ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Minutes from the First Consultative Group Meeting for *Disclosure of Agency Legal Materials*
June 6, 2022

Introductory Matters

Staff from the Administrative Conference of the U.S. (ACUS) introduced the consultants and welcomed the consultative group.

Lead Consultant Presentation

The lead consultant explained that the "principle of avoiding secret law" was the motivating principle underlying the consultants' research and is the same principle that underlies the major statutes governing disclosure of agency legal materials, namely: the Freedom of Information Act (FOIA), the Federal Register Act, and the E-Government Act of 2002. She also explained that ambiguity abounds in these laws; for example, categories of legal materials are often undefined. One task of the consultants will be, she explained, to define "agency legal materials."

Consultative Group Discussion

Clarifying the Scope of the Research and Key Terms

A consultative group member from an agency stated that it is important for the report to specify clearly the problem being addressed: it should, in other words, indicate why it is important for the public to have access to legal materials, and the extent to which that need is not currently being met.

There was considerable discussion of the importance of defining key terms in the report. Many consultative group members, from all sectors (i.e., academia, private practice, and agencies) emphasized the importance of explicitly defining, at the outset, the terms "proactive (or affirmative) disclosure" and "agency legal materials." A consultative group member from an agency stated that the project should set forth a clear position as to whether all guidance documents are "agency legal materials." Another consultative group member from an agency stated that if the report uses the term "secret law," then the report should indicate whether "secret law" includes only deliberately withheld legal materials, or if it also includes legal materials that are difficult for the public to access for other reasons (e.g., because the agency website is not well organized).

There was also considerable discussion as to the specific kinds of materials that ought to fall within the definition of "agency legal materials." A consultative group member from an agency stated that agency litigation materials, such as briefs and other materials on PACER, should not be included within the definition of "agency legal materials." Two other consultative group members from agencies stated that advisory opinions issued by one agency for another that are not intended to occasion legal consequences should not be included within the definition of

"agency legal materials." One of these agency officials stated that, by contrast, certain internal guidance documents, namely those that restrict an agency's statutory discretion, should be included within the definition of "agency legal materials."

Some discussion centered on whether it would be more advantageous, in general, for the project to focus on a narrow or a broad set of materials. A consultative group member from an agency stated that "agency legal materials" should be defined narrowly because ACUS tends to be most effective when its focus is narrow and specific. Another consultative group member, from academia, stated that the project should expand its scope even beyond "agency legal materials" because it is not possible to isolate disclosure matters pertaining to "agency legal materials" from disclosure matters implicating a broader set of materials. The ACUS Executive Director responded that the project's scope, as approved by the Council, is limited to "agency legal materials," though which specific materials fall within that category is a topic ripe for continued discussion.

Principles Motivating the Research

A consultative group member from an agency stated that equity should be a guiding principle for this project. This official explained that many agencies are currently subject to a variety of directives (e.g., executive orders and memoranda) that require agencies to promote equity in their operations broadly. The report should, this official stated, explain how promoting access to agency legal materials advances these equity goals and requirements.

Another consultative group member from an agency stated that the principle of "secret law" resonates. A consultative group member from academia stated that "secret law" should be understood not just to refer to legal materials that agencies deliberately withhold, but also those that are practically unavailable to members of the public. This member explained that materials may be practically unavailable to members of the public because there could be costs associated with accessing certain legal materials (e.g., copyrighted materials incorporated by reference), or materials could simply be hard to find because agencies have not organized their materials to facilitate easy public access.

Another consultative group member from academia explained that certain legal materials may be practically unavailable to members of the public because agencies destroy them or maintain them in a way that no one can access them. This member suggested that the Presidential Records Act be made part of the inquiry in light of allegations that former White House officials' records have been destroyed or hidden. He also explained that under a ruling from the U.S. Court of Appeals for the D.C. Circuit, a party cannot sue, under the Federal Records Act, to require the executive branch to make materials available.

A consultative group member from an agency stated that agencies do not deliberately try to withhold guidance documents from the public – indeed, it is oxymoronic to speak of "secret law" in the context of guidance documents because agencies create guidance documents for the very purpose of providing information to the public.

Publishing Legal Materials Generally

A consultative group member from academia stated that all documents associated with this project (e.g., the project page, the Request for Comments, etc.) should clearly state that 5 U.S.C. Sections (a)(1) and (a)(2) are central to this project. Considerable discussion ensued regarding publication requirements under these provisions and others.

A consultative group member from an agency stated that agencies need clarity on the question of which legal materials must be published in the *Federal Register* versus which ones must be published on agency websites.

The merits of publishing opinions from the U.S. Department of Justice's (DOJ's) Office of Legal Counsel (OLC) were discussed extensively. A consultative group member from academia stated that the report should not state that OLC opinions are not currently required under law to be made publicly available. Rather, if the report weighs in on existing legal requirements with respect to publication of OLC opinions, it should state that agencies take the position that they are not legally required to be published. This same member stated that members of the public do not know that OLC opinions exist, and so they do not know to request them, which makes indexing of legal materials so important.

Discussion ensued regarding indexing of legal materials and, more broadly, ensuring that legal materials are easily accessible on agency websites. A consultative group member from an agency seconded the importance of indexing legal materials and stated that optimizing the quality of agency search engines is essential. This member stated that even if an agency published on its website every legal material it has ever issued, if there is no search engine, or if the search engine is ineffective, the material is practically inaccessible. A member of the consultant team responded to this exchange by welcoming thoughts about how Congress should legislate to require search engines and indexing. Another member of the consultant team responded that the team welcomes concrete examples of indexes, both those that are excellent and those that are inadequate.

There was also discussion regarding the enforceability of FOIA's proactive disclosure requirements. A consultative group member from private practice noted that there is currently a circuit split as to whether 552 Sections (a)(1) and (a)(2) are enforceable. This member noted that DOJ takes position that these provisions are legal requirements but cannot be judicially enforced. The member stated that the report should recommend that these provisions be made judicially enforceable, though it should not necessarily take a position on whether they are currently enforceable.

Finally, there was some discussion about the effect of Section 508 of the Rehabilitation Act on agencies' ability to publish legal materials. A consultative group member from an agency stated that agencies struggle with the tension between disclosure obligations and Section 508 compliance.

