Administrative Conference of the United States

73rd Plenary Session
December 16-17, 2020

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agenda for 73rd Plenary Session

Wednesday, December 16, 2020 – Thursday, December 17, 2020

Wednesday, December 16, 2020

10:00 a.m.	Call to Order Opening Remarks by Vice Chairman Matthew L. Wiener Initial Business (Vote on Adoption of Minutes of December 2019 Plenary Session and Resolution Governing the Order Business)
10:20 a.m.	Consider Proposed Recommendation: *Rules on Rulemakings*
11:50 a.m.	Lunch Break
12:30 p.m.	Consider Proposed Recommendation: *Protected Materials in Public Rulemaking Dockets*
2:00 p.m.	Consider Proposed Statement: *Agency Use of Artificial Intelligence*
3:30 p.m.	Consider Proposed Recommendation: *Agency Appellate Systems*
5:00 p.m.	Recess Until Thursday Morning

Thursday, December 17, 2020

10:00 a.m.	Call to Order
10:05 a.m.	Remarks by The Honorable Paul J. Ray, Administrator, Office of Information and Regulatory Affairs
10:20 a.m.	Consider Proposed Recommendation: *Government Contract Bid Protests Before Agencies*
11:50 a.m.	Update on Pending Projects by Research Director Reeve T. Bull
12:00 p.m.	Lunch Break
12:45 p.m.	Consider Proposed Recommendation: *Public Availability of Information About Agency Adjudicators*
2:15 p.m.	Remarks by Jonathan R. Siegel, F. Elwood and Eleanor Davis Research Professor of Law, The George Washington University Law School (*Sourcebook of Judicial Review Statutes*)
2:30 p.m.	Consider Proposed Recommendation: *Agency Litigation Webpages*
4:00 p.m.	Adjourn

Resolution Governing the Order of Business

The time initially allotted to each item of business is separately stated in the agenda. Individual comments from the floor shall not exceed five minutes, unless further time is authorized by unanimous consent of the voting members present. A majority of the voting members present may extend debate on any item for up to 30 additional minutes. At any time after the expiration of the time initially allotted to an item, the Chair shall have discretion to move the item to a later position in the agenda.

Unless the Chair determines otherwise, amendments and substitutes to recommendations that have been timely submitted in writing to the Office of the Chairman before the meeting will receive priority in the discussion of any proposed item of business; and other amendments and substitutes to recommendations will be entertained only to the extent that time permits.

Minutes
December 12, 2019

I. Call to Order and Opening Remarks

The 72nd Plenary Session of the Administrative Conference of the United States (ACUS) convened on December 12, 2019, at approximately 9:30 a.m., at The George Washington University Law School Jacob Burns Moot Court Room, 2000 H Street, NW, Washington, D.C.

ACUS Vice Chairman Matthew Wiener called the meeting to order. He introduced the Council members present and recognized former ACUS Chairman Paul Verkuil. He then thanked Associate Dean Alan Morrison, Senior Fellow, for hosting the Plenary Session at The George Washington University Law School. He asked the seventeen new ACUS members to stand and be recognized. He also introduced new ACUS staff member Mark Thomson, Deputy Director of Research. Next, he recognized the contributions to ACUS by Judith Starr, who is retiring as General Counsel of the Pension Benefit Guaranty Corporation. Next, he recognized the contributions of Susan Jensen, who retired as Senior Counsel and Parliamentarian of the House of Representatives Committee on the Judiciary where she worked extensively on legislative measures to reauthorize ACUS.

Vice Chairman Wiener noted the continued vacancy of the position of ACUS Chairman. He then briefly described some of the recently completed and ongoing projects of the Office of the Chairman, including: the *Sourcebook of Federal Administrative Adjudication Outside the Administrative Procedure Act*; the *Sourcebook of Federal Judicial Review Statutes*; two upcoming reports on the use of artificial intelligence by federal agencies; a working group to guide agencies compiling rulemaking records for judicial review; a statutorily required annual report on awards against the government under the Equal Access to Justice Act; a statutorily required report on ways the Social Security Administration may improve information sharing in its representative payee program; a guide for consultants who conduct research for ACUS; a forum on the use of nationwide injunctions against agency actions in federal courts; and the periodic issuance of short topical guides on administrative procedure known as Information Interchange Bulletins.

Vice Chairman Wiener then noted three recent developments in the implementation of past ACUS projects. First, he noted that two orders issued by the President—Executive Order 13891 and Executive Order 13892—align with recent ACUS recommendations on guidance documents. Second, he noted that the Federal Communications Commission as well as other agencies have relied on ACUS recommendations on adjudication rules in proposing amendments

to their rules of practice. Third, he shared that the National Labor Relations Board relied on a recent ACUS recommendation in drafting a report on the Board's recusal practices and procedures.

Vice Chairman Wiener then addressed the fiscal status of ACUS, stating that the administration has continued to request, and Congress has continued to provide, the appropriations necessary for ACUS to carry out its work.

II. Initial Business and Introduction to Recommendations

Vice Chairman Wiener explained the rules for debating, voting, and making motions. He then asked for and received approval of the minutes from the 71st Plenary Session. Vice Chairman Wiener then described the standard Resolution on the Order of Business. The Resolution was then approved. Vice Chairman Wiener explained that pre-submitted amendments would receive priority during discussion and noted that the agenda included five proposed recommendations.

III. Consideration of the Proposed Recommendation on Agency Economists

Vice Chairman Wiener thanked Connor Raso, Government Member and Chair of the Committee on Regulation; Jerry Ellig, project consultant; and Keith Holman, Legal Fellow. Mr. Ellig provided an overview of the report on which the Recommendation is based. Mr. Raso discussed the Committee's deliberations.

Vice Chairman Wiener took the floor and began the deliberation of three amendments to the Recommendation proposed by the Council. The first two amendments proposed stylistic changes, and they were adopted. The third amendment proposed by the Council clarified that the Recommendation applies to agencies that seek to apply economic analysis to their rulemakings, and it was also adopted.

Vice Chairman Wiener then opened the floor for amendments. John Duffy, Public Member, proposed amending the Recommendation to clarify that the use of the word "independence" does not intend that economists should be independent from agency leadership. After additional discussion and modification of Mr. Duffy's amendment, the Recommendation was amended to remove language calling on agencies to "provide their economists the independence to develop objective regulatory analysis." Following additional discussion and other amendments, Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

IV. Consideration of the Proposed Recommendation on Internet Evidence in Agency Adjudication

Vice Chairman Wiener thanked Nadine Mancini, Government Member and Chair of the Committee on Adjudication; and Jeremy Graboyes, Staff Attorney and in-house researcher. Mr. Graboyes discussed his research, and Ms. Mancini discussed the Committee's proceedings. Vice Chairman Wiener took the floor and moved to the manager's amendment, which was adopted.

Following general discussion, Vice Chairman Wiener proceeded to amendments proposed by the Council, including an amendment to revise the definition of "independent research" and an amendment to remove authorial intent from the Recommendation's list of potential indicia of a source's reliability. The amendments proposed by the Council were adopted.

Vice Chairman Wiener then proceeded to two pre-submitted amendments. The first amendment, previously agreed to by a vote of the Committee on Adjudication, changed the title of the Recommendation to "Independent Research by Agency Adjudicators in the Internet Age." The amendment was adopted. The second amendment, suggested by Jeffrey Lubbers, Special Counsel, and offered by Alice Kottmyer, Government Member, proposed to change the language of a sentence to avoid giving the impression that many agencies have adopted the Federal Rules of Evidence in toto. The amendment was adopted.

During further consideration of the Recommendation, Judge Stephen Williams, Senior Fellow, commented that the list of indicia of reliability in paragraph 3 favored external authority at the expense of internal indicia of reliability. Anne Joseph O'Connell, Public Member, proposed an amendment adding an item to the list encouraging adjudicators to consider "whether the information is thorough, materially supported, internally consistent, and analytically persuasive." The amendment was adopted. Following additional discussion and other amendments, Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted. The meeting then recessed for lunch.

V. Pending Assembly Projects

Vice Chairman Wiener then announced that proceedings would continue with a brief presentation by Reeve Bull, ACUS Research Director, on pending Assembly projects, explaining that Assembly projects are those intended to result in a formal recommendation of the Assembly. Mr. Bull then briefly described several pending or potential Assembly projects: *Agency Appellate Systems, Government Contract Bid Protests Before Agencies,* potential Assembly

projects that may arise from the two previously-mentioned forthcoming reports on the use of artificial intelligence by federal agencies, *Protected Materials in Public Rulemaking Dockets*, *Agency Litigation Webpages*, *Early Input on Regulatory Alternatives*. Mr. Bull also mentioned selected forthcoming Office of the Chairman projects, including a potential follow-up project to *Recusal Rules for Adjudicators* (Recommendation 2018-4) and *Classification of Agency Guidance*. Mr. Bull finished by thanking the Project Advisory Group for offering advice and ideas deserving additional research.

VI. Consideration of the Proposed Recommendation on Acting Agency Officials and Delegations of Authority

Vice Chairman Wiener thanked Aaron Nielson, Public Member and Chair of the Committee on Administration and Management; Anne Joseph O'Connell, Public Member and project consultant; and Bobby Ochoa, Staff Attorney. Ms. O'Connell then discussed the research supporting the Recommendation, and Mr. Nielson discussed the Committee's deliberations. Vice Chairman Wiener took the floor and moved to the manager's amendment, which was adopted.

After general discussion of the proposed Recommendation, Vice Chairman Wiener turned to a pre-submitted inquiry and amendment proposed by the Council. Ronald A. Cass, Council Member, explained that the Council inquired whether the Recommendation should identify a particular government agency to provide government-wide training on the Vacancies Act. Mr. Cass then proposed an amendment listing several agencies as potential candidates to provide the government-wide training, and the amendment was adopted. Mr. Cass then explained that the pre-submitted Council amendment proposed to strike the language in paragraph 6 requiring agencies to identify the projected end dates of acting officials because it would be overly burdensome. After discussion, the Council amendment was adopted. Following additional discussion and other amendments, Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

VII. Consideration of the Proposed Recommendation on Public Identification of Agency Officials

Vice Chairman Wiener thanked Aaron Nielson, Public Member and Chair of the Committee on Administration and Management; and Bobby Ochoa, Staff Attorney and in-house researcher. Mr. Ochoa then discussed the research supporting the Recommendation, and Mr. Nielson spoke about the Committee's deliberations.

After general discussion, Vice Chairman Wiener proceeded to three pre-submitted amendments from the Council. Mr. Cass explained that the first Council amendment proposed to expand the scope of paragraph 1 and paragraph 2, applicable to agencies generally, to include all

members of the Senior Executive Service, rather than limiting the scope to only those members who perform "significant leadership responsibilities." After discussion, the amendment was not adopted. The second and third amendments proposed by the Council—to strike the word "broad" from footnote 1, and to rephrase the language concerning the regularity of publication of data in paragraph 2, respectively—were adopted.

Vice Chairman Wiener then proceeded with discussion of a pre-submitted amendment from Mr. Nielson to correct a drafting error that included overbroad language in the Recommendation's preamble describing Senate-confirmed presidential appointees, and Vice Chairman Wiener recognized and thanked both Alan Morrison, Senior Fellow, and Richard Pierce, Senior Fellow, for also raising this issue. After discussion, the proposed language was adopted. Following additional discussion and other amendments, Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

VIII. Consideration of the Proposed Recommendation on Recruiting and Hiring Agency Attorneys

Vice Chairman Wiener thanked Eloise Pasachoff, Public Member and Chair of the Ad Hoc Committee to consider the Recommendation; Todd Phillips, Staff Attorney and in-house researcher; and Todd Rubin, Staff Attorney and in-house researcher. Mr. Rubin discussed the research supporting the Recommendation, and Ms. Pasachoff spoke about the Committee's deliberations.

Vice Chairman Wiener then turned to a pre-submitted amendment in the nature of a substitute proposed by the Council, and it was adopted. He then proceeded to the manager's amendment, and it was adopted. After general discussion, Vice Chairman Wiener then turned to ten pre-submitted amendments by Robert J. Girouard, Government Member, consisting largely of language to clarify the Recommendation's meaning in several locations. After deliberation and votes, eight of Mr. Girouard's amendments adopted, and two amendments were withdrawn.

Vice Chairman Wiener opened the floor for general discussion. Ms. Pasachoff proposed an amendment to strike the appendix—containing an example of an attorney job announcement—in response to concerns raised by Mr. Morrison about the adequacy of the example. After lengthy discussion, the amendment to strike the appendix was adopted. Following additional discussion and other amendments, Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

IX. Concluding Remarks

Vice Chairman Wiener began concluding remarks by thanking ACUS staff for planning and preparing for the plenary session, and particularly Harry Seidman, Chief Financial and Operations Officer; Talia Hutchison, Program Manager; and Alisha Anderson, Program Specialist. He noted the tentative date of June 11th, 2020, for the 73rd Plenary Session. He then adjourned the 72nd Plenary Session.

Bylaws of the Administrative Conference of the United States

[The numbering convention below reflects the original numbering that appeared in Title 1, Code of Federal Regulations (CFR), Part 302, which was last published in 1996. Although the original numbering convention is maintained below, the bylaws are no longer published in the CFR. The official copy of the bylaws is currently maintained on the Conference's website at https://www.acus.gov/policy/administrative-conference-bylaws.]

§ 302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§ 591 *et seq.*, 78 Stat. 615 (1964), as amended, authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purposes of the Administrative Conference are to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest, to promote more effective participation and efficiency in the rulemaking process, to reduce unnecessary litigation and improve the use of science in the regulatory process, and to improve the effectiveness of laws applicable to the regulatory process. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

§ 302.2 Membership

(a) General

(1) Each member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly, either in person or by telephone or videoconference if that is permitted for the session or meeting involved. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing

does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. The Chairman shall, by random selection, identify one-half of the non-Government members appointed in 2010 to serve terms ending on June 30, 2011, and the other half to serve terms ending on June 30, 2012. Thereafter, all non-Government member terms shall be for two years. No non-Government members shall at any time be in continuous service beyond three terms; provided, however, that such former members may thereafter be appointed as senior fellows pursuant to paragraph (e) of this section; and provided further, that all members appointed in 2010 to terms expiring on June 30, 2011, shall be eligible for appointment to three continuous two-year terms thereafter.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he or she leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he or she enters full-time government service. In the event a non-Government member of the Conference appointed by the Chairman resigns or becomes ineligible to continue as a member, the Chairman shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a member may designate (by e-mail) a suitably informed alternate to participate for a member in a meeting of the committee, and that alternate may have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of or liaisons to the Conference for six or more years, former members who have served as members of the federal judiciary, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Senior fellows shall have all the privileges of members, but may not

vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) Special Counsels

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Special counsels shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication
2. Committee on Administration
3. Committee on Judicial Review
4. Committee on Regulation
5. Committee on Rulemaking

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. The Chairman, with the approval of the Council, may establish additional standing committees or rename, modify, or terminate any standing committee.

(b) Special Committees

With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. Such special committees shall expire after two years, unless their term is renewed by the Chairman with the approval of the Council for an additional period not to exceed two years for each renewal term. The Chairman may also terminate any special committee with the approval of the Council when in his or her judgment the committee's assignments have been completed.

(c) Coordination

The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

§ 302.4 Liaison Arrangements

(a) Appointment

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(b) Term

Any liaison arrangement entered into on or before January 1, 2020, shall remain in effect for the term ending on June 30, 2022. Any liaison arrangement entered into after January 1, 2020, shall terminate on June 30 in 2-year intervals in even-numbered years. The Chairman may, with the approval of the Council, extend the term of any liaison arrangement for additional terms of two years. There shall be no limit on the number of terms.

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

(1) The Office of Government Ethics and the Office of Legal Counsel have advised the Conference that non-Government members are special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. Accordingly, the Chairman of the Conference is authorized to prescribe requirements for the filing of information with respect to the employment and financial interests of non-Government members consistent with law, as he or she reasonably deems necessary to comply with these provisions of law, or any applicable law or Executive Order or other directive of the President with respect to participation in the activities of the Conference (including but not limited to eligibility of federally registered lobbyists).

(2) The Chairman will include with the agenda for each plenary session and each committee meeting a statement calling to the attention of each participant in such session or meeting the requirements of this section, and requiring each non-Government member to provide the information described in paragraph (a)(1), which information shall be maintained by the Chairman as confidential and not disclosed to the public. Except as provided in this paragraph (a) or paragraph (b), members may vote or participate in matters before the Conference to the extent permitted by these by-laws without additional disclosure of interest.

(b) Disqualifications

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

(2) No member may vote or otherwise participate in that capacity with respect to any proposed recommendation in connection with any study as to which he or she has been engaged as a consultant or contractor by the Conference.

(c) Applicability to Senior Fellows, Special Counsel, and Liaison Representatives

This section shall apply to senior fellows, special counsel, and liaison representatives as if they were members.

§ 302.6 General

(a) Meetings

In the case of meetings of the Council and plenary sessions of the Assembly, the Chairman (and, in the case of committee meetings, the committee chairman) shall have authority in his or her discretion to permit attendance by telephone or videoconference. All sessions of the Assembly and all committee meetings shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to special counsel, and to liaison representatives (and to consultants and staff members insofar as matters on which they have been engaged are under consideration), and to persons who, prior to the commencement of the session or meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly (or, in the case of committee meetings, the approval of the chairman of the committee and unanimous consent of the committee).

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council. Action by the Council may be effected either by meeting or by individual vote, recorded either in writing or by electronic means.

(c) Proposed Amendments at Plenary Sessions

Any amendment to a committee-proposed recommendation that a member wishes to move at a plenary session should be submitted in writing in advance of that session by the date established by the Chairman. Any such pre-submitted amendment, if supported by a proper

motion at the plenary session, shall be considered before any amendments that were not pre-submitted. An amendment to an amendment shall not be subject to this rule.

(d) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation. A member's failure to file or join in such a separate statement does not necessarily indicate his or her agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Director not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(e) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(f) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Meeting Policies and Procedures

(Updated December 2, 2020)

Note: Modified policies may be used during the COVID-19 pandemic, during which ACUS meetings are being held remotely.

The Administrative Conference of the United States (the "Conference") adheres to the following policies and procedures regarding the operation and security of committee meetings and plenary sessions open to the public.

Public Notice of Plenary Sessions and Committee Meetings

The Administrative Conference will publish notice of its plenary sessions in the *Federal Register* and on the Conference's website, www.acus.gov. Notice of committee meetings will be posted only on the Conference website. Barring exceptional circumstances, such notices will be published 15 calendar days before the meeting in question. Members of the public can also sign up to receive meeting alerts at acus.gov/subscribe.

Public Access to Meetings

Members of the public who wish to attend a committee meeting or plenary session in person or remotely should RSVP online at www.acus.gov no later than two business days before the meeting. To RSVP for a meeting, go to the Calendar on ACUS's website, click the event you would like to attend, and click the "RSVP" button. ACUS will reach out to members of the public who have RSVP'd if the meeting space cannot accommodate all who wish to attend in person.

Members of the public who wish to attend a meeting held at ACUS headquarters should first check in with security at the South Lobby entrance of Lafayette Centre, accessible from 20th Street and 21st Street NW. Members of the public who wish to attend an ACUS-sponsored meeting held at another facility should follow that facility's access procedures.

The Conference will make reasonable efforts to provide interested members of the public remote access to all committee meetings and plenary sessions and to provide access on its website to archived video of committee meetings and plenary sessions. The Conference will make reasonable efforts to post remote access information or instructions for obtaining remote access information on its website no later than four calendar days before a meeting. The *Federal Register* notice for each plenary session will also include remote access information or instructions for obtaining remote access information.

Participation in Meetings

The 101 statutory members of the Conference as well as liaison representatives, special counsels, and senior fellows may speak at plenary sessions and committee meetings. Voting at plenary sessions is limited to the 101 statutory members of the Conference. Statutory members may also vote in their respective committees. Liaison representatives, special counsels, and senior fellow may vote in their respective committees at the discretion of the Committee Chair.

The Conference Chair, or the Committee Chair at committee meetings, may permit a member of the public to speak with the unanimous approval of all present voting members. The Conference expects that every public attendee will be respectful of the Conference's staff, members, and others in attendance. A public attendee will be considered disruptive if he or she speaks without permission, refuses to stop speaking when asked by the Chair, acts in a belligerent manner, or threatens or appears to pose a threat to other attendees or Conference staff. Disruptive persons may be asked to leave and are subject to removal.

Written Public Comments

To facilitate public participation in committee and plenary session deliberations, the Conference typically invites members of the public to submit comments on the report(s) or recommendation(s) that it will consider at an upcoming committee meeting or plenary session.

Comments can be submitted online by clicking the "Submit a comment" button on the webpage for the project or event. Comments that cannot be submitted online can be mailed to the Conference at 1120 20th Street NW, Suite 706 South, Washington, DC 20036.

Members of the public should make sure that the Conference receives comments before the date specified in the meeting notice to ensure proper consideration.

Disability or Special Needs Accommodations

The Conference will make reasonable efforts to accommodate persons with physical disabilities or special needs. If you need special accommodations due to a disability, you should contact the Staff Counsel listed on the webpage for the event or the person listed in the *Federal Register* notice no later than seven business days before the meeting.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Council Members

Name	Organization	Title
Ronald A. Cass	Cass & Associates, PC	President
Jennifer B. Dickey	U.S. Department of Justice	Principal Deputy Assistant Attorney General, Civil Division
Jeffrey M. Harris	Consovoy McCarthy PLLC	Partner
Donald F. McGahn II	Jones Day	Practice Leader of Government Regulation
Michael H. McGinley	Dechert LLP	Partner
Matthew E. Morgan	Elections, LLC	Partner
Roger Thomas Severino	U.S. Department of Health & Human Services	Director, Office for Civil Rights (OCR)
Adrian Vermeule	Harvard Law School	Ralph S. Tyler, Jr. Professor of Constitutional Law
Matthew L. Wiener	Administrative Conference of the U.S.	Acting Chairman, Vice Chairman, and Executive Director

Government Members

Name	Organization	Title
James L. Anderson	Federal Deposit Insurance Corporation	Deputy General Counsel, Supervision and Legislation Branch
David J. Apol	U.S. Office of Government Ethics	General Counsel
Gregory R. Baker	Federal Election Commission	Deputy General Counsel for Administration
Eric S. Benderson	U.S. Small Business Administration	Associate General Counsel for Litigation & Claims
Ketan D. Bhirud	U.S. Equal Employment Opportunity Commission	Legal Counsel

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Christina M. Brown	U.S. Department of Housing and Urban Development	Senior Counsel
Paige Bullard	Federal Energy Regulatory Commission	Managing Attorney
Daniel Cohen	U.S. Department of Energy	Assistant General Counsel for Legislation, Regulation and Energy Efficiency
Michael J. Cole	Federal Mine Safety and Health Review Commission	Senior Attorney, Office of General Counsel
Peter J. Constantine	U.S. Department of Labor	Associate Solicitor, Office of Legal Counsel
Anika S. Cooper	Surface Transportation Board	Attorney, Office of General Counsel
Elizabeth H. Dickinson	U.S. Food & Drug Administration	Senior Deputy Chief Counsel
Jonathan Dols	U.S. Department of Transportation	Deputy Assistant General Counsel for Regulation
Robert J. Girouard	U.S. Office of Personnel Management	Senior Counsel, Office of General Counsel
Gina K. Grippando	U.S. International Trade Commission	Assistant General Counsel for Administrative Law
Richard J. Hipolit	U.S. Department of Veterans Affairs	Deputy General Counsel for Legal Policy
Janice L. Hoffman	U.S. Department of Health & Human Services	Associate General Counsel, Centers for Medicare & Medicaid Services
Paul S. Koffsky	U.S. Department of Defense	Senior Deputy General Counsel and Deputy General Counsel (Personnel and Health Policy)
Alice M. Kottmyer	U.S. Department of State	Attorney Adviser
Tristan L. Leavitt	U.S. Merit Systems Protection Board	Acting Chief Executive and Administrative Officer
Hilary Malawer	U.S. Department of Education	Deputy General Counsel, Office of the General Counsel

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Nadine N. Mancini	Occupational Safety and Health Review Commission	General Counsel
Christina E. McDonald	U.S. Department of Homeland Security	Associate General Counsel for Regulatory Affairs, Office of the General Counsel
Mary E. McLeod	Consumer Financial Protection Bureau	General Counsel
Brian Morrissey	U.S. Department of the Treasury	Principal Deputy General Counsel
Patrick R. Nagle	Social Security Administration	Chief Administrative Law Judge
Bao Nguyen	Office of the Comptroller of the Currency	Principal Deputy Chief Counsel
Alfred M. Pollard	Federal Housing Finance Agency	General Counsel
Connor N. Raso	U.S. Securities and Exchange Commission	Senior Counsel, Office of General Counsel
Carrie F. Ricci	U.S. Department of Agriculture	Associate General Counsel for Marketing, Regulatory, and Food Safety Programs
Roxanne L. Rothschild	National Labor Relations Board	Executive Secretary
Jessica Salmoiraghi	U.S. General Services Administration	Associate Administrator of the Office of Government-wide Policy
Jay R. Schwarz	Board of Governors of the Federal Reserve System	Senior Counsel, Legal Division
William H. Shakely	Federal Maritime Commission	Assistant General Counsel for General Law and Regulation
Carol Ann Siciliano	U.S. Environmental Protection Agency	Associate General Counsel
Robert F. Stone	Occupational Safety and Health Administration	Director, Office of Regulatory Analysis (Health); Directorate of Standards and Guidance
Heath P. Tarbert	U.S. Commodity Futures Trading Commission	Chairman and Chief Executive
Stephanie J. Tatham	Office of Management and Budget	Senior Policy Analyst and Attorney, Office of Information and Regulatory Affairs

Drita Tonuzi	Internal Revenue Service	Deputy Chief Counsel (Operations), Office of the Chief Counsel
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Rules on Rulemakings

Committee on Regulation

Proposed Recommendation | December 16, 2020

Numerous agencies have promulgated rules setting forth the policies and procedures they will follow when conducting informal rulemakings.[1] The rules can cover a variety of practices, including processes for initiating and seeking public input on new rules, coordinating with the Office of Management and Budget and other agencies as a rule is being formulated, and obtaining approval from agency leadership before a proposed rule is issued or finalized. Agencies refer to these rules by different names. This Recommendation calls them "rules on rulemakings."

Rules on rulemakings vary—in terms of the particular matters they address, their scope and comprehensiveness, and other characteristics—but they share several common features. First, they authoritatively reflect the agency's position as to what procedures it will observe when adopting new rules. By "authoritative," the Recommendation means that a rule on rulemakings sets forth the procedures that agency officials responsible for drafting and finalizing new rules will follow in at least most cases within the rule on rulemakings' scope, though it may contemplate the possibility that agency leadership could authorize an alternative set of procedures.[2]

[1] This Recommendation does not address rulemakings subject to the formal hearing requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 556–57.

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

Second, rules on rulemakings do not simply summarize or explain rulemaking requirements of the Administrative Procedure Act and other statutes, although they often serve an explanatory function at the same time that they set forth the procedures the agencies will follow in conducting rulemakings. Rules on rulemakings set forth additional commitments by an agency concerning how it will conduct rulemakings. And third, agencies disseminate rules on rulemakings publicly rather than just internally. They appear on agency websites and are often published not only in the daily *Federal Register* but also in the Code of Federal Regulations (CFR).

Rules on rulemakings can serve at least four important objectives. First, they promote efficiency by ensuring that both agency officials and those outside the agency know where to go to find the agency's rulemaking policies. Second, they promote predictability by informing the public that the agency will follow particular procedures, thereby allowing the public to plan their participation in the rulemaking process accordingly. Third, they promote accountability by ensuring that agency leadership has approved the policies and procedures the agency will follow. And they can also provide accountability in connection with individual rulemakings by creating an internal approval process by which agency leadership reviews proposed and final rules. Finally, they promote transparency by affording the public access to the agency's internal procedures pertaining to its rulemaking process.

