flexibility may often stem from causes other than agency intent. Officials who behave inflexibly may be seeking to balance the importance of being flexible against stakeholder demands to honor other, competing values that officials would be remiss to ignore. For example, if one regulated firm argues for a different approach from that in a policy statement and the agency approves, this may prompt other firms to criticize the agency for not keeping a level playing field among competitors; may cause other firms to lose faith in the agency's consistency and predictability, which may render them less likely to trust and cooperate with the agency; and may open the agency to accusations of favoritism from non-governmental organizations (NGOs), the media, and congressional overseers.

In principle, one way an agency might reconcile these understandable pressures would be to prepare and disseminate written reasons when it approves an approach different from that in a policy statement, thereby making the same reasoning available to all similarly situated parties going forward. This transparency helps level the playing field, makes agency behavior more predictable, and diminishes concerns about favoritism. But agencies might still find inflexibility



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the easier course and adopt it by default, because reason-giving requires agency resources.<sup>10</sup> Besides this, there are additional organizational reasons for inflexibility: some agency offices, by reason of their usual day-to-day business, are socialized to be less receptive to stakeholder requests than others; higher-level officials have institutional reasons to back the decisions of their subordinates; and the distinction between binding and nonbinding policies is counter-intuitive for many officials, at least without substantial training.

These various pressures tend to give at least some policy statements a quasi-binding character in fact regardless of their legal status. That said, there are important steps that agency officials can take to mitigate these legislative-rule-like effects of policy statements by stating that they are not binding<sup>11</sup> and by remaining flexible in their use of such statements by offering members of the public a fair opportunity to argue for other approaches. What steps to take and when is the focus of paragraphs 4 through 8 of this Recommendation. Agencies should also, in appropriate circumstances, use appropriate tools to enable public participation in the formulation of policy statements before these statements are adopted. This is the focus of paragraphs 9 through 11 of this Recommendation.

First, flexibility often requires managerial initiative and resources to foster and maintain. This Recommendation identifies concrete organizational measures that agencies may take to foster flexibility: low-cost measures that agencies should take at a minimum and additional measures with higher cost that agencies should consider in light of resource limitations and competing priorities.

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<sup>10</sup> Another difficulty with giving reasons is a potential tension with agency policies on the protection of confidential business or personal information. This Recommendation is not intended to alter existing agency policies on such protection.

<sup>11</sup> See, e.g., *About Guidance Documents*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/RegulatoryInformation/Guidances/default.htm#about> (“Guidance documents represent FDA’s current thinking on a topic. They do not create or confer any rights for or on any person and do not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations.”).



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In addition, public participation at the time of a policy statement's adoption may be of value to the agency, regulated parties, regulatory beneficiaries, and other interested parties. Such public participation may be especially valuable to parties that lack the opportunity and resources to participate in the individual adjudicatory or enforcement proceedings to which a policy may apply.

Choosing a level and means of public participation that is appropriate to a policy statement's likely impact and is practicable requires consideration of several factors. Given the complexity of these factors and their tendency to vary with context, it is appropriate to make decisions about whether or how to seek public participation on policy statements on a document-by-document or agency-by-agency basis.<sup>12</sup> A government-wide requirement for inviting written input from the public on policy statements is not recommended, unless confined to the most extraordinary documents.<sup>13</sup> This is a function both of the complex cost-benefit considerations noted above and the fact that broad mandates for written public input on policy statements can result in two additional unintended consequences. First, a broad mandate applied to a resource-strapped agency may cause the agency to fail to process and incorporate comments and instead leave many policy statements in published "draft" form indefinitely, which may at least partly defeat the purpose of participation and cause stakeholder confusion. Second, a broad mandate may so legitimize policy statements in the eyes of the agency that such statements could end up largely supplanting legislative rulemaking.

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<sup>12</sup> Some agencies have adopted procedural rules requiring solicitation of written input from the public for large and well-defined categories of their policy statements, whereas others have undertaken such solicitations on a decentralized, ad hoc basis. Parrillo, *supra* note 6, at 167–68.

<sup>13</sup> The Office of Management and Budget's Good Guidance Practices calls for pre-adoption public comment on "economically significant" guidance documents, but this appears to cover only a very small number of documents. *See id.* at 167–71 (citing Final Bulletin for Agency Good Guidance Practices, *supra* note 8, 72 Fed. Reg. at 3439–40).