Federal Register Publication Costs

There was discussion regarding the effects of *Federal Register* publication costs on agencies' publication practices. A consultative group member from academia stated that *Federal Register* publication costs create incentives for agencies to publish materials on their websites rather than in the *Federal Register*. This member noted that these costs cause agencies to publish notices of availability in the *Federal Register* and post the underlying document itself on the agency's website. The member stated that over time, documents on agency websites can disappear, a point seconded by a consultative group member from an agency, and unless these financial incentives are addressed, this problem will not be remedied. Three consultative group members from agencies confirmed that *Federal Register* publication costs are a real calculation for agencies in deciding whether to post materials on their website or in the *Federal Register*. Another consultative group member, from academia, suggested that a potential legislative solution to reduce agencies' publication costs would be to reduce the scope of FOIA's (a)(1) obligations (publication in the *Federal Register*) and instead require more documents to be published on agency websites.

To suggest an alternative model to the current model of agencies paying for *Federal Register* publication, a consultative group member from an agency provided the history of funding of the *Federal Register*, noting that agencies were not required to pay for *Federal Register* publication until 1977. A consultative group member from academia encouraged the researchers to address the issue of *Federal Register* publication costs and suggested that, if they recommend that agencies no longer pay for *Federal Register* publication, they also address how publication costs ought to be paid for. This academic mentioned, by way of analogy, that there is currently a movement to support free public access to PACER, and that the Judicial Conference supports this proposal.

Creating Digests, Syntheses, Summaries, and Other Materials to Help the Public Understand Content

A member of the consultant team mentioned that the team is grappling with the question of whether "accessibility" of legal materials should be understood to include "understandability" of these materials. If so, then agencies would need to not just publish and disseminate underlying legal materials but would also need to *generate* materials such as guides, syntheses, summaries, and so on to help the public digest these materials. This consultant team member mentioned that some agencies produce these sorts of explanatory documents with this goal in mind and the question he raised for the group was: should the project recommend that agencies do more to generate these documents? Two consultative group members from academia expressed support for the idea that agencies should create these digests, syntheses, summaries, and so on to help the public understand legal materials, one of whom suggested that the consultants revisit ACUS's Plain Language recommendation as part of this inquiry, but also noted that doing so would be a "tough lift."

A consultative group member from an agency asked whether these syntheses, summaries, guides, and so on would themselves be considered "guidance documents." Another consultative group member from an agency said that a creation requirement would cause bottlenecks, especially

considering that agencies are also bogged down with responding to FOIA requests. Another consultative group member from an agency stated that a creation obligation would have a tremendous impact on agency operations. To support this assertion, this official noted that agency guidance documents are frequently subject to litigation, so a creation obligation would tremendously burden the agency, not just in the generation of the documents but then in later defending them in litigation. Another consultative group member from an agency cautioned that if agencies create these syntheses, guides, etc., some members of the public might appreciate it, but others might say: "here's the agency creating more guidance documents." The member suggested that the consultants approach this question neutrally.

Incorporation by Reference

There was discussion surrounding the topic of material that has been incorporated into regulations by reference. A consultative group member from academia stated that materials incorporated by reference are the bulk of legally binding materials, yet they are not obligated to be made public. He further described this material as "secret law" and stated that it should be made publicly available without charge. He noted that under copyright law, there is a fair use exception, and it is a fair use to make industrial standards public so as to avoid secret law. He suggested amending the documents affiliated with the project to say that incorporation by reference (IBR) is explicitly included. He noted that there was a previous ACUS project on IBR but that, in his view, it did not go far enough in recommending that agencies publish material incorporated by reference. This sentiment was seconded by another consultative group member from academia, who also stated that IBR implicates equity. She noted that requiring the public to pay to access these materials, or to show up to a physical reading room to access them, could impact under-resourced parties. She also stated that access to material incorporated by reference has not improved in the years since the ACUS recommendation.

Another consultative group member from academia stated that she disagrees that access to material incorporated by reference has not improved and expressed her disagreement with the characterization of material incorporated by reference as "secret law." She stated that paying to access the material does not make it "secret." IBR material is also often available at the agency's headquarters or reading room. She also discouraged the consultants from pursuing IBR as part of the project, noting that ACUS has already devoted sizable resources to the topic, produced an extremely high-quality recommendation that incorporates views from both sides, the topic remains extremely divisive, and there is ongoing litigation regarding this area, which merits waiting until the law has resolved. In response to the point about ongoing litigation, a consultative group member from an agency stated that the project should not shy away from this topic just because there is ongoing litigation.

A consultative group from academia stated that when the IBR provision was added to the Administrative Procedure Act (5 U.S.C. Section 552(a)(1)), the purpose was to keep page numbers down in the *Federal Register*; however, there was no expectation that this material would not be available other than by pay – rather, the drafters assumed that the incorporated material would be picked up by commercial clearinghouses and made available in paper form in law libraries. That has not happened, he explained.

Potentially Protected or Privileged Agency Materials

Consultative group members from academia and from agencies urged the consultant team to be cognizant of various legally recognizable privileges, including the attorney client privilege, work product privilege, deliberative process privilege, and law enforcement privilege, to which a member of the consultant team responded that the team is actively considering these privileges. With respect to materials that express tentative legal opinions by an agency, a consultative group member from an agency stated that disclosing too much of this material can create rather than resolve ambiguity in the law. This member mentioned an article by Bayless Manning called *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385* that makes this point. Another consultative group from an agency seconded the point that releasing pre-decisional documents can create public confusion.

Several consultative group members expressed the view that agencies sometimes over-rely on privileges to prevent access to legal materials and that even if legal materials are covered by privileges, this does mean they ought not be released. A consultative group member from an agency stated that even if information meets an exemption under FOIA, that does not mean that the agency is permitted to withhold it. The agency still must perform a balancing test in which it analyzes whether the release of the information benefits the public to a greater extent than it harms the interest being protected. If the answer is "yes," the information still needs to be released, even though it meets an exemption.