In promulgating a rule on rulemakings, an agency may wish to solicit public input to inform the rule's development, even if such a rule is subject to 5 U.S.C. § 553's exemption from notice-and-comment procedures as a rule of procedure, general statement of policy, or otherwise. In soliciting public input, agencies may wish to use mechanisms that facilitate more robust participation, including by underrepresented communities.[3] As the Administrative Conference

[3] *See, e.g.*, 2 U.S.C. § 1534 (Unfunded Mandates Reform Act); 5 U.S.C. § 609 (Regulatory Flexibility Act); Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 11, 2000).

has acknowledged in past recommendations, public comment can both provide valuable input from the public and enhance public acceptance of the agency's rules.[4]

An agency may also wish to publish its rule on rulemakings in the CFR. Doing so can enhance transparency and facilitate accountability. Importantly, publishing a rule on rulemakings in the CFR does not, by itself, make the rule on rulemakings judicially enforceable.[5]

This Recommendation does not address whether, when, or on what legal bases a court might enforce a rule on rulemakings against an agency. As Paragraph 7 below provides, however, an agency that does not wish to be bound by its rule on rulemakings may wish to include a provision in its rule on rulemakings stating that such rules do not create any substantive or procedural rights or benefits.[6]

RECOMMENDATION

1. Agencies should consider promulgating rules setting forth the policies and procedures they will follow when conducting their informal rulemaking process (rules on rulemakings).
2. In issuing rules on rulemakings, agencies should consider including provisions addressing the following topics (which reflect topics frequently covered in existing agency rules on rulemakings):
   (a) procedures prior to the issuance of a notice of proposed rulemaking;
   (b) procedures connected with the notice-and-comment process;

[4] *See* Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (Jul. 8, 1992); s*ee also* Recommendation 2019-1, *supra* note 2; Recommendation 2017-5, *supra* note 2.

[5] *See, e.g.*, Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (stating that "publication in the Code of Federal Regulations, or its absence" is only "a snippet of evidence of agency intent" that the published pronouncement has binding effect).

[6] *See, e.g.*, 49 C.F.R. § 5.23. Agencies could be discouraged from promulgating rules on rulemakings if courts were to not defer to agencies' characterizations that they are not judicially enforceable. *Cf.* Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 228 (D.C. Cir. 2007) ("[W]e have previously relied on similar disclaimers as relevant to the conclusion that a guidance document is non-binding.").

(c) procedures connected with the presidential review process, if applicable;
(d) procedures for handling post-comment period communications;
(e) internal approval procedures for issuing and finalizing rules; and
(f) procedures for reassessing existing rules.

The appendix gives examples of particular subtopics agencies may wish to consider under each of these topics.

3. Agencies should make rules on rulemakings available in a prominent, easy-to-find place on the portion of their websites dealing with rulemaking matters. Additionally, agencies should consider publishing them in the daily *Federal Register* or the Code of Federal Regulations. When posting rules on rulemakings on their websites, agencies should use techniques like linked tabs, pull-down menus, indexing, tagging, and sorting tables to ensure that relevant documents are easily findable. Agencies should also design their search engines to allow people to easily identify relevant documents.
4. In addition to issuing rules on rulemakings, agencies should consider explaining in accessible language how the rulemaking process works in order to educate the public. Such explanations might be integrated within a rule on rulemakings or might be contained in separate explanatory documents (e.g., documents identifying frequently asked questions). When providing such explanations, an agency should, to the extent practicable, distinguish between procedures it intends to follow and material provided purely by way of background.
5. Agencies should consider a broad range of means for seeking public input on rules on rulemakings, whether or not the Administrative Procedure Act requires it.
6. Agencies should consider the extent to which procedures required by a rule on rulemakings are internally waivable and if so, by whom. For example, they might consider drafting a rule on rulemakings in a way that allows high-level agency officials to permit other officials to use alternative procedures.

7. If agencies do not wish for their rules on rulemakings to be enforceable in court on judicial review, they should consider including a statement within their rules on rulemakings that such rules do not create any substantive or procedural rights or benefits.

APPENDIX

Non-exhaustive List of Topics for Agencies to Consider Including Within Their Rules on Rulemakings

(a) procedures prior to the issuance of a notice of proposed rulemaking

Subtopic examples:

(1) regulatory planning;[7]

(2) issuing advance notices of proposed rulemaking and obtaining feedback from members of the public using means other than the notice-and-comment process, such as requests for information and focus groups;[8]

(3) accepting, reviewing, and responding to petitions for rulemaking;[9]

(4) considering options besides rulemaking;

(5) performing ex ante regulatory analyses (e.g., benefit-cost analysis and regulatory flexibility analysis);[10]

(6) using plain language in regulatory drafting;[11]

(7) preparing for potential judicial review of rulemakings, including deciding whether to make any of the provisions of a rule severable;[12]

[7] *See* Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757 (June 26, 2015).

[8] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

[9] *See* Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014).

[10] *See* Admin. Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

[11] *See* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

[12] *See* Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 Fed. Reg. 30,685 (June 29, 2018).

(8) conducting negotiated rulemaking;[13] and

(9) establishing an effective date for rules.

(b) procedures connected with the notice-and-comment process

Subtopic examples:

(1) materials to be published on Regulations.gov with the notice;[14]

(2) minimum comment periods to be allowed;[15]

(3) incorporating standards by reference;[16]

(4) using social media to engage the public in rulemaking;[17]

(5) obtaining feedback from American Indian tribes, other historically underrepresented or under-resourced groups, and state and local governments;[18]

(6) posting, analyzing, and responding to public comments, including comments that may contain confidential commercial information, protected personal information, or other kinds of sensitive submissions;[19]

(7) waiving or invoking of Administrative Procedure Act exemptions to notice and comment;[20] and

[13] *See* Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,040 (July 5, 2017).

[14] *See* Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019).

[15] *See* Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

[16] *See* Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

[17] *See* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

[18] *See* Recommendation 2018-7, *supra* note 8.

[19] *See* Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011). There is also an ongoing project of the Administrative Conference called *Protected Materials in Public Rulemaking Dockets* that deals with these subjects.

[20] *See* Recommendation 92-1, *supra* note 4.

(8) using interim final rules or direct final rules.[21]

(c) procedures connected with the presidential review process, if applicable

Subtopic examples:

(1) interacting with the Office of Information and Regulatory Affairs, the Office of the Federal Register, the Regulatory Information Service Center, the Small Business Administration's Office of Advocacy, and other offices with government-wide rulemaking responsibilities;

(2) participating in the interagency review process; and

(3) procedures related to international regulatory cooperation.[22]

(d) procedures for handling post-comment period communications

Subtopic examples:

(1) provisions respecting reply comments;[23]

(2) handling external merits communications not filed as comments;[24] and

(3) handling late-filed comments.[25]

(e) internal approval procedures for issuing and finalizing rules

Subtopic examples:

(1) procedures for submitting rules to offices with legal, economic, and other responsibilities within the agency for review[26] and

(2) procedures for submitting rules to the relevant agency official for final approval.

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[21] *See* Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemakings*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

[22] *See* Admin. Conf. of the U.S., Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2259 (Jan. 17, 2012).

[23] *See* Recommendation 2011-2, *supra* note 15.

[24] *See* Admin. Conf. of the U.S., Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

[25] *See* Recommendation 2011-2, *supra* note 15.

[26] *See* Admin. Conf. of the U.S., Recommendation 2019-5, *Agency Economists*, 84 Fed. Reg. 71,349 (Dec. 27, 2019).

(f) procedures for reassessing existing rules

Subtopic examples:

(1) issuing regulatory waivers and exemptions;[27]

(2) engaging in retrospective review of rules;[28]

(3) maintaining and preserving rulemaking records, including transparency of such records and the handling of confidential commercial information, protected personal information, or other kinds of sensitive information contained therein;[29] and

(4) handling rules that have been vacated or remanded without vacatur.[30]

[27] *See* Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61,742 (Dec. 29, 2017).

[28] *See* Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

[29] *See* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

[30] *See* Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,272 (Dec. 17, 2013).

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Rules on Rulemakings

Committee on Regulation

Proposed Recommendation | December 16, 2020

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).

Numerous agencies have promulgated rules setting forth the policies and procedures they will follow when conducting informal rulemakings under 5 U.S.C. § 553.[1] The rules can cover a variety of practices, including processes for initiating and seeking public input on new rules, coordinating with the Office of Management and Budget and other agencies as a rule is being formulated, and obtaining approval from agency leadership before a proposed rule is issued or finalized. Agencies refer to these rules by different names. This Recommendation calls them "rules on rulemakings."

Rules on rulemakings vary—in terms of the particular matters they address, their scope and comprehensiveness, and other characteristics—but they share several common features. First, they authoritatively reflect the agency's position as to what procedures it will observe when adopting new rules. By "authoritative," thise Recommendation means that a rule on rulemakings sets forth the procedures that agency officials responsible for drafting and finalizing new rules will follow in at least most cases within the rule on rulemakings' scope, though it may

[1] This Recommendation does not address rulemakings subject to the formal hearing requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 556–57.

contemplate the possibility that agency leadership could authorize an alternative set of procedures.[2]

Second, rules on rulemakings do ~~not~~more than simply summarize or explain rulemaking requirements of the Administrative Procedure Act and other statutes, although they often serve an explanatory function at the same time that they set forth the procedures the agencies will follow in conducting rulemakings. Rules on rulemakings set forth additional commitments by an agency concerning how it will conduct rulemakings. And third, agencies disseminate rules on rulemakings publicly rather than ~~just~~only internally. They appear on agency websites and are often published not only in the ~~daily~~ *Federal Register* but also in the ~~Code of Federal Regulations~~*Code of Federal Regulations* (CFR).

Rules on rulemakings can serve at least four important objectives. First, they promote efficiency by ensuring that both agency officials and those outside the agency know where to go to find the agency's rulemaking policies. Second, they promote predictability by informing the public that the agency will follow particular procedures, thereby allowing the public to plan their participation in the rulemaking process accordingly. Third, they promote accountability by ensuring that agency leadership has approved the policies and procedures the agency will follow. And they can also provide accountability in connection with individual rulemakings by creating an internal approval process by which agency leadership reviews proposed and final rules. Finally, they promote transparency by affording the public access to the agency's internal procedures pertaining to its rulemaking process.

In promulgating a rule on rulemakings, an agency may wish to solicit public input to inform the rule's development, even if such a rule is subject to 5 U.S.C. § 553's exemption from notice-and-comment procedures as a rule of procedure, general statement of policy, or otherwise. In soliciting public input, agencies may wish to use mechanisms that facilitate more robust

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

participation, including by underrepresented communities.[3] As the Administrative Conference has acknowledged in past recommendations, public comment can both provide valuable input from the public and enhance public acceptance of ~~the~~an agency's rules.[4]

An agency may also wish to publish its rule on rulemakings in the CFR. Doing so can enhance transparency and facilitate accountability. Importantly, publishing a rule on rulemakings in the CFR does not, by itself, make the rule on rulemakings judicially enforceable.[5]

This Recommendation does not ~~address~~seek to resolve whether, when, or on what legal bases a court might enforce a rule on rulemakings against an agency.[6] ~~As Paragraph 7 below provides, however, an agency that does not wish to be bound by its rule on rulemakings may wish to include a provision in its rule on rulemakings stating that such rules do not create any substantive or procedural rights or benefits.[7]~~ However, some or all provisions in a rule on rulemakings may be comparable to executive orders that are "intended only to improve the internal management of the Federal Government."[8] Courts have given effect to language in such

Commented [CA1]: Proposed Council Amendment (see parallel amendment at lines 94-96 below and corresponding explanation)

[3] *See, e.g.*, 2 U.S.C. § 1534 (Unfunded Mandates Reform Act); 5 U.S.C. § 609 (Regulatory Flexibility Act); Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 11, 2000).

[4] *See* Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992); *see also* Recommendation 2019-1, *supra* note 2; Recommendation 2017-5, *supra* note 2.

[5] *See, e.g.*, Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (stating that "publication in the Code of Federal Regulations, or its absence" is only "a snippet of evidence of agency intent" that the published pronouncement ~~has~~be given binding effect).

[6] Some rules on rulemakings include a statement that they do not create any substantive or procedural rights or benefits. This Recommendation does not address whether such disclaimers should be included or what legal effect they may have on judicial review. These questions cannot be answered in isolation from the broader question of when a rule on rulemakings is judicially enforceable.

~~[7] *See, e.g.*, 49 C.F.R. § 5.23. Agencies could be discouraged from promulgating rules on rulemakings if courts were to not defer to agencies' characterizations that they are not judicially enforceable. *Cf.* Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 228 (D.C. Cir. 2007) ("[W]e have previously relied on similar disclaimers as relevant to the conclusion that a guidance document is non-binding.").~~

[8] *See, e.g.*, Exec. Order 12,866, 58 Fed. Reg. 51,735, § 10 (Oct. 4, 1993).

orders declaring that they do "not create any right or benefit, substantive or procedural."[9] Insofar as an agency considers some or all provisions in a rule on rulemakings to have been adopted for internal management reasons, making them inappropriate for private enforcement, it should consider including in the rule on rulemakings a statement that such rules or provisions do not create any substantive or procedural rights or benefits. The option to include such language may encourage agencies to make more extensive use of rules on rulemakings, thereby serving the purposes of this recommendation.

Commented [CMA2]: Proposed Amendment from Senior Fellow Ronald M. Levin (see parallel amendment at lines 97-100 below)

RECOMMENDATION

1. Agencies should consider promulgating rules on rulemakings setting forth the policies and procedures they will follow ~~when conducting their~~in informal rulemaking ~~process (rules on rulemakings)~~under 5 U.S.C. § 553.
2. In issuing rules on rulemakings, agencies should consider including provisions addressing the following topics (which reflect topics frequently covered in existing ~~agency~~ rules on rulemakings):
   (a) procedures prior to the issuance of a notice of proposed rulemaking;
   (b) procedures connected with the notice-and-comment process;
   (c) procedures connected with the presidential review process, if applicable;
   (d) procedures for handling post-comment period communications;
   (e) internal approval procedures for issuing and finalizing rules; and
   (f) procedures for reassessing existing rules.

   The appendix gives examples of particular subtopics agencies may wish to consider under each of these topics.

[9] *Id.*; *see, e.g.*, Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); Alliance for Natural Health US v. Sebelius, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011). *See also* Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538 (1970) (declining to enforce a rule that was "adopted for the orderly transaction of business before" the agency and was "not intended primarily to confer important procedural benefits upon individuals").

3. Agencies should make rules on rulemakings available in a prominent, easy-to-find place on the portion of their websites dealing with rulemaking matters. Additionally, agencies should consider publishing them in the ~~daily~~ *Federal Register* ~~or~~and the ~~Code of Federal Regulations~~*Code of Federal Regulations*. When posting rules on rulemakings on their websites, agencies should use techniques like linked tabs, pull-down menus, indexing, tagging, and sorting tables to ensure that relevant documents are easily findable. Agencies should also design their search engines to allow people to easily identify relevant documents.
4. In addition to issuing rules on rulemakings, agencies should consider explaining in accessible language how the rulemaking process works in order to educate the public. Such explanations might be integrated within a rule on rulemakings or might be contained in separate explanatory documents (e.g., documents identifying frequently asked questions). When providing such explanations, an agency should, to the extent practicable, distinguish between procedures it intends to follow and material provided purely by way of background.
5. Agencies should consider a broad range of means for seeking public input on rules on rulemakings, ~~whether or not~~ even if the Administrative Procedure Act does not require~~s~~ it.
6. Agencies should consider the extent to which procedures required by a rule on rulemakings ~~are~~should be made internally waivable and, if so, by whom. For example, they might consider drafting a rule on rulemakings in a way that allows high-level agency officials to permit other officials to use alternative procedures.
~~7. If agencies do not wish for their rules on rulemakings to be enforceable in court on judicial review, they should consider including a statement within their rules on rulemakings that such rules do not create any substantive or procedural rights or benefits.~~
7. Insofar as an agency considers some or all provisions in a rule on rulemakings to have been adopted for internal management reasons, making them inappropriate for private

Commented [CA3]: Proposed Council Amendment (see parallel amendment at lines 45-48 above). Explanation: The Council appreciates the considerations that underly this Paragraph and encourages discussion of it at the plenary session. But the Council is concerned that, as currently drafted, the Paragraph takes a position on the legal effect of blanket disclaimers with which courts may disagree. The Council recommends that the Conference say no more on the issue than what appears in revised footnote 6. Individual Council members may wish to express additional views at the plenary session.

enforcement, it should consider including in the rule on rulemakings a statement that such rules or provisions do not create any substantive or procedural rights or benefits.

Commented [CMA4]: Proposed Amendment from Senior Fellow Ronald M. Levin (see parallel amendment at lines 48-57 above)

APPENDIX

Non-exhaustive List of Topics for Agencies to Consider Including Within Their Rules on Rulemakings

(a) procedures prior to the issuance of a notice of proposed rulemaking

sSubtopic examples:

(1) regulatory planning;[10]

(2) issuing advance notices of proposed rulemaking and obtaining feedback from members of the public using means other than the notice-and-comment process, such as requests for information and focus groups;[11]

(3) accepting, reviewing, and responding to petitions for rulemaking;[12]

(4) considering options besides rulemaking;

(5) performing ex ante regulatory analyses (e.g., benefit-cost analysis and regulatory flexibility analysis);[13]

(6) using plain language in regulatory drafting;[14]

(7) preparing for potential judicial review of rulemakings, including deciding whether to make any of the provisions of a rule severable;[15]

[10] *See* Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757 (June 26, 2015).

[11] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

[12] *See* Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014).

[13] *See* Admin. Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

[14] *See* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

[15] *See* Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 Fed. Reg. 30,685 (June 29, 2018).

(8) conducting negotiated rulemaking;[16] and

(9) establishing an effective date for rules.

(b) procedures connected with the notice-and-comment process

s~~S~~ubtopic examples:

(1) materials to be published on Regulations.gov with the notice;[17]

(2) minimum comment periods to be allowed;[18]

(3) policies on ex parte contacts;[19]

(4) handling external merits communications not filed as comments;

~~(2)~~(5) handling intra-agency, interagency, and other internal Executive Branch merits communications not filed as comments;

Commented [CMA5]: Proposed Amendment from Public Member Jack M. Beermann. Note: See parallel amendment at line 146 below.

~~(3)~~(6) incorporating standards by reference;[20]

~~(4)~~(7) using social media to engage the public in rulemaking;[21]

~~(5)~~(8) obtaining feedback from American Indian tribes, other historically underrepresented or under-resourced groups, and state and local governments;[22]

[16] *See* Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,040 (July 5, 2017).

[17] *See* Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019).

[18] *See* Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

[19] *See* Admin. Conf. of the U.S., Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

[20] *See* Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

[21] *See* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

[22] *See* Recommendation 2018-7, *supra* note 8.

~~(6)~~(9) posting, analyzing, and responding to public comments, including comments that may contain confidential commercial information, protected personal information, or other kinds of sensitive submissions;[23]

~~(7)~~(10) waiving or invoking of Administrative Procedure Act exemptions to notice and comment;[24] and

~~(8)~~(11) using interim final rules or direct final rules.[25]

(c) procedures connected with the presidential review process, if applicable

~~s~~*Subtopic examples*:

(1) interacting with the Office of Information and Regulatory Affairs, the Office of the Federal Register, the Regulatory Information Service Center, the Small Business Administration's Office of Advocacy, and other offices with government-wide rulemaking responsibilities;

(2) participating in the interagency review process; and

(3) procedures related to international regulatory cooperation.[26]

(d) procedures for handling post-comment period communications

~~s~~*Subtopic examples*:

(1) provisions ~~respecting~~pertaining to reply comments;[27]

(2) ~~handling external merits communications not filed as comments;[28]~~ and

Commented [CMA6]: Proposed Amendment from Public Member Jack M. Beermann. Note: See parallel edit at lines 120-23 above, where Mr. Beermann proposes moving this language.

[23] *See* Admin. Conf. of the U.S., Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, Fed. Reg. ___. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011).~~). There is also an ongoing project of the Administrative Conference called *Protected Materials in Public Rulemaking Dockets* that deals with these subjects.~~

[24] *See* Recommendation 92-1, *supra* note 4.

[25] *See* Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemakings*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

[26] *See* Admin. Conf. of the U.S., Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2259 (Jan. 17, 2012).

[27] *See* Recommendation 2011-2, *supra* note 15.

~~[28] *See* Admin. Conf. of the U.S., Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).~~

(3) handling late-filed comments.[29]

(e) internal approval procedures for issuing and finalizing rules

Subtopic examples:

(1) procedures for submitting rules to offices with legal, economic, and other responsibilities within the agency for review[30] and

(2) procedures for submitting rules to the relevant agency official for final approval.

(f) procedures for reassessing existing rules

Subtopic examples:

(1) issuing regulatory waivers and exemptions;[31]

(2) engaging in retrospective review of rules;[32]

(3) maintaining and preserving rulemaking records, including transparency of such records and the handling of confidential commercial information, protected personal information, or other kinds of sensitive information contained therein;[33] and

(4) handling rules that have been vacated or remanded without vacatur.[34]

[29] *See* Recommendation 2011-2, *supra* note 15.

[30] *See* Admin. Conf. of the U.S., Recommendation 2019-5, *Agency Economists*, 84 Fed. Reg. 71,349 (Dec. 27, 2019).

[31] *See* Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61,742 (Dec. 29, 2017).

[32] *See* Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

[33] *See* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

[34] *See* Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,272 (Dec. 17, 2013).

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation | December 16, 2020

As part of the rulemaking process, an agency creates a public rulemaking docket, which consists of all rulemaking materials the agency has: (1) proactively published online or (2) made available for public inspection in a reading room. Public rulemaking dockets include materials agencies generate themselves and comments agencies receive from the public. Their purpose is to provide the public with the information that informed the agency's rulemaking.[1]

The Administrative Conference has issued several recommendations to help agencies balance the competing considerations of transparency and confidentiality in managing their public rulemaking dockets.[2] This project builds on these recommendations.

The scope of the Recommendation is limited to personal information and confidential commercial information that an agency has decided to withhold from its public rulemaking docket, which this Recommendation calls "protected material." The Recommendation specifies

[1] The public rulemaking docket is distinguished from "the administrative record for judicial review," which is intended to provide courts with a record for evaluating challenges to the rule, and the "rulemaking record," which means all comments and materials submitted to the agency during comment periods and any other materials the agency considered during the course of the rulemaking. *See* Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

[2] Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, advises agencies to allow submitters to flag confidential information, including trade secrets, and advises agencies to devise procedures for reviewing and handling such information. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Issues in e-Rulemaking*, ¶ 1, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, *supra* note 1, ¶ 11, advises agencies to develop guidance on managing and segregating protected information, such as confidential commercial information and sensitive personal information, while disclosing non-protected materials. *See also* Admin. Conf. of the U.S., Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,494 (Dec. 29, 1988); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).

how agencies should consider handling protected material. For purposes of this Recommendation, personal information is information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information.[3] Confidential commercial information is commercial information that is customarily kept private, or at least closely held, by the person or business providing it.[4] Other types of information, such as national security information and copyrighted materials, are beyond the Recommendation's scope. The Recommendation is also limited to addressing procedures for protecting materials that agencies decide warrant protection. It is not intended to define the universe of protected materials.

Agencies accept public comments for their public rulemaking dockets primarily through Regulations.gov, their own websites, and email. Regulations.gov and many agency websites that accept comments expressly notify the public that agencies may publish the information submitted in public comments.[5] When a person submits a comment to an agency, however, the agency typically does not immediately publish the comment. Instead, the agency generally takes time to screen comments before publishing them. Most agencies perform at least some kind of screening during this period.

For all agencies, whether to withhold or disclose protected material is governed by various laws: some mandate disclosure, some mandate withholding, and some leave agencies with substantial discretion in deciding whether to disclose. Although a full description of those laws is beyond the scope of this Recommendation, a brief overview of at least some of this body of law helps to identify the issues agencies face.

The Administrative Procedure Act requires agencies to "give interested persons an opportunity to participate in rulemaking through submission of written data, views, or

[3] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-130, MANAGING INFORMATION AS A STRATEGIC RESOURCE § 10 (37) (2016).

[4] *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019).

[5] *See* Christopher Yoo, Protected Materials in Public Rulemaking Dockets 24 (Mar. 10, 2020) (draft report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/draft-report-protected-materials-public-rulemaking-dockets.

arguments."[6] The United States Court of Appeals for the D.C. Circuit has interpreted this provision to ordinarily require that agencies make publicly available the critical information—including studies, data, and methodologies—underlying proposed rules.[7]

The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed above. Generally, the Privacy Act prevents agencies from disclosing any information about a person, such as medical records, educational background, and employment history, contained in an agency's system of records, without that person's written consent.[8] The Trade Secrets Act generally prevents agencies from disclosing trade secrets and other kinds of confidential commercial information, such as corporate losses and profits.[9]

Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the main exception relevant to this Recommendation is for information required to be released under the Freedom of Information Act (FOIA).[10] The Trade Secrets Act only has one exception, which covers any materials authorized to be disclosed by statute (including FOIA) or regulation.[11] Whether a particular piece of personal or confidential commercial information meets one of the exceptions often involves a complex determination that depends upon the exact type of information at issue and its contemplated use, and agencies must determine the applicability of the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of confidential commercial information may turn in part on whether the agency in receipt of the information assured the submitter that the information would be withheld from the public.[12] If an

[6] 5 U.S.C. § 553(c).

[7] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973). In addition to these public transparency requirements, there are a number of federal record-retention requirements of which agencies should be aware. *See, e.g.*, 44 U.S.C. § 3301.

[8] 5 U.S.C. § 552a(b).

[9] 18 U.S.C. § 1905.

[10] 5 U.S.C. § 552a(b)(2).

[11] *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).

[12] *See Food Mktg. Inst.*, 139 S. Ct. at 2361.

agency offers assurances that it will not disclose confidential commercial information, the agency and the submitter may rely on those assurances as a defense against compelled disclosure under FOIA. In many cases, agencies assure companies that they will not disclose such information in order to encourage companies to submit it.

Particular cases are governed by specific requirements of law, not broad categorical labels. But generally, agencies often consider certain types of personal information and confidential commercial information to be protected material (e.g., trade secrets, social security numbers, bank account numbers, passport numbers, addresses, email addresses, medical information, and information concerning a person's finances).

There are many ways such protected material may arrive at the agency in a rulemaking. A person might submit his or her own information, intentionally or unintentionally, and then ask the agency not to disclose it. A third party might submit another person's information, with or without that person's knowledge. A company might submit a document containing its own confidential commercial information, intentionally or unintentionally, with or without the agency's prior assurance of protection. Or a company might submit another company's or person's information. Depending on the information in question, and the manner in which it was submitted, there may be issues of waiver of statutory protection. Such questions, like all questions regarding the substance of the laws governing protected material, are beyond this Recommendation's scope, but they illustrate the various considerations that agencies and the public often face in the submission and handling of such material.

This Recommendation proposes steps agencies can take to withhold protected materials from their public rulemaking dockets while still providing the public with the information upon which agencies relied in formulating a proposed rule.[13]

RECOMMENDATION

Recommendations for All Agencies

1. For purposes of this Recommendation, "protected material" is personal information or confidential commercial information that agencies determine should be withheld from the public rulemaking docket. "Personal information" is information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information. "Confidential commercial information" is commercial information that is customarily kept private, or at least closely held, by the person or business providing it. To reduce the risk that agencies will inadvertently disclose protected material, agencies should describe what kinds of personal and confidential commercial information qualify as protected material and should clearly notify the public about their treatment of protected material. An agency's notifications should:
    a. Inform members of the public that comments are generally subject to public disclosure, except when disclosure is limited by law;
    b. Inform members of the public whether the agency offers assurances of protection from disclosure for their confidential commercial information and, if so, how to identify such information for the agency;
    c. Instruct members of the public never to submit protected material that pertains to third parties;

[13] Permitting the submission of anonymous and pseudonymous comments is one way that some agencies attempt to reduce the privacy risks that commenters face when submitting protected material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in an ongoing project of the Administrative Conference titled *Mass, Computer-Generated, and Fraudulent Comments* and are beyond the scope of this Recommendation.

d. Advise members of the public to review their comments for the material identified above in (c) and, if they find such material, to remove it;
e. Inform members of the public that they may request, during the period between when a comment is received and when it is made public, that protected material they inadvertently submitted be withheld from the public rulemaking docket;
f. Inform members of the public that they may request, after the agency has published any comment, that protected material pertaining to themselves or to their dependents within the comment be removed from the public rulemaking docket; and
g. Inform members of the public that the agency reserves the right to redact or aggregate any part of a comment if the agency determines that it constitutes protected material, or may withhold a comment in its entirety if it determines that redaction or aggregation would insufficiently prevent the disclosure of this material.