## RECOMMENDATION

### **Policy Statements Should Not Bind the Public**

1. An agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.
2. An agency should afford members of the public a fair opportunity to argue for lawful approaches other than those put forward by a policy statement or for modification or rescission of the policy statement.
3. Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement. But the agency should ensure that this does not interfere with the fair opportunity called for in Recommendation 2. For example, a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement. Agency review should be available in cases in which frontline officials fail to follow policy statements in conformity with which they are properly directed to act.

### **Minimum Measures to Avoid Binding the Public**

4. A policy statement should prominently state that it is not binding on members of the public and explain that a member of the public may take a lawful approach different from the one set forth in the policy statement or request that the agency take such a lawful approach. The policy statement should also include the identity and contact information of officials to whom such a request should be made.
5. A policy statement should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement, or the language is addressed to agency employees and will not interfere with the fair opportunity called for in Recommendation 2.



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6. The agency should instruct all employees engaged in an activity to which a policy statement pertains to refrain from making any statements suggesting that a policy statement is binding on the public. Insofar as any employee is directed, as an internal agency management matter, to act in conformity with a policy statement, that employee should be instructed as to the difference between such an internal agency management requirement and law that is binding on the public.

### **Additional Measures to Avoid Binding the Public**

7. In order to avoid using policy statements to bind the public and in order to provide a fair opportunity for other lawful approaches, an agency should, subject to considerations of practicability and resource limitations and the priorities described in Recommendation 8, consider additional measures, including the following:
  - a. Promoting the flexible use of policy statements in a manner that still takes due account of needs for consistency and predictability. In particular, when the agency accepts a proposal for a lawful approach other than that put forward in a policy statement and the approach seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected stakeholders, to officials likely to hear the argument, and to members of the public, subject to existing protections for confidential business or personal information.
  - b. Assigning the task of considering arguments for approaches other than that in a policy statement to a component of the agency that is likely to engage in open and productive dialogue with persons who make such arguments, such as a program office that is accustomed to dealing cooperatively with regulated parties and regulatory beneficiaries.
  - c. In cases where frontline officials are authorized to take an approach different from that in a policy statement but decline to do so, directing appeals of such a refusal to a higher-level official who is not the direct superior of those frontline officials.





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- d. Investing in training and monitoring of frontline personnel to ensure that they (i) understand the difference between legislative rules and policy statements; (ii) treat parties' ideas for lawful approaches different from those in a policy statement in an open and welcoming manner; and (iii) understand that approaches other than that in a policy statement, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them.
- e. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support approaches different from those in a policy statement and to provide feedback to the agency on whether its officials are giving reasonable consideration to such proposals.

### **Priorities in Deciding When to Invest in Promoting Flexibility**

- 8. Because measures to promote flexibility (including those listed in Recommendation 7) may take up agency resources, it will be necessary to set priorities for which policy statements are most in need of such measures. In deciding when to take such measures the agency should consider the following, bearing in mind that these considerations will not always point in the same direction:
  - a. An agency should assign a higher priority to a policy statement the greater the statement's impact is likely to be on the interests of regulated parties, regulatory beneficiaries, and other interested parties, either because regulated parties have strong incentives to comply with the statement or because the statement practically reduces the stringency of the regulatory scheme compared to the status quo.
  - b. An agency should assign a lower priority to promoting flexibility in the use of a policy statement insofar as the statement's value to the agency and to stakeholders lies primarily in the fact that it is helpful to have consistency independent of the statement's substantive content.



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### **Public Participation in Adoption or Modification of Policy Statements**

9. When an agency is contemplating adopting or modifying a policy statement, it should consider whether to solicit public participation, and, if so, what kind, before adopting the statement. Options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response. In deciding how to proceed, the agency should consider:
  - a. Existing agency procedures for the adoption of policy statements, including any procedures adopted in response to the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices (2007).
  - b. The factors listed in Recommendation 8.
  - c. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated parties (regulatory beneficiaries and other interested parties) may offer different information than regulated parties and that non-regulated parties will often have no opportunity to provide input regarding policy statements other than at the time of adoption.
  - d. The likely increase in policy acceptance from broadening participation, keeping in mind that non-regulated parties will often have no opportunity to provide input regarding policy statements other than at the time of adoption, and that policy acceptance may be less likely if the agency is not responsive to stakeholder input.
  - e. Whether the agency is likely to learn more useful information by having a specific agency proposal as a focal point for discussion, or instead having a more free-ranging and less formal discussion.
  - f. The practicability of broader forms of participation, including invitation for written input from the public, keeping in mind that broader participation may slow the adoption of policy statements and may diminish resources for other agency tasks, including the provision of policy statements on other matters.



