

To: ACUS Committee on Rulemaking
From: Matthew Wiener (Special Counsel)
Date: October 31, 2022
Re: Regulatory Enforcement Manuals

The Committee's excellent draft dated November 1 identifies several benefits of manuals. See lines 11–32 (second and third paragraphs of the preamble).

I have one suggestion, inspired by Nina Mendelson's comment relating to ACUS Recommendation 2017-5, *Agency Guidance Through Policy Statements*: The Committee may wish to consider noting that another important function of enforcement manuals can be to qualifiedly circumscribe (when appropriate) the discretion of enforcement personnel for the benefit of regulated parties and regulatory beneficiaries—by ensuring that personnel enforce the law consistently, predictably, even-handedly, and fairly. *See, e.g.*, Gillian E. Metzger and Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1258 (2017). I say “qualifiedly” because the agency “as a whole” (line 41, drawn from Recommendation 2017-5 (§ 3)) will presumably wish to reserve its discretion to depart from a manual in particular cases. The point could be made around lines 15–16.

One reason why this function can be important is that, as practical matter, a party's liability is often determined at the investigative stage (before an adjudication is formally initiated). (Michael Asimow, among others, has made this point.) Actual adjudications are infrequent in some programs and virtually non-existent in others.