Another consultative group member from an agency stated that "secret law" is too often invoked by that member's employing agency to prevent public access to legal materials and the official is not clear on why the agency designates this material "secret." A member of the consultative group from academia noted that FOIA's deliberative process privilege has a 25-year time limit and urged the consultants more broadly to consider timing provisions in various laws, including the Presidential Records Act. A member of the consultant team stated that he personally agrees with this suggestion. This same consultative group member noted that many agency-issued documents have aspects of both "legal recommendations" and "policy recommendations" and that courts have held that documents with both are sometimes "policy recommendations" and therefore do not have to be made public. He suggested that the project recommend that if a document has significant law, the fact that there is also policy in it should not disqualify it from disclosure.

Concluding Remarks

ACUS staff thanked the consultative group and the consultants for their participation and encouraged the submission of written comments from consultative group members.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Minutes from the Second Consultative Group Meeting for *Disclosure of Agency Legal Materials*
August 4, 2022

Introductory Matters

Staff from the Administrative Conference of the U.S. (ACUS) introduced the consultants and welcomed the consultative group. Staff also asked if there were any questions or comments regarding the meeting minutes from the first consultative group meeting, which took place on June 6, 2022. There were no questions or comments on the minutes.

Lead Consultant Presentation

The lead consultant stated that the current legal standards pertaining to the disclosure of adjudication-related legal materials are "minimal and ambiguous." She stated that it is commonly understood that precedential decisions must be posted on agency websites but that agencies often post a broader set of adjudicative materials on their websites and that ACUS has recommended that agencies post a broader set of materials on their websites. She stated that the team is interested in learning whether there are any other kinds of adjudicative materials that should be required to be proactively published on agency websites.

She also stated that when a member of the consultant team speaks, that person's remarks should not be interpreted as expressing the views of the consultant team writ large.

Consultative Group Discussion

Posting of Agency Adjudicative and Enforcement Materials

A consultative group member from academia asked whether the term "legal materials" encompasses transcripts, briefs, and other materials associated with adjudication. There followed considerable discussion about the posting of these materials, and the decisions themselves, on agency websites.

Of the agency members who spoke, most acknowledged that their agencies do not post every adjudicative and enforcement-related document. For example, a consultative group member from an agency stated that the member's agency does not post initial adjudicative decisions involving private-sector parties, though it does post the appeals decisions, using pseudonyms for the parties to avoid Privacy Act concerns. A consultative group member from private practice stated that an agency familiar to this member due to the member's litigation work posts only a sample of appellate decisions on its website and that some decisions that have significant impact on the public are not available. A consultative group member from an agency stated that, under a contractual arrangement with a court reporter company that produces the transcripts of the hearings, the transcripts are available to the parties for sale, but the agency does not make them available on its website. Several other consultative group members from agencies also stated that

their agencies do not make transcripts of hearings available on their websites, and no consultative group member from an agency stated that their agency does.

The lead consultant asked the group whether any agencies distinguish between precedential or non-precedential decisions in deciding which decisions to post. Most agency participants stated that their agencies post both precedential and non-precedential decisions in some form, though the way in which they are posted and the extent to which they are posted may be different. For example, a consultative group member from an agency stated that the member's agency posts all precedential decisions dating back to the 1970's and all non-precedential decisions dating back to 2008. A consultative group member from a different agency stated that the agency posts routine licensing decisions, which are non-precedential, in an electronic licensing database, which is different from the agency's website, which houses precedential decisions. Once per week, the agency releases a digest of licensing decisions, which triggers the petition for reconsideration process, this member explained.

Two additional consultative group members from agencies stated that their agencies do not distinguish between precedential and non-precedential decisions when posting their decisions, though one agency caveated this assertion by noting that the relevant agency has many component agencies, and it is possible that some of these components may so distinguish.

A member of the ACUS staff asked whether agencies, given the Administrative Procedure Act's broad definition of "adjudication," face difficult decisions in deciding which materials are "final opinions . . . as well as orders, made in the adjudication of cases," which FOIA requires agencies to proactively disclose. A member of the consultative group from private practice stated that, in this member's experience, the decision is never difficult for agencies: if it is not crystal clear to the agency that the agency should post it, the agency does not post it. This member explained that this was evident in recent litigation brought by this member's organization against an agency in which the agency shared adjudicative decisions internally but not with the public.

In response to the observation that agencies do not post all of their adjudicative and enforcement-related materials, a member of the consultant team asked whether Congress should require agencies to inform the public of the kinds of adjudicative materials they post and the kinds they do not post. He explained that this requirement could, for example, mandate that agencies issue rules that require them to so inform the public. A member of the consultative group from academia stated that this is an "excellent" suggestion, and that Congress should, additionally, require a minimum set of adjudicative materials to be posted. A member of the consultative group from an agency stated that, though there is some appeal to this suggestion, it might not be the best use of the agency's time to determine all of the adjudicative materials the agency does not post, because there are so many agency actions that could potentially constitute "adjudication" that are of no public interest and it would be a resource-intensive endeavor to create such a list.

Indexing of and Establishing Search Capabilities for Adjudicative and Enforcement Materials on Agency Websites

Considerable discussion centered on the ways in which agencies index their adjudicative and enforcement materials and make them searchable. A consultative group member from an agency stated that the member's agency catalogs adjudicative decisions by topic, similar to the system employed by commercial legal databases. This member also stated that the agency's website has full text search capabilities so that members of the public can enter terms and find adjudicative materials that contain those terms. Several other consultative group members from agencies also stated that their agencies' websites allow users to search the full texts of decisions and related materials. One consultative group member from an agency stated that although adjudicative decisions are searchable on the member's agency's website, certain enforcement documents, such as inspection reports, are not searchable though they are posted and members of the public need to know what they are looking for in order to find them.

A member of the consultant team asked whether there are any methods of finding documents that are available only to agency employees and not to the public. Several consultative group members from agencies responded that their agencies afford the public the same search features as they afford their employees and no consultative group member stated that they made available to their employees search capabilities different from the ones they make available to the public.