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10. If an agency does not provide for public participation before adopting or modifying a policy statement, it should consider offering an opportunity for public participation after adoption. As with Recommendation 9, options for public participation include outreach to selected stakeholder representatives, stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response.
11. An agency may make decisions about the appropriate level of public participation document-by-document or by assigning certain procedures for public participation to general categories of documents. If an agency opts for the latter, it should consider whether resource limitations may cause some documents, if subject to pre-adoption procedures for public participation, to remain in draft for substantial periods of time. If that is the case, agencies should either (a) make clear to stakeholders which draft policy statements, if any, should be understood to reflect current agency thinking; or (b) provide in each draft policy statement that, at a certain time after publication, the document will automatically either be adopted or withdrawn.
12. All written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found. Written policy statements should also indicate the nature of the reliance that may be placed on them and the opportunities for reconsideration or modification of them or the taking of different approaches.



## Separate Statement of Senior Fellow Ronald M. Levin

The accompanying Recommendation observes that “[t]his Recommendation . . . concerns only policy statements, not interpretive rules; nevertheless, many of the recommendations herein regarding flexible use of policy statements may also be helpful with respect to agencies’ use of interpretive rules.” This remark is well taken as far as it goes, but in another respect it is notably cautious. Other governmental bodies that have adopted procedures or guidelines regarding the same general subject during the past two decades have each used only one framework to address all guidance – that is, both policy statements and interpretive rules.<sup>1</sup>

In adopting the Recommendation, the Assembly of the Administrative Conference was generally sympathetic to the stance taken by the groups just mentioned, but it concluded that it did not have enough information to take a firm stand. The research for its project had focused primarily on policy statements. Thus, the Assembly opted for a relatively narrow recommendation for the present, but it also adopted a “sense of the Conference” resolution envisioning a follow-up study that would lay the groundwork for a subsequent recommendation on interpretive rules. The Assembly’s caution is understandable, but I will use this separate statement to emphasize that its ancillary resolution has pointed in the right direction.

The basic problem that Recommendation 2017-5 seeks to redress is that regulated persons sometimes feel that they have no choice other than to comply with a policy statement’s position, even if they disagree with it. The Recommendation seeks to mitigate that problem by suggesting ways in which an agency can give those persons a fair opportunity to ask the agency to reconsider and perhaps change its position. At the same time, the Recommendation’s

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<sup>1</sup> See, e.g., Prohibition on Improper Guidance Documents, (DOJ, Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>; Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (OMB, Jan. 25, 2007); FDA Good Guidance Practices, 21 C.F.R. § 10.115 (2017) (issued Sept. 19, 2000).



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solutions are made “subject to considerations of practicability and resource limitations,” so as to avoid deterring agencies from giving advice that the public desires.

Essentially the same analysis can also be applied to interpretive rules: The relative proportion of law and policy in the document has little or nothing to do with either the agency’s interest in giving advice or the private party’s interest in being able to induce the agency to reconsider it. Moreover, in practice, law and policy blend together in many guidance document; thus, procedures that speak to one and not the other are bound to prove somewhat artificial.

Why, then, wouldn’t one urge agencies to apply the same principles to interpretive rules? It may be thought that, in contrast to its handling of policy statements, an agency will naturally treat an interpretive rule as binding, because it concerns binding law. But that is a non-sequitur. An agency should, of course, be free to state and act on its *position* that a statute or regulation, as construed in an interpretive rule, is binding. However, the very purpose of issuing such a rule is to specify which of various imaginable readings of the statute or regulation the agency considers correct. Persons who may believe that a different interpretation is correct should have what Recommendation 2017-5 calls a “fair opportunity” to try to persuade the agency to adopt their preferred view – just as the Recommendation contemplates with respect to policy statements. For an agency to assert that, because the underlying text is binding, the interpretation that the agency happens to have chosen must also be binding is to beg the question that ought to be the subject of that dialogue.

The Assembly was mindful that opinions have differed on the question of whether, for procedural purposes, interpretive rules can be binding in a sense that policy statements cannot be. As just suggested, I myself believe the answer is no, but some agency lawyers think otherwise. Ultimately, however, that divergence in opinion should not prevent the Conference from moving forward with a recommendation in the next phase of its inquiry. As with most Conference pronouncements, the principal goal should be to articulate recommended practices, not to opine about the law.



