



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Procedural Rules for Agency Adjudication

What are procedural rules?

Procedural law is commonly contrasted with substantive law. Substantive law defines and regulates legal rights and duties. Procedural law prescribes the means of enforcing rights and redressing wrongs.

A number of different sources create the procedures that agencies follow to adjudicate cases. These include the Constitution's Due Process Clause, the Administrative Procedure Act (APA), and agency- and program-specific statutes.

Agencies also create their own procedural rules to adjudicate cases fairly, efficiently, and accurately. Agency-created sources of procedural rules may include:

- Procedural and practice rules published in the [Code of Federal Regulations](#);
- Guidance documents and explanatory materials (e.g., manuals, bench books);
- Agency [precedential decisions](#);
- Agency-specific forms; and
- Standing orders issued by adjudicators.

What topics do agency procedural rules cover?

Many agencies have adopted rules that, like the rules applicable in the federal courts, cover topics like jurisdiction, pleading, evidence, conduct of evidentiary hearings, and appellate standards of review ([IIB-010](#)). Given the diversity of agency proceedings, procedural rules may also govern matters as varied as:

- Applying for benefits, grants, and loans;
- Conferring licenses and permits;
- Conducting inspections, grading, and testing;
- Adjudicator recusal ([IIB-004](#));
- Virtual hearings ([IIB-020](#)); and
- Representative conduct ([IIB-021](#)).

Where do agencies publish procedural rules?

The Freedom of Information Act (FOIA) and Federal Register Act direct agencies to publish some procedural rules in the [Federal Register](#) or [Code of Federal Regulations](#) ([IIB-001](#)). FOIA and the E-Government Act also require agencies to post many procedural rules online ([IIB-002](#)). ACUS [recommends](#) that agencies provide updated access on their websites to all sources of procedural rules and present them in a clear, logical, and comprehensive fashion.

How do agencies promulgate procedural rules under the Administrative Procedure Act?

Although the APA generally requires agencies to use the notice-and-comment process when they promulgate rules ([IIB-014](#)), it excepts from this requirement "rules of agency organization, procedure, or practice." Agencies do sometimes voluntarily use the notice-and-comment process when adopting procedural rules, however, and ACUS [encourages](#) them to do so except when the costs of doing so would outweigh the benefits.

The scope of the exception can be difficult to define and has been the subject of extensive litigation in the courts. Although courts employ different tests, many follow the test that the D.C. Circuit announced in *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (1987). Under that test, courts determine whether a rule is substantive rather than procedural by examining whether it "encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."

Are procedural rules binding on members of the public and the agencies that issue them?

Like substantive rules adopted through the notice-and-comment process, procedural rules in the [Code of Federal Regulations](#) generally are considered binding law. Other sources of procedural rules, such as guidance documents and explanatory materials, are often not binding but may be in some circumstances.

Applying the [Accardi](#) doctrine, courts generally require agencies to follow their own procedural rules—at least those in the [Code of Federal Regulations](#). But this area of law is complicated. One important case is [Am. Farm Lines v. Black Ball Freight Serv.](#), 397 U.S. 532 (1970). The Supreme Court declined to require an agency to comply with a procedural rule that was intended to guide agency employees and did not "confer important procedural benefits" upon the public. The Court stressed that there was no prejudice to the private party and that an agency has discretion to "modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."

For more information about the legal effect of procedural rules, see Thomas W. Merrill, [The Accardi Principle](#), 74 GEO. WASH. L. REV. 569 (2006).

Additional Resources

ACUS Rec. [2018-5](#), [Public Availability of Adjudication Rules](#)
ACUS Rec. [92-1](#), [The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements](#)
Jeffrey S. Lubbers, [The Procedural and Practice Rule Exemption from the APA Notice-and-Comment-Rulemaking Requirements](#) (1991)