2. An agency should include the notifications described in Paragraph 1, or a link to those notifications, in at least the following places:
   a. Within the rulemaking document on which the agency requests comments, such as a notice of proposed rulemaking or an advance notice of proposed rulemaking;
   b. On the agency's own comment submission form, if the agency has one;
   c. Within any automatic emails that an agency sends acknowledging receipt of a comment;
   d. On any part of the agency's website that describes its rulemaking process; and
   e. Within any notices of public meetings pertaining to the rule.
3. The General Services Administration's eRulemaking Program Management Office should work with agencies that participate in Regulations.gov to include or refer to the

notifications described in Paragraph 1 within any automated emails Regulations.gov sends acknowledging receipt of a comment.

4. If a submitter notifies an agency that the submitter inadvertently included protected material in the submitter's comment, the agency should act as promptly as possible to determine whether such material warrants withholding from the public rulemaking docket and, if so, withhold it from the public rulemaking docket, or, if already disclosed, remove it from the public rulemaking docket.
5. Agencies should allow third parties to request that protected material pertaining to themselves or a dependent be removed from the public rulemaking docket. Agencies should review such requests and, upon determining that the material subject to the request qualifies as protected material, should remove it from the public rulemaking docket as promptly as possible.

Recommendations for Agencies That Screen Comments for Protected Material Before Publication in the Public Rulemaking Docket

6. Agencies that screen comments for protected material before publication in the public rulemaking docket, either as required by law or as a matter of discretion, should redact the protected material and publish the rest of the comment. Redaction should be thorough enough to prevent the public from discerning the redacted material, but not so broad as to prevent the public from viewing non-protected material.
7. If redaction is not feasible within a comment, agencies should consider presenting the data in a summarized form.
8. If redaction is not feasible across multiple, similar comments, agencies should consider presenting any related information in an aggregated form. Agencies should work with data science experts and others in relevant disciplines to ensure that aggregation is thorough enough to prevent someone from disaggregating the information.
9. If the approaches identified in Paragraphs 6–8 would still permit a member of the public to identify protected material, agencies should withhold the comment in its entirety.

When doing so, they should describe the withheld material for the public in as much detail as possible without compromising its confidentiality.

10. When deciding whether and how to redact, aggregate, or withhold protected material, agencies should explore using artificial intelligence-based tools to aid in identifying protected material. Agencies should speak with private sector experts and technology-focused agencies, such as the General Services Administration's Technology Transformation Service and the Office of Management and Budget's United States Digital Service, to determine which tools are most appropriate and how they can best be deployed given the agencies' resources.

Recommendations for Agencies That Offer Assurances of Protection from Disclosure of Confidential Commercial Information

11. Agencies that offer assurances of protection from disclosure of confidential commercial information should decide how they will offer such assurances. Agencies can choose to inform submitters, directly upon submission, that they will withhold confidential commercial information from the public rulemaking docket; post a general notice informing submitters that confidential commercial information will be withheld from the public rulemaking docket; or both.
12. Such agencies should adopt policies to help them identify such information. Agencies should consider including the following, either in tandem or as alternatives, as part of their policies:
    a. Instructing submitters to clearly identify that the document contains confidential commercial information;
    b. Instructing submitters to flag the particular text within the document that constitutes confidential commercial information; and
    c. Instructing submitters to submit both redacted and unredacted versions of a comment that contains confidential commercial information.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation | December 16, 2020

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).

As part of the rulemaking process, an agency creates a public rulemaking docket, which consists of all rulemaking materials the agency has: (1) proactively published online or (2) made available for public inspection in a reading room. Public rulemaking dockets include materials agencies generate themselves and comments agencies receive from the public. Their purpose is to provide the public with the information that informed the agency's rulemaking.[1]

The Administrative Conference has issued several recommendations to help agencies balance the competing considerations of transparency and confidentiality in managing their public rulemaking dockets.[2] This project builds on these recommendations.

[1] The public rulemaking docket is distinguished from "the administrative record for judicial review," which is intended to provide courts with a record for evaluating challenges to the rule, and the "rulemaking record," which means all comments and materials submitted to the agency during comment periods and any other materials the agency considered during the course of the rulemaking. *See* Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

[2] Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, advises agencies to allow submitters to flag confidential information, including trade secrets, and advises agencies to devise procedures for reviewing and handling such information. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Issues in e-Rulemaking*, ¶ 1, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, *supra* note 1, ¶ 11, advises agencies to develop guidance on managing and segregating protected information, such as confidential commercial information and sensitive personal information, while disclosing non-protected materials. *See also* Admin. Conf. of the U.S.,

The scope of the Recommendation is limited to personal information and confidential commercial information that an agency has decided to withhold from its public rulemaking docket, which this Recommendation calls "protected material." The Recommendation specifies how agencies should consider handling protected material. For purposes of this Recommendation, personal information is ~~information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information.[3]~~ information about an individual that is maintained by an agency, including his or her education, financial transactions, medical history, and criminal or employment history, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual.[4] Confidential commercial information is commercial information that is customarily kept private, or at least closely held, by the person or business providing it.[5] Other types of information, such as national security information and copyrighted materials, are beyond the Recommendation's scope. The Recommendation is also limited to addressing procedures for protecting materials that agencies decide warrant protection. It is not intended to define the universe of protected materials. In particular, this Recommendation does not address any issue that may arise if an agency desires to rely on protected material in its rulemaking explanation.

Agencies accept public comments for their public rulemaking dockets primarily through Regulations.gov, their own websites, and email. Regulations.gov and many agency websites that accept comments expressly notify the public that agencies may publish the information

Commented [CA1]: Proposed Amendment from Council. Explanation: This change aligns the definition of "personal information" with the definition of "record" in the Privacy Act (see parallel amendment at lines 83-88 below).

Note from Administrative Conference Staff: Public Member Jack M. Beermann has proposed the following revision, which may be rendered moot if the Council Amendment is adopted:
"For purposes of this Recommendation, personal information is information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information, and information that an individual would ordinarily keep private, such as bank account numbers, passport numbers, addresses, email addresses, medical information, and information concerning a person's finances."

Commented [CMA2]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 1 (change appears in footnote 5)

Commented [CMA3]: Proposed Amendment from Public Member Jack M. Beermann

Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,494 (Dec. 29, 1988); Admin. Conf. of the U.S., Recommendation 82-1, *Exemption (b)(4) of the Freedom of Information Act*, 47 Fed. Reg. 30,702 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).

~~[3] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-130, MANAGING INFORMATION AS A STRATEGIC RESOURCE § 10 (37) (2016).~~

[4] *See* Privacy Act of 1974 § 3, 5 U.S.C. § 552a(a)(4).

[5] *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019). *See also* Exec. Order No. 12,600, *Predisclosure Notification Procedures for Confidential Commercial Information*, 52 Fed. Reg. 23,781 (June 23, 1987).

submitted in public comments.[6] When a person submits a comment to an agency, however, the agency typically does not immediately publish the comment. Instead, the agency generally takes time to screen comments before publishing them. Most agencies perform at least some kind of screening during this period.

For all agencies, whether to withhold or disclose protected material is governed by various laws: some mandate disclosure, some mandate withholding, and some leave agencies with substantial discretion in deciding whether to disclose. Although a full description of those laws is beyond the scope of this Recommendation, a brief overview of at least some of this body of law helps to identify the issues agencies face.

The Administrative Procedure Act requires agencies to "give interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments."[7] The United States Court of Appeals for the D.C. Circuit has interpreted this provision to ordinarily require that agencies make publicly available the critical information—including studies, data, and methodologies—underlying proposed rules.[8]

The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed above. Generally, the Privacy Act prevents agencies from disclosing any information about a person, such as medical records, educational background, and employment history, contained in an agency's system of records, without that person's written consent.[9] The Trade Secrets Act

[6] *See* Christopher Yoo, Protected Materials in Public Rulemaking Dockets 24 (Mar. 10, 2020) (draft report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/draft-report-protected-materials-public-rulemaking-dockets.

[7] 5 U.S.C. § 553(c).

[8] ~~See~~ Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973). In addition to these public transparency requirements, there are a number of federal record-retention requirements of which agencies should be aware. *See, e.g.*, 44 U.S.C. § 3301.

[9] 5 U.S.C. § 552a(b).

generally prevents agencies from disclosing trade secrets and other kinds of confidential commercial information, such as corporate losses and profits.[10]

Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the main exception relevant to this Recommendation is for information required to be released under the Freedom of Information Act (FOIA).[11] The Trade Secrets Act only has one exception, which covers any materials authorized to be disclosed by statute (including FOIA) or regulation.[12] Whether a particular piece of personal or confidential commercial information meets one of these exceptions often involves a complex determination that depends upon the exact type of information at issue and its contemplated use, and agencies must determine the applicability of the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of confidential commercial information may turn in part on whether the agency in receipt of the information assured the submitter that the information would be withheld from the public.[13] If an agency offers assurances that it will not disclose confidential commercial information, the agency and the submitter may rely on those assurances as a defense against compelled disclosure under FOIA. In many cases, agencies assure companies that they will not disclose such information in order to encourage companies to submit it.

Particular cases are governed by specific requirements of law, not broad categorical labels. But generally, agencies often consider certain types of personal information and confidential commercial information to be protected material (e.g., trade secrets, social security numbers, bank account numbers, passport numbers, addresses, email addresses, medical information, and information concerning a person's finances).

[10] 18 U.S.C. § 1905.

[11] 5 U.S.C. § 552a(b)(2).

[12] *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).

[13] *See Food Mktg. Inst.*, 139 S. Ct. at 2361.

There are many ways such protected material may arrive at the agency in a rulemaking. A person might submit his or her own information, intentionally or unintentionally, and then ask the agency not to disclose it. A third party might submit another person's information, with or without that person's knowledge. A company might submit a document containing its own confidential commercial information, intentionally or unintentionally, with or without the agency's prior assurance of protection. Or a company might submit another company's or person's information. Depending on the information in question~~,~~ and the manner in which it was submitted, there may be issues of waiver of statutory protection. Such questions, like all questions regarding the substance of the laws governing protected material, are beyond this Recommendation's scope, but they illustrate the various considerations that agencies and the public often face in the submission and handling of such material.

This Recommendation proposes steps agencies can take to withhold protected materials from their public rulemaking dockets while still providing the public with the information upon which agencies relied in formulating a proposed rule.[14]

RECOMMENDATION

Recommendations for All Agencies

1. For purposes of this Recommendation, "protected material" is personal information or confidential commercial information that agencies determine should be withheld from the public rulemaking docket. "Personal information" is ~~information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information.~~information about an individual that is maintained by an agency, including his or her education, financial transactions, medical history, and criminal or employment

Commented [CA4]: Comment from Vice Chairman Matthew L. Wiener: Inclusion of definitions in numbered paragraphs is inconsistent with conventions of the Administrative Conference. Does the Assembly wish to strike the definitions?

[14] Permitting the submission of anonymous and pseudonymous comments is one way that some agencies attempt to reduce the privacy risks that commenters face when submitting protected material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in an ongoing project of the Administrative Conference titled *Mass, Computer-Generated, and Fraudulent Comments* and are beyond the scope of this Recommendation.

history, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual. "Confidential commercial information" is commercial information that is customarily kept private, or at least closely held, by the person or business providing it. To reduce the risk that agencies will inadvertently disclose protected material, agencies ~~should describe what kinds of personal and confidential commercial information qualify as protected material and~~ should clearly notify the public about their treatment of protected material. An agency's notifications should:

a. Inform members of the public that comments are generally subject to public disclosure, except when disclosure is limited by law;
b. Inform members of the public whether the agency offers assurances of protection from disclosure for their confidential commercial information and, if so, how to identify such information for the agency;
c. Instruct members of the public never to submit protected material that pertains to third parties;
d. Advise members of the public to review their comments for the material identified above in (c) and, if they find such material, to remove it;
e. Inform members of the public that they may request, during the period between when a comment is received and when it is made public, that protected material they inadvertently submitted be withheld from the public rulemaking docket;
f. Inform members of the public that they may request, after the agency has published any comment, that protected material pertaining to themselves or to their dependents within the comment be removed from the public rulemaking docket; and
g. Inform members of the public that the agency reserves the right to redact or aggregate any part of a comment if the agency determines that it constitutes protected material, or may withhold a comment in its entirety if it determines that

Commented [CA5]: Proposed Amendment from Council (see parallel amendment and explanation at lines 13-18 above)

Commented [CMA6]: Proposed Amendment from Government Member James L. Anderson # 1

redaction or aggregation would insufficiently prevent the disclosure of this material.

2. An agency should include the notifications described in Paragraph 1, or a link to those notifications, in at least the following places:
    a. Within the rulemaking document on which the agency requests comments, such as a notice of proposed rulemaking or an advance notice of proposed rulemaking;
    b. On the agency's own comment submission form, if the agency has one;
    c. Within any automatic emails that an agency sends acknowledging receipt of a comment;
    d. On any part of the agency's website that describes its rulemaking process or within any rule on rulemakings it may have, as described in Recommendation 2020-1, *Rules on Rulemakings*; and
    e. Within any notices of public meetings pertaining to the rule.
3. The General Services Administration's eRulemaking Program Management Office should work with agencies that participate in Regulations.gov to include or refer to the notifications described in Paragraph 1 within any automated emails Regulations.gov sends acknowledging receipt of a comment.
4. If a submitter notifies an agency that the submitter inadvertently included protected material in the submitter's comment, the agency should act as promptly as possible to determine whether such material warrants withholding from the public rulemaking docket and, if so, withhold it from the public rulemaking docket, or, if already disclosed, remove it from the public rulemaking docket. If agencies determine that such material does not qualify as protected, they should promptly notify the submitter of this finding with a brief statement of reasons.
5. Agencies should allow third parties to request that protected material pertaining to themselves or a dependent be removed from the public rulemaking docket. Agencies should review such requests and, upon determining that the material subject to the request qualifies as protected material, should remove it from the public rulemaking docket as

Commented [CMA7]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 2 (see paragraph 12 below for parallel amendment)

Commented [CMA8]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 3 (see paragraph 5 below for parallel amendment)

promptly as possible. If agencies determine that the material does not qualify as protected, they should promptly notify the submitter of this finding with a brief statement of reasons.

Commented [CMA9]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 3 (see paragraph 4 above for parallel amendment)

Recommendations for Agencies t~~T~~hat Screen Comments for Protected Material Before Publication in the Public Rulemaking Docket

6. Agencies that screen comments for protected material before publication in the public rulemaking docket, either as required by law or as a matter of discretion, should redact the protected material and publish the rest of the comment. Redaction should be thorough enough to prevent the public from discerning the redacted material, but not so broad as to prevent the public from viewing non-protected material. In addition, all redactions made pursuant to the Freedom of Information Act should include citations to the specific exemptions being applied.

Commented [CMA10]: Proposed Amendment from Government Member James L. Anderson # 2

7. If redaction is not feasible within a comment, agencies should consider presenting the data in a summarized form.
8. If redaction is not feasible across multiple, similar comments, agencies should consider presenting any related information in an aggregated form. Agencies should work with data science experts and others in relevant disciplines to ensure that aggregation is thorough enough to prevent someone from disaggregating the information.
9. If the approaches identified in Paragraphs 6–8 would still permit a member of the public to identify protected material, agencies should withhold the comment in its entirety. When doing so, they should describe the withheld material for the public in as much detail as possible without compromising its confidentiality.
10. When deciding whether and how to redact, aggregate, or withhold protected material, agencies should explore using artificial intelligence-based tools to aid in identifying protected material. Agencies should ~~speak~~consult with private sector experts and technology-focused agencies, such as the General Services Administration's Technology Transformation Service and the Office of Management and Budget's United States

Digital Service, to determine which tools are most appropriate and how they can best be deployed given the agencies' resources.

Recommendations for Agencies That Offer Assurances of Protection from Disclosure of Confidential Commercial Information

11. Agencies that offer assurances of protection from disclosure of confidential commercial information should decide how they will offer such assurances. Agencies can choose to inform submitters, directly upon submission, that they will withhold confidential commercial information from the public rulemaking docket; post a general notice informing submitters that confidential commercial information will be withheld from the public rulemaking docket; or both.
12. Such agencies should adopt policies to help them identify such information. Agencies should consider including the following, either in tandem or as alternatives, as part of their policies, including within any rules on rulemakings they may have, as described in Recommendation 2020-1, *Rules on Rulemakings*:
    a. Instructing submitters to ~~clearly~~ identify clearly that the document contains confidential commercial information;
    b. Instructing submitters to flag the particular text within the document that constitutes confidential commercial information; and
    c. Instructing submitters to submit both redacted and unredacted versions of a comment that contains confidential commercial information.

Commented [CMA11]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 2 (see paragraph 2(d) above for parallel amendment)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Use of Artificial Intelligence

Ad Hoc Committee on Agency Use of Artificial Intelligence

Proposed Statement | December 16, 2020

Artificial intelligence (AI) techniques are changing how government agencies do their work.[1] Advances in AI hold out the promise of lowering the cost of completing government tasks and improving the quality, consistency, and predictability of agencies' decisions. But agencies' uses of AI also raise concerns about the discretion being vested in AI systems and the extent to which those systems are exercising authority previously exercised by human officials.

Consistent with its statutory mission to promote efficiency, participation, and fairness in administrative processes,[2] the Administrative Conference offers this Statement to identify issues agencies should consider when adopting or modifying AI systems and developing practices and procedures for their use and regular monitoring. The Statement draws on a pair of reports commissioned by the Conference,[3] as well as the input of AI experts from government,

[1] There is no universally accepted definition of "artificial intelligence," and the rapid state of evolution in the field, as well as the proliferation of use cases, makes coalescing around any such definition difficult. *See, e.g.*, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 238(g), 132 Sta. 1636, 1697–98 (2018) (using one definition of AI); Nat'l Inst. of Standards & Tech., U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools 7–8 (Aug. 9, 2019) (offering a different definition of AI). Generally speaking, AI systems tend to have characteristics such as the ability to learn to solve complex problems, make predictions, or undertake tasks that heretofore have relied on human decision making or intervention. There are many illustrative examples of AI that can help frame the issue for the purpose of this statement. They include, but are not limited to, AI assistants, computer vision systems, biomedical research, unmanned vehicle systems, advanced game-playing software, and facial recognition systems as well as application of AI in both information technology and operational technology.

[2] *See* 5 U.S.C. § 591.

[3] DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY, & MARIANO-FLORENTINO CUÉLLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (2020), https://www.acus.gov/sites/default/files/documents/Government%20by%20Algorithm.pdf; Cary Coglianese, *A Framework for Governmental Use of Machine Learning* (Oct. 2020), https://www.acus.gov/sites/default/files/documents/Coglianese%20Report%20-%20A%20Framework%20for%20Governmental%20Use%20of%20Machine%20Learning.pdf (draft report for Administrative Conference of the United States).

academia, and the private sector (some ACUS members) provided at meetings of the ad hoc committee of the Administrative Conference that proposed this Statement.

The issues addressed in this Statement implicate matters involving law, policy, finances, human resources, and technology. To minimize the risk of unforeseen problems involving an AI system, agencies should, throughout an AI system's lifespan, solicit input about the system from the offices that oversee these matters. Agencies should also keep in mind the need for public trust in their practices and procedures for use and regular monitoring of AI technologies.

1. Transparency

Agencies' efforts to ensure transparency in connection with their AI systems can serve many valuable goals. When agencies set up processes to ensure transparency in their AI systems, they should consider publicly identifying the processes' goals and the rationales behind them. For example, agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities. Different AI systems are likely to satisfy some transparency goals more than others. Where possible, agencies should use metrics to measure the performance of their AI-transparency processes.

In setting transparency goals, agencies should consider to whom they should be transparent. For instance, depending on the nature of its operations, agencies might prioritize transparency to the public, courts, Congress, or their own officials.

The appropriate level or nature of transparency and interpretability in agencies' AI systems will also depend on context. In some contexts, such as adjudication, reason-giving requirements may call for a higher degree of transparency and interpretability from agencies regarding how their AI systems function. In other contexts, such as enforcement, agencies' legitimate interests in preventing gaming or adversarial learning by regulated parties could militate against providing too much information (or specific types of information) to the public about AI systems' processes. In every context, agencies should consider whether particular laws or policies governing disclosure of information apply.

In selecting and using AI techniques, agencies should be cognizant of the degree to which a particular AI system can be made transparent to appropriate people and entities, including the general public. There may exist tradeoffs between explainability and accuracy in AI systems, so that transparency and interpretability might sometimes weigh in favor of choosing simpler AI models. The appropriate balance between explainability and accuracy will depend on the specific context, including agencies' circumstances and priorities.

The proprietary nature of some AI systems may also affect the extent to which they can be made transparent. When agencies' AI systems rely on proprietary technologies or algorithms the agencies do not own, the agencies and the public may have limited access to the information about the AI techniques. Agencies should strive to anticipate such circumstances and address them appropriately, such as by working with outside providers to ensure they will be able to share sufficient information about such a system. Agencies should not enter into contracts to use proprietary AI systems unless they are confident that actors both internal and external to the agencies will have adequate access to information about the systems.

2. Harmful Bias

At their best, AI systems can help agencies identify and reduce the impact of unwanted biases.[4] Yet they can also unintentionally create or exacerbate those biases by encoding and deploying them at scale. In deciding whether and how to deploy an AI system, agencies should carefully evaluate the harmful biases that might result from the use of the AI system as well as the biases that might result from alternative systems (such as an incumbent system that the AI system would augment or replace). Because different types of bias pose different types of harms, the outcome of the evaluation will depend on agencies' unique circumstances and priorities and the consequences posed by those harms in those contexts.

[4] The term *bias* has a technical meaning in the machine learning literature related to model characteristics. Under some circumstances, increasing bias (roughly the error of the average prediction) can improve system performance, if it reduces the risk of overfitting. Here, the Administrative Conference uses the term more generally to refer to common or systematic errors in decision making, especially those implicating concerns related to fairness and equal treatment.

AI systems can be biased because of their reliance on data reflecting historical human biases or because of their designs. Biases in AI systems can increase over time through feedback. That can occur, for example, if the use of a biased AI system leads to systematic errors in categorizations, which are then reflected in the data set or data environment the system uses to make future predictions. Agencies should be mindful of the interdependence of the models, metrics, and data that underpin AI systems.

Identifying harmful biases in AI systems can pose challenges, as when the bias affects a particular population but information about those in that population is not directly available. To identify and mitigate such biases, agencies should, to the extent practical, consider whether other data or methods are available. Agencies should periodically examine and refresh AI algorithms and other protocols to ensure that they remain sufficiently current and reflect new information and circumstances relevant to the functions they perform.

Data science techniques for identifying and mitigating harmful biases in AI systems are developing. Agencies should stay up to date on developments in the field of AI, particularly on algorithmic fairness; establish processes to ensure that personnel that reflect various disciplines and relevant perspectives are able to inspect AI systems and their decisions for indications of harmful bias; test AI systems in environments resembling the ones in which they will be used; and make use of internal and external processes for evaluating the risks of harmful bias in AI systems and for identifying such bias.

3. Technical Capacity

AI systems can help agencies conserve resources, but they can also require substantial investments of human and financial capital. Agencies should carefully evaluate the short- and long-term costs and benefits of an AI system before committing significant resources to it. Agencies should also ensure they have access to the technical expertise required to make informed decisions about the type of AI systems they require; how to integrate those systems into their operations; and how to oversee, maintain, and update those systems.

Given the data science field's ongoing and rapid development, agencies should consider cultivating an AI-ready workforce, including through recruitment and training efforts that emphasize AI skills. When agency personnel lack the skills to develop, procure, or maintain AI systems that meets agencies' needs, agencies should consider other means of expanding their technical expertise, including by relying on tools such as the Intergovernmental Personnel Act,[5] prize competitions, cooperative research and development agreements with private institutions or universities, and consultation with external technical advisors and subject-matter experts.

4. Obtaining AI Systems

Decisions about whether to obtain an AI system can involve important trade-offs. Obtaining AI systems from external sources might allow agencies to acquire more sophisticated tools than they could design on their own, access those tools sooner, and save some of the up-front costs associated with developing the technical capacity needed to design AI systems.[6] Creating AI tools within agencies, by contrast, might yield tools that are better tailored to the agencies' particular tasks and policy goals. Creating AI systems within agencies can also facilitate development of internal technical capability, which can yield benefits over the lifetime of the AI systems and in other technological tasks the agencies may confront.

Certain government offices are available to help agencies with decisions and actions related to technology.[7] Agencies should make appropriate use of these resources when obtaining an AI system. Agencies should also consider the cost and availability of the technical support

[5] 5 U.S.C. §§ 3371–76.

[6] Agencies may also obtain AI systems that are embedded in commercial products. The considerations applicable to such embedded AI systems should reflect the fact that agencies may have less control over their design and development.

[7] Within the General Services Administration, for example, the office called 18F routinely partners with government agencies to help them build and buy technologies. Similarly, the United States Digital Service has a staff of technologists whose job is to help agencies build better technological tools. While the two entities have different approaches—18F acts more like an information intermediary and the Digital Service serves as an alternative source for information technology contracts—both could aid agencies with obtaining, developing, and using different AI techniques.

necessary to ensure that an AI system can be maintained and updated in a manner consistent with its expected life cycle and service mission.

5. Data

AI systems require data, often in vast quantities. Agencies should consider whether they have, or can obtain, data that appropriately reflects conditions similar to the ones the agencies' AI systems will address in practice; whether the agencies have the resources to render the data into a format that can be used by the agencies' AI systems; and how the agencies will maintain the data and link it to their AI systems without compromising security or privacy. Agencies should also review and consider statutes and regulations that impact their uses of AI as a potential consumer of data.

6. Privacy

Agencies have a responsibility to protect privacy with respect to personally identifiable information in AI systems. In a narrow sense, this responsibility demands that agencies comply with requirements related to, for instance, transparency, due process, accountability, and information quality and integrity established by the Privacy Act of 1974, Section 208 of the E-Government Act of 2002, and other applicable laws and policies.[8] More broadly, agencies should recognize and appropriately manage privacy risks posed by an AI system. Agencies should consider privacy risks throughout the entire life cycle of an AI system from development to retirement and assess those risks, as well as associated controls, on an ongoing basis. In designing and deploying AI systems, agencies should consider using relevant privacy risk management frameworks developed through open, multi-stakeholder processes.[9]

[8] *See, e.g.* 5 U.S.C. § 552a(e), (g), & (p); 44 U.S.C. § 3501 note.

[9] *See, e.g.*, Nat'l Inst. of Standards & Tech., *NIST Privacy Framework: A Tool for Improving Privacy Through Enterprise Risk Management, Version 1.0* (Jan. 16, 2020); Nat'l Inst. of Standards & Tech. Special Publication SP-800-37 revision 2, *Risk Management Framework for Information Systems and Organizations: A System Lifecycle Approach for Security and Privacy* (Dec. 2018); Office of Mgmt. & Budget, Circular A-130, *Managing Information as a Strategic Resource* (July 28, 2016).

7. Security

Agencies should consider the possibility that AI systems might be manipulated, fooled, evaded, and misled, including through manipulation of training data and exploitation of model sensitivities. Agencies must ensure not only that their data is secure, but also that their AI systems are trained on that data in a secure manner, make forecasts based on that data in a secure manner, and otherwise operate in a secure manner. Agencies should continuously consider and evaluate the safety and security of AI systems, including resilience to vulnerabilities, manipulation, and other malicious exploitation. In designing and deploying AI systems, agencies should consider using relevant voluntary consensus standards and frameworks developed through open, multi-stakeholder processes.[10]

8. Decisional Authority

Agencies should be mindful that most AI systems will involve human beings in a range of capacities—as operators, customers, overseers, policymakers, or interested members of the public. Human factors may sometimes undercut the value of using AI systems to make certain determinations. There is a risk, for example, that human operators will devolve too much responsibility to AI systems and fail to detect cases where the AI systems yield inaccurate or unreliable determinations. That risk may be tolerable in some settings—such as when the AI system has recently been shown to perform significantly better than alternatives—but intolerable in others.

Similarly, if agency personnel come to rely reflexively on algorithmic results in exercising discretionary powers, use of an AI system could have the practical effect of curbing the exercise of agencies' discretion or shifting it from the person who is supposed to be exercising it to the system's designer. Agencies should beware of such potential shifts of

[10] *See, e.g.*, NAT'L INST. FOR STANDARDS & TECH., FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY (Apr. 16, 2018).

practical authority and take steps to ensure that appropriate officials have the knowledge and power to be accountable for decisions made or aided by AI techniques.