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I hope that a project of the kind contemplated by the sense of the Conference resolution will be pursued in the near future. I trust that it will culminate in broad recognition that most, if not all, of the advice in the present Recommendation can and should be applied to interpretive rules as well.



## **Administrative Conference Recommendation 2017-1**

### **Adjudication Materials on Agency Websites**

**Adopted June 16, 2017**

In contrast to federal court records, which are available for download from the judiciary’s Public Access to Court Electronic Records (PACER) program (for a fee), or records produced during notice-and-comment rulemaking, which are publicly disseminated on the rulemaking website [www.regulations.gov](http://www.regulations.gov), there exists no single, comprehensive online clearinghouse for the public hosting of decisions and other materials generated throughout the course of federal administrative adjudication.<sup>1</sup> Instead, to the extent a particular adjudication record is digitally available, it is likely to be found on the relevant agency’s website.

This recommendation is confined to records issued or filed in adjudicative proceedings in which a statute, executive order, or regulation mandates an evidentiary hearing.<sup>2</sup> Specifically, this recommendation applies to (a) “[a]djudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge” and (b) “[a]djudication that consists of legally required evidentiary hearings that are not regulated by the APA’s adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges.”<sup>3</sup>

Federal administrative adjudication affects an enormous number of individuals and businesses engaged in a range of regulated activities or dependent on any of the several

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<sup>1</sup> The Administrative Conference currently takes no position in this recommendation as to whether there should be such a tool, but will consider whether the issue merits attention in the future. In the meantime, the research underlying this recommendation is limited to an examination of agencies’ existing websites.

<sup>2</sup> See Administrative Conference of the United States, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

<sup>3</sup> *Id.* (referring to these two types of proceedings as “Type A” and “Type B” adjudication, respectively).





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government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions, and other records generated by agencies and parties involved in adjudication bespeak the procedural complexities and sophistication of many proceedings.

Many federal laws and directives mandate or encourage the online disclosure of important government materials, including certain adjudication records. The Freedom of Information Act (FOIA) requires that agencies make available in an electronic format “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”<sup>4</sup> The prevailing interpretation of this provision limits its ambit to “precedential” decisions.<sup>5</sup> Nonetheless, other laws and policies, including most recently the FOIA Improvement Act of 2016,<sup>6</sup> encourage more expansive online disclosure of federal records.<sup>7</sup>

When, as is often the case, adjudicative proceedings involve the application of governmental power to resolve disputes involving private parties, the associated records are of public importance. Further, administrative adjudication records can serve as ready-made models for private parties (especially those who are self-represented)<sup>8</sup> in drafting their own materials and may provide insight into the relevant substantive law and procedural requirements. Easy availability of these materials can save staff time or money through a reduction in the volume of FOIA requests or printing costs, or an increase in the speed with which agency staff will be able

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<sup>4</sup> 5 U.S.C. § 552(a)(2)(A).

<sup>5</sup> See U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.); U.S. Dep’t of Justice, Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967).

<sup>6</sup> Pub. L. No. 114-185, 130 Stat. 538 (2016). The Act, for instance, amended the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, by adding a requirement that agencies’ records management programs provide “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.” *Id.* § 3102(2).

<sup>7</sup> See, e.g., Office of Mgmt. & Budget Circular A-130, § 5.e.2.a (directing agencies to publish “public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely”).

<sup>8</sup> The Conference recently adopted a recommendation that offers best practices for agencies to consider in assisting self-represented parties in administrative hearings. See Administrative Conference of the United States, Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016).



to respond to remaining FOIA requests. In addition, there may also be more intangible benefits engendered by increased public trust and website user satisfaction.

In the absence of a comprehensive, government-wide platform akin to PACER or [www.regulations.gov](http://www.regulations.gov), agencies generally rely on their individual websites to comply with online transparency laws and initiatives, disclosing the binding orders, opinions, and, in some cases, supporting records produced during adjudicative proceedings. Some agencies host relatively accessible, comprehensive libraries of decisions and supporting adjudication materials. Not all agency websites, however, are equally navigable or robust. Additionally, in providing online access to adjudication materials, agencies utilize navigational and organizational tools and techniques in various ways.