A different member of the consultant team asked whether Congress ought to legislate any best practices for indexing materials and allowing the public to search for them. There was general support for the principle that agency adjudicative materials should be well indexed and easily searchable—indeed, one consultative group member from an agency stated that there is limited value to posting materials if they are not easily searchable and indexed—however, generally, members of the consultative group from agencies stated that any such legislative proposal would need to take into consideration agencies' limited resources and unique missions. For example, a consultative group member from an agency stated that any legislation would need to account for the antiquated nature of agency IT systems and provide adequate resources. A consultative group member from a different agency stated that if Congress were to legislate a searching and indexing system, it should adopt a "performance" rather than a "design" standard: that is, Congress should specify the minimum features of a searching and indexing system but not specify any particular platform agencies must use. A consultative group member from another agency stated that any such legislation should only apply prospectively, that is, to documents generated after the time the legislation goes into effect, because it would be extremely burdensome for the agency to bring all of its existing materials into compliance with any new standard.

Handling of Legally Protected Information Contained Within Agency Adjudicative and Enforcement Materials

There was some discussion of the different ways that agencies attempt to protect legally protected information, including personally identifiable information (PII) and confidential business information (CBI), contained within adjudicative and enforcement materials that are subject to online disclosure. The discussion revealed that there is some variety in the way that agencies attempt to protect this information. For example, a consultative group member from an agency stated that the agency's website prompts a user who is uploading adjudicative materials to select a box indicating whether the document contains PII or CBI. If the user selects that box,

then the agency does not disclose the document on its website unless it determines that it has no PII or CBI. A consultative group member from a different agency stated that the agency instructs parties not to include PII or CBI within materials they submit to the agency "unless absolutely necessary." If the agency finds such material, it will redact it, this member explained. Several other consultative group members from agencies stated that their agencies use similar approaches. One consultative group member from an agency stated that CBI triggers special considerations separate and apart from PII: this member explained that the agency has internal regulations that govern the procedures the agency must follow if the agency finds CBI in a submitted document.

A consultative group member from an agency stated that even if information meets an exemption under FOIA, that does not mean that the agency is permitted to withhold it. The agency still must perform a balancing test in which it analyzes whether the release of the information benefits the public to a greater extent than it harms the interest being protected. If the answer is "yes," the information still needs to be released, even though it meets an exemption. This is called the "foreseeable harm standard." There was general agreement that the foreseeable harm standard is easier to apply with respect to material that falls under FOIA's (b)(5) exemption (for internal agency deliberations) than it is to apply to material that falls under other FOIA exemptions. A consultative group member from an agency stated that agency employees who process FOIA requests usually do not apply the foreseeable harm standard, but FOIA attorneys within the agency do apply the standard in those instances in which an issue is elevated to their attention.

Concluding Remarks

ACUS staff thanked the consultative group and the consultants for their participation and encouraged the submission of written comments from consultative group members.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Minutes from the Third Consultative Group Meeting for *Disclosure of Agency Legal Materials*

August 8, 2022

Introductory Matters

Staff from the Administrative Conference of the U.S. (ACUS) introduced the consultants and welcomed the consultative group.

Lead Consultant Presentation

The lead consultant explained that the laws governing disclosure of agency rules are extensive, that agency practices with respect to publishing rules vary widely, and that the consultant team is interested in learning what sort of rules should be publicly disclosed and how they ought to be disclosed. She also explained that the team is not looking to focus on the topic of incorporation by reference during this discussion, given that there was robust discussion of the topic at the first consultative group meeting and that the team has received extensive written input on the subject.

She also stated that when a member of the consultant team speaks, that person's remarks should not be interpreted as expressing the views of the consultant team writ large or necessarily even the views of the individual speaker, but rather comments should be considered in the spirit of furthering discussion only and gathering information.

Consultative Group Discussion

Posting Legislative Rules on Agency Websites

There was some discussion regarding the meaning of the term "legislative rule." A member of the ACUS staff, when asking the group about the posting of legislative rules on agency websites, stated that the term "legislative rule" encompasses both "procedural rules" and "substantive rules." A consultative group member from private practice responded that "procedural rules" are distinct from "legislative rules," and cited Mendoza v. Perez, 754 F.3d 1002, 1023 (D.C. Cir. 2014) for this proposition. A member of the consultant team responded that, although it is true that procedural rules are not legislative rules for purposes of the Administrative Procedure Act, many procedural rules are, and should be, published in the *Code of Federal Regulations* (*CFR*).

Several members of the consultative group from agencies stated that their agencies post legislative rules on their websites, in addition to publishing them in the *Federal Register*. One member explained that the relevant agency has a webpage dedicated to all of the agency's legislative rules and has separate webpages devoted to particular kinds of legislative rules, depending on the general subject matter of the rule. This member also explained that the webpages contain a disclaimer that the rules are subject to change.

Considerable discussion centered on the practice of posting legislative rules on agency websites before the rules are published in the *Federal Register*. Several members of the consultative group from agencies stated that their agencies post PDF versions of final legislative rules on their agencies' website before the rule is published in the *Federal Register*. They also stated that, once the rule is published in the *Federal Register*, their agency replaces the previously posted version of the rule with the version of the rule published in the *Federal Register*. One consultative group member from an agency stated that the relevant agency posts on its website, in addition to the PDF version of the final rule, PDF versions of any associated Advance Notice of Proposed Rulemaking (ANPRM) and Notice of Proposed Rulemaking (NPRM). He further explained that if the rule is "a big deal," the agency will leave the ANPRM and NPRM posted on the website even when the rule is final, but otherwise, the agency takes down the associated ANPRM and NPRM. A consultative group member from a different agency stated that the relevant agency posts hyperlinks to Regulations.gov and to the *Federal Register* for final rules and associated NPRMs and ANPRMs. This member stated that the agency "rarely" posts PDF versions of the final rule on its website in advance of publishing the rule in the *Federal Register* but will occasionally do so if there is a legal obligation, such as a court order.

There was some discussion about the potential legal consequences of posting final rules on agency websites. A consultative group member from an agency discussed the recently decided Humane Society v. U.S. Dept. of Agriculture, 2022 WL 2898893 (D.C. Cir. July 22, 2022), which held that when a rule is made available for public inspection in the *Federal Register*, the agency cannot withdraw the rule without adhering to the procedures required for repealing a rule, including any applicable notice-and-comment requirements. This member also explained that there was some language in the opinion suggesting that these requirements may be triggered even once the agency posts the final rule on its website.