Finally, there may be some circumstances where, for reasons wholly apart from decisional accuracy, agencies may wish to have decisions be made by human beings, even if the law does not require it. In some contexts, accuracy and fairness are not the only relevant values at stake, and AI systems may be difficult to sustain if human beings perceive them as unfair, inhumane, or otherwise unsatisfactory.[11]

9. Oversight

It is essential that agencies' AI systems be subject to appropriate and regular oversight throughout their lifespans. There are two general categories of oversight: external and internal. Agencies' mechanisms of internal oversight will be shaped by the demands of external oversight. Agencies should be cognizant of both forms of oversight in making decisions about their AI systems.

External oversight of agencies' uses of AI systems can come from a variety of government sources, including inspectors general, externally-facing ombuds, the Government Accountability Office, and Congress. In addition, because agencies' uses of AI systems might lead to litigation in a number of circumstances, courts can also play an important role in external oversight. Those affected by an agency's use of an AI system might, for example, allege that use of the system violates their right to procedural due process.[12] Or they might allege that the AI system's determination violated the Administrative Procedure Act (APA) because it was

[11] *Cf.* Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018) (suggesting, in the context of case management systems, that agencies consider implementing electronic systems only when they conclude that doing so would lead to benefits without impairing either the objective "fairness" of the proceedings or the subjective "satisfaction" of those participating in those proceedings).

[12] Courts would analyze such challenges under the three-part balancing framework from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

arbitrary and capricious.[13] When an AI system narrows the discretion of agency personnel, or fixes or alters the legal rights and obligations of people subject to the agency's action, affected people or entities might also sue on the ground that the AI system is a legislative rule adopted in violation of the APA's requirement that legislative rules go through the notice-and-comment process.[14] Agencies should consider these different forms of potential external oversight as they are making and documenting decisions and the underlying processes for these AI systems.

Agencies should also develop their own internal evaluation and oversight mechanisms for their AI systems, both for initial approval of an AI system and for regular oversight of the system. Successful internal oversight requires advance and ongoing planning and consultation with the various offices in an agency that will be affected by the agency's use of an AI system, including its legal, policy, financial, human resources, internally-facing ombuds, and technology offices. Agencies' oversight plans should address how the agencies will pay for their oversight mechanisms and how they will respond to what they learn from their oversight.

Agencies should establish a protocol for regularly evaluating AI systems throughout the systems' lifespans. That is particularly true if a system or the circumstances in which it is deployed are liable to change over time. In these instances, review and explanation of the system's functioning at one stage of development or use may become outdated due to changes in the system's underlying models. To enable that type of oversight, agencies should monitor and keep track of the data being used by their AI systems, as well as how the systems use that data. Agencies may also wish to secure input from members of the public or private evaluators to improve the likelihood that they will identify defects in their AI systems.

To make their oversight systems more effective, agencies should clearly define goals for their AI systems. The relevant question for oversight purposes will often be whether the AI

[13] *See* 5 U.S.C. § 706(2)(A). Courts would likely review such challenges under the standard set forth in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

[14] *See* 5 U.S.C. § 553(b)–(c).

system outperforms alternatives, which may require agencies to benchmark their systems against the status quo or some hypothetical state of affairs.

Finally, AI systems can affect how agencies' staffs do their jobs, particularly as agency personnel grow to trust and rely on the systems. In addition to evaluating and overseeing their AI systems, agencies should pay close attention to how agency personnel interact with those systems.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Use of Artificial Intelligence

Ad Hoc Committee

Proposed Statement | December 16, 2020

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).

Artificial intelligence (AI) techniques are changing how government agencies do their work.[1] Advances in AI hold out the promise of lowering the cost of completing government tasks and improving the quality, consistency, and predictability of agencies' decisions. But agencies' uses of AI also raise concerns about the absence of individual human decision making~~discretion being vested in AI systems and the extent to which those systems are exercising authority previously exercised by human officials~~.

Consistent with its statutory mission to promote efficiency, participation, and fairness in administrative processes,[2] the Administrative Conference offers this Statement to identify issues agencies should consider when adopting or modifying AI systems and developing practices and procedures for their use and regular monitoring. The Statement draws on a pair of reports

Commented [CMA1]: Proposed Amendment from Public Member Jack M. Beermann # 1. Mr. Beermann proposes replacing "human" with "agency" if Proposed Amendment from Council # 1 is not adopted.

Commented [CA2]: Proposed Amendment from Council # 1

[1] There is no universally accepted definition of "artificial intelligence," and the rapid state of evolution in the field, as well as the proliferation of use cases, makes coalescing around any such definition difficult. *See, e.g.*, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 238(g), 132 Stat. 1636, 1697–98 (2018) (using one definition of AI); Nat'l Inst. of Standards & Tech., U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools 7–8 (Aug. 9, 2019) (offering a different definition of AI). Generally speaking, AI systems tend to have characteristics such as the ability to learn to solve complex problems, make predictions, or undertake tasks that heretofore have relied on human decision making or intervention. There are many illustrative examples of AI that can help frame the issue for the purpose of this statement. They include, but are not limited to, AI assistants, computer vision systems, biomedical research, unmanned vehicle systems, advanced game-playing software, and facial recognition systems as well as application of AI in both information technology and operational technology.

[2] *See* 5 U.S.C. § 591.

commissioned by the Conference,[3] as well as the input of AI experts from government, academia, and the private sector (some ACUS members) provided at meetings of the ad hoc committee of the Administrative Conference that proposed this Statement.

The issues addressed in this Statement implicate matters involving law, policy, finances, human resources, and technology. To minimize the risk of unforeseen problems involving an AI system, agencies should, throughout an AI system's lifespan, solicit input about the system from the offices that oversee these matters. Agencies should also keep in mind the need for public trust in their practices and procedures for use and regular monitoring of AI technologies.

1. Transparency

Agencies' efforts to ensure transparency in connection with their AI systems can serve many valuable goals. When agencies set up processes to ensure transparency in their AI systems, they should consider publicly identifying the processes' goals and the rationales behind them. For example, agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities. Different AI systems are likely to satisfy some transparency goals more than others. Where possible, agencies should use metrics to measure the performance of their AI-transparency processes.

In setting transparency goals, agencies should consider to whom they should be transparent. For instance, depending on the nature of its operations, agencies might prioritize transparency to the public, courts, Congress, or their own officials.

[3] DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY, & MARIANO-FLORENTINO CUÉLLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (2020), https://www.acus.gov/report/government-algorithm-artificial-intelligence-federal-administrative-agencieshttps://www.acus.gov/sites/default/files/documents/Government%20by%20Algorithm.pdf; Cary Coglianese, A Framework for Governmental Use of Machine Learning (Dec. 8,Oct. 2020) (report for Admin. Conf. of the U.S.), https://www.acus.gov/report/framework-governmental-use-machine-learning-final-report https://www.acus.gov/sites/default/files/ documents/Coglianese%20Report%20-%20A%20Framework%20for%20Governmental%20Use%20of%20Machine %20Learning.pdf (draft report for Administrative Conference of the United States).

The appropriate level or nature of transparency and interpretability in agencies' AI systems will also depend on context. In some contexts, such as adjudication, reason-giving requirements may call for a higher degree of transparency and interpretability from agencies regarding how their AI systems function. In other contexts, such as enforcement, agencies' legitimate interests in preventing gaming or adversarial learning by regulated parties could militate against providing too much information (or specific types of information) to the public about AI systems' processes. In every context, agencies should consider whether particular laws or policies governing disclosure of information apply.

In selecting and using AI techniques, agencies should be cognizant of the degree to which a particular AI system can be made transparent to appropriate people and entities, including the general public. There may ~~exist~~ be tradeoffs between explainability and accuracy in AI systems, so that transparency and interpretability might sometimes weigh in favor of choosing simpler AI models. The appropriate balance between explainability and accuracy will depend on the specific context, including agencies' circumstances and priorities.

The proprietary nature of some AI systems may also affect the extent to which they can be made transparent. When agencies' AI systems rely on proprietary technologies or algorithms the agencies do not own, the agencies and the public may have limited access to the information about the AI techniques. Agencies should strive to anticipate such circumstances and address them appropriately, such as by working with outside providers to ensure they will be able to share sufficient information about such a system. Agencies should not enter into contracts to use proprietary AI systems unless they are confident that actors both internal and external to the agencies will have adequate access to information about the systems.

2. Harmful Bias

At their best, AI systems can help agencies identify and reduce the impact of unwanted biases.[4] Yet they can also unintentionally create or exacerbate those biases by encoding and

Commented [CA3]: Proposed Amendment from Council # 2. Note: Change appears in footnote 4.

[4] The term *bias* has a technical meaning in the machine learning literature related to model characteristics. Under some circumstances, increasing bias (roughly the error of the average prediction) can improve system performance,

deploying them at scale. In deciding whether and how to deploy an AI system, agencies should carefully evaluate the harmful biases that might result from the use of the AI system as well as the biases that might result from alternative systems (such as an incumbent system that the AI system would augment or replace). Because different types of bias pose different types of harms, the outcome of the evaluation will depend on agencies' unique circumstances and priorities and the consequences posed by those harms in those contexts.

AI systems can be biased because of their reliance on data reflecting historical human biases or because of their designs. Biases in AI systems can increase over time through feedback. That can occur, for example, if the use of a biased AI system leads to systematic errors in categorizations, which are then reflected in the data set or data environment the system uses to make future predictions. Agencies should be mindful of the interdependence of the models, metrics, and data that underpin AI systems.

Identifying harmful biases in AI systems can pose challenges, as when the bias affects a particular population but information about those in that population is not directly available. To identify and mitigate such biases, agencies should, to the extent practical, consider whether other data or methods are available. Agencies should periodically examine and refresh AI algorithms and other protocols to ensure that they remain sufficiently current and reflect new information and circumstances relevant to the functions they perform.

Commented [CA4]: Comment from Council # 1: The Council requests clarification from the Committee as to what it means by "population."

Data science techniques for identifying and mitigating harmful biases in AI systems are developing. Agencies should stay up to date on developments in the field of AI, particularly on algorithmic fairness; establish processes to ensure that personnel that reflect various disciplines and relevant perspectives are able to inspect AI systems and their decisions for indications of harmful bias; test AI systems in environments resembling the ones in which they will be used;

if it reduces the risk of overfitting. Here, the Administrative Conference uses the term more generally to refer to common or systematic errors in decision making~~, especially those implicating concerns related to fairness and equal treatment~~.

and make use of internal and external processes for evaluating the risks of harmful bias in AI systems and for identifying such bias.

3. Technical Capacity

AI systems can help agencies conserve resources, but they can also require substantial investments of human and financial capital. Agencies should carefully evaluate the short- and long-term costs and benefits of an AI system before committing significant resources to it. Agencies should also ensure they have access to the technical expertise required to make informed decisions about the type of AI systems they require; how to integrate those systems into their operations; and how to oversee, maintain, and update those systems.

Given the data science field's ongoing and rapid development, agencies should consider cultivating an AI-ready workforce, including through recruitment and training efforts that emphasize AI skills. When agency personnel lack the skills to develop, procure, or maintain AI systems that meet~~s~~ agencies' needs, agencies should consider other means of expanding their technical expertise, including by relying on tools such as the Intergovernmental Personnel Act,[5] prize competitions, cooperative research and development agreements with private institutions or universities, and consultation with external technical advisors and subject-matter experts.

4. Obtaining AI Systems

Decisions about whether to obtain an AI system can involve important trade-offs. Obtaining AI systems from external sources might allow agencies to acquire more sophisticated tools than they could design on their own, access those tools sooner, and save some of the up-front costs associated with developing the technical capacity needed to design AI systems.[6] Creating AI tools within agencies, by contrast, might yield tools that are better tailored to the agencies' particular tasks and policy goals. Creating AI systems within agencies can also

[5] 5 U.S.C. §§ 3371–76.

[6] Agencies may also obtain AI systems that are embedded in commercial products. The considerations applicable to such embedded AI systems should reflect the fact that agencies may have less control over their design and development.

facilitate development of internal technical capability, which can yield benefits over the lifetime of the AI systems and in other technological tasks the agencies may confront.

Certain government offices are available to help agencies with decisions and actions related to technology.[7] Agencies should make appropriate use of these resources when obtaining an AI system. Agencies should also consider the cost and availability of the technical support necessary to ensure that an AI system can be maintained and updated in a manner consistent with its expected life cycle and service mission.

5. Data

Commented [CMA5]: Comment from Special Counsel Jeffrey S. Lubbers: How does the Paperwork Reduction Act factor into this data gathering effort?

AI systems require data, often in vast quantities. Agencies should consider whether they have, or can obtain, data that appropriately reflect~~s~~ conditions similar to the ones the agencies' AI systems will address in practice; whether the agencies have the resources to render the data into a format that can be used by the agencies' AI systems; and how the agencies will maintain the data and link ~~it~~ them to their AI systems without compromising security or privacy. Agencies should also review and consider statutes and regulations that impact their uses of AI as a potential consumer of data.

6. Privacy

Agencies have a responsibility to protect privacy with respect to personally identifiable information in AI systems. In a narrow sense, this responsibility demands that agencies comply with requirements related to, for instance, transparency, due process, accountability, and information quality and integrity established by the Privacy Act of 1974, Section 208 of the E-Government Act of 2002, and other applicable laws and policies.[8] More broadly, agencies should

[7] Within the General Services Administration, for example, the office called 18F routinely partners with government agencies to help them build and buy technologies. Similarly, the United States Digital Service (which is within the Executive Office of the President) has a staff of technologists whose job is to help agencies build better technological tools. While the two entities have different approaches—18F acts more like an information intermediary and the Digital Service serves as an alternative source for information technology contracts—both could aid agencies with obtaining, developing, and using different AI techniques.

[8] *See, e.g.*, 5 U.S.C. § 552a(e), (g), & (p); 44 U.S.C. § 3501 note.

recognize and appropriately manage privacy risks posed by an AI system. Agencies should consider privacy risks throughout the entire life cycle of an AI system from development to retirement and assess those risks, as well as associated controls, on an ongoing basis. In designing and deploying AI systems, agencies should consider using relevant privacy risk management frameworks developed through open, multi-stakeholder processes.[9]

7. Security

Agencies should consider the possibility that AI systems might be hacked, manipulated, fooled, evaded, and misled, including through manipulation of training data and exploitation of model sensitivities. Agencies must ensure not only that their data ~~is~~ are secure, but also that their AI systems are trained on those~~at~~ data in a secure manner, make forecasts based on those~~at~~ data in a secure ~~manner~~way, and otherwise operate in a secure manner. Agencies should ~~continuously~~ regularly consider and evaluate the safety and security of AI systems, including resilience to vulnerabilities, manipulation, and other malicious exploitation. In designing and deploying AI systems, agencies should consider using relevant voluntary consensus standards and frameworks developed through open, multi-stakeholder processes.[10] The Risk Management Framework is also a tool for agencies to utilize in addressing information security risks.[11]

Commented [CMA6]: Proposed Amendment from Public Member Jack M. Beermann # 2

Commented [CMA7]: Proposed Amendment from Government Member Stephanie J. Tatham # 1

8. Decisional Authority

Agencies should be mindful that most AI systems will involve human beings in a range of capacities—as operators, customers, overseers, policymakers, or interested members of the public. Human factors may sometimes undercut the value of using AI systems to make certain determinations. There is a risk, for example, that human operators will devolve too much

[9] *See, e.g.*, Nat'l Inst. of Standards & Tech., *NIST Privacy Framework: A Tool for Improving Privacy Through Enterprise Risk Management, Version 1.0* (Jan. 16, 2020); Nat'l Inst. of Standards & Tech. Special Publication SP-800-37 revision 2, *Risk Management Framework for Information Systems and Organizations: A System Lifecycle Approach for Security and Privacy* (Dec. 2018); Office of Mgmt. & Budget, Circular A-130, *Managing Information as a Strategic Resource* (July 28, 2016).

[10] *See, e.g.*, NAT'L INST. FOR STANDARDS & TECH., FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY (Apr. 16, 2018).

[11] *See id.*

responsibility to AI systems and fail to detect cases where the AI systems yield inaccurate or unreliable determinations. That risk may be tolerable in some settings—such as when the AI system has recently been shown to perform significantly better than alternatives—but intolerable in others.

Similarly, if agency personnel come to rely reflexively on algorithmic results in exercising discretionary powers, use of an AI system could have the practical effect of curbing the exercise of agencies' discretion or shifting it from the person who is supposed to be exercising it to the system's designer. Agencies should beware of such potential shifts of practical authority and take steps to ensure that appropriate officials have the knowledge and power to be accountable for decisions made or aided by AI techniques.

Finally, there may be some circumstances where, for reasons wholly apart from decisional accuracy, agencies may wish to have decisions be made by ~~human beings~~people in a more traditional manner (without reliance on AI techniques), even if the law does not require it. In some contexts, accuracy and fairness ~~are not~~may not be the only relevant values at stake. In making decisions about their AI systems, agencies may wish to consider whether people will perceive the systems~~, and AI systems may be difficult to sustain if human beings perceive them~~ as unfair, inhumane, or otherwise unsatisfactory.[12]

Commented [CA8]: Comment from Council # 2: The Council requests clarification from the Committee as to what is meant by "tolerable." Does it mean "legally tolerable"? "Tolerable in terms of public perception"? Something else?

Commented [CMA9]: Proposed Amendment from Public Member Jack M. Beermann # 3. Note from Staff: If the Assembly makes this change, it may wish to attend to the usage of "human beings" throughout the rest of this document to ensure consistency.

Commented [CA10]: Proposed Amendment from Council # 3

Commented [CA11]: Proposed Amendment from Council # 4

9. Oversight

It is essential that agencies' AI systems be subject to appropriate and regular oversight throughout their lifespans. There are two general categories of oversight: external and internal. Agencies' mechanisms of internal oversight will be shaped by the demands of external oversight. Agencies should be cognizant of both forms of oversight in making decisions about their AI systems.

[12] *Cf.* Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018) (suggesting, in the context of case management systems, that agencies consider implementing electronic systems only when they conclude that doing so would lead to benefits without impairing either the objective "fairness" of the proceedings or the subjective "satisfaction" of those participating in those proceedings).

External oversight of agencies' uses of AI systems can come from a variety of government sources, including inspectors general, externally -facing ombuds, the Government Accountability Office, and Congress. In addition, because agencies' uses of AI systems might lead to litigation in a number of circumstances, courts can also play an important role in external oversight. Those affected by an agency's use of an AI system might, for example, allege that use of the system violates their right to procedural due process.[13] Or they might allege that the AI system's determination violated the Administrative Procedure Act (APA) because it was arbitrary and capricious.[14] When an AI system narrows the discretion of agency personnel, or fixes or alters the legal rights and obligations of people subject to the agency's action, affected people or entities might also sue on the ground that the AI system is a legislative rule adopted in violation of the APA's requirement that legislative rules go through the notice-and-comment process.[15] Agencies should consider these different forms of potential external oversight as they are making and documenting decisions and the underlying processes for these AI systems.

Agencies should also develop their own internal evaluation and oversight mechanisms for their AI systems, both for initial approval of an AI system and for regular oversight of the system, taking into account their system-level risk management, authorization to operate, and continuous monitoring responsibilities, and their broader enterprise risk management responsibilities.[16] Successful internal oversight requires advance and ongoing planning and consultation with the various offices in an agency that will be affected by the agency's use of an AI system, including its legal, policy, financial, human resources, internally-facing ombuds, and technology offices. Agencies' oversight plans should address how the agencies will pay for their oversight mechanisms and how they will respond to what they learn from their oversight.

Commented [CMA12]: Proposed Amendment from Government Member Stephanie J. Tatham # 2

[13] Courts would analyze such challenges under the three-part balancing framework from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[14] *See* 5 U.S.C. § 706(2)(A). Courts would likely review such challenges under the standard set forth in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

[15] *See* 5 U.S.C. § 553(b)–(c).

[16] *See* Office of Mgmt. & Budget, Circular 1-130, *supra* n.9; Office of Mgmt. & Budget, Circular A-123, *Management's Responsibilities for Enterprise Risk Management and Internal Control* (July 15, 2016).

Agencies should establish a protocol for regularly evaluating AI systems throughout the systems' lifespans. That is particularly true if a system or the circumstances in which it is deployed are liable to change over time. In these instances, review and explanation of the system's functioning at one stage of development or use may become outdated due to changes in the system's underlying models. To enable that type of oversight, agencies should monitor and keep track of the data being used by their AI systems, as well as how the systems use ~~that~~ those data. Agencies may also wish to secure input from members of the public or private evaluators to improve the likelihood that they will identify defects in their AI systems.

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Finally, AI systems can affect how agencies' staffs do their jobs, particularly as agency personnel grow to trust and rely on the systems. In addition to evaluating and overseeing their AI systems, agencies should pay close attention to how agency personnel interact with those systems.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Appellate Systems

Committee on Adjudication

Proposed Recommendation | December 16, 2020

In Recommendation 2016-4,[1] the Administrative Conference offered best practices for evidentiary hearings in administrative adjudications. Paragraph 26 recommended that agencies provide for "higher-level review" (or "agency appellate review") of the decisions of hearing-level adjudicators.[2] This Recommendation offers best practices for such review. The Administrative Conference intends this Recommendation to cover appellate review of decisions resulting from (1) hearings governed by the formal hearing provisions of the Administrative Procedure Act (APA) and (2) evidentiary hearings that are not governed by those provisions but are required by statute, regulation, or executive order. Agencies may also decide to apply this Recommendation to appellate review of decisions arising from other hearings, depending on their level of formality.

Appellate review of hearing-level decisions can be structured in numerous ways. Two structures are most common. In the first, litigants appeal directly to the agency head, which may be a multi-member board or commission. In the second, litigants appeal to an appellate adjudicator or group of adjudicators—often styled as a board or council—sitting below the

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

[2] Recommendation 2016-4 addressed agency adjudications in which an evidentiary hearing, though not governed by the formal hearing provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 554, 556–57 (2018)), is required by statute, regulation, or executive order. Those adjudications, which are often as formal as APA adjudications in practice, far outnumber so-called APA adjudications. Although Recommendation 2016-4 addresses only non-APA adjudications, most of its best practice are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA's formal hearing provisions.

agency head. The appellate decision may be the agency's final action or may be subject to further appeal within the agency (usually to the agency head).

The Administrative Conference has twice before addressed agency appellate review. In Recommendations 68-6 and 83-3, it provided guidance to agencies when establishing new, and reviewing existing, organizational structures of appellate review.[3] Both recommendations focused on the selection of "delegates"—individual adjudicators, review boards composed of multiple adjudicators, or panels composed of members of a multi-member agency—to exercise appellate review authority vested in agency heads (including boards and commissions). Recommendation 83-3 also addressed when agencies should consider providing appellate review as a matter of right and when as a matter of discretion, and, in the case of the latter, under what criteria.

With the exception of the appropriate standard for granting review, this Recommendation's focus lies elsewhere. It addresses, and offers best practices with respect to, the following subjects: first, an agency's identification of the purpose or objective served by its appellate review; second, its selection of cases for appellate review, when review is not required by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth, its management, administration, and bureaucratic oversight of its appellate system; and sixth, its public disclosure of information about its appellate system.[4]

Most importantly, this Recommendation begins by suggesting that agencies identify, and publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems may have different purposes, and any given appellate system may have multiple purposes. Purposes or objectives can include the correction of errors, inter-decisional consistency of decisions, policymaking, political accountability, management of the hearing-level adjudicative

[3] Both recommendations concerned only the review of decisions in proceedings governed by the formal hearing provisions of the APA. Their principles, though, are not so confined.

[4] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (Nov. 10, 2020) (draft report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/draft-report-agency-appellate-systems.

system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts. The identification of purpose is important both because it dictates (or should dictate) how an agency administers its appellate system—including what cases it hears and under what standards of review it decides them—and provides a standard against which an agency's performance can be evaluated.

This Recommendation proceeds from the recognition that agency appellate systems vary enormously—as to their purposes or objectives, governing substantive law, size, and resources—and that what may be a best practice for one system may not always be the best practice for another. In offering the best practices that follow, moreover, the Administrative Conference recognizes that an agency's procedural choices may sometimes be constrained by statute. The Recommendation is drafted accordingly.

RECOMMENDATION

Objectives of Appellate Review

1. Agencies should identify and publish in procedural regulations what objective or objectives their appellate systems serve, and they should design their processes and draft their procedural regulations accordingly. In particular, agencies should set their scope and standard of review to be consistent with the objectives of their appellate system.

Procedures for Appellate Review

2. Agencies should promulgate and publish procedural regulations governing agency appellate review in the *Federal Register* and codify them in the Code of Federal Regulations. These regulations should cover all significant procedural matters pertaining to agency appellate review, including but not limited to the following:
    a. the objectives of the agency's appellate review system;
    b. the timing and procedures for initiating review, including any available interlocutory review;

c. the standards for granting review, if review is discretionary;
d. the standards for permitting participation by interested persons and amici;
e. the standard of review;
f. the allowable and required submissions by litigants and their required form and contents;
g. the procedures and criteria for designating decisions as precedential and the legal effect of such designations;
h. the record on review and the opportunity, if any, to submit new evidence;
i. the availability of oral argument or other form of oral presentation;
j. the standards of and procedures for reconsideration and reopening, if available;
k. any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review;
l. openness of proceedings to the public and availability of video or audio streaming or recording; and
m. in the case of multi-member appellate boards, councils, and similar entities, the authority to assign decision-making authority to fewer than all members (e.g., panels).

3. Agencies should include in the procedural regulations governing their appellate programs: (a) a brief statement or explanation of each program's review authority, structure, and decision-making components; and (b) for each provision based on a statutory source, an accompanying citation to that source.
4. When revising existing or adopting new appellate rules, agencies should consider the appellate rules (Rules 400–450) in the Administrative Conference's *Model Rules of Agency Adjudication* (rev. 2018) in deciding what their rules should provide.
5. When materially revising existing or adopting new appellate rules, agencies should use notice-and-comment procedures or other mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs clearly outweigh the benefits of doing so.

Case Selection for Appellate Review

6. Based on the agency-specific objectives of appellate review, agencies should decide whether the granting of review should be mandatory or discretionary (assuming they have statutory authority to decide); if discretionary, the criteria for granting review should track the objectives of the appellate system, and they should be published in the procedural regulations.
7. Agencies should consider implementing procedures for sua sponte appellate review of non-appealed hearing-level decisions, as well as for the referral of cases or issues by hearing-level adjudicators to the appellate entity for interlocutory review.

Appellate Decision-making Processes and Decisions

8. Whenever possible, agencies should consider maintaining electronic case management systems (eCMS) that ensure that hearing records are easily accessible to appellate adjudicators. Such an eCMS may include the capability for electronic filing.
9. Although the randomized assignment of cases to appellate adjudicators is typically an appropriate docketing method for an agency appellate system, agencies should consider the potential benefits of sorting and grouping appeals on the appellate docket, such as reduced case processing times and more efficient use of adjudicators', staff attorneys', and law clerks' skills and time. Criteria for sorting and grouping cases may include size of a case's record, complexity of a case's issues, subject matter of a case, and similarity of a case's legal issues to those of other pending cases.
10. Consistent with the objectives of the agency's appellate system and in light of the costs of time and resources, agencies should consider adopting an appellate model of judicial review in which the standard of review is not de novo with respect to findings of fact and application of law to facts. For similar reasons, many agencies should consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication.

11. Taking agency resources into account, agencies should emphasize concision, readability, and plain language in their appellate decisions and explore the use of decision templates, summary dispositions, and other quality-improving measures.
12. Agencies should establish clear criteria and processes for identifying and selecting appellate decisions as precedential, especially for appellate systems with objectives of policymaking or inter-decisional consistency.
13. Agencies should assess the value of oral argument and amicus participation in their appellate system based on the agencies' identified objectives for appellate review and should establish clear rules governing both. Criteria which may favor oral argument and amicus participation include issues of high public interest, issues of concern beyond the parties to the case, specialized or technical matters, and a novel or substantial question of law, policy, or discretion.