This recommendation offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with a balancing of the transparency objectives and privacy considerations of FOIA and other relevant laws and directives.<sup>9</sup> It is drafted with recognition that all agencies are subject to unique programming and financial constraints, and that the distinctiveness of agencies' respective adjudicative schemes limits the development of workable standardized practices. To the extent agencies are required to expend additional resources in implementing this recommendation, any upfront costs incurred may be accompanied by offsetting benefits.

## RECOMMENDATION

### **Affirmative Disclosure of Adjudication Materials**

1. Agencies should consider providing access on their websites to decisions and supporting materials (e.g., pleadings, motions, briefs) issued and filed in adjudicative proceedings in excess of the affirmative disclosure requirements of the Freedom of Information Act (FOIA).

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<sup>9</sup> For the report undergirding this recommendation, see Daniel J. Sheffner, Adjudication Materials on Agency Websites (April 10, 2017) (report to the Admin. Conf. of the U.S.), *available at* <https://www.acus.gov/report/adjudication-materials-agency-websites-final-report-0>.



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In determining which materials to disclose, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy interests implicated by the disclosure of adjudication materials. Agencies should also consider the following factors in deciding what to disclose:

- a. the interests of the public in gaining insight into the agency's adjudicative processes;
  - b. the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements;
  - c. any offsetting benefits the agency may realize in disclosing these materials; and
  - d. any other relevant considerations, such as agency-specific adjudicative practices.
2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials.

### **Access to Adjudication Materials**

3. Agencies that choose to post all or nearly all decisions and supporting materials filed in adjudicative proceedings should endeavor to group materials from the same proceedings together, for example, by providing a separate docket page for each adjudication.
4. Subject to considerations of cost, agencies should endeavor to ensure that website users are able to locate adjudication materials easily by:
  - a. displaying links to agency adjudication sections in readily accessible locations on the website;
  - b. maintaining a search engine and a site map or index, or both, on or locatable from the homepage;
  - c. offering relevant filtering and advanced search options in conjunction with their main search engines that allow users to specify with greater detail the records or types of records for which they are looking, such as options to sort, narrow, or filter searches by record type, action or case type, date, case number, party, or specific words or phrases; and



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- d. offering general and advanced search and filtering options specifically within the sections of their websites that disclose adjudication materials to sort, narrow, or filter searches in the ways suggested in subparagraph (c).



## **Administrative Conference Recommendation 2016-4**

### **Evidentiary Hearings Not Required by the Administrative Procedure Act**

**Adopted December 13, 2016**

Federal administrative adjudication can be divided into three categories:

(a) Adjudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge (referred to as Type A in the report that underlies this recommendation and throughout the preamble)<sup>1</sup>;

(b) Adjudication that consists of legally required evidentiary hearings that are not regulated by the APA's adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges, though they are known by many other titles (referred to as Type B in the report that underlies this recommendation and throughout the preamble)<sup>2</sup>; and

(c) Adjudication that is not subject to a legally required (i.e., required by statute, executive order, or regulation) evidentiary hearing (referred to as Type C in the report that underlies this recommendation and throughout the preamble).<sup>3</sup>

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<sup>1</sup> See Administrative Procedure Act, 5 U.S.C. §§ 554–559 (2012). In a few kinds of cases, the “presiding employees” in APA hearings are not administrative law judges. Congress may provide for a presiding employee who is not an ALJ. See *id.* § 556(b).

<sup>2</sup> This type of adjudication is subject to 5 U.S.C. § 555 (requiring various procedural protections in all adjudication) and 5 U.S.C. § 558 (relating to licensing), as well as the APA's judicial review provisions.

<sup>3</sup> See generally Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act (Nov. 10, 2016) [hereinafter Asimow], available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.



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This recommendation concerns best practices for the second category of adjudication, that is, Type B adjudication.<sup>4</sup> In these adjudications, although there is no statutory mandate to hold an “on the record” hearing,<sup>5</sup> a statute, regulation, or other source of law does require the agency to conduct an evidentiary hearing. Because the APA’s adjudication provisions in 5 U.S.C. §§ 554 and 556–557 are not applicable to these adjudications, the procedures that an agency is required to follow are set forth elsewhere, most commonly in its own procedural regulations.