Considerable discussion centered on how agencies keep legislative rules posted on their website updated. One consultative group member from an agency stated that, in this member's experience, many agencies do not keep legislative rules posted on their website updated. This member observed that often the version of the rule that appears in the *Federal Register* does not match the version of the rule posted on the agency's website. This member further explained that when agencies link directly to the *Federal Register* or obtain an API and XML feed from the *Federal Register* rather than post stand-alone PDF versions of rules on their websites, they are more likely to ensure that their websites are up to date with respect to legislative rules.

A member of the consultant team asked if agencies update their posted rules based on court decisions, such as decisions to vacate a rule. A consultative group member from private practice explained that, in this member's experience, the U.S. Department of Justice (DOJ) informs agencies as to how to label their posted rules if the rules have been enjoined. Another member of the consultant team asked if agencies have internal procedures to determine if there are updates needed to posted rules. No consultative group member from an agency answered this question.

Posting Guidance Documents on Agency Websites

Considerable discussion centered on the kinds of guidance documents that agencies post proactively on their websites and the kinds that they do not proactively post. In general, members of the consultative group from agencies indicated that they do not proactively post guidance documents that are directed solely to agency officials and that they deem unlikely to be of general interest to the public. They also indicated that they do not proactively post guidance documents that could reveal an agency's enforcement strategy or that reveal internal agency thought processes.

For example, a consultative group member from an agency stated that the relevant agency does not post those guidance documents directed to its rule writers that the agency deems unlikely to be of general interest to the public, but it does post its guidance that describes the agency's practices for compiling administrative records for use in litigation challenging the agency's decisions. A consultative group member from a different agency stated that an enforcement office within the relevant agency does not publish its internal manual that specifies the agency's procedures for conducting investigations, but this member is aware of a different agency that has a similar enforcement office that does post its analogous manual. A consultative group member from private practice stated that a private litigation group recently filed a FOIA request for an agency's internal process manual directed at its enforcement staff. A consultative group member from an agency stated that the relevant agency has an internal process whereby it uses statistical methods to generate a random list of regulated entities that are subject to enforcement-related actions. This member stated that the agency does not post its methodology for generating this random list because doing so would "tip off" entities to potential enforcement action.

A member of the consultant team asked whether a memorandum of understanding between DOJ and agencies with respect to whether DOJ will represent independent regulatory agencies in litigation should be made public. A consultative group member from private practice stated that, in this member's experience, DOJ does not publish these documents because of long-established practice, not because of particular concerns regarding the public availability of these documents.

A consultative group member from an agency stated that the head of the relevant agency recently released a memorandum that lays out principles that govern the agency's creation and disclosure of guidance documents, and the memorandum defines a guidance document as "a statement of general applicability issued by an agency to inform the public of its policies or legal interpretations." This member noted that the memorandum encourages the agency's components to post their guidance documents online, specifically on the agency's online guidance portal. This member also stated that the relevant agency recently codified this memorandum.

There was also considerable discussion on the topic of the organization, indexing, and labeling of guidance documents on agency websites. In general, members of the consultative group indicated that agency websites do currently organize, index, and label guidance documents and were cautiously open to the idea of legislation pertaining to this topic, albeit with certain caveats and considerations.

For example, a consultative group member from private practice stated that the U.S. Food and Drug Administration's (FDA's) website does a good job preserving guidance documents that are

no longer in effect by clearly labeling these documents as "superseded" or "expired." A consultative group member from an agency stated that the relevant agency's website has a webpage where members of the public can find guidance documents, and that guidance documents on this page are sortable by date of issuance and subject matter. This member also explained that the agency's website indexes the agency's guidance documents and that the whole website is searchable but that Google is more effective than the agency's embedded search engine in finding the agency's guidance documents. The member also explained that when Executive Order 13,891 was in effect, the relevant agency, which is a component of a larger agency, was required to merge its guidance webpage with the larger agency's webpage, which this member considered to be inefficient. This member cautioned that if Congress creates an indexing or labeling requirement, it should be performance-oriented and not based on a specific method, a view echoed by other agencies in previous consultative group meetings.

A member of the consultant team noted that statutory requirements for the public availability of guidance documents already exist. For example, in 1997, Congress imposed a requirement on the FDA to have a systematic disclosure regime in place for its guidance documents. A consultative group member from private practice expressed concern about ACUS recommending that Congress expand these requirements because of the politically sensitive nature of the topic of "guidance documents" generally.

Publishing Guidance Documents in the Federal Register and the CFR

Considerable discussion centered on agency decision making with respect to publishing guidance documents in the *Federal Register* and the *CFR*. In general, members of the consultative group from agencies indicated that they consider several factors in deciding whether to publish a guidance document in the *Federal Register*, including whether they wish to provide constructive notice of its existence, which weighs in favor of publishing in the *Federal Register*, and the length of the document, with longer documents weighing in favor of not publishing in the *Federal Register*. In general, members of the consultative group indicated that they do not publish guidance documents in the *CFR*, with an important exception discussed below.

With respect to *Federal Register* publication, a consultative group member from an agency stated that the relevant agency publishes its policy statements in the *Federal Register* but does not publish its interpretive rules in the *Federal Register* because its interpretive rules are "much longer" documents. A consultative group member from a different agency stated that the relevant agency does not publish any of its guidance documents in the *Federal Register* and that most of these guidance documents are "instructions to staff." He stated that the agency's practice is to not publish these documents in the *Federal Register*, at least in part because they are "lengthy documents." He stated that all of these documents are posted on the agency's website and that the website archives "old documents."

A consultative group member from private practice noted that, in her experience, the FDA posts notices of guidance documents in the *Federal Register*, with links to the full text of the guidance documents on the FDA's website. A consultative group member from an agency stated that the relevant agency posts all of its guidance documents (e.g., instructions in grant notices) on its

website and publishes some of them in the *Federal Register*. He also indicated that in some instances, the agency will post notices in the *Federal Register* of the availability of guidance documents, with links to the full text of the guidance documents on the agency's website. A consultative group member from a different agency stated that the relevant agency submits its policy statements and interpretive rules for publication in the *Federal Register*, as well as a separate category of guidance documents that contains the observations of its investigatory staff with respect to practices the agency has the authority to regulate. The agency official stated that the relevant agency decided to publish this latter type of guidance document in the *Federal Register* because it was unable to find an analogous kind of guidance document from a different agency, which illustrated the need for the relevant agency to publish these documents in the *Federal Register*.

