



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Regulatory Enforcement Manuals

Committee on Rulemaking

Proposed Recommendation | December 15, 2022

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Many agencies are responsible for detecting, investigating, and prosecuting potential
2 violations of the laws they administer. Statutes and agency rules govern the exercise of agencies'
3 enforcement authority and direct the activities of enforcement personnel. Agencies' policies (a)
4 explain and interpret relevant statutes and rules; (b) establish standards, priorities, and
5 procedures for detecting and investigating suspected violations, issuing complaints against
6 suspected violators, and prosecuting cases before an administrative body or a federal court; (c)
7 describe how enforcement staff interact with other agency personnel and persons outside the
8 agency; and (d) set forth processes for soliciting and receiving complaints about alleged
9 violations from members of the public.

10 Many agencies have developed documents, often called "enforcement manuals," that
11 provide their personnel with a single, comprehensive resource regarding enforcement-related
12 laws and policies. Enforcement manuals provide a way for agencies to effectively communicate
13 such policies, which would otherwise be dispersed within a voluminous body of separate
14 documents, and to ensure that agency enforcement is internally consistent, fair, efficient,
15 effective, and legally sound.¹ Although enforcement manuals should not necessarily bind
16 agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency

¹ See Jordan Perkins, Regulatory Enforcement Manuals 1, 9 (Sept. 28, Dec. 9, 2022) (draft report to the Admin. Conf. of the United States).

Commented [CMA1]: Proposed Amendment #1 from Senior Fellow Alan B. Morrison (see parallel amendment at line 60):

"Line 15 - on the binding effect of manuals on the agency, is the correct word 'should' or 'do'? Same point for line 60."



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17 management matter, to direct enforcement personnel to act in conformity with an enforcement
18 manual.² Because enforcement manuals are generally a form of agency guidance, the public
19 should not necessarily rely upon them.

Commented [CA2]: Proposed Amendment from Council #1

20 Enforcement manuals can also be a useful, practical resource for the public. The Freedom
21 of Information Act (FOIA) requires agencies to post on their websites “administrative staff
22 manuals and instructions to staff that affect a member of the public.”³ ~~Although To be sure,~~
23 ~~several courts of appeals have held that this provision simply does not apply to some portions of~~
24 ~~enforcement manuals,⁴ But whatever the exact scope of this provision, the policies underlying it~~
25 ~~are relevant. Like other internal manuals, enforcement manuals can also be a useful, practical~~
26 ~~resource for the public. By by providing public access to enforcement manuals them,~~ agencies
27 can improve awareness of and compliance with relevant policies ~~and while promoting~~
28 transparency more generally.

29 Enforcement manuals may contain information that agencies should not disclose.
30 ~~However, d~~Disclosure of some portions of enforcement manuals might, for example, also enable
31 persons to circumvent the law by revealing forms of noncompliance that will not lead to
32 investigation or enforcement. Avoiding such disclosures is both legitimate and important.
33 Accordingly, FOIA exempts from disclosure records or information that “would disclose
34 techniques and procedures for law enforcement investigations or prosecutions” or “guidelines for
35 law enforcement investigations or prosecutions if such disclosure could reasonably be expected
36 to risk circumvention of the law.”⁵ FOIA also allows agencies to withhold records that fall within
37 the attorney work-product privilege. This exemption may encompass information provided to
38 enforcement personnel about litigation strategies and legal theories, the disclosure of which

² See Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 3, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).

³ 5 U.S.C. § 552(a)(2)(C).

⁴ See, e.g., *Smith v. N.T.S.B.*, 981 F.2d 1326 (D.C. Cir. 1993); *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973).

⁵ *Id.* § 552(b)(7)(E).



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39 ~~c~~would adversely affect the integrity of adversarial proceedings.⁶ Agencies cannot rely on these
40 exemptions reflexively, however. Since 2016, agencies may withhold information under FOIA
41 All or part of a manual can be withheld only if they “the agency” reasonably foresees that
42 disclosure would harm an interest protected by” an exemption or if disclosure is prohibited by
43 law.⁷ In other circumstances absent such foreseeable harm, agencies should or must disclose
44 their enforcement manuals, or at least the non-exempt portions of the manual, the manual should
45 or must be disclosed.⁸

46 This Recommendation offers agencies best practices for developing, managing, and
47 disseminating enforcement manuals. It builds on several recommendations the Administrative
48 Conference has previously adopted regarding the development, management, and dissemination
49 of agency procedural rules and guidance documents.⁹ In offering these recommendations, the
50 Conference recognizes that enforcement manuals may not be appropriate for all agencies, given
51 differences in the volume and complexity of documents that govern their enforcement activities,
52 resources available to agencies, and the differing informational needs of persons affected by or
53 interested in agency enforcement activities.