Type B adjudications are extremely diverse.<sup>6</sup> They involve types of matters spanning many substantive areas, including immigration, veterans’ benefits, environmental issues, government contracts, and intellectual property. Some involve disputes between the federal government and private parties; others involve disputes between two private parties. Some involve trial-type proceedings that are at least as formal as Type A adjudication. Others are quite informal and can be decided based only on written submissions. Some proceedings are highly adversarial; others are inquisitorial.<sup>7</sup> Caseloads vary. Some have huge backlogs and long delays; others seem relatively current. The structures for internal appeal also vary.

The purpose of this recommendation is to set forth best practices that agencies should incorporate into regulations governing hearing procedures in Type B adjudications. The procedures suggested below are highlighted as best practices because they achieve a favorable balance of the criteria of accuracy (meaning that the procedure produces a correct and consistent

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<sup>4</sup> Traditionally, Type A adjudication has been referred to as “formal adjudication” and Type B and Type C adjudication have been treated in an undifferentiated way as “informal adjudication.” This recommendation does not use that terminology for several reasons. First, the nature of Type B adjudication as involving a legally required hearing sharply distinguishes it from Type C adjudication and makes it feasible to prescribe best practices. Second, the term “informal adjudication” can be a misnomer when applied to Type B adjudication; in fact, Type B adjudication is often as “formal” or even more “formal” than Type A adjudication. Finally, Type C adjudication—which can properly be referred to as “informal adjudication”—is an enormous category, consisting of many millions of adjudications each year. This type of adjudication is highly diverse and does not easily lend itself to an overarching set of best practices.

<sup>5</sup> *See id.* at 7–9 (discussing the boundary between Type A and Type B adjudication).

<sup>6</sup> *See generally id.* (describing the vast variety of evidentiary hearings that are not required by the APA). *See also* Federal Administrative Adjudication, available at <https://www.acus.gov/research-projects/federal-administrative-adjudication> (providing an extensive database that maps the contours of administrative adjudication across the federal government).

<sup>7</sup> *See* Asimow, *supra* note 3 at 11–12, 84–88 (providing examples of inquisitorial adjudications).



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outcome), efficiency (meaning that the procedure minimizes cost and delay), and acceptability to the parties (meaning that the procedure meets appropriate standards of procedural fairness).

Some of the best practices set forth in this recommendation may not be applicable or desirable for every Type B adjudicatory program. Accordingly, the recommendation does not attempt to prescribe the exact language that the agency should employ in its procedural regulations.<sup>8</sup> This recommendation should be particularly useful to agencies that are either fashioning procedural regulations for new adjudicatory programs or seeking to revise their existing procedural regulations.

### RECOMMENDATION

#### **Integrity of the Decisionmaking Process**

1. *Exclusive Record.* Procedural regulations should require a decision to be based on an exclusive record. That is, decisionmakers should be limited to considering factual information presented in testimony or documents they received before, at, or after the hearing to which all parties had access, and to matters officially noticed.
2. *Ex Parte Communications.* Procedural regulations should prohibit ex parte communications relevant to the merits of the case between persons outside the agency and agency decisionmakers or staff who are advising or assisting the decisionmaker. Communications between persons outside the agency and agency decisionmakers or staff who advise or assist decisionmakers should occur only on the record. If oral, written, or electronic ex parte communications occur, they should be placed immediately on the record.

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<sup>8</sup> Drafters of procedural regulations implementing these best practices may want to consult the Conference-prepared 1993 Model Adjudication Rules for guidance on language, though those rules are directed to adjudication governed by the APA. See Michael Cox, *The Model Adjudication Rules (MARS)*, 11 T.M. COOLEY L. REV. 75 (1994). The Conference has initiated a new Model Adjudication Rules Working Group to revise the model rules. See Admin. Conf. of the U.S., Office of the Chairman Model Adjudication Rules Working Group, available at <https://www.acus.gov/research-projects/office-chairman-model-adjudication-rules-working-group> for more information.





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3. *Separation of Functions.* In agencies that have combined functions of investigation, prosecution, and adjudication, procedural regulations should require internal separation of decisional and adversarial personnel. The regulations should prohibit staff who took an active part in investigating, prosecuting, or advocating in a case from serving as a decisionmaker or staff advising or assisting the decisionmaker in that same case. Adversary personnel should also be prohibited from furnishing ex parte advice or factual materials to a decisionmaker or staff who advise or assist decisionmakers.
4. *Staff Who Advise or Assist Decisionmakers.* Procedural regulations should explain whether the agency permits ex parte advice or assistance to decisionmakers by staff. The staff may not have taken an active part in investigating, prosecuting, mediating, or advocating in the same case (see paragraph 3). The advice should not violate the exclusive record principle (see paragraph 1) by introducing new factual materials. The term “factual materials” does not include expert, technical, or other advice on the meaning or significance of “factual materials.”
5. *Bias.* Procedural regulations should prohibit decisionmaker bias in adjudicatory proceedings by stating that an adjudicator can be disqualified if any of the following types of bias is shown:
  - a. Improper financial or other personal interest in the decision;
  - b. Personal animus against a party or group to which that party belongs; or
  - c. Prejudgment of the adjudicative facts at issue in the proceeding.