In response to some agencies' practices of not posting guidance documents in the *Federal Register*, or only providing links to guidance documents in the *Federal Register*, a consultative group member from academia stated that these practices create barriers to the public's ability to access guidance documents, especially when there is a change in presidential administration. She pointed to an example of a particular guidance document that was posted on an agency's website, with a notice of its availability in the *Federal Register*, but then when there was a change in administration, the new administration took down the website, along with all materials posted there, which resulted in a period of time in which that guidance document was not publicly available. She further stated that the current financing model for the *Federal Register*, in which agencies must pay for publication, creates incentives for them to publish their documents, including their guidance documents, on their websites rather than in the *Federal Register*. A consultative group member from private practice stated that publishing documents in the *Federal Register* provides a permanent citation for those documents, which is why *Federal Register* publication is a beneficial practice.

There was some discussion about publication of guidance documents in the *CFR*. A consultative group member from an agency explained that documents that have "general applicability and legal effect" are published in the *CFR*. If a document has general applicability but not legal effect, it need not be published in the *CFR*. Nonetheless, some agencies request that such documents be published in the *CFR*. A consultative group member from a different agency stated that the relevant agency is permitted, via statute, to take enforcement action against certain entities for violating the agency's "guidelines." The agency publishes these "guidelines" in the *CFR*. He stated that "guidance documents," as the term is used in the relevant agency, are distinct from "guidelines" in that the agency cannot take action against an entity solely for violating a "guidance document" but can do so for violating a "guideline." This member explained that the agency does not publish "guidance documents," as the term is understood by the relevant agency, in the *CFR*.

A member of the consultant team asked whether there is a cost to publish materials in the *CFR*. A consultative group member from an agency explained that the cost is $85 per page per year.

Using the Official Formats of the Federal Register

There was considerable discussion regarding agencies' use of the official formats of the *Federal Register*. A consultative group member from an agency explained that the official format of the *Federal Register* is the version that appears in print and in PDF form on the website of the U.S. Government Publishing Office. By contrast, the HTML versions of the *Federal Register* that appears on Federalregister.gov and on eCFR.gov are not official formats of the *Federal Register*, this member explained.

This member also explained that, under the Federal Register Act, the Office of the Federal Register (OFR) is required to print the *Federal Register*. A member of the consultant team asked whether this Act should be amended to no longer require OFR to print the *Federal Register*. In response to this question, the agency official stated that the official's agency supports the Federal Register Modernization Act, a bill that, if enacted, would no longer require OFR to print the *Federal Register*.

Much discussion centered on the availability of previous issues of the *Federal Register*. A member of the consultative group from an agency explained that every issue of the *Federal Register* since March 14, 1936 is available on govinfo.gov. This member also explained that each issue of the *Federal Register* on govinfo.gov is searchable (e.g., if you open up the March 30, 1940 issue, you can "control+F" the document to find terms). However, if a user wants to search terms that appear across multiple issues, the website only allows the user to do so for issues starting in 1994 onwards. A member of the consultant team asked whether it is possible to search the indexes for the pre-1994 versions, to which the member responded that each index is searchable and that users can search terms that appear across multiple indexes for those indexes starting in 1994 onwards.

With respect to the *CFR*, this member explained that govinfo.gov has all versions of the *CFR* from 1997 onwards, some versions from 1996, and no versions before 1996. This member also stated that there is no timeline for digitizing the pre-1997 versions of the *CFR*. The first version of the *CFR* was published in 1939.

A member of the consultative group from a different agency stated that the relevant agency maintains hard copies of the *Federal Register* and the *CFR* and that, every day, an employee of the agency replaces the pocket parts. This member stated that the member does not use the paper versions and that it does not seem as though it is the best use of the agency's time to replace the pocket parts and to maintain paper versions. A member of the consultative group from a different agency stated that there are limited circumstances in which this member uses the paper versions of the *Federal Register*. One such circumstance is when a table is difficult to read in the online version. A consultative group member from a different agency stated that this member is aware of several colleagues who still use the paper versions of the *CFR*. A consultative group member from a different agency stated that the member's agency uses Hein Online to search the *CFR*.

Concluding Remarks

ACUS staff thanked the consultative group and the consultants for their participation and encouraged the submission of written comments from consultative group members.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Minutes from the Fourth Consultative Group Meeting for *Disclosure of Agency Legal Materials*

August 16, 2022

Introductory Matters

Staff from the Administrative Conference of the U.S. (ACUS) introduced the consultants and welcomed the consultative group.

Consultant Presentation

A consultant explained that the consultant team has not decided whether it will recommend that any particular kind of legal material be part of a proactive disclosure regime. He stated that memoranda of understanding are an understudied kind of legal material and that this kind of document came to the consultants' attention from comments received in response to a Request for Comments that ACUS published in the *Federal Register*. He also mentioned that certain aspects of the disclosure of opinions from the U.S. Department of Justice's Office of Legal Counsel (OLC) and documents from the Executive Office of the President (EOP) are understudied and that the team is looking for additional factual background on these kinds of documents.

He also stated that when a member of the consultant team speaks, that person's remarks should not be interpreted as expressing the views of the consultant team writ large or necessarily even the views of the individual speaker, but rather comments should be considered in the spirit of furthering discussion only and gathering information.

Agency Legal Opinions

Form of Agency Legal Opinions

Agency legal opinions take different names and forms, both across and within agencies. Consultative group members from various agencies informed us that general counsel offices render legal advice both in written and oral form. Of the written forms of legal advice, some take the form of formal memoranda; some are informal documents, including emails. For example, a consultative group member from an agency stated that the relevant agency, which dispenses legal advice to other federal agencies, creates formal memoranda addressing legal questions that other agencies frequently ask the relevant agency.

The discussion also revealed that legal opinions may be attributed to different categories of agency officials. For example, a consultative group member from an agency stated that in the relevant agency, agency legal opinions are sometimes publicly designated the work product of staff and are sometimes publicly designated the work product of the agency head.