Administration, Management, and Bureaucratic Oversight

14. Agency appellate systems should promptly transmit their precedential decisions to all appellate program adjudicators and, directly or through hearing-level programs, to hearing-level adjudicators (as appropriate). Appellate programs should include in their transmittals, when feasible, brief summaries of the decision.
15. Agencies should notify their adjudicators of significant federal-court decisions reviewing the agencies' decisions and, when providing notice, explain the significance of those decisions to the program. As appropriate, agencies should notify adjudicators if the agency will not acquiesce in a particular decision of the federal courts of appeals.
16. Agencies in which decision making relies extensively on their own precedential decisions should consider preparing or having prepared indexes and digests—with annotations and comments, as appropriate—to identify those decisions and their significance.
17. As appropriate, agency appellate systems should communicate with agency rule-writers and other agency policymakers—and, as appropriate, institutionalize communication mechanisms—to address whether recurring issues in their decisions should be addressed by rule rather than precedential case-by-case adjudication.

18. The Office of the Chairman of the Administrative Conference should provide for, as authorized by statute, the "interchange among administrative agencies of information potentially useful in improving" (5 U.S.C. § 594(2)) agency appellate systems. The subjects of interchange might include electronic case management systems, procedural innovations, quality-assurance reviews, and common management problems.

Public Disclosure and Transparency

19. Agencies should disclose on their websites any rules (sometimes styled as "orders"), and statutes authorizing such rules, by which an agency head has delegated review authority to appellate adjudicators.
20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate review system, agencies should consider announcing, livestreaming, and maintaining video recordings on their websites of appellate proceedings (including oral argument) that present significant legal and policy issues likely to be of interest to regulated parties and other members of the public. Brief explanations of the issues to be addressed by oral argument may usefully be included in website notices of oral argument.
21. Agencies should include on their websites brief and accessibly written explanations as to how their internal decision-making processes work and, as appropriate, include links to explanatory documents appropriate for public disclosure. Specific subjects agencies should consider addressing include: the process of assigning cases to adjudicators (when fewer than all of the programs' adjudicators participate in a case), the role of staff, and the order in which cases are decided.
22. When posting decisions on their websites, agencies should distinguish between precedential and non-precedential decisions. Agencies should also include a brief explanation of the difference.
23. When posting decisions on their websites, agencies should consider including, as much as practicable, brief summaries of precedential decisions and, for precedential decisions at least, citations to court decisions reviewing them.

24. Agencies should include on their websites any digests and indexes of decisions they maintain. It may be appropriate to remove material exempt from disclosure under the Freedom of Information Act or other laws.
25. Agencies should affirmatively solicit feedback concerning the functioning of their appellate systems and provide a means for doing so on their websites.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Appellate Systems

Committee on Adjudication

Proposed Recommendation | December 16, 2020

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).

In Recommendation 2016-4,[1] the Administrative Conference offered best practices for evidentiary hearings in administrative adjudications. Paragraph 26 recommended that agencies provide for "higher-level review" (or "agency appellate review") of the decisions of hearing-level adjudicators.[2] This Recommendation offers best practices for such review. The Administrative Conference intends this Recommendation to cover appellate review of decisions resulting from (1) hearings governed by the formal hearing provisions of the Administrative Procedure Act (APA) and (2) evidentiary hearings that are not governed by those provisions but are required by statute, regulation, or executive order. Agencies may also decide to apply this Recommendation to appellate review of decisions arising from other hearings, depending on their level of formality.

Appellate review of hearing-level decisions can be structured in numerous ways. Two structures are most common. In the first, litigants appeal directly to the agency head, which may

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

[2] Recommendation 2016-4 addressed agency adjudications in which an evidentiary hearing, though not governed by the formal hearing provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 554, 556–57 ~~(2018)~~), is required by statute, regulation, or executive order. Those adjudications, which are often as formal as APA adjudications in practice, far outnumber so-called APA adjudications. Although Recommendation 2016-4 addresses only non-APA adjudications, most of its best practice are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA's formal hearing provisions.

be a multi-member board or commission. In the second, litigants appeal to an appellate adjudicator or group of adjudicators—often styled as a board or council—sitting below the agency head. The appellate decision may be the agency's final action or may be subject to further appeal within the agency (usually to the agency head).

The Administrative Conference has twice before addressed agency appellate review. In Recommendations 68-6 and 83-3, it provided guidance to agencies when establishing new, and reviewing existing, organizational structures of appellate review.[3] Both recommendations focused on the selection of "delegates"—individual adjudicators, review boards composed of multiple adjudicators, or panels composed of members of a multi-member agency—to exercise appellate review authority vested in agency heads (including boards and commissions). Recommendation 83-3 also addressed when agencies should consider providing appellate review as a matter of right and when as a matter of discretion, and, in the case of the latter, under what criteria.

With the exception of the appropriate standard for granting review, this Recommendation's focus lies elsewhere. It addresses, and offers best practices with respect to, the following subjects: first, an agency's identification of the purpose or objective served by its appellate review; second, its selection of cases for appellate review, when review is not required by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth, its management, administration, and bureaucratic oversight of its appellate system; and sixth, its public disclosure of information about its appellate system.[4]

[3] Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983). Both recommendations concerned only the review of decisions in proceedings governed by the formal hearing provisions of the APA. Their principles, though, are not so confined.

[4] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (~~Nov. 10, 2020~~Dec. 14, 2020) (~~draft~~ report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-agency-appellate-systems~~https://www.acus.gov/report/draft-report-agency-appellate-systems~~.

Most importantly, this Recommendation begins by suggesting that agencies identify, and publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems may have different purposes, and any given appellate system may have multiple purposes. Purposes or objectives can include the correction of errors, inter-decisional consistency of decisions, policymaking, political accountability, management of the hearing-level adjudicative system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts. The identification of purpose is important both because it dictates (or should dictate) how an agency administers its appellate system—including what cases it hears and under what standards of review it decides them—and provides a standard against which an agency's performance can be evaluated.

This Recommendation proceeds from the recognition that agency appellate systems vary enormously—as to their purposes or objectives, governing substantive law, size, and resources—and that what may be a best practice for one system may not always be the best practice for another. In offering the best practices that follow, moreover, the Administrative Conference recognizes that (1) an agency's procedural choices may sometimes be constrained by statute and (2) available resources and personnel policies may dictate an agency's decision as to whether and how to implement some of the best practices that follow. The Administrative Conference makes this Recommendation subject to these important qualifications. ~~The Recommendation is drafted accordingly.~~

Commented [CA1]: Proposed Amendment from Council # 1

RECOMMENDATION

Objectives of Appellate Review

1. Agencies should identify ~~and publish in procedural regulations what~~ the objective(s) ~~or objectives their~~ of appellate ~~systems serve~~review~~,~~; disclose those objectives in procedural regulations; and design rules and processes, including especially the scope and standard of review, to serve them.~~and they should design their processes and draft their procedural regulations accordingly. In particular, agencies should set their scope and standard of review to be consistent with the objectives of their appellate system.~~

Commented [CM2]: Proposed Amendment from Public Member Emily S. Bremer: If the original text of Paragraph 1 is retained, Ms. Bremer proposes the following amended language for Paragraph 1:
"Agencies should identify and publish in procedural regulations the objective or objectives their appellate systems serve, and they should design their processes and draft their regulations accordingly. In particular, agencies should establish a scope and standard of review that is consistent with the objectives of their appellate system."

Commented [CA3]: Proposed Amendment from Council # 2

2. Agencies should promulgate and publish procedural regulations governing agency appellate review in the *Federal Register* and codify them in the *Code of Federal Regulations*. These regulations should cover all significant procedural matters pertaining to agency appellate review, including but not limited to the following:
    a. the objectives of the agency's appellate review system;
    b. the timing and procedures for initiating review, including any available interlocutory review;
    c. the standards for granting review, if review is discretionary;
    d. the standards for permitting participation by interested persons and amici;
    e. the standard of review;
    f. the allowable and required submissions by litigants and their required form and contents;
    g. the procedures and criteria for designating decisions as precedential and the legal effect of such designations;
    h. the record on review and the opportunity, if any, to submit new evidence;
    i. the availability of oral argument or other form of oral presentation;
    j. the standards of and procedures for reconsideration and reopening, if available;
    k. any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review, including a clear statement as to whether agency appellate review is a mandatory prerequisite to judicial review;
    l. openness of proceedings to the public and availability of video or audio streaming or recording; ~~and~~
    m. in the case of multi-member appellate boards, councils, and similar entities, the authority to assign decision-making authority to fewer than all members (e.g., panels); and
    ~~m.~~n. whether seeking agency appellate review automatically stays the effectiveness of the appealed agency action until appeal is resolved, and, if not,

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how a party seeking agency appellate review may request such a stay and the standards for deciding whether to grant it.

Commented [CM4]: Proposed Amendment from Public Member Jonathan R. Siegel

3. Agencies should include in the procedural regulations governing their appellate programs: (a) a brief statement or explanation of each program's review authority, structure, and decision-making components; and (b) for each provision based on a statutory source, an accompanying citation to that source.
4. When revising existing or adopting new appellate rules, agencies should consider the appellate rules (Rules 400–450) in the Administrative Conference's *Model Rules of Agency Adjudication* (rev. 2018) ~~in deciding what their rules should provide~~.
5. When materially revising existing or adopting new appellate rules, agencies should use notice-and-comment procedures or other mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs clearly outweigh the benefits of doing so.

Case Selection for Appellate Review

6. Based on the agency-specific objectives of appellate review, agencies should decide whether the granting of review should be mandatory or discretionary (assuming they have statutory authority to decide); if discretionary, the criteria for granting review should track the objectives of the appellate system, and they should be published in the procedural regulations.
7. Agencies should consider implementing procedures for sua sponte appellate review of non-appealed hearing-level decisions, as well as for the referral of cases or issues by hearing-level adjudicators to the appellate entity for interlocutory review.

8. Whenever possible, agencies should consider maintaining electronic case management systems ~~(eCMS)~~ that ensure that hearing records are easily accessible to appellate adjudicators. Such ~~an eCMS~~systems may include the capability for electronic filing.
9. Although the randomized assignment of cases to appellate adjudicators is typically an appropriate docketing method for an agency appellate system, agencies should consider the potential benefits of sorting and grouping appeals on the appellate docket, such as reduced case processing times and more efficient use of adjudicators', staff attorneys', and law clerks' skills and time. Criteria for sorting and grouping cases may include the size of a case's record, complexity of a case's issues, subject matter of a case, and similarity of a case's legal issues to those of other pending cases.
10. Consistent with the objectives of the agency's appellate system and in light of the costs of time and resources, agencies should consider adopting an appellate model of judicial review in which the standard of review is not de novo with respect to findings of fact and application of law to facts. For similar reasons, many agencies should consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication.
11. Taking agency resources into account, agencies should emphasize concision, readability, and plain language in their appellate decisions and explore the use of decision templates, summary dispositions, and other quality-improving measures.
12. Agencies should establish clear criteria and processes for identifying and selecting appellate decisions as precedential, especially for appellate systems with objectives of policymaking or inter-decisional consistency.
13. Agencies should assess the value of oral argument and amicus participation in their appellate system based on the agencies' identified objectives for appellate review and should establish ~~clear~~ rules governing both. Criteria ~~which~~ that may favor oral argument and amicus participation include issues of high public interest, issues of concern beyond

the parties to the case, specialized or technical matters, and a novel or substantial question of law, policy, or discretion.

Administration, Management, and Bureaucratic Oversight

14. Agency appellate systems should promptly transmit their precedential decisions to all appellate program adjudicators and, directly or through hearing-level programs, to hearing-level adjudicators (as appropriate). Appellate programs should include in their transmittals, when feasible, brief summaries of the decision.
15. Agencies should notify their adjudicators of significant federal court decisions reviewing the agencies' decisions and, when providing notice, explain the significance of those decisions to the program. As appropriate, agencies should notify adjudicators if the agency will not acquiesce in a particular decision of the federal courts of appeals.
16. Agencies in which decision making relies extensively on their own precedential decisions should consider preparing or having prepared indexes and digests—with annotations and comments, as appropriate—to identify those decisions and their significance.
17. As appropriate, agency appellate systems should communicate with agency rule-writers and other agency policymakers—and, as appropriate, institutionalize communication mechanisms—to address whether recurring issues in their decisions should be addressed by rule rather than precedential case-by-case adjudication.
18. The Office of the Chairman of the Administrative Conference should provide for, as authorized by 5 U.S.C. § 594(2)~~statute~~, the "interchange among administrative agencies of information potentially useful in improving" ~~(5 U.S.C. § 594(2))~~ agency appellate systems. The subjects of interchange might include electronic case management systems, procedural innovations, quality-assurance reviews, and common management problems.

Public Disclosure and Transparency

19. Agencies should disclose on their websites any rules (sometimes styled as "orders"), and statutes authorizing such rules, by which an agency head has delegated review authority to appellate adjudicators.

20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate review system, agencies should consider announcing, livestreaming, and maintaining video recordings on their websites of appellate proceedings (including oral argument) that present significant legal and policy issues likely to be of interest to regulated parties and other members of the public. Brief explanations of the issues to be addressed by oral argument may usefully be included in website notices of oral argument.
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25. Agencies should affirmatively solicit feedback concerning the functioning of their appellate systems and provide a means for doing so on their websites.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Government Contract Bid Protests Before Agencies

Committee on Administration and Management

Proposed Recommendation | December 17, 2020

Federal law establishes policies and procedures governing how federal executive agencies procure goods and services.[1] The primary source of these policies and procedures is the Federal Acquisition Regulation (FAR),[2] which applies to all executive-agency acquisitions except where expressly excluded. Other relevant policies and procedures are found in federal statutes and agencies' own procurement rules.

If a vendor believes a federal executive agency has not complied with the law or the terms of a solicitation, it may file what is called a bid protest—that is, a written objection to a government agency's conduct in acquiring supplies and services for its direct use or benefit.[3] Responding to bid protests can require agencies to reevaluate their procurement processes and, sometimes, make improvements. That, in turn, results in more competitive, fairer, and more transparent procurement processes, benefitting vendors, agencies, and ultimately the public.

To file a bid protest, an actual or prospective vendor need only show that it is an "interested party," meaning that its direct economic interest would be affected by the award of, or failure to award, the contract in question.[4] Vendors that qualify as interested parties may file

[1] *See* Federal Acquisition Regulation, 48 C.F.R. ch. 1; *see also* Competition in Contracting Act of 1984, 41 U.S.C. § 253; Exec. Order 12979, Agency Procurement Protests, 60 Fed. Reg. 55171 (Oct. 25, 1995).

[2] *See* 48 C.F.R. ch. 1.

[3] *See* Admin. Conf. of the U.S., Recommendation 95-5, *Government Contract Bid Protests*, 60 Fed. Reg. 43108, 43113 (Aug. 18, 1995).

[4] *See* 4 C.F.R. § 21.0(a)(1) (defining "interested party" for purposes of bid protest proceedings before the Government Accountability Office); 48 C.F.R. § 33.101 (defining "interested party" for purposes of bid protest proceedings before procuring agencies); CliniComp Int'l, Inc. v. United States, 904 F.3d 1353, 1358 (Fed. Cir. 2018)

bid protests in any of three forums: (1) the Court of Federal Claims (COFC),[5] (2) the Government Accountability Office (GAO),[6] and (3) the procuring agency.[7] The procedural tools available in a given forum, along with other strategic and cost considerations, typically drive vendors' decisions about where to file their bid protests.

Bid protests filed with procuring agencies are commonly referred to as agency-level protests. Agency-level protests have important benefits for the public, contractors, procuring agencies, and COFC and GAO. By "provid[ing] for inexpensive, informal, procedurally simple, and expeditious resolution of protests,"[8] agency-level protest mechanisms allow small businesses (among other vendors) to affordably contest agencies' procurement decisions. They also give procuring agencies the chance to review and improve their own procurement practices. And they funnel some protests away from COFC and GAO, reducing the likelihood that the number of protests will overwhelm those institutions.

Vendors, however, seldom file agency-level protests. Although there is little data on the number of agency-level protests filed each year, available evidence suggests that substantially more protests are filed with COFC and GAO each year than with procuring agencies.[9] There are several reasons why vendors may forego agency-level protests that implicate the themes of transparency, predictability, and accountability.

(defining "interested party" for purposes of 28 U.S.C. § 1491(b), which covers actions in the Court of Federal Claims).

[5] *See* 28 U.S.C. § 1491(b).

[6] *See* 31 U.S.C. §§ 3552(a), 3553(a).

[7] *See* 48 C.F.R. § 33.103.

[8] *See* Exec. Order. No. 12979, 60 Fed. Reg. 55171, 55171 (Oct. 25, 1995).

[9] *See* Christopher Yukins, Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government 12–13 (May 1, 2020) (report to Admin. Conf. of the U.S.), www.acus.gov/sites/default/files/documents/Agency%20Bid%20Protests%20Report.pdf.

First, some vendors report shying away from agency-level protests because they perceive them as biased.[10] Sometimes, for instance, the official responsible for soliciting or awarding a procurement contract is also responsible for handling any agency-level protests that are filed regarding the procurement. This perceived conflict of interest may cause some vendors to file their protests at GAO or COFC, rather than at the agency level.

Second, some vendors report that they view agency-level protest processes as opaque.[11] Agencies do not publish or provide comprehensive data on their bid protest decisions. And the FAR and agency-specific bid protest rules establish few hard-and-fast requirements for the process. For example, although the FAR states that "[a]gencies shall make their best efforts to resolve agency protests within 35 days after [an agency-level protest] is filed,"[12] that language is hortatory and does not establish any binding deadlines for agency decisions. Nothing in the FAR does. The failure to provide for any binding deadlines distinguishes the FAR from other federal procurement statutes, such as the Contract Disputes Act,[13] which sets or requires contracting officers to set firm deadlines for deciding most claims[14] and provides that the passage of the deadline for a claim means the claim is deemed denied.[15]

Third, some vendors report being dissuaded by their inability to compel production of the procurement record as part of an agency-level protest.[16] The FAR gives disappointed offerors the right to an agency debriefing—a procedure whereby contracting personnel provide offerors with an explanation of the agency's evaluation process and an assessment of the offerors' proposals. But nothing in the FAR guarantees vendors the right to view the procurement record itself. The

[10] *Id.* at 23.

[11] *Id.* at 13.

[12] 48 C.F.R. § 33.103(g).

[13] 41 U.S.C. §§ 7101 *et seq.*

[14] *See id.* § 7103(f)(1)–(2).

[15] *See id.* § 605(c)(5).

[16] Yukins, *supra* note 9, at 39.

FAR provides only that agencies "*may* exchange relevant information" with agency-level protesters.[17] By contrast, vendors that file bid protests at GAO may demand to see the entire record of the procurement, and procuring agencies must respond to such requests within 30 days—either by producing the responsive documents or giving a valid reason for withholding them.[18]

Finally, some vendors deem agency-level protests to be too risky.[19] In many cases, vendors who do not obtain relief through an agency-level protest will seek relief from GAO by pursuing their protest in that forum. But GAO's deadline for filing such "follow-on protests" often begins to run as soon as the vendor has actual or constructive notice of some "adverse agency action," which can occur before a protester receives the decision in its agency-level protest.[20] In this way, delayed notification about an agency's decision in a bid protest can seriously prejudice protesters' rights at GAO.[21] This causes some vendors to forego agency-level protests altogether.[22]

The perception that agency-level protests lack transparency, predictability, and accountability makes it more likely that protesters who lose at the agency level will mistrust the agency's decision and file follow-on protests with GAO or COFC. Such follow-on protests not only tax the limited resources of GAO and COFC, but also can disrupt activities at procuring agencies. For instance, just as a valid agency-level protest automatically stays a procurement until the agency denies or dismisses the protest and takes some adverse action,[23] a valid follow-on protest at GAO may automatically stay a procurement (if the requisite filing deadlines are

[17] 48 C.F.R. § 33.103(g) (italics added).

[18] 4 C.F.R. § 21.3(d); 48 C.F.R. § 33.104(a).

[19] Yukins, *supra* note 9, at 31.

[20] *See* 4 C.F.R. §§ 21.0(e), 21.2.

[21] *See* Yukins, *supra* note 9, at 13–14, 18–19.

[22] *See id.* at 23.

[23] 48 C.F.R. § 33.103(f).

met) until GAO denies or dismisses the protest.[24] Thus, when an agency-level protest is followed by another protest at GAO, delays in procurements can be substantial.

Protesters, agencies, and the public would all benefit from an improved agency-level protest system. Protesters would benefit because agency-level protests are typically the least formal and least costly types of bid protest procedures. Agencies would benefit from an improved agency-level protest system because greater use of agency-level protests means more agency control over the timing and conduct of protests and more opportunities for agencies to superintend their own procurement processes. And the public would benefit from more competitive, fairer, and more transparent agency procurements.

Because an improved agency-level protest system is of significant value to contractors, agencies, and the public, this recommendation identifies changes to make it more likely vendors will avail themselves of agency-level protest procedures. The recommended changes reflect three overarching principles—transparency, simplicity, and predictability—meant to address contractors' principal concerns about agency-level protest systems.

RECOMMENDATION

Identification of Decisions Subject to Agency-Level Protests

1. Agencies should clearly identify which categories of procurement decisions may or may not be made the subjects of agency-level protests.

[24] 31 U.S.C. §§ 3553(c)(1) & (d)(3).

2. Agencies should formalize and compile in a publicly available, online document the procedures they apply in adjudicating agency-level protests. In so doing, they should be guided by the principles set out in Conference Recommendation 2018-5.[25]

3. Agencies should clearly identify who within the agency will adjudicate an agency-level protest. They should consider designating at least one Agency Protest Official (APO)—a person who specializes in handling agency-level protests—to oversee and coordinate agency-level protests and to hear protests brought to a level above the contracting officer. Agencies lacking the resources to designate their own APO might consider sharing an APO with other agencies.

Notice of the Timeline for Agency-Level Protests

4. Agencies should consider adopting presumptive timelines for agency-level protests, similar to the ones under the Contract Disputes Act. Agencies should also make best efforts to notify protesters of the timelines applicable to their agency-level protests.

5. Agencies should clearly and immediately provide written notice to protesters of any adverse agency action affecting the rights of the protester under the challenged procurement. Protests should be deemed denied after a certain number of days without a decision, with the agency to notify the protester of the number of days at the beginning of the protest.

[25] *See* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).

Compiling the Record and Making It Available

6. Agencies should make available to protesters as much of the procurement record as is feasible. To address confidential information in the record, agencies should consider using tools such as enhanced debriefings.

7. Agencies should consider adopting a 30-day deadline, running from the date a protest is filed, for providing protesters with as much of the procurement record as is feasible.

Protecting Against Adverse Consequences

8. Although the FAR automatically stays a procurement during an agency-level protest, agencies should provide for a short extension of the stay after a final decision in an agency-level bid protest. The short extension should be of sufficient duration (*e.g.*, five days) to give the protester time to bring a follow-on protest at GAO or COFC after the agency's decision.

9. Congress should provide that, if a protester promptly files a GAO protest after an adverse decision in an agency-level protest, the procurement is automatically stayed during the pendency of the GAO protest.

10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO are handled on an expedited basis, to the extent feasible.

Publishing Data on Agency-Level Bid Protests

11. Agencies should annually collect and publish data about the bid protests they adjudicate. To the extent feasible, the data should at least include what the GAO currently provides in its annual reports about the bid protests it adjudicates (*e.g.*, the number of bid protests filed with the agency; the effectiveness rate of agency-level bid protests (the ratio of protests sustained or in which corrective action is afforded versus total agency-level

protests filed); the number of merits decisions by the agency; the number of decisions sustaining the protest; the number of decisions denying the protest; and the average time required for a bid protest to be resolved).

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Government Contract Bid Protests Before Agencies

Committee on Administration and Management

Proposed Recommendation | December 17, 2020

Proposed Amendments

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Commented [CMA1]: Proposed Amendment from Government Member Robert J. Girouard # 1. Note: Change appears in footnote 1.

Commented [CMA2]: Proposed Amendment from Government Member Robert J. Girouard # 2

[1] *See* Federal Acquisition Regulation, 48 C.F.R. ch. 1; *see also* Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 942–85 (codified, as amended, in various parts of the U.S. Code); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355; Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106. 110 Stat. 186 (1996) (later renamed the Clinger-Cohen Act of 1996)~~41 U.S.C. § 253~~; Exec. Order 12979, *Agency Procurement Protests*, 60 Fed. Reg. 55.171 (Oct. 25, 1995).

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[2] *See* 48 C.F.R. ch. 1.

[3] *See* Admin. Conf. of the U.S., Recommendation 95-5, *Government Contract Bid Protests*, 60 Fed. Reg. 43.108, 43.113 (Aug. 18, 1995).

sometimes, make improvements. That, in turn, results in more competitive, fairer, and more transparent procurement processes, benefiting vendors, agencies, and ultimately the public.

To file a bid protest, an actual or prospective vendor need only show that it is an "interested party," meaning that its direct economic interest would be affected by the award of, or failure to award, the contract in question.[4] Vendors that qualify as interested parties may file bid protests in any of three forums: (1) the Court of Federal Claims (COFC),[5] (2) the Government Accountability Office (GAO),[6] and (3) the procuring agency.[7] The procedural tools available in a given forum, along with other strategic and cost considerations, typically drive vendors' decisions about where to file their bid protests.

Bid protests filed with procuring agencies are commonly referred to as agency-level protests. Agency-level protests have important benefits for the public, contractors, procuring agencies, and COFC and GAO. By "provid[ing] for inexpensive, informal, procedurally simple, and expeditious resolution of protests,"[8] agency-level protest mechanisms allow small businesses (among other vendors) to affordably contest agencies' procurement decisions. They also give procuring agencies the chance to review and improve their own procurement practices. And they funnel some protests away from COFC and GAO, reducing the likelihood that the number of protests will overwhelm those institutions.

Commented [CMA3]: Proposed Amendment from Government Member Robert J. Girouard # 3. Note: Change appears in footnote 4.

Commented [CMA4]: Proposed Amendment from Government Member Robert J. Girouard # 4. Note: Change appears in footnote 6.

Commented [CMA5]: Comment from Special Counsel Jeffrey S. Lubbers # 1: This is a bit confusing. Are these three routes mutually exclusive? Does a vendor who files an agency-level protest lose the right to file with the COFC or the GAO? It appears that way from the description (although lines 65–67 state otherwise). I also assume the agency-level decision is judicially reviewable but in what court?

[4] *See* 4 C.F.R. § 21.0(a)(1) (defining "interested party" for purposes of bid protest proceedings before the Government Accountability Office); 48 C.F.R. § 33.101 (defining "interested party" for purposes of bid protest proceedings before procuring agencies); CliniComp Int'l, Inc. v. United States, 904 F.3d 1353, 1358 (Fed. Cir. 2018) (defining "interested party" for purposes of 28 U.S.C. § 1491(b), which covers actions in the Court of Federal Claims). There are some instances where Congress has restricted the ability to file a protest, regardless of whether a vendor is an "interested party." *See, e.g.*, 41 U.S.C. § 4106(f); 48 C.F.R. § 16.505(a)(10) (limiting the ability to protest the issuance or proposed issuance of a task or delivery order).

[5] *See* 28 U.S.C. § 1491(b).

[6] *See* 31 U.S.C. §§ 3552(a), 3553(a). For civilian agencies, GAO has exclusive jurisdiction over protests of task and delivery orders in excess of $10 million unless the protest is on the grounds that the order increases the scope, period, or maximum value of the contract. *See* 41 U.S.C. § 4106(f); 48 C.F.R. § 16.505(a)(10).

[7] *See* 48 C.F.R. § 33.103.

[8] *See* Exec. Order. No. 12979, 60 Fed. Reg. 55171, 55171 (Oct. 25, 1995).

Vendors, however, seldom file agency-level protests. Although there is little data on the number of agency-level protests filed each year, available evidence suggests that substantially more protests are filed with COFC and GAO each year than with procuring agencies.[9] There are several reasons why vendors may forego agency-level protests ~~that~~ which implicate the themes of transparency, predictability, and accountability.

First, some vendors report shying away from agency-level protests because they perceive them as biased.[10] Sometimes, for instance, the official responsible for soliciting or awarding a procurement contract is also responsible for handling any agency-level protests that are filed regarding the procurement. This ~~perceived conflict of interest~~perception of a pre-judgment by the agency may cause some vendors to file their protests at GAO or COFC, rather than at the agency level.

Commented [CMA6]: Proposed Amendment from Senior Fellow Alan B. Morrison

Second, some vendors report that they view agency-level protest processes as opaque.[11] Agencies do not publish or provide comprehensive data on their bid protest decisions. And the FAR and agency-specific bid protest rules establish few hard-and-fast requirements for the process. For example, although the FAR states that "[a]gencies shall make their best efforts to resolve agency protests within 35 days after [an agency-level protest] is filed,"[12] that language is hortatory and does not establish any binding deadlines for agency decisions. Nothing in the FAR does. The failure to provide for any binding deadlines distinguishes the FAR from other federal procurement statutes, such as the Contract Disputes Act,[13] which sets or requires contracting

[9] *See* Christopher Yukins, Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government 12–13 (May 1, 2020) (report to Admin. Conf. of the U.S.), https://www.acus.gov/report/agency-level/bid-protests-final-report.

[10] *Id.* at 23.

[11] *Id.* at 13.

[12] 48 C.F.R. § 33.103(g).

[13] 41 U.S.C. §§ 7101 *et seq.*

officers to set firm deadlines for deciding most claims[14] and provides that the passage of the deadline for a claim means the claim is deemed denied.[15]

Third, some vendors report being dissuaded by their inability to compel production of the procurement record as part of an agency-level protest.[16] The FAR gives disappointed offerors the right to an agency debriefing—a procedure whereby contracting personnel provide offerors with an explanation of the agency's evaluation process and an assessment of the offerors' proposals. But nothing in the FAR guarantees vendors the right to view the procurement record itself. The FAR provides only that agencies "*may* exchange relevant information" with agency-level protesters.[17] By contrast, vendors that file bid protests at GAO may demand to see the entire record of the procurement, and procuring agencies must respond to such requests within twenty-five days and produce the responsive documents within thirty days (unless they are withheld for a valid reason). ~~30 days—either by producing the responsive documents or giving a valid reason for withholding them~~.[18]

Finally, some vendors deem agency-level protests to be too risky.[19] In many cases, vendors who do not obtain relief through an agency-level protest will seek relief from GAO by pursuing their protest in that forum. But GAO's deadline for filing such "follow-on protests" often begins to run as soon as the vendor has actual or constructive notice of some "adverse agency action," which can occur before a protester receives the decision in its agency-level protest.[20] In this way, delayed notification about an agency's decision in a bid protest can

Commented [CMA7]: Comment from Special Counsel Jeffrey S. Lubbers # 2: Do vendors have the same right if they file with the COFC?

Commented [CMA8]: Proposed Amendment from Government Member Robert J. Girouard # 5

Commented [CMA9]: Proposed Amendment from Government Member Robert J. Girouard # 6. Note: Change appears in footnote 18.

[14] *See id.* § 7103(f)(1)–(2).

[15] *See id.* § 605(c)(5).

[16] Yukins, *supra* note 9, at 39.

[17] 48 C.F.R. § 33.103(g) (italics added).

[18] 4 C.F.R. § 21.3(c)–(d); 48 C.F.R. § 33.104(a).

[19] Yukins, *supra* note 9, at 31.

[20] *See* 4 C.F.R. §§ 21.0(e), 21.2.

seriously prejudice protesters' rights at GAO.[21] This causes some vendors to forego agency-level protests altogether.[22]

The perception that agency-level protests lack transparency, predictability, and accountability makes it more likely that protesters who lose at the agency level will mistrust the agency's decision and file follow-on protests with GAO or COFC. Such follow-on protests not only tax the limited resources of GAO and COFC, but also can disrupt activities at procuring agencies. For instance, just as a valid agency-level protest automatically ~~stays a procurement~~prohibits the contract from being awarded or performed until the agency denies or dismisses the protest and takes some adverse action,[23] a valid follow-on protest at GAO may automatically ~~stay a procurement~~prevent the contract from being awarded or performed (if the requisite filing deadlines are met) until GAO denies or dismisses the protest.[24] Thus, when an agency-level protest is followed by another protest at GAO, delays in procurements can be substantial.

Protesters, agencies, and the public would all benefit from an improved agency-level protest system. Protesters would benefit because agency-level protests are typically the least formal and least costly types of bid protest procedures. Agencies would benefit from an improved agency-level protest system because greater use of agency-level protests means more agency control over the timing and conduct of protests and more opportunities for agencies to superintend their own procurement processes. And the public would benefit from more competitive, fairer, and more transparent agency procurements.

Commented [CMA10]: Comment from Special Counsel Jeffrey S. Lubbers # 3: What does "valid" mean in this sentence? Note: See parallel comment at line 74.

Commented [CMA11]: Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 75, 118-19, and 125-26.

Commented [CMA12]: Proposed Amendment from Government Member Robert J. Girouard # 8. Note: Change appears in footnote 23.

Commented [CMA13]: Comment from Special Counsel Jeffrey S. Lubbers # 3: What does "valid" mean in this sentence? Note: See parallel comment at line 72.

Commented [CMA14]: Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 72-73, 118-19, and 125-26.

Commented [CMA15]: Proposed Amendment from Government Member Robert J. Girouard # 9. Note: Change appears in footnote 24.

[21] *See* Yukins, *supra* note 9, at 13–14, 18–19.

[22] *See id.* at 23.

[23] 48 C.F.R. § 33.103(f). Under certain circumstances, the agency can override the regulatory stay for agency-level protests. *See* 48 C.F.R. §§ 33.103(f)(1), (f)(3).

[24] 31 U.S.C. §§ 3553(c)(1), ~~&~~ (d)(3). Under certain circumstances, the agency can override the statutory stay for protests to GAO. *See* 31 U.S.C. § 3553(c)–(d); 48 C.F.R. § 33.104(b)–(c).

Because an improved agency-level protest system is of significant value to contractors, agencies, and the public, this ~~recommendation~~ Recommendation identifies changes to make it more likely vendors will avail themselves of agency-level protest procedures. The recommended changes reflect three overarching principles—transparency, simplicity, and predictability—meant to address contractors' principal concerns about agency-level protest systems.

RECOMMENDATION

Identification of Decisions Subject to Agency-Level Protests

1. Agencies should clearly identify which categories of procurement decisions may or may not be made the subjects of agency-level protests.

Transparency for the Process and Personnel for Agency-Level Protests

2. Agencies should formalize and compile in a document that is publicly available online~~publicly available, online document~~ the procedures they apply in adjudicating agency-level protests. In so doing, they should be guided by the principles set out in Conference Recommendation 2018-5, *Public Availability of Adjudication Rules*.[25]
3. Agencies should clearly identify who within the agency will adjudicate an agency-level protest. They should consider designating at least one Agency Protest Official (APO)—a person who specializes in handling agency-level protests—to oversee and coordinate agency-level protests and to hear protests brought to a level above the contracting officer. Agencies lacking the resources to designate their own APO might consider sharing an APO with other agencies.

[25] ~~*See* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).~~

Notice of the Timeline for Agency-Level Protests

4. Agencies should consider adopting presumptive timelines for agency-level protests, similar to the ones under the Contract Disputes Act. Agencies should also make best efforts to notify protesters of the timelines applicable to their agency-level protests.
5. Agencies should clearly and immediately provide written notice to protesters of any adverse agency action affecting the rights of the protester under the challenged procurement. ~~Protests should be deemed denied after a certain number of days without a decision, with the agency to notify the protester of the number of days at the beginning of the protest.~~Agency rules should provide that protests are deemed denied after a specified number of days without a decision, and should also provide that agencies may grant case-specific extensions based on identified criteria.

Compiling the Record and Making It Available

6. Agencies should make available to protesters as much of the procurement record as is feasible. To address confidential information in the record, agencies should consider using tools such as enhanced debriefings.
7. Agencies should consider adopting a 30-day deadline, running from the date a protest is filed, for providing protesters with as much of the procurement record as is feasible.

Protecting Against Adverse Consequences

8. Although the FAR ~~automatically stays a procurement~~prohibits the award of a contract or continued performance under an awarded contract during an agency-level protest, agencies should provide for a short extension of the stay after a final decision in an agency-level bid protest as permitted by regulation. The short extension should be of sufficient duration (e.g., five days) to give the protester time to bring a follow-on protest at GAO or COFC after the agency's decision.

Commented [CMA16]: Comment from Special Counsel Jeffrey S. Lubbers # 4: Shouldn't the FAR itself be amended to include the requirements in paragraphs 4–7 (or at least to provide that the agencies do so)?

Commented [CA17]: Proposed Amendment from Council # 1. Explanation: Change is intended to avoid vesting agencies with unnecessary and potentially problematic discretion.

Commented [CMA18]: Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 72-73, 75, and 125-26.

Commented [CMA19]: Proposed Amendment from Government Member Robert J. Girouard # 10

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9. Congress should provide that, if a protester promptly files a GAO protest after an adverse decision in an agency-level protest, the ~~procurement is automatically stayed~~agency shall not award the contract or commence performance under the contract during the pendency of the GAO protest, subject to potential override in urgent and compelling circumstances.

10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO are handled on an expedited basis, to the extent feasible.

Publishing Data on Agency-Level Bid Protests

11. Agencies should ~~annually~~ collect and annually publish data, on a fiscal year basis, about the bid protests they adjudicate. To the extent feasible, the data should at least include what the GAO currently provides in its annual reports about the bid protests it adjudicates (e.g., the number of bid protests filed with the agency; the effectiveness rate of agency-level bid protests (the ratio of protests sustained or in which corrective action is afforded versus the total of all agency-level protests ~~filed~~closed in the fiscal year); the number of merits decisions by the agency; the number of decisions sustaining the protest; the number of decisions denying the protest; and the average time required for a bid protest to be resolved).

Commented [CMA20]: Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 72-73, 75, and 118-19.

Commented [CA21]: Proposed Amendment from Council # 2. Explanation: Change made to align text with 31 U.S.C. § 3553(c)(2).

Commented [CMA22]: Comment from Special Counsel Jeffrey S. Lubbers # 5: Should this sort of stay also apply if the protester files a COFC protest? Also, this is the only recommendation directed to Congress. Aren't there any others that could be?

Commented [CMA23]: Proposed Amendment from Government Member Robert J. Girouard # 11

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Commented [CMA24]: Proposed Amendment from Government Member Robert J. Girouard # 12

Commented [CMA25]: Comment from Government Member Robert J. Girouard: "The average time required for a bid protest to be resolved" is not currently part of GAO's reporting; GAO only indicates whether or not there were protests that were resolved within 100 days. So under the draft recommendation, there would be some different reporting outcomes for GAO and for agencies."

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Information About Agency Adjudicators

Committee on Adjudication

Proposed Recommendation | December 17, 2020

Federal agency officials throughout the country preside over hundreds of thousands of adjudications each year.[1] As the Administrative Conference has previously observed, litigants, their lawyers, and other members of the public benefit from having ready online access to procedural rules, decisions, and other key materials associated with adjudications.[2] They also benefit from having ready online access to the policies and practices by which agencies appoint and oversee administrative law judges and other adjudicators. The availability of these policies and practices helps inform the public about, among other things, any actions agencies have taken to ensure the impartiality of administrative adjudicators[3] and promotes an understanding of adjudicators' constitutional status under the Appointments Clause and other constitutional provisions.[4]

Agencies may benefit from disclosures about agency adjudicators because it allows them to compare their own policies with those made publicly available by other agencies. Agencies' proactive disclosures, which may sometimes already be required under the Freedom of

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

[2] Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

[3] *Cf.* Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

[4] *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018); Arthrex v. Smith & Nephew, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted,* __ S. Ct. __ (Oct. 13, 2020) (No. 19-1434).

Information Act and the E-Government Act, may also be more cost-effective than agencies' responding to individual requests for information.[5]

Like other recent recommendations regarding adjudicators,[6] this Recommendation addresses officials who preside over (1) hearings governed by the formal hearing provisions of the Administrative Procedure Act (APA)[7] and (2) hearings that are not governed by those provisions but are required by statute, regulation, or executive order. It also addresses officials (agency heads excluded) who review hearing-level adjudicators' decisions on appeal. For ease of reference, this Recommendation refers to the covered adjudicators as either "administrative law judges" (ALJs) or "administrative judges" (AJs).[8] Agencies may decide to include the disclosures identified in this Recommendation about other adjudicators, depending on the level of formality of the proceedings over which they preside and whether they serve as full-time adjudicators. Agencies may also decide to make similar disclosures with respect to agency heads if their websites do not already provide sufficient information.

This Recommendation is concerned with policies and practices relating to adjudicators that agencies should disclose, including those addressing appointment and qualifications; compensation (including salaries, bonuses, and performance incentives); duties and responsibilities; supervision and assignment of work; position within agencies' organizational hierarchies; methods of evaluating performance; limitations on ex parte communications and other policies ensuring the separation between adjudicative and enforcement functions; recusal and disqualification; the process for review of adjudications; and discipline and removal.

[5] FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (amending 5 U.S.C. § 552(a)(2)); E-Government Act of 2002, Pub. L. No. 140-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).

[6] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

[7] *See* 5 U.S.C. §§ 554, 556–557.

[8] The vast majority of ALJs work at the Social Security Administration. AJs work at many different agencies under a variety of titles, including not only "Administrative Judge" but also, by way of example, "Hearing Officer," "Immigration Judge," "Veterans Law Judge," "Administrative Patent Judge," and "Administrative Appeals Judge."

Many of the policies and practices applicable to ALJs governing these matters are already publicly available because they reside in in the APA, Office of Personnel Management rules, and other legal authorities.[9] Nevertheless, agencies that employ ALJs can take steps to improve the public's access to this information.

ALJs, in any case, make up a small portion of federal adjudicators. There are many more AJs than ALJs.[10] AJs are regulated by a complex mix of statutory provisions, including civil service laws, agency rules codified in the *Code of Federal Regulations*, and agency-specific policies that take a variety of forms. Many types of information about AJs reside in these sources, but they may be difficult to find.[11] Some relevant sources may not be publicly available, including internal administrative and personnel manuals, position descriptions, and labor agreements. This is particularly true with respect to certain kinds of policies, such as those relating to compensation and performance incentives.[12] Of course, the Administrative Conference recognizes that some of these agency policies and practices may qualify for an exemption under the Freedom of Information Act,[13] Privacy Act,[14] or other laws and executive-branch policies.

Agency websites are the most helpful location for agencies to make relevant policies and practices publicly available. Individuals most naturally seek information about administrative policies and practices on agencies' websites. Agencies can situate information about their adjudicators in a logical and easily identifiable place on their websites and structure their

[9] 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521; 5 C.F.R. part 930, subpart B; Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018).

[10] Kent Barnett et al., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 1 (Sept. 24, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-1.

[11] Leigh Anne Schriever, Public Availability of Information About Adjudicators 10 (Nov. 23, 2020) (report to the Admin. Conf. of the U.S.).

[12] *Id.* at 7.

[13] 5 U.S.C. § 552.

[14] 5 U.S.C. § 552a.

websites to synthesize policies in plain language and link to information from many different sources.[15]

This Recommendation encourages agencies to provide clear and readily accessible descriptions on their websites of the policies governing the appointment and oversight of ALJs and AJs and to include links to relevant legal documents. How, exactly, they should do so will of course depend on the specific features of their adjudicative programs and their institutional needs.

RECOMMENDATION

1. Each adjudicative agency should prominently display on its website a short, straightforward description of all generally applicable policies and practices governing the appointment and oversight of ALJs and AJs, including, as applicable, those that address:
    a. Procedures for assessing, selecting, and appointing candidates for adjudicator positions and the legal authority under which the appointments are made;
    b. Placement of adjudicators within agencies' organizational hierarchies;
    c. Compensation structure and performance incentives, such as bonuses, non-monetary awards, and promotions;
    d. Procedures for assigning cases;
    e. Assignment, if any, of non-adjudicative duties to adjudicators;
    f. Limitations on ex parte communications, including between adjudicators and other agency officials, related to the disposition of individual cases, as well as other policies ensuring a separation of adjudication and enforcement functions;
    g. Standards for recusal by and disqualification of adjudicators;
    h. Administrative review of adjudicators' decisions;
    i. Supervision of adjudicators by higher-level officials;

[15] *Cf.* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

j. Evaluation of adjudicators, including quantitative and qualitative methods for appraising adjudicators' performance, such as case-processing goals, if any; and

k. Discipline and removal of adjudicators.

Agencies may choose not to provide access to policies covered by a Freedom of Information Act exemption or may be required not to disclose information otherwise protected by law.

2. On the same webpage as the information described in Paragraph 1 appears, each adjudicative agency should provide links to key legal documents or, when links are not available, citations to such documents. These documents may include (a) federal statutes, including relevant provisions of the APA and other laws applicable to ALJs and AJs; (b) agency-promulgated rules regarding adjudicators, including Office of Personnel Management rules applicable to ALJs; (c) publicly available agency-promulgated guidance documents relating to adjudicators, including manuals, bench books, and other explanatory materials; and (d) delegations of authority. To the extent that some policies concerning adjudicators may be a matter of custom, such as assignment of non-adjudicative duties, each adjudicative agency should consider documenting those policies in order to make them publicly accessible to the extent practicable.

3. The webpage containing the information described in Paragraphs 1 and 2 should present the materials in a clear, logical, and comprehensive fashion. One possible method of presenting this information appears in Appendix A. The appendix gives one example for ALJs and another for AJs.

4. If an agency's mission consists exclusively or almost exclusively of conducting adjudications, the agency should provide a link to the webpage containing the information described in Paragraphs 1 and 2 on the agency's homepage. If conducting adjudications is merely one of an agency's functions, the agency should provide a link to these materials from a location on the website that is both dedicated to adjudicative materials and logical in terms of a user's likelihood of finding the documents in the selected location. One example would be an enforcement or adjudication page or the homepage for the component in which a particular category of adjudicators works.

Citations to agency webpages that currently provide this information in a way that makes it easy for the public to locate, as well as descriptions of how to find those pages on agency websites, appear in Appendix B.

APPENDIX A

Sample Website Text for Administrative Law Judges

About Our Administrative Law Judges

Administrative Law Judges (ALJs) at [agency name] conduct hearings and decide cases under [insert name of authorizing act]. They are part of the [agency component in which ALJs are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

[Agency name] is committed to ensuring that all hearings and appeals are conducted in a fair and equitable manner. Parties are entitled to a due process hearing presided over by an impartial, qualified ALJ. ALJs resolve cases involving [kinds of cases ALJs hear] in a fair, transparent, and accessible manner. Our ALJs are appointed by [agency official], and are [describe qualifications]. ALJs are paid according to the [pay scale for ALJs with link to the scale] scale (with cost-of-living adjustments for ALJs' locations) set by another agency, the Office of Personnel Management.

Cases are assigned to ALJs [in each geographic office] in rotation so far as practicable. The ALJ assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. ALJs are required by statute to perform their functions impartially. 5 U.S.C. § 556(b). To ensure impartiality, they do not take part in investigative or enforcement activities, nor do they report to officials in the [agency]'s investigative or enforcement components. 5 U.S.C. §§ 554(d); 3105. The ALJ assigned to your case may not communicate privately about the facts of your case with other agency officials. [More details on [agency name]'s rules about communicating with ALJs are available [location of agency-specific ex parte prohibitions]].

By law, [agency] does not reward or discipline ALJs for their decisions. [Agency] does not evaluate ALJs' performance and can only discipline or remove an ALJ from office if another

agency, the Merit Systems Protection Board, decides after a hearing that good cause supports doing so. 5 U.S.C. §§ 4301, 7521.

The agency has adopted rules of recusal [link] that allow a participant to request that the ALJ in charge of his or her case be disqualified if the participant believes the ALJ cannot fairly and impartially decide the cases.

If you are dissatisfied with an ALJ's decision, you can request reconsideration from the ALJ or appeal that decision to [agency office/official]. Visit [link] for information on appealing an ALJ decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the ALJ's decision.

For Further Information:

- Hiring process: [link]
- Pay rates: [link]
- How cases are assigned to ALJs: [link]
- Communicating with ALJs (ex parte communications): [link]
- Process for addressing allegations that an ALJ has a conflict of interest (recusal and disqualification procedures): [link]
- How to appeal an ALJ decision: [link]
- Case processing goals: [link]
- Process for addressing allegations of ALJ misconduct: [link]

See also:

- Statutory provisions governing ALJs: 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521
- OPM's regulations governing ALJs: 5 C.F.R. §§ 930.205, 930.206, 930.207, 930.211
- MSPB's regulations governing ALJs: 5 C.F.R. §§ 1201.127–1201.142
- [Additional legal provisions governing ALJs]

- Executive Orders pertaining to ALJs: EO 13,843 (giving agencies control over the hiring process of ALJs) [add other pertinent EOs]

Sample Website Text for Administrative Judges

If agencies have different kinds of adjudicators, they should consider providing a separate webpage for each.

About Our [Insert Adjudicator Title]

[Adjudicator title] at [agency name] [conduct hearings and decide cases/review appeals] under [name of authorizing act(s)]. They are part of the [agency component in which adjudicators are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

[Agency name] is committed to ensuring that all hearings and appeals are conducted in a fair and equitable manner. Parties are entitled to a due process hearing presided over by an impartial, qualified [adjudicator title]. [Adjudicator title] resolve cases involving [kinds of cases] in a fair, transparent, and accessible manner. Our [adjudicator title] are appointed pursuant to [authorizing statute] by [agency official] [for terms of [number of years] years], and are [describe qualifications]. [Adjudicator title] are paid according to the [pay scale for adjudicator with link to the scale] scale set [by another agency, the Office of Personnel Management/by [agency title]], and they [are/are not] eligible to receive bonuses or other performance incentives.

Cases are [describe how cases are assigned]. The [adjudicator title] assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. [Description of policies (if any exist) that ensure the agency component or adjudicators remain independent from investigative or enforcement activities]. [Description of rules about ex parte communications, if any exist].

[Agency official or body] is responsible for evaluating the quality of [adjudicator title] decisions, and [agency official or body] conducts performance reviews of [adjudicator title]. [Agency official/entity from another agency] may remove the [adjudicator title] or [agency official or body/other entity] may discipline the [adjudicator title] by [kinds of discipline] when warranted.

The agency has adopted rules of recusal [link] that allow a participant to request that the [adjudicator title] in charge his or her case be disqualified if the participant believes the [adjudicator title] cannot fairly and impartially decide the case.

If you are dissatisfied with an [adjudicator title] decision, you can request reconsideration from the [adjudicator title] or appeal that decision to [agency office/official]. Visit [link] for information on appealing an [adjudicator title] decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the [adjudicator title]'s decision.

For Further Information:

- Hiring process: [link]
- Pay rates: [link]
- Bonuses and performance incentives: [link]
- How cases are assigned to [adjudicator title]: [link]
- Communicating with [adjudicator title] (ex parte communications): [link]
- Process for addressing allegations that an [adjudicator title] has a conflict of interest (recusal and disqualification procedures): [link]
- How to appeal an [adjudicator title] decision: [link]
- Case processing goals: [link]
- Process for addressing allegations of [adjudicator title] misconduct: [link]

See also:

- Statutory provisions regarding [adjudicator title], including the appointment authority: [statutory citations]
- Agency regulations governing [adjudicator title]: [C.F.R. provisions]

APPENDIX B

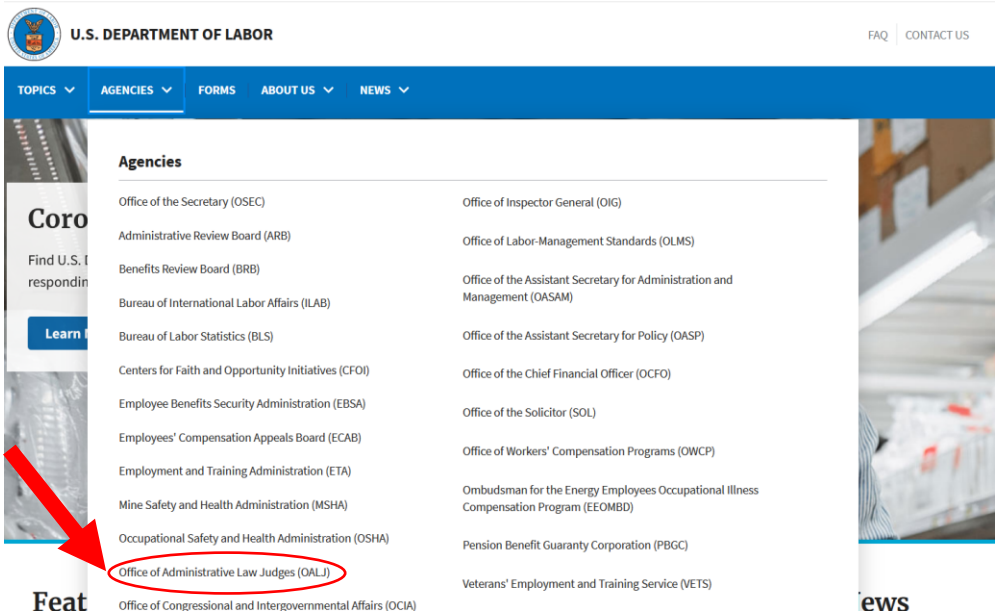
Example 1 – Department of Labor's Office of Administrative Law Judges

The website of the Office of Administrative Law Judges provides an example of how agencies can intuitively place information about adjudicators on their websites in plain-language text with citations. It is easy to find because a link to it is placed on the home page for the Office of Administrative Law Judges.

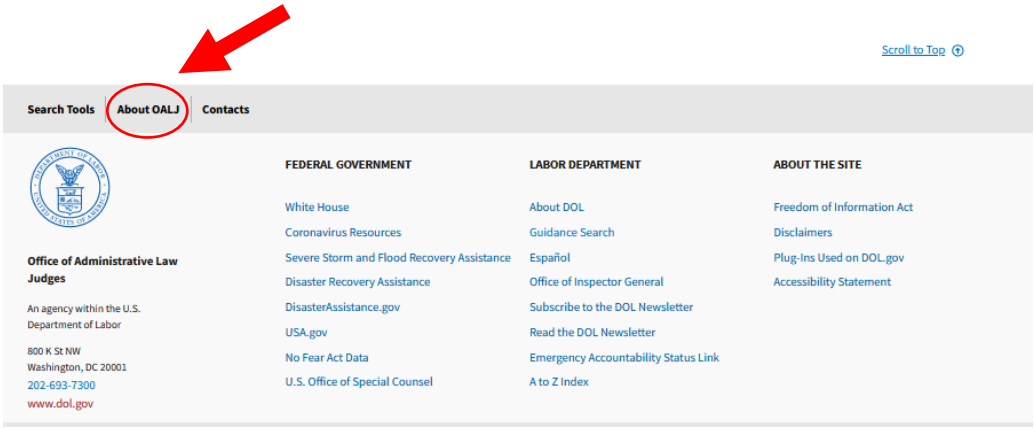
Citation: *About the Office of Administrative Law Judges*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oalj/about/ALJMISSN (last visited Nov. 9, 2020).

How to Find:

1. Go to the Department of Labor Website (www.dol.gov) and click on the "Agencies Tab," which should bring up a drop-down menu. Click on "Office of Administrative Law Judges (OALJ)."



2. Scroll down to the bottom of the OALJ page and click on "About OALJ."



3. The "About the Office of Administrative Law Judges" page includes information about the locations of administrative law judges (ALJs), the authority under which they are appointed, and the kinds of cases heard by ALJs.

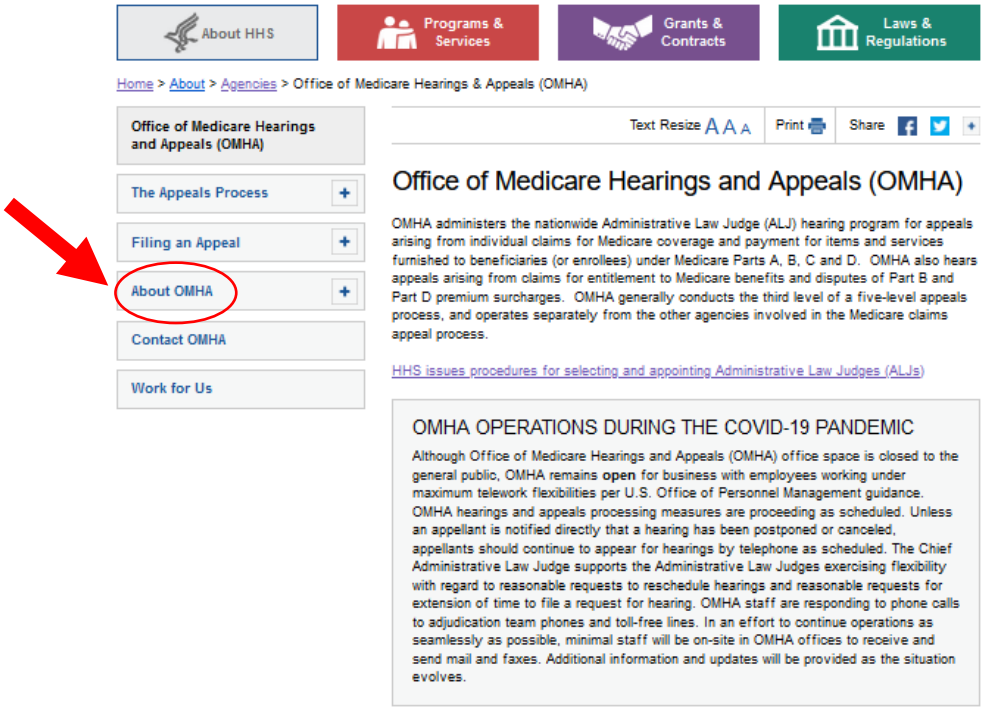
Example 2 – Department of Health and Human Service's Office of Medicare Hearings and Appeals

The website of the Office of Medicare Hearings and Appeals shows a clear and intuitive way agencies can organize information about adjudicators. The link to the "About OMHA" page is easy to find from the main page for the Office of Medicare Hearings and Appeals, which contains a link to it.

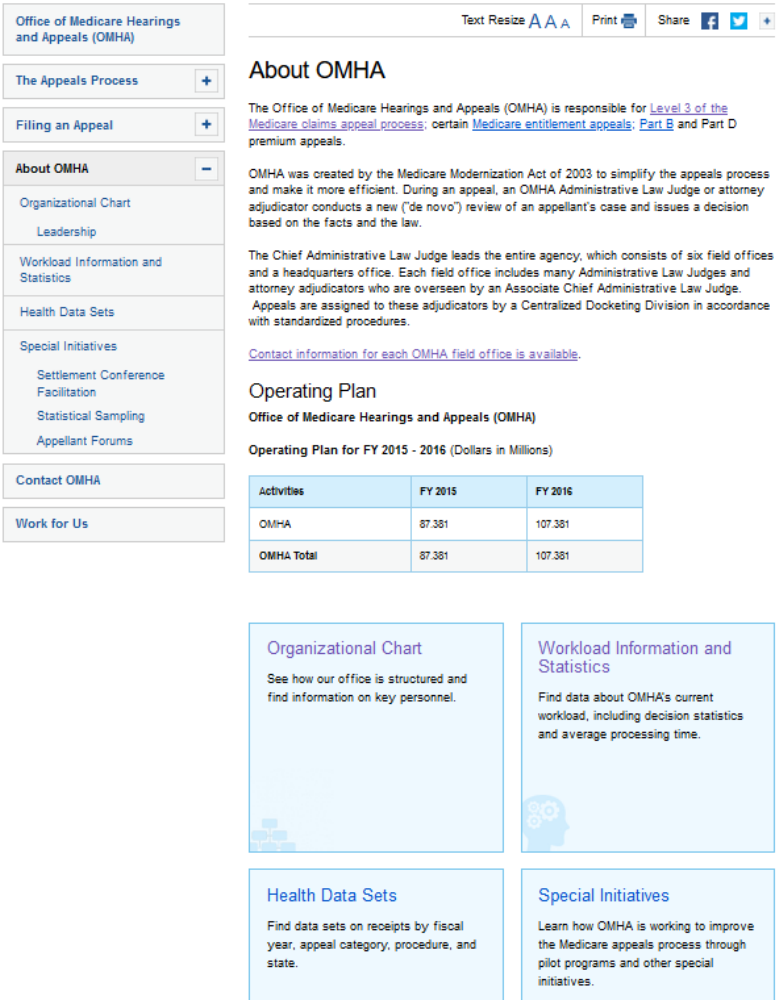
Citation: *About OMHA*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/about/agencies/omha/about/index.html (last visited Nov. 9, 2020).

How to Find:

1. Go to the main page for OMHA (https://www.hhs.gov/about/agencies/omha/index.html) and click on "About OMHA" on the left side.



2. The "About OMHA" page includes information about what cases ALJs at OMHA hear and the organization of the agency.



Office of Medicare Hearings and Appeals (OMHA)
The Appeals Process +
Filing an Appeal +
About OMHA −
Organizational Chart
Leadership
Workload Information and Statistics
Health Data Sets
Special Initiatives
Settlement Conference Facilitation
Statistical Sampling
Appellant Forums
Contact OMHA
Work for Us

Text Resize A A A Print Share

About OMHA

The Office of Medicare Hearings and Appeals (OMHA) is responsible for Level 3 of the Medicare claims appeal process; certain Medicare entitlement appeals; Part B and Part D premium appeals.

OMHA was created by the Medicare Modernization Act of 2003 to simplify the appeals process and make it more efficient. During an appeal, an OMHA Administrative Law Judge or attorney adjudicator conducts a new ("de novo") review of an appellant's case and issues a decision based on the facts and the law.

The Chief Administrative Law Judge leads the entire agency, which consists of six field offices and a headquarters office. Each field office includes many Administrative Law Judges and attorney adjudicators who are overseen by an Associate Chief Administrative Law Judge. Appeals are assigned to these adjudicators by a Centralized Docketing Division in accordance with standardized procedures.

Contact information for each OMHA field office is available.

Operating Plan

Office of Medicare Hearings and Appeals (OMHA)

Operating Plan for FY 2015 - 2016 (Dollars in Millions)

Activities	FY 2015	FY 2016
OMHA	87.381	107.381
OMHA Total	87.381	107.381

Organizational Chart
See how our office is structured and find information on key personnel.

Workload Information and Statistics
Find data about OMHA's current workload, including decision statistics and average processing time.

Health Data Sets
Find data sets on receipts by fiscal year, appeal category, procedure, and state.

Special Initiatives
Learn how OMHA is working to improve the Medicare appeals process through pilot programs and other special initiatives.

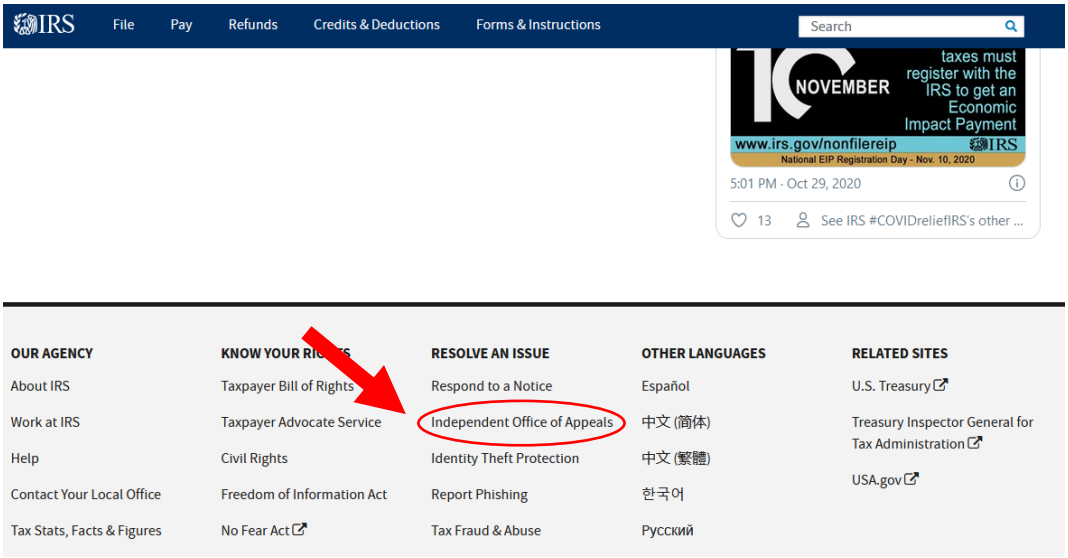
Example 3 – Internal Revenue Service's Independent Office of Appeals

The website of the Independent Office of Appeals presents an example of how agencies can use website text to reassure the public about their adjudicators' independence and impartiality in plain language. The IRS website has a link to the Independent Office of Appeals webpage on its main page. The first sentence of the Office's homepage includes a hyperlink to a page containing more information about its adjudications, including details about ex parte communications and the separation of adjudicative functions from other agency functions.

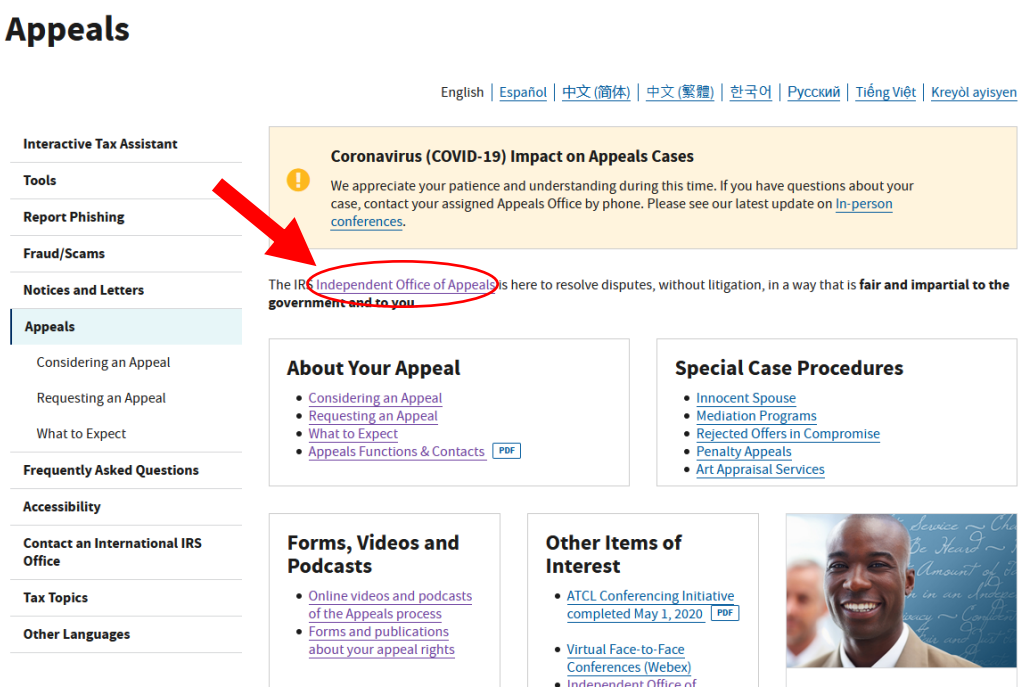
Citation: *Appeals – An Independent Organization*, I.R.S., https://www.irs.gov/appeals/appeals-an-independent-organization (last visited Nov. 9, 2020).

How to Find:

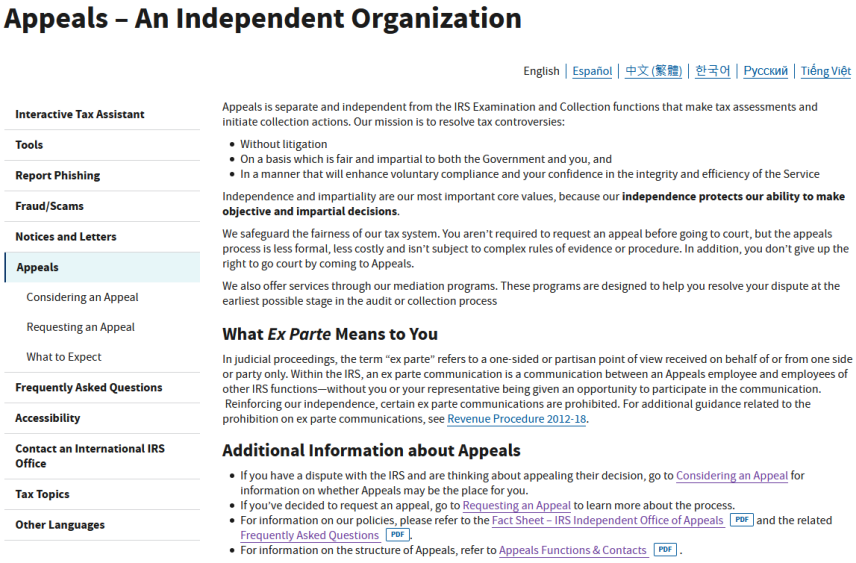
1. Go to the IRS's home page (www.irs.gov) and scroll down to the bottom. Click on "Independent Office of Appeals."



2. Click on "Independent Office of Appeals" in the first sentence on the webpage.



3. The "Appeals – An Independent Organization" page includes information about the agency's relationship with other agency components and provides an explanation about the rules around ex parte communications.



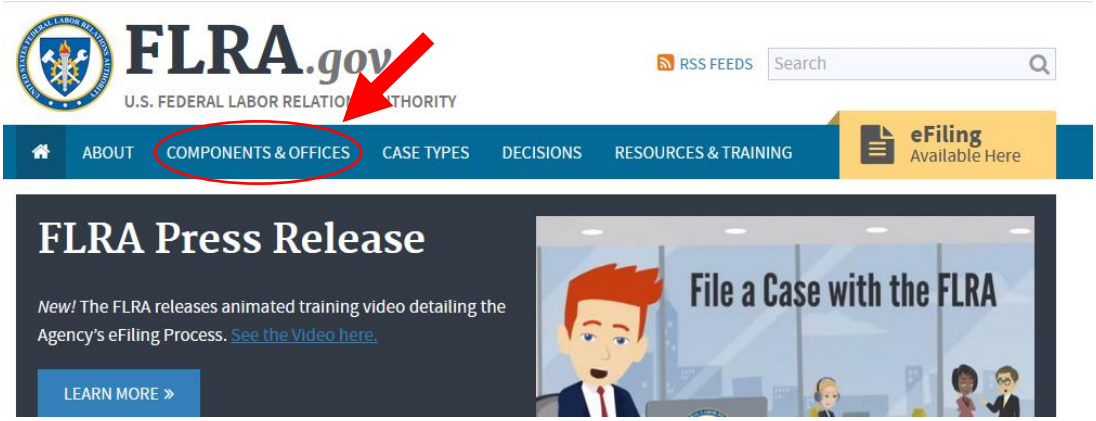
Example 4 – Federal Labor Relations Authority

The website of the Federal Labor Relations Authority provides a good example of how agencies can create an easily-located page that is accessible from the main page and that provides information about the appointment and job duties of the adjudicators.

Citation: *Office of Administrative Law Judges*, FED. LABOR RELATIONS AUTH., https://www.flra.gov/components-offices/offices/office-administrative-law-judges (last visited Nov. 9, 2020).

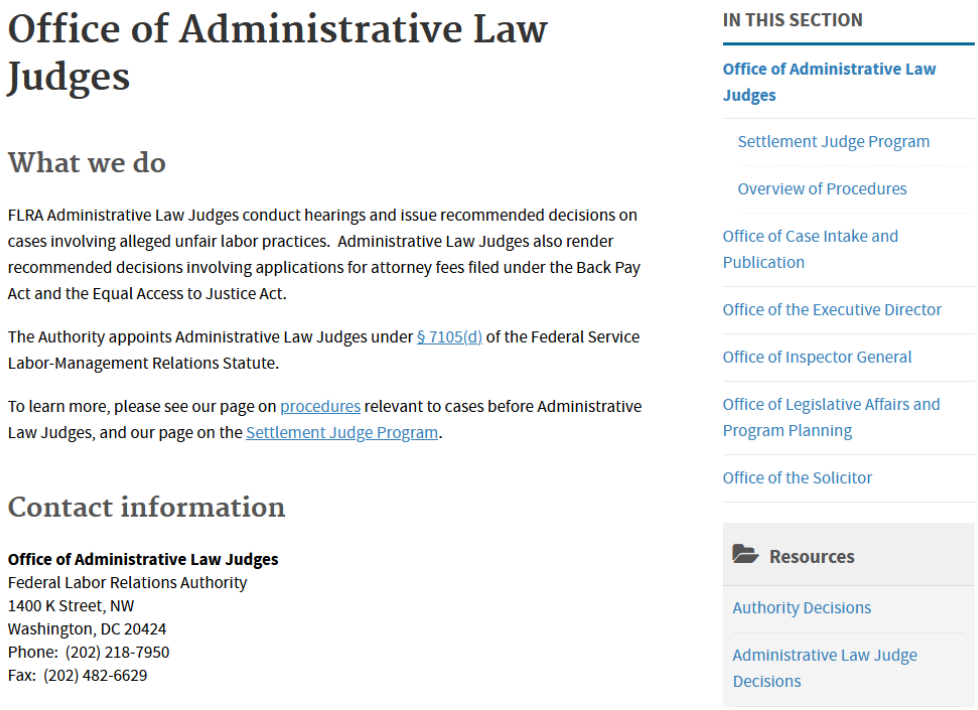
How to Find:

1. Go to the FLRA website (www.flra.gov) and click on "Components & Offices."



2. Click on "Office of Administrative Law Judges."

3. The "Office of Administrative Law Judges" page includes information about office location, the authority for the appointment of ALJs, and descriptions of the kinds of cases ALJs hear.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Publication of Policies Governing ~~Availability of Information About~~ Agency Adjudicators

Commented [CMA1]: Proposed Amendment from Senior Fellow Ronald M. Levin

Committee on Adjudication

Proposed Recommendation | December 17, 2020

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).

Federal agency officials throughout the country preside over hundreds of thousands of adjudications each year.[1] As the Administrative Conference has previously observed, litigants, their lawyers, and other members of the public benefit from having ready online access to procedural rules, decisions, and other key materials associated with adjudications.[2] They also benefit from having ready online access to the policies and practices by which agencies appoint and oversee administrative law judges and other adjudicators. The availability of these policies and practices helps inform the public about, among other things, any actions agencies have taken to ensure the impartiality of administrative adjudicators[3] and promotes an understanding of

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

[2] Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

[3] *Cf.* Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

adjudicators' constitutional status under the Appointments Clause and other constitutional provisions.[4]

Agencies may benefit from disclosures about agency adjudicators because it allows them to compare their own policies with those made publicly available by other agencies. Agencies' proactive disclosures, which may sometimes already be required under the Freedom of Information Act and the E-Government Act, may also be more cost-effective than agencies' responding to individual requests for information.[5]

Like other recent recommendations regarding adjudicators,[6] this Recommendation addresses officials who preside over (1) hearings governed by the formal hearing provisions of the Administrative Procedure Act (APA)[7] and (2) hearings that are not governed by those provisions but are required by statute, regulation, or executive order. It also addresses officials (agency heads excluded) who review hearing-level adjudicators' decisions on appeal. For ease of reference, this Recommendation refers to the covered adjudicators as either "administrative law judges" (ALJs) or "administrative judges" (AJs).[8] Agencies may decide to include on their websites the disclosures identified in this Recommendation forabout other adjudicators, depending on the level of formality of the proceedings over which they preside and whether they serve as full-time adjudicators. Agencies may also decide to make similar disclosures with respect to agency heads if their websites do not already provide sufficient information.

[4] *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018); Arthrex v. Smith & Nephew, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted,* __ S. Ct. __ (Oct. 13, 2020) (No. 19-1434).

[5] FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (amending 5 U.S.C. § 552(a)(2)); E-Government Act of 2002, Pub. L. No. 140-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).

[6] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

[7] *See* 5 U.S.C. §§ 554, 556–557.

[8] The vast majority of ALJs work at the Social Security Administration. AJs work at many different agencies under a variety of titles, including not only "Administrative Judge" but also, by way of example, "Hearing Officer," "Immigration Judge," "Veterans Law Judge," "Administrative Patent Judge," and "Administrative Appeals Judge."

This Recommendation is concerned with policies and practices relating to adjudicators that agencies should disclose, including those addressing appointment and qualifications; compensation (including salaries, bonuses, and performance incentives); duties and responsibilities; supervision and assignment of work; position within agencies' organizational hierarchies; methods of evaluating performance; limitations on ex parte communications and other policies ensuring ~~the~~ separation between adjudicative and enforcement functions; recusal and disqualification; the process for review of adjudications; and discipline and removal.

Many of the policies and practices applicable to ALJs governing these matters are already publicly available because they reside in ~~in~~ the APA, Office of Personnel Management rules, or~~and~~ other legal authorities.[9] Nevertheless, agencies that employ ALJs can take steps to improve the public's access to this information.

ALJs, in any case, make up a small portion of federal adjudicators. There are many more AJs than ALJs.[10] AJs are regulated by a complex mix of statutory provisions, including civil service laws, agency rules codified in the *Code of Federal Regulations*, and agency-specific policies that take a variety of forms. Many types of information about AJs reside in these sources, but they may be difficult to find.[11] Some relevant sources may not be publicly available, including internal administrative and personnel manuals, position descriptions, and labor agreements. This is particularly true with respect to certain kinds of policies, such as those relating to compensation and performance incentives.[12] Of course, the Administrative Conference recognizes that some of these agency policies and practices may qualify for an

[9] 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521; 5 C.F.R. p~~art~~. 930, subp~~art~~. B; Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018).

[10] Kent Barnett et al., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 1 (Sept. 24, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-1.

[11] Leigh Anne Schriever, Public Availability of Information About Adjudicators 10 (Nov. 23, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-public-availability-information-about-agency-adjudicators.

[12] *Id.* at 7.

exemption under the Freedom of Information Act,[13] Privacy Act,[14] or other laws and executive-branch policies.

Agency websites are the most helpful location for agencies to make relevant policies and practices publicly available. Individuals most naturally seek information about administrative policies and practices on agencies' websites. Agencies can situate information about their adjudicators in a logical and easily identifiable place on their websites and structure their websites to synthesize policies in plain language and link to information from many different sources.[15]

This Recommendation encourages agencies to provide clear and readily accessible descriptions on their websites of the policies governing the appointment and oversight of ALJs and AJs and to include links to relevant legal documents. How, exactly, they should do so will of course depend on the specific features of their adjudicative programs and their institutional needs.

RECOMMENDATION

1. Each adjudicative agency should prominently display on its website a short, straightforward description of all generally applicable policies and practices governing the appointment and oversight of ALJs and AJs, including, as applicable, those that address:
    a. Procedures for assessing, selecting, and appointing candidates for adjudicator positions and the legal authority under which such~~the~~ appointments are made;
    b. Placement of adjudicators within agencies' organizational hierarchies;
    c. Compensation structure and performance incentives, such as bonuses, non-monetary awards, and promotions;

Commented [CMA2]: Comment from Senior Fellow Richard J. Pierce, Jr.: The constitutional status of many adjudicators and the continuing validity of the means through which they can be appointed and removed are subject to active litigation in scores of cases that are now pending in circuit courts. Did the committee consider recommending that agencies include a reference to any pending cases in which the continued validity of their means of appointment and/or removal of adjudicators is at stake?

[13] 5 U.S.C. § 552.

[14] ~~5 U.S.C.~~ *Id.* § 552a.

[15] *Cf.* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

d. Procedures for assigning cases;
e. Assignment, if any, of non-adjudicative duties to adjudicators;
f. Limitations on ex parte communications, including between adjudicators and other agency officials, related to the disposition of individual cases, as well as other policies ensuring a separation of adjudication and enforcement functions;
g. Standards for recusal by and disqualification of adjudicators;
h. Administrative review of adjudicators' decisions;
i. Supervision of adjudicators by higher-level officials;
j. Evaluation of adjudicators, including quantitative and qualitative methods for appraising adjudicators' performance, such as case-processing goals, if any; and
k. Discipline and removal of adjudicators.

Agencies may choose not to provide access to policies covered by a Freedom of Information Act exemption or may be required not to disclose information otherwise protected by law.

2. On the same webpage as the information described in Paragraph 1 appears, each adjudicative agency should provide links to key legal documents or, when links are not available, citations to such documents. These documents may include (a) federal statutes, including relevant provisions of the APA and other laws applicable to ALJs and AJs; (b) agency-promulgated rules regarding adjudicators, including Office of Personnel Management rules applicable to ALJs; (c) publicly available agency-promulgated guidance documents relating to adjudicators, including manuals, bench books, and other explanatory materials; ~~and~~ (d) delegations of authority; and (e) position descriptions. To the extent that some policies concerning adjudicators may be a matter of custom, such as assignment of non-adjudicative duties, each adjudicative agency should consider documenting those policies in order to make them publicly accessible to the extent practicable.

Commented [CMA3]: Proposed Amendment from Senior Fellow Alan B. Morrison

3. The webpage containing the information described in Paragraphs 1 and 2 should present the materials in a clear, logical, and comprehensive fashion. One possible method of

presenting this information appears in Appendix A. The appendix gives one example for ALJs and another for AJs.

4. If an agency's mission consists exclusively or almost exclusively of conducting adjudications, the agency should provide a link to the webpage containing the information described in Paragraphs 1 and 2 on the agency's homepage. If conducting adjudications is merely one of an agency's functions, the agency should provide a link to these materials from a location on the website that is both dedicated to adjudicative materials and logical in terms of a user's likelihood of finding the documents in the selected location. One example would be an enforcement or adjudication page or the homepage for the component in which a particular category of adjudicators works. Citations to agency webpages that currently provide this information in a way that makes it easy for the public to locate, as well as descriptions of how to find those pages on agency websites, appear in Appendix B.

APPENDIX A

Sample Website Text for Administrative Law Judges

About Our Administrative Law Judges

Administrative Law Judges (ALJs) at [agency name] conduct hearings and decide cases under [insert name of authorizing act]. They are part of the [agency component in which ALJs are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

[Agency name] is committed to ensuring that all hearings and appeals are conducted in a fair and equitable manner. Parties are entitled to a due process hearing presided over by an impartial, qualified ALJ. ALJs resolve cases involving [kinds of cases ALJs hear] in a fair, transparent, and accessible manner. Our ALJs are appointed by [agency official], and are [describe qualifications]. ALJs are paid according to the [pay scale for ALJs with link to the scale] scale (with cost-of-living adjustments for ALJs' locations) set by another agency, the Office of Personnel Management.

Cases are assigned to ALJs [in each geographic office] in rotation so far as practicable. The ALJ assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. ALJs are required by statute to perform their functions impartially. 5 U.S.C. § 556(b). To ensure impartiality, they do not take part in investigative or enforcement activities, nor do they report to officials in the [agency]'s investigative or enforcement components. 5 U.S.C. §§ 554(d)~~,~~; 3105. The ALJ assigned to your case may not communicate privately about the facts of your case with other agency officials. [More details on [agency name]'s rules about communicating with ALJs are available [location of agency-specific ex parte prohibitions]].

By law, [agency] does not reward or discipline ALJs for their decisions. A federal statute provides that [~~A~~agency] may remove, or take certain other disciplinary actions, against ~~does not evaluate ALJs' performance and can only discipline or remove~~ an ALJ it employs only for good

cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board. ~~from office if another agency, the Merit Systems Protection Board, decides after a hearing that good cause supports doing so.~~ 5 U.S.C. §~~§ 4301,~~ 7521.

Commented [CA4]: Proposed Amendment from Council

The agency has adopted rules of recusal [link] that allow a participant to request that the ALJ in charge of his or her case be disqualified if the participant believes the ALJ cannot fairly and impartially decide the cases.

If you are dissatisfied with an ALJ's decision, you can request reconsideration from the ALJ or appeal that decision to [agency office/official]. Visit [link] for information on appealing an ALJ decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the ALJ's decision.

For Further Information:

- Hiring process: [link]
- Pay rates: [link]
- How cases are assigned to ALJs: [link]
- Communicating with ALJs (ex parte communications): [link]
- Process for addressing allegations that an ALJ has a conflict of interest (recusal and disqualification procedures): [link]
- How to appeal an ALJ decision: [link]
- Case processing goals: [link]
- Process for addressing allegations of ALJ misconduct: [link]

See also:

- Statutory provisions governing ALJs: 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521
- OPM's regulations governing ALJs: 5 C.F.R. §§ 930.205~~, 930.206,~~ 930.207, 930.211
- MSPB's regulations governing ALJs: 5 C.F.R. §§ 1201.127–1201.142

- [Additional legal provisions governing ALJs]
- Executive Orders pertaining to ALJs: E.O. 13,843 (giving agencies control over the hiring process of ALJs) [add other pertinent EOs]

If agencies have different kinds of adjudicators, they should consider providing a separate webpage for each.

About Our [Insert Adjudicator Title]

[Adjudicator title] at [agency name] [conduct hearings and decide cases/review appeals] under [name of authorizing act(s)]. They are part of the [agency component in which adjudicators are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

[Agency name] is committed to ensuring that all hearings and appeals are conducted in a fair and equitable manner. Parties are entitled to a due process hearing presided over by an impartial, qualified [adjudicator title]. [Adjudicator title] resolve cases involving [kinds of cases] in a fair, transparent, and accessible manner. Our [adjudicator title] are appointed pursuant to [authorizing statute] by [agency official] [for terms of [number of years] years], and are [describe qualifications]. [Adjudicator title] are paid according to the [pay scale for adjudicator with link to the scale] scale set [by another agency, the Office of Personnel Management/by [agency title]], and they [are/are not] eligible to receive bonuses or other performance incentives.

Cases are [describe how cases are assigned]. The [adjudicator title] assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. [Description of policies (if any exist) that ensure the agency component or adjudicators remain independent from investigative or enforcement activities]. [Description of rules about ex parte communications, if any exist].

[Agency official or body] is responsible for evaluating the quality of [adjudicator title] decisions, and [agency official or body] conducts performance reviews of [adjudicator title]. [Agency official/entity from another agency] may remove the [adjudicator title] or [agency official or body/other entity] may discipline the [adjudicator title] by [kinds of discipline] when warranted.

The agency has adopted rules of recusal [link] that allow a participant to request that the [adjudicator title] in charge of his or her case be disqualified if the participant believes the [adjudicator title] cannot fairly and impartially decide the case.

If you are dissatisfied with an [adjudicator title] decision, you can request reconsideration from the [adjudicator title] or appeal that decision to [agency office/official]. Visit [link] for information on appealing an [adjudicator title] decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the [adjudicator title]'s decision.

For Further Information:

- Hiring process: [link]
- Pay rates: [link]
- Bonuses and performance incentives: [link]
- How cases are assigned to [adjudicator title]: [link]
- Communicating with [adjudicator title] (ex parte communications): [link]
- Process for addressing allegations that an [adjudicator title] has a conflict of interest (recusal and disqualification procedures): [link]
- How to appeal an [adjudicator title] decision: [link]
- Case processing goals: [link]
- Process for addressing allegations of [adjudicator title] misconduct: [link]

See also:

- Statutory provisions regarding [adjudicator title], including the appointment authority: [statutory citations]
- Agency regulations governing [adjudicator title]: [C.F.R. provisions]

APPENDIX B

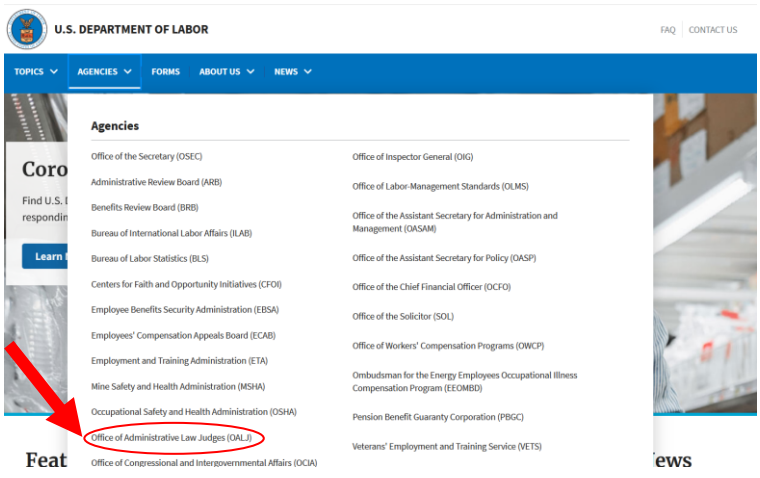
Example 1 – Department of Labor's Office of Administrative Law Judges

The website of the Office of Administrative Law Judges provides an example of how agencies can intuitively place information about adjudicators on their websites in plain-language text with citations. It is easy to find because a link to it is placed on the home page for the Office of Administrative Law Judges.

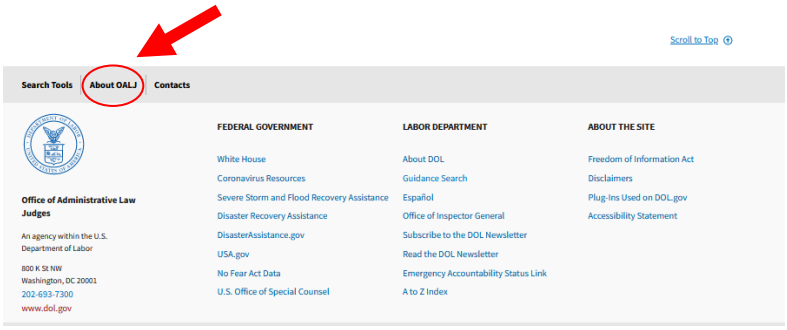
Citation: *About the Office of Administrative Law Judges*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oalj/about/ALJMISSN (last visited Nov. 9, 2020).

How to Find:

1. Go to the Department of Labor Website (www.dol.gov) and click on the "Agencies Tab," which should bring up a drop-down menu. Click on "Office of Administrative Law Judges (OALJ)."



2. Scroll down to the bottom of the OALJ page and click on "About OALJ."



3. The "About the Office of Administrative Law Judges" page includes information about the locations of administrative law judges (ALJs), the authority under which they are appointed, and the kinds of cases heard by ALJs.

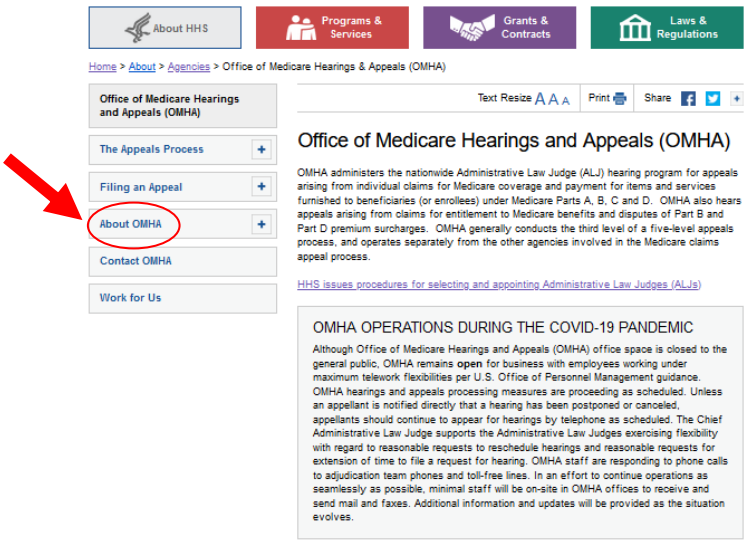
Example 2 – Department of Health and Human Service's Office of Medicare Hearings and Appeals

The website of the Office of Medicare Hearings and Appeals shows a clear and intuitive way agencies can organize information about adjudicators. The link to the "About OMHA" page is easy to find from the main page for the Office of Medicare Hearings and Appeals, which contains a link to it.

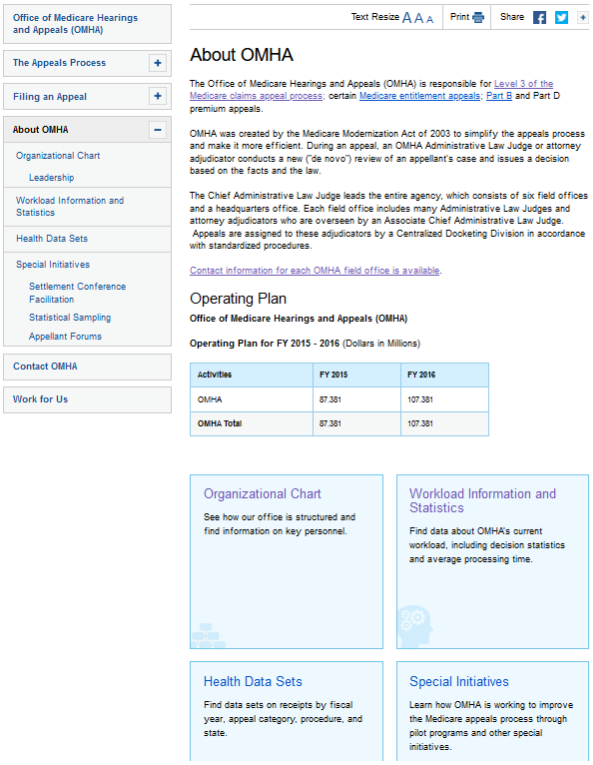
Citation: *About OMHA*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/about/agencies/omha/about/index.html (last visited Nov. 9, 2020).

How to Find:

1. Go to the main page for OMHA (https://www.hhs.gov/about/agencies/omha/index.html) and click on "About OMHA" on the left side.



2. The "About OMHA" page includes information about what cases ALJs at OMHA hear and the organization of the agency.



Office of Medicare Hearings and Appeals (OMHA)
The Appeals Process +
Filing an Appeal +
About OMHA −
Organizational Chart
Leadership
Workload Information and Statistics
Health Data Sets
Special Initiatives
Settlement Conference Facilitation
Statistical Sampling
Appellant Forums
Contact OMHA
Work for Us

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About OMHA

The Office of Medicare Hearings and Appeals (OMHA) is responsible for Level 3 of the Medicare claims appeal process; certain Medicare entitlement appeals; Part B and Part D premium appeals.

OMHA was created by the Medicare Modernization Act of 2003 to simplify the appeals process and make it more efficient. During an appeal, an OMHA Administrative Law Judge or attorney adjudicator conducts a new ("de novo") review of an appellant's case and issues a decision based on the facts and the law.

The Chief Administrative Law Judge leads the entire agency, which consists of six field offices and a headquarters office. Each field office includes many Administrative Law Judges and attorney adjudicators who are overseen by an Associate Chief Administrative Law Judge. Appeals are assigned to these adjudicators by a Centralized Docketing Division in accordance with standardized procedures.

Contact information for each OMHA field office is available.

Operating Plan

Office of Medicare Hearings and Appeals (OMHA)

Operating Plan for FY 2015 - 2016 (Dollars in Millions)

Activities	FY 2015	FY 2016
OMHA	87.381	107.381
OMHA Total	87.381	107.381

Organizational Chart
See how our office is structured and find information on key personnel.

Workload Information and Statistics
Find data about OMHA's current workload, including decision statistics and average processing time.

Health Data Sets
Find data sets on receipts by fiscal year, appeal category, procedure, and state.

Special Initiatives
Learn how OMHA is working to improve the Medicare appeals process through pilot programs and other special initiatives.

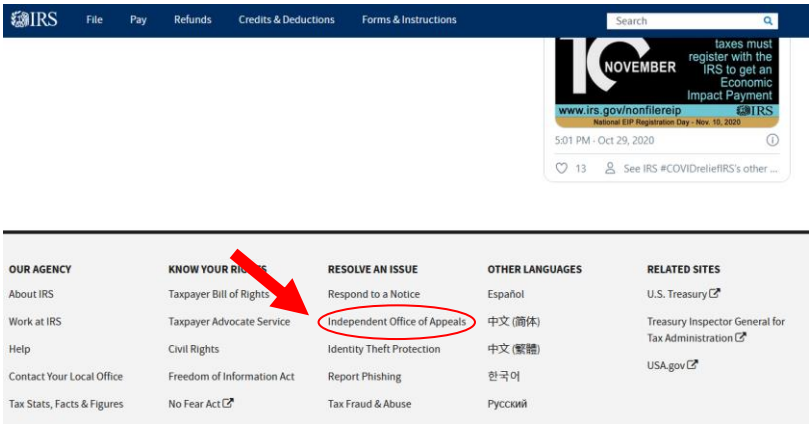
Example 3 – Internal Revenue Service's Independent Office of Appeals

The website of the Independent Office of Appeals presents an example of how agencies can use website text to reassure the public about their adjudicators' independence and impartiality in plain language. The IRS website has a link to the Independent Office of Appeals webpage on its main page. The first sentence of the Office's homepage includes a hyperlink to a page containing more information about its adjudications, including details about ex parte communications and the separation of adjudicative functions from other agency functions.

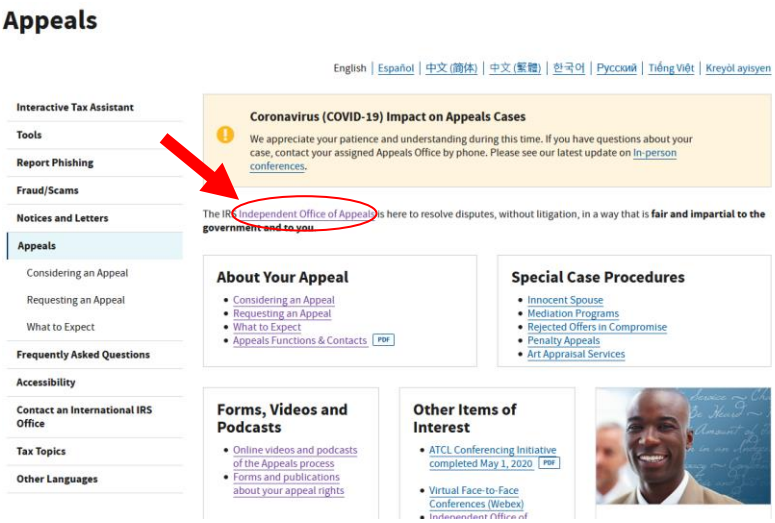
Citation: *Appeals – An Independent Organization*, I.R.S., https://www.irs.gov/appeals/appeals-an-independent-organization (last visited Nov. 9, 2020).

How to Find:

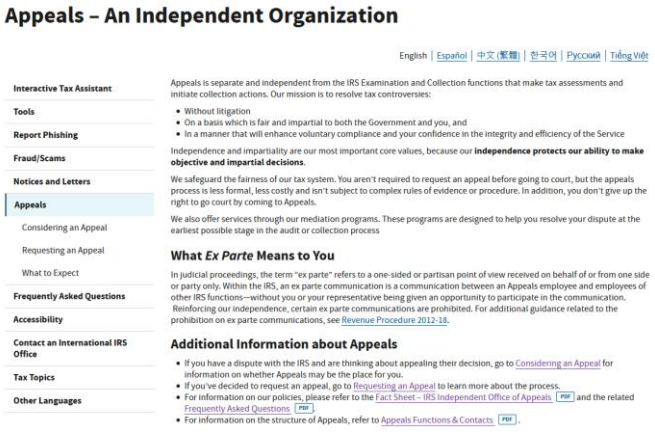
1. Go to the IRS's home page (www.irs.gov) and scroll down to the bottom. Click on "Independent Office of Appeals."



2. Click on "Independent Office of Appeals" in the first sentence on the webpage.



3. The "Appeals – An Independent Organization" page includes information about the agency's relationship with other agency components and provides an explanation about the rules around ex parte communications.



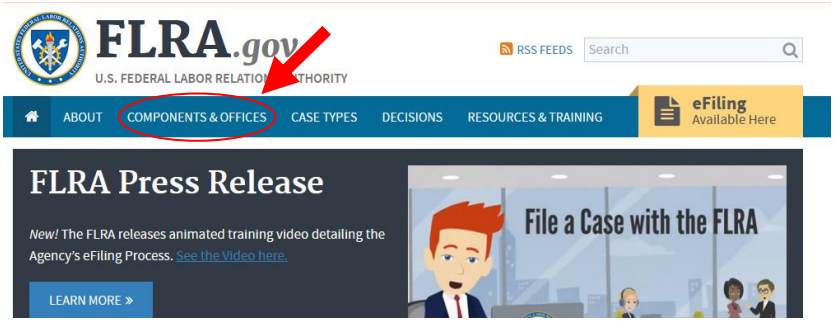
Example 4 – Federal Labor Relations Authority

The website of the Federal Labor Relations Authority provides a good example of how agencies can create an easily -located page that is accessible from the main page and that provides information about the appointment and job duties of the adjudicators.

Citation: *Office of Administrative Law Judges*, FED. LABOR RELATIONS AUTH., https://www.flra.gov/components-offices/offices/office-administrative-law-judges (last visited Nov. 9, 2020).

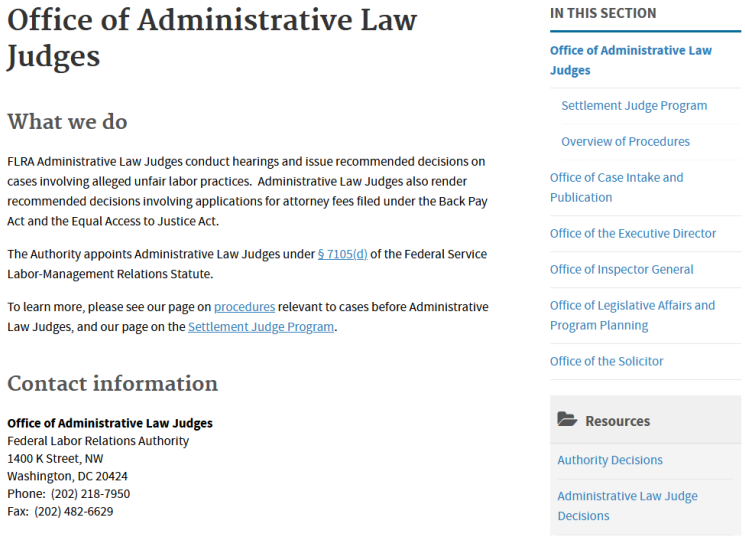
How to Find:

1. Go to the FLRA website (www.flra.gov) and click on "Components & Offices."



2. Click on "Office of Administrative Law Judges."

3. The "Office of Administrative Law Judges" page includes information about office location, the authority for the appointment of ALJs, and descriptions of the kinds of cases ALJs hear.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Litigation Webpages

Committee on Judicial Review

Proposed Recommendation | December 17, 2020

Federal agencies and their component units[1] participate in thousands of court cases every year. Most such cases result in "agency litigation materials," which this recommendation defines as including agencies' publicly filed pleadings, briefs, and settlements, as well as court decisions bearing on agencies' regulatory or enforcement activities.

Public access to agency litigation materials is desirable for at least two reasons. First, because agency litigation materials often clarify how the federal government interprets and aims to enforce federal law, they can help people understand their legal obligations. Second, public access to agency litigation materials promotes accountable and transparent government. Those two reasons distinguish agency litigation materials from litigation filings by private parties.

However valuable public access to agency litigation materials might be, federal law does little to mandate it. When it comes to agencies' own litigation filings, only the Freedom of Information Act (FOIA) requires disclosure, and then only when members of the public specify the materials in which they are interested.[2] In the same vein, the E-Government Act of 2002 requires federal courts to make their written opinions, including opinions in cases involving federal agencies, available on websites.[3] But that requirement has not always made judicial

[1] The term "component units" encompasses an agency's sub-units, which are often identified under terms like "agency," "bureau," "administration," "division," or "service." For example, the United States Fish and Wildlife Service is a component unit of the Department of the Interior, and the Office of Water is a component unit of the United States Environmental Protection Agency.

[2] *See* 5 U.S.C. § 552(a)(3).

[3] *See* 44 U.S.C. § 3502(a).

opinions readily accessible to the public, partly because most courts' websites lack functions and features that would allow users to easily identify cases about specific topics or agencies.

The most comprehensive source of agency litigation materials is the federal courts' Public Access to Court Electronic Records (PACER) service, which provides the public with instantaneous access to virtually every document filed in every federal court. But PACER searches often cost money, and the costs can add up quickly, especially when users are uncertain about what cases or documents they are trying to find. PACER's limited search functionality also makes it difficult to find cases involving particular agencies, statutes, regulations, or types of agency action. For example, a person interested in identifying ongoing cases to which the United States Fish and Wildlife Service (FWS) is a party would have to search for a host of terms—including "United States Fish and Wildlife Service," "U.S. Fish and Wildlife Service," and the names of FWS's recent directors—just to come close to identifying all such cases. Even after conducting all those searches, the person would still have to scroll through and eliminate search results involving state fish-and-wildlife agencies and private citizens with the same names as FWS's recent directors. Similarly, were a person interested in finding cases about FWS's listing of species under the Endangered Species Act (ESA), PACER would not afford that person any way to filter search results to include only cases about ESA listings. The person's only option would be to open and review documents in potentially thousands of cases.

The cost and time involved in performing this type of research limit PACER's usefulness as a tool for locating and searching agency litigation materials. And although paid legal services, such as Westlaw and Lexis, have far greater search capabilities than PACER, their costs can dissuade many individuals and researchers.

Agency litigation webpages, by contrast, can be a convenient way for the public to examine agency litigation materials. For purposes of this Recommendation, an agency litigation webpage is a webpage on an agency's website that systematically catalogs and links to agency litigation materials that may aid the public in understanding the agency's regulatory or

enforcement activities. When agencies maintain up-to-date, search-friendly agency litigation webpages, the public can visit them and quickly find important filings in court cases concerning matters of interest. Agency litigation webpages thus make it easier for the public to learn about the law and to hold government accountable for agencies' actions.

Several federal agencies already maintain agency litigation webpages.[4] A survey of websites for 25 federal agencies of all stripes revealed a range of practices regarding agency litigation webpages.[5] The survey suggests that most federal agencies do not maintain active agency litigation webpages. Among those that do, the quality of the agency litigation webpages varies appreciably. Some contain vast troves of agency litigation materials; others contain much more limited collections. Some are updated regularly; others are updated only sporadically. Some are easy to locate and search; others are not. In short, there appears to be no standard practice for publishing and maintaining agency litigation webpages, save that all the surveyed agency litigation webpages contained only the publicly filed versions of agency litigation materials, with all confidential material—such as trade secrets and personal identifying information—redacted.

An inspection of agencies' litigation webpages suggests four general features that make an agency litigation webpage useful. First, an agency's litigation webpage must be easy to find. Second, it must contain a representative and up-to-date collection of agency litigation materials. Third, those materials must be easy to search and sort. And fourth, the agency's litigation webpage must give visitors the information they need to understand the materials on the

[4] *See* Mark Thomson, Report on Agency Litigation Webpages at 14–16 (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/report-agency-litigation-webpages-112420.

[5] *See id.* at 12–19 (identifying variations in agency practices). The survey conducted for this Recommendation covered all kinds of agencies—big and small, independent and not, regulatory and benefit-oriented, and so forth—with the aim of covering a broad and at least somewhat representative cross-section of federal agencies. In particular, the survey focused on agencies that are frequently in federal court or that are parties to a significant number of high-profile cases.

webpage, including information about materials the agency omitted from the webpage and the criteria the agency employed to determine which materials to include on the webpage.

Agency litigation webpages can promote transparency and accountability. The Administrative Conference recognizes, however, that creating and maintaining a useful agency litigation webpage takes time, money, and effort. An agency's decision to launch an agency litigation webpage will necessarily be informed by considerations like the agency's mission, litigation portfolio, existing technological capacity, budget, and the anticipated benefits—public-facing and internal—of creating an agency litigation webpage. Further, an agency's decisions about what content to include on an agency litigation webpage should be tailored to the agency's unique circumstances. An agency that litigates thousands of cases each year, for example, could choose to feature only a representative sample of agency litigation materials on its agency litigation webpage.

Similarly, an agency that litigates many repetitive, fact-based cases could reasonably choose to post documents from just a few example cases instead of posting documents from all of its cases.[6] And an agency that litigates many different types of cases, some of obviously greater interest to the public than others, might appropriately restrict the contents of its agency litigation webpage to agency litigation materials from the types of cases that are of greater public interest, particularly when the agency determines that the resources required to post more agency litigation materials can be better applied elsewhere.

Since the decision to create and maintain an agency litigation webpage involves balancing factors that will differ from agency to agency, this Recommendation should not be read to suggest that agency litigation webpages be created and maintained by all agencies,

[6] *Cf.* Administrative Conference of the United States, Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017) ("Agencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials.").

especially those that litigate thousands of cases each year. Nor should this Recommendation be read as dictating the precise contents or structure of agency litigation webpages. While encouraging the creation and maintenance of agency litigation webpages, the Administrative Conference recognizes that an agency's unique circumstances might ultimately militate against creating an agency litigation webpage or might support only the creation of a comparatively limited agency litigation webpage. At bottom, this Recommendation simply offers best practices and factors for agencies to consider in making their agency litigation materials available on their websites, should the agencies choose to do so. The Recommendation leaves the weighing and balancing of those factors to the sound discretion of individual agencies.

RECOMMENDATION

Providing Access to Agency Litigation Materials

1. Agencies should consider providing access on their websites to publicly filed pleadings, briefs, and settlements, as well as court decisions bearing on agencies' regulatory or enforcement activities (collectively "agency litigation materials").
2. Should an agency choose to post such material, an agency with a large volume of court litigation could decide not to post documents from every case. The agency might, for instance, post examples of filings from routine litigation and all or a portion of the filings from cases raising important or unusual questions.
3. In determining whether to provide access to agency litigation materials on their websites, and in determining which types of agency litigation materials to include on their websites, among the factors agencies should consider are the following:
    a. The internal benefits of maintaining a webpage providing access to certain types of agency litigation materials;
    b. The public's interest in having ready access to certain categories of the agency's litigation materials;

c. The availability and cost of other technological services that may more reliably and effectively give access to agency litigation material because of its scale or volume and the wide variety of issues and matters involved;
d. The extent to which providing access to agency litigation materials on the agency's website will advance the agency's mission;
e. The costs of creating and maintaining a webpage providing access to the types of agency litigation materials the agency sees fit to include;
f. The nature of the agency's litigation portfolio, including the quantity of litigation materials the agency generates each year;
g. The degree to which the agency's existing technological capacity can accommodate the creation and maintenance of a webpage providing access to certain types of agency litigation materials; and
h. The risk of disclosure or wide dissemination of confidential or sensitive information of private litigants.

4. In determining which agency litigation materials to include on their websites, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy and business interests implicated by the disclosure of agency litigation materials. Each agency should implement a protocol to ensure that, before a document is posted to the agency's litigation webpage, the document has been reviewed and determined not to contain confidential information, such as trade secrets and personal identifying information.
5. Agencies should disclose materials in a way that gives a full and accurate picture of their litigating positions. To provide proper context, agencies should:
    a. Use objective, clear, and publicly posted criteria to determine which agency litigation materials the agencies will publish on their websites;

b. Regularly review their websites to ensure the agency litigation materials posted there (especially court opinions) are complete and up-to-date, and consider including notations regarding when material on the webpage was last updated;
c. Provide appropriate context for agency litigation materials, at least when failure to do so might confuse or mislead the public;
d. Explain the types of litigation in which the agency is involved and other ways to search for any additional agency litigation materials not included on the agency's litigation webpage, as well as opposing counsel's litigation filings;
e. When resources permit, consider posting opposing parties' litigation filings when they are significant or important to understanding an issue;
f. Neither present litigation materials as a means of setting policy, nor use those materials to circumvent rulemaking processes; and
g. Ensure that descriptions of agency litigation materials, if any, fairly reflect the litigation.

6. Agencies that choose to post significant quantities of agency litigation materials on their websites should consider grouping together links to those materials on a single, dedicated webpage (an "agency litigation webpage"). If an agency is organized so that its component units have their own litigation portfolios, some or all of the component units may wish to have their own agency litigation webpages, or the agency may wish to maintain an agency litigation webpage compiling litigation materials from or relating to the agency's component units.

Making It Easy to Locate Agency Litigation Webpages

7. Agencies that post agency litigation materials on their websites should make sure that website users can easily locate those materials. Agencies can accomplish this goal by:
    a. Displaying links to agency litigation webpages in readily visible locations on the homepage for the agency's website; and

b. Maintaining a search engine and a site map or index, or both, on the agency's homepage.

8. When an agency collects its component units' litigation materials on a single agency litigation webpage, those component units should post links, on their websites, to the agency's litigation webpage.

Making It Easy to Find Relevant Materials on Agency Litigation Webpages

9. Agencies and their component units should have substantial flexibility in organizing materials. Agencies should consider grouping together materials from the same and related cases on their agency litigation webpages. Agencies might, for example, consider providing a separate docket page for each case, with a link to the docket page on their agency litigation webpages. Agencies should also consider linking to the grouped-together materials when issuing press releases concerning a particular litigation.
10. Agencies should consider offering general and advanced search and filtering options within their agency litigation webpages. The search and filtering options could, for instance, allow users to sort, narrow, or filter searches according to criteria like action or case type, date, topic, case number, party name, a relevant statute or regulation, or specific words and phrases, along with any other criteria the agency decides are especially useful given its litigation activities.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Litigation Webpages

Committee on Judicial Review

Proposed Recommendation | December 