Procedural regulations and manuals should explain when and how parties should raise claims of bias, and how agencies resolve them.

### **Pre-Hearing Practices**

6. *Notice of Hearing.* Procedural regulations should require notice to parties by appropriate means and sufficiently far in advance so that they may prepare for hearings. The notice should contain a statement of issues of fact and law to be decided. In addition, the notice



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should be in plain language and, when appropriate, contain the following basic information about the agency's adjudicatory process:

- a. Procedures for requesting a hearing;
  - b. Discovery options, if any (see paragraph 10);
  - c. Information about representation, including self-representation and non-lawyer or limited representation, if permitted (see paragraphs 13–16), and any legal assistance options;
  - d. Available procedural alternatives (e.g., in-person, video, or telephonic hearings (see paragraph 20); written and oral hearings (see paragraph 21); and alternative dispute resolution (ADR) opportunities (see paragraph 12));
  - e. Deadlines for filing pleadings and documents;
  - f. Procedures for subpoenaing documents and witnesses, if allowed (see paragraph 11);
  - g. Opportunity for review of the initial decision at a higher agency level (see paragraph 26);
  - h. Availability of judicial review; and
  - i. Website address for and/or citation to the procedural regulations and any practice manuals.
7. *Confidentiality*. Procedural regulations should provide a process by which the parties may seek to keep certain information confidential or made subject to a protective order in order to protect privacy, confidential business information, or national security.
8. *Pre-Hearing Conferences*. Procedural regulations should allow the decisionmaker discretion to require parties to participate in a pretrial conference if the decisionmaker believes the conference would simplify the hearing or promote settlement. The decisionmaker should require that (a) parties exchange witness lists and expert reports before the pretrial conference and (b) both sides be represented at the pretrial conference by persons with authority to agree to a settlement.



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9. *Inspection of Materials.* Procedural regulations should permit parties to inspect unprivileged materials in agency files that are not otherwise protected.
10. *Discovery.* Agencies should empower their decisionmakers to order discovery through depositions, interrogatories, and other methods of discovery used in civil trials, upon a showing of need and cost justification.
11. *Subpoena Power.* Agencies with subpoena power should explain their subpoena practice in detail. Agencies that do not have subpoena power should seek congressional approval for subpoena power, when appropriate.
12. *Alternative Dispute Resolution.* Agencies should encourage and facilitate ADR, and ensure confidentiality of communications occurring during the ADR process.

### **Hearing Practices**

13. *Lawyer Representation.* Agencies should permit lawyer representation.
14. *Non-Lawyer Representation.* Agencies should permit non-lawyer representation. Agencies should have the discretion to (a) establish criteria for appearances before the agency by non-lawyer representatives or (b) require approval on a case-by-case basis.<sup>9</sup>
15. *Limited Representation.* Agencies should permit limited representation by lawyers or non-lawyers, when appropriate (i.e., representation of a party with respect to some issues or during some phases of the adjudication).

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<sup>9</sup> Agencies should refer to Recommendation 86-1, Nonlawyer Assistance and Representation, 51 Fed. Reg. 25,641 (June 16, 1986), available at <https://www.acus.gov/recommendation/nonlawyer-assistance-and-representation>, when establishing or improving their procedures related to non-lawyer representation.



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16. *Self-Representation.* Agencies should make hearings as accessible as possible to self-represented parties by providing plain language resources, legal information, and other assistance, as allowed by statute and regulations.<sup>10</sup>
17. *Sanctions.* Agencies with the requisite statutory power should authorize decisionmakers to sanction attorneys and parties for misconduct. Sanctions can include admonitions, monetary fines, and preclusion from appearing before the agency. Agencies should have a mechanism for administrative review of any sanctions.
18. *Open Hearings.* Agencies should adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect:
  - a. National security;
  - b. Law enforcement;
  - c. Confidentiality of business documents; and
  - d. Privacy of the parties to the hearing.
19. *Adjudicators.* Agencies that decide a significant number of cases should use adjudicators—rather than agency heads, boards, or panels—to conduct hearings and provide initial decisions, subject to higher-level review (see paragraph 26).
20. *Video Conferencing and Telephone Hearings.* Agencies should consult the Administrative Conference’s recommendations<sup>11</sup> in determining whether and when to conduct hearings or parts of hearings by video conferencing or telephone.