Audience for Agency Legal Opinions

Some agency legal opinions are directed to various kinds of agency officials; others are directed to those outside the agency. For example, a consultative group member from an agency stated that the relevant agency routinely provides legal advice to other federal agencies with respect to the disclosure of agency documents. Several stated that their agencies issue at least some opinions to members of the public. Consultative group members from agencies that have field offices stated that their agencies routinely issue legal opinions to staff in their field offices and agencies that have an investigative function routinely issue legal opinions and guidance for investigative staff. Consultative group members from several agencies stated that their agencies routinely issue at least legal opinions to the agency head.

Bindingness of Agency Legal Opinions

Some consultative group members from agencies stated that they deem at least some of their agencies' legal opinions to be binding on various components of the agency. Several stated that their agencies issue legal opinions that bind the agency head. One stated that at least some of the relevant agency's legal opinions are not binding on the agency.

Whether Agency Legal Opinions Are Made Publicly Available

In general, agencies decide whether to make legal opinions publicly available based on several factors, including whether they believe the public availability of these opinions will compromise an interest protected by a statutory provision, including a FOIA exemption, and whether there is public interest in the materials. For example, a consultative group member from an agency stated that the relevant agency does not make those legal opinions agency staff issues to the agency head publicly available because the agency deems these legal opinions to represent candid advice and therefore privileged. This member stated that this is analogous to a law clerk providing an opinion to a judge in the sense that it is confidential advice that is not to be made public. A consultative group member from a different agency echoed a similar sentiment. According to this member, who serves as a legal advisor to a component agency within a larger agency, the agency does not publish legal advice provided to the component agency because doing so would chill advice giving.

A consultative group member from a different agency stated that the relevant agency is divided into a prosecutorial arm and an adjudicative arm. This member explained that the agency makes publicly available all legal opinions issued by staff within the prosecutorial arm, even those that are directed internally. However, this member explained, on the adjudicative side, the agency does not make publicly available legal opinions issued by staff directed to adjudicators, though it does make the adjudicative decisions themselves publicly available. It views the legal opinions issued by staff to adjudicators to be deliberative.

A consultative group member from a different agency with a prosecutorial arm stated that the relevant agency does not make publicly available any internal legal opinions pertaining to a decision to charge because of a statutory provision that protects personal information in charging documents. However, this member explained, the agency does make publicly available internal

legal guidance directed to agency investigators and makes publicly available opinions from the agency head.

A consultative group member from a different agency stated that the agency is under an agency-specific statutory obligation to make certain kinds of legal opinions directed to the public publicly available. A consultative group member from academia stated that he has seen many of this agency's legal opinions on the agency's website.

A member of the consultant team asked whether there ought to be a statutory requirement to achieve greater uniformity in the kinds of legal materials agencies are required to disclose. In other words, if Agency A publishes one kind of legal material, and Agency B does not publish that same kind of legal material, ought there be a statutory requirement for all agencies to disclose at least what Agency A discloses? In response to this question, a consultative group member from an agency stated that any legal requirements should take into account variation in agencies' circumstances. This member explained that the sort of legal opinions the relevant agency produces are intended to convey candid advice to the agency head, and that a statutory requirement to make those opinions publicly available would chill advice giving. The member further explained that a client can always waive the attorney client privilege but that doing so is a choice. The member stated that, in contrast, an agency that is more enforcement-oriented might be better suited to make its advisory opinions publicly available.

In response to this same question, a consultative member from a different agency advised the consultants to consider whether, if they propose that all OGC legal opinions be published, if that is tantamount to calling these documents "interpretive rules." This member cautioned that, if so, this could introduce complications. A consultative group member from yet a different agency also advised the consultants that a blanket requirement to make OGC opinions available would present challenges. This member explained that the relevant agency publishes bound volumes of OGC opinions and that the agency often receives questions about the application of these opinions to specific circumstances. This member stated that the consultants, if they decide to propose a statutory change, would need to grapple with questions such as whether the agency's responses to questions from members of the public about the application of the OGC opinions to specific circumstances should also be made publicly available.

Where Agency Legal Opinions Are Made Publicly Available

Agencies use both their own websites and the *Federal Register* to make agency legal opinions publicly available. For example, a consultative group member from an agency stated that the relevant agency distinguishes between legal opinions that are "for reliance" and those that are not. The agency publishes legal opinions that are "for reliance" in the *Federal Register* and other legal opinions on the agency's website. A consultative group member from a different agency stated that the relevant agency publishes its letters of interpretation on its website but not in the *Federal Register*.

Indexes and Inventories of Agency Legal Opinions

In response to a question, posed by a member of the consultant team, about what agencies think about a potential legal requirement to create a public inventory of legal opinions, a consultative group member from an agency stated that it is not clear how helpful such an inventory would be to the public and that it could chill advice giving within the agency. A consultative group member from a different agency stated that the relevant agency provides legal advice mainly through oral discussions, and that it would be challenging and burdensome to inventory those discussions, and there would not be a clear benefit to the public to do so.

OLC Opinions

Form of OLC Opinions

OLC opinions take various forms. A consultative group member from an agency explained that there are formal written opinions, oral advice, comment bubbles on documents that are subjected to interagency review, informal email changes, and other forms of informal communication whereby OLC conveys legal advice.

Audience for OLC Opinions

As explained by many consultative group members, both from agencies and from private practice, some OLC opinions are addressed directly to the president and others are addressed to agencies.

Bindingness of OLC Opinions

A consultative group member from an agency stated that OLC opinions on legal topics are generally authoritative in the executive branch, though it is up to agencies to decide how to address the policies based on the legal framework that OLC has laid out on the relevant topic. This member state that the member cannot speak to whether agencies follow the opinions. A consultative group member from academia stated that OLC opinions are the most important opinions in government and that they control government actions.

Whether OLC Opinions Are Made Publicly Available

A consultative group member from academia stated that many OLC opinions are classified. He stated that a member of the public can request access to OLC opinions one at a time, but this is only useful if the member knows that the opinion exists. He further stated that OLC has the sole discretion to publish opinions, that it only publishes a very small percentage of all opinions it issues, and that he hopes that ACUS recommends changes to require greater disclosure of OLC opinions.

A consultative group member from an agency stated that OLC opinions are not subject to automatic disclosure under 5 U.S.C. Section 552 (a)(2) and that a recent DOJ brief best lays out DOJ's position on that point. A consultative group member from a different agency stated that OLC opinions on legal questions involving regulatory review are pre-decisional and therefore exempt from FOIA.