RECOMMENDATION

Developing Enforcement Manuals

- 54 1. Subject to available resources, agencies responsible for investigating and prosecuting
55 potential violations of the laws that they administer should develop an enforcement

⁶ See *ACLU of N. Cal. v. U.S. DOJ*, 880 F.3d 473, 486–88 (9th Cir. 2018); *Nat’l Ass’n of Crim. Def. Lawyers v. U.S. DOJ Exec. Off. for U.S. Attys.*, 844 F.3d 246, 254 (D.C. Cir. 2016).

⁷ 5 U.S.C. § 552(a)(8)(A).

⁸ ~~5 U.S.C. § 552(a)(8)(A).~~

⁹ See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Recommendation 2017-5, *supra* note 2.

Commented [CA3]: Proposed Amendment from Council #2:

The Council proposes this amendment to simplify the language.

Commented [CMA4]: Proposed Amendment #2 from Senior Fellow Alan B. Morrison:

“Consider adding after ‘manual’ ‘or at least the non-exempt portions of the manual!’.”



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56 manual—that is, a document that provides personnel a single, comprehensive resource
57 for enforcement-related statutes, rules, and policies—if doing so would improve the
58 communication of enforcement-related policies to agency personnel and promote the fair
59 and efficient performance of enforcement functions consistent with established policies.

60 2. In developing enforcement manuals, agencies should consider, among other things:

- 61 a. Identifying the office or individual within the agency under whose name and
62 authority the manual is being issued;
- 63 b. Identifying which offices within the agency are directed to act in conformity with
64 the manual;
- 65 c. Describing the manual’s purpose, scope, and organization; ~~and~~
- 66 d. Describing the manual’s legal effect, including a disclaimer, if applicable, that the
67 manual should not bind the agency as a whole and that the public should not
68 necessarily rely upon the manual;
- 69 e-e. Identifying any safe harbors (i.e., descriptions of conduct that the agency will not
70 treat as a violation of a statute or rule) upon which regulated entities may rely;
- 71 d-f. Identifying the office or individual within the agency that is empowered to
72 receive, and potentially to act on, any complaint that the agency personnel who
73 are conducting an investigation or other enforcement action are engaging in
74 unlawful or inappropriate conduct;
- 75 e-g. Identifying the statutes and rules that govern the agency’s enforcement activities;
- 76 f-h. Describing criteria for selecting among options available to the agency to compel
77 remedial action, procedures for formally initiating agency adjudicative or judicial
78 proceedings, and criteria for making criminal referrals;
- 79 g. Explaining how and by whom the manual is developed, periodically reviewed for
80 accuracy, and updated;
- 81 h-i. Describing procedures for soliciting and receiving information about alleged
82 violations of law from persons outside the agency;
- 83 i-j. Identifying criteria used to classify the severity of alleged violations, recommend
84 or assess penalties or other remedies, or prioritize investigations or prosecutions;

Commented [CMA5]: Proposed Amendment from Special Counsel Jeffrey Lubbers:

“In recommendation 2, I would reorder a few of the paragraphs. I think paragraph d should be moved after g since they cover the same issue, I would also switch paragraphs m and n since settlements seem a better topic to end with.”

Commented [CA6]: Proposed Amendment from Council #3

Commented [CMA7]: Proposed Amendment #1 from Senior Fellow Alan B. Morrison (see parallel amendment at line 15):

“On the binding effect of manuals on the agency, is the correct word ‘should’ or ‘do’?”

Commented [CMA8]: Comment #1 from Senior Fellow Alan B. Morrison:

“I do not know what the phrase ‘and that the public should not necessarily rely upon the manual’ means. Perhaps it is not necessary and may provide more confusion than illumination.”

Commented [CA9]: Proposed Amendment from Council #4

Commented [CMA10]: Comment #2 from Senior Fellow Alan B. Morrison:

“Should the public also report conduct that is inconsistent with the manual also?”

Commented [CA11]: Proposed Amendment from Council #5:

The Council proposes this amendment to clarify what is meant by the term “enforcement alternatives.”

Commented [CA12]: Proposed Amendment from Council #6:

Re-ordered the list.

Commented [CMA13]: Proposed Amendment #3 from Senior Fellow Alan B. Morrison:

“I think you mean violations of law (not the manual). If so, I would insert ‘of law’ after violations.”



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- 85 ~~j-k.~~ Describing procedures for conducting investigations, inspections, audits, or
86 similar processes;
- 87 ~~k-l.~~ Describing policies governing communications between enforcement personnel
88 and other agency personnel, the subjects of enforcement actions, and other
89 persons outside the agency;
- 90 ~~l-m.~~ Explaining procedures for determining if records or information are
91 legally protected **from unauthorized disclosure**, and procedures for handling such
92 records or information;
- 93 ~~m.~~ ~~Addressing when and how agency personnel may publicly disclose information~~
94 ~~about an enforcement proceeding, such as by issuing a press release;~~
- 95 n. Identifying guidelines for ~~both~~ informally adjudicating ~~and or~~ negotiating
96 settlements with the subjects of enforcement actions; ~~and~~
- 97 ~~o.~~ ~~Describing criteria for the selection among enforcement alternatives, procedures~~
98 ~~for formally initiating agency adjudicative or judicial proceedings, and making~~
99 ~~criminal referrals.~~
- 100 ~~o.~~ Addressing when agency personnel may publicly disclose information about an
101 enforcement proceeding, such as by issuing a press release, ~~and the nature of~~
102 ~~information that may be disclosed; and~~
- 103 ~~p.~~ Explaining how and by whom the manual is developed, periodically reviewed for
104 accuracy, and updated;
- 105 3. Agencies should ensure that the contents of enforcement manuals are presented in a clear,
106 logical, and comprehensive fashion, and include a table of contents and an index.

Managing Enforcement Manuals

- 107 4. Agencies should periodically review their enforcement manuals and update them as
108 needed to ensure **that** they accurately reflect current law and policies. When agencies
109 update their enforcement manuals, **they manuals** should prominently display the date of
110 the update and identify what changes were made.
- 111 5. Agencies with enforcement manuals should develop procedures for ~~managing them and~~

Commented [CA14]: Proposed Amendment from Council #7

Commented [CMA15]: Comment #3 from Senior Fellow Alan B. Morrison:

“Does this mean that ACUS does not recommend that anything else that agencies produce besides manuals should be ‘clear, logical, and comprehensive’? Perhaps all that is needed is a reminder to include a table of contents and an index, if that.”

Commented [CA16]: Proposed Amendment from Council #8 (see parallel amendment at line 105):

It is unclear what the term "managing" means.



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- 112 keeping them up to date. These procedures should address:
- 113 a. How often the enforcement manual, in whole or in part, is reviewed for accuracy
- 114 and updated if necessary;
- 115 b. Which office or individual within the agency is responsible for periodically
- 116 reviewing the enforcement manual, in whole or in part; and
- 117 c. How and by whom changes to the enforcement manual are drafted, reviewed,
- 118 approved, and implemented.
- 119 6. To ensure that enforcement personnel can easily access current versions of enforcement
- 120 manuals, agencies should make enforcement manuals available in a searchable, electronic
- 121 format in an appropriate location on an internal network.
- 122 7. Agencies should solicit feedback on their enforcement manuals from their personnel and
- 123 consider that feedback in managing-revising their manuals.

Disseminating Enforcement Manuals to the Public

- 124 8. Agencies should make their enforcement manuals, or portions of their manuals thereof,
- 125 publicly available on their websites when doing so would improve public awareness of
- 126 relevant policies and compliance with legal requirements or promote transparency more
- 127 generally, and if they have adequate resources available to ensure publicly available
- 128 enforcement manuals remain up to date. Agencies should not include information in
- 129 publicly available versions of enforcement manuals that would enable persons to
- 130 circumvent the law or reflect litigation strategies or legal theories, the disclosure of which
- 131 would adversely affect the integrity of adversarial proceedings, or enable persons to
- 132 circumvent the law.
- 133 9. When agencies post publicly available versions of enforcement manuals, they should post
- 134 the manuals in an easily identified location on their websites, in a user-friendly format,
- 135 and with an introduction sufficient to ensure that potentially interested persons —,
- 136 including members of historically underserved communities, who may be unfamiliar with
- 137 the existence, purpose, and legal effect of enforcement manuals—, can easily find and
- 138 use them.

Commented [CA17]: Proposed Amendment from Council #8 (see parallel amendment at line 93):

It is unclear what the term "managing" means.

Commented [CMA18]: Comment #4 from Senior Fellow Alan B. Morrison:

"I do not think that the harm from disclosure is that described in these two lines. I am not sure it is needed at all since there are two good reasons/concerns in lines 111-12."

Commented [CA19]: Proposed Amendment from Council #9:

The Council proposes this amendment to clarify why agencies should consider the needs of members of communities that have been historically underserved by agency programs.



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- 139 10. ~~When a~~ agencies issue or revise publicly available enforcement manuals, they should
140 provide notice to the public of such actions, ~~when they issue or revise a publicly available~~
141 ~~enforcement manual~~ for example by placing a notice on the agency's website, issuing a
142 press release, making an announcement on social media, or publishing a notice of
143 availability in the *Federal Register*.
- 144 11. Agencies that make enforcement manuals publicly available should solicit feedback on
145 them ~~in a public forum~~ from a wide range of persons interested in or affected by agency
146 enforcement proceedings.

Commented [CA20]: Proposed Amendment from Council #10:

The Council proposes striking the phrase "in a public forum" because an agency might also solicit feedback through direct outreach.