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<sup>10</sup> Agencies should refer to Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016), available at <https://www.acus.gov/recommendation/self-represented-parties-administrative-proceedings-final-recommendation>, when establishing or improving their procedures related to self-represented parties.

<sup>11</sup> Agencies should refer to Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011), available at <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>; Recommendation 2014-7, *Best Practices for Using Video*



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21. *Written-Only Hearings.* Procedural regulations should allow agencies to make use of written-only hearings in appropriate cases. Particularly good candidates for written-only hearings include those that solely involve disputes concerning:
- a. Interpretation of statutes or regulations; or
  - b. Legislative facts as to which experts offer conflicting views.
- Agencies should also consider the adoption of procedures for summary judgment in cases in which there are no disputed issues of material fact.
22. *Oral Argument.* Agencies generally should permit oral argument in connection with a written-only hearing if a party requests it, while retaining the discretion to dispense with oral argument if it appears to be of little value in a given case or parts of a case.
23. *Evidentiary Rules.* Procedural regulations should prescribe the evidentiary rules the decisionmaker will apply in order to avoid confusion and time-consuming evidentiary disputes.<sup>12</sup>
24. *Opportunity for Rebuttal.* Agencies should allow an opportunity for rebuttal, which can take the form of cross-examination of an adverse witness as well as additional written or oral evidence. Agencies should have the discretion to limit or preclude cross-examination or have it be conducted in camera in appropriate cases, such as when:
- a. The dispute concerns a question of legislative fact where the evidence consists of expert testimony;
  - b. Credibility is not at issue;

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Teleconferencing for Hearings, 79 Fed. Reg. 75,119 (Dec. 17, 2014), available at <https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings>; and the Conference's Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings, available at <https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings>, when establishing or improving their video teleconferencing hearings.

<sup>12</sup> Agencies should refer to Recommendation 86-2, Use of Federal Rules of Evidence in Federal Agency Adjudications, 51 Fed. Reg. 25,642 (June 16, 1986), available at <https://www.acus.gov/recommendation/use-federal-rules-evidence-federal-agency-adjudications>, when considering whether or how to use the Federal Rules of Evidence.



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- c. The only issue is how a decisionmaker should exercise discretion;
- d. National security could be jeopardized; or
- e. The identity of confidential informants might be revealed.

### **Post-Hearing Practices**

25. *Decisions.* Procedural regulations should require the decisionmaker to provide a written or transcribable decision and specify the contents of the decision. The decision should include:

- a. Findings of fact, including an explanation of how the decisionmaker made credibility determinations; and
- b. Conclusions of law, including an explanation of the decisionmaker's interpretation of statutes and regulations.

26. *Higher-Level Review.* Apart from any opportunity for reconsideration by the initial decisionmaker, procedural regulations should provide for a higher-level review of initial adjudicatory decisions. Agencies should give parties an opportunity to file exceptions and make arguments to the reviewing authority. The reviewing authority should be entitled to summarily affirm the initial decision without being required to write a new decision.

27. *Precedential Decisions.* Procedural regulations should allow and encourage agencies to designate decisions as precedential in order to improve decisional consistency. These decisions should be published on the agency's website to meet the requirements of 5 U.S.C. § 552.

### **Management of Procedures**

28. *Complete Statement of Important Procedures.* Agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations



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that are published in the Federal Register and the Code of Federal Regulations and posted on the agency website.

29. *Manuals and Guides.* Agencies should provide practice manuals and guides for decisionmakers, staff, parties, and representatives in which they spell out the details of the proceeding and illustrate the principles that are set forth in regulations. These manuals and guides should be written in simple, non-technical language and contain examples, model forms, and checklists, and they should be posted on the agency website.
30. *Review of Procedures.* Agencies should periodically re-examine and update their procedural regulations, practice manuals, and guides.
31. *Feedback.* Agencies should seek feedback from decisionmakers, staff, parties, representatives, and other participants in order to evaluate and improve their adjudicatory programs.