A consultative group member from an agency stated that OLC publishes a significant number of formal written opinions, that the Attorney General has emphasized the importance of transparency of agency legal materials, and that DOJ complies with the 2016 FOIA amendments, including the foreseeable harm requirement. This member also mentioned the existence of a public memorandum, popularly termed "the Barron memo," which lays out OLC's criteria for making its opinions publicly available and explained that DOJ adheres to this memo, which can be found on OLC's webpage. A consultative group member from academia commended this memorandum for explaining which formal opinions OLC makes publicly available, but also noted that it does not lay out OLC's criteria for making informal legal opinions publicly available.

A member of the consultant team asked whether greater disclosure of OLC opinions directed to agencies might chill agencies from asking OLC for legal opinions. In response, a consultative group member from an agency stated that greater disclosure of these opinions would not cause the relevant agency to hesitate asking OLC for legal opinions and, in fact, there have been multiple occasions in which the agency has asked OLC for permission to publish OLC legal opinions.

Where OLC Opinions Are Made Publicly Available

Several consultative group members from agencies explained that at least some OLC opinions are made available on OLC's website and can be found on commercial legal databases.

Indexes and Inventories of OLC Opinions

A consultative group member from academia explained that it is critical to index OLC opinions because, under current rules, a member of the public can request OLC opinions one at a time if that person knows they exist. An index, he explained, is the only way to know whether a non-published OLC opinion exists.

Legal Materials from the EOP

Form of EOP Legal Materials

Consultative group members mentioned the existence of a variety of kinds of legal materials from the EOP. These include executive orders, presidential memoranda, presidential proclamations, OMB circulars, and informal oral consultations between various components of the EOP and agencies outside the EOP.

Audience for EOP Legal Materials

Consultative group members mentioned that EOP legal materials are directed to a range of audiences, from the president, to agencies outside the EOP, to entitles within the EOP, to members of the public. For example, a consultative group member from an agency outside of the EOP stated that the relevant agency has received legal advice from OMB's OGC on questions such as how executive orders apply to particular agency actions. A consultative group member from a different agency stated that OMB's OGC provides legal advice to agencies with respect to several statutes, including the Paperwork Reduction Act, the Regulatory Flexibility Act, and the

Information Quality Act and that the White House Counsel's Office offers legal interpretations with respect to executive orders.

Whether and Where EOP Legal Materials Are Made Publicly Available

A consultative group member from an agency stated that unclassified EOP legal materials are publicly available. This member stated that the *Federal Register's* website maintains a table of executive orders, which indicates whether an executive order is rescinded. This member also stated that OMB circulars and memoranda are on OMB's website.

A consultative group member from a different agency stated that documents from the EOP are located on a variety of websites, not just whitehouse.gov. This member encouraged the consultants to canvass existing websites where EOP documents might be located before issuing any recommendations with respect to the public availability of EOP legal materials. This member noted, for example, that digital.gov contains EOP legal materials.

A member of the consultant team noted that the Federal Register Act requires the publication of certain "executive orders" and "presidential proclamations" but does not mention "presidential memoranda," and asked whether the Federal Register Act should be revised to explicitly include "presidential memoranda." In response, a consultative group member from an agency stated that, although it is true that the Federal Register Act does not include "presidential memoranda," the Office of the Federal Register nonetheless publishes a variety of documents signed by the President, at the discretion of the White House. These documents are included within the Weekly Compilation of Presidential Documents, which is not published in the *Federal Register* but is available here: https://www.govinfo.gov/app/collection/CPD as well as on the *Federal Register* website here: https://www.federalregister.gov/presidential-documents

Indexes and Inventories of EOP Legal Materials

A consultative group member from an agency stated that the Office of the Federal Register maintains on its website a "disposition table" of executive orders, and for each executive order that has been rescinded, the table contains a notation that it has been rescinded. This disposition table can be viewed here: https://www.archives.gov/federal-register/executive-orders/disposition. This member noted that the Office of the Federal Register does not make judgment calls as to whether executive orders are no longer current; rather, it relies solely on the text of a subsequent executive order that explicitly revokes an earlier one in order to make the notation of rescission.

Memoranda of Understanding (MOUs)

Form of MOUs

MOUs take different forms across agencies, and even within agencies. A consultative group member from an agency noted that the term "MOU" is broad and could include business arrangements, which this member thinks would clearly be outside the scope of the project. This member advised ACUS staff and the consultants to scope this term concretely. A consultative group member from a different agency stated that MOUs sometimes take the term "interagency agreements."

Whether and Where MOUs Are Made Publicly Available

In general, agencies decide whether to make MOUs publicly available based on several factors, including whether they believe the public availability of MOUs will compromise an interest protected by a FOIA exemption and whether there is public interest in the materials. For example, a consultative group member from an agency stated that the relevant agency posts some, but not all, of its MOUs online. This member also noted that the relevant agency is "decentralized" with respect to its MOUs: that is, some MOUs are brokered by the agency's regional offices, and some are brokered at headquarters. Several other consultative group members from agencies noted that certain MOUs implicate privileges and similar considerations, such as national security.

Agencies have different methods for displaying MOUs on their websites. Several consultative group members from agencies stated that their agencies post MOUs on a dedicated webpage whereas others stated that MOUs are posted on their websites but not on a dedicated webpage. A member of the consultant team asked whether agencies that have posted MOUs on their webpages experienced any adverse consequences from doing so. In response to this question, a consultative group member from an agency that maintains a dedicated webpage of MOUs stated that the relevant agency experienced no adverse consequences from posting its MOUs online.

Multiple consultative group members from agencies stated that it is helpful for agency officials to have an online listing of all of the agency's MOUs. Indeed, one consultative group member from an agency stated that the relevant agency created a dedicated webpage housing MOUs for this very purpose: to help the agency staff keep track of all of the agency's MOUs. A consultative group member from an agency stated that, if there were a statutory requirement with respect to posting MOUs on agency websites, the requirement should be prospective rather than retrospective and yet another opined that, in general, any statutory reforms should leave considerable discretion to agencies, given agencies' different missions and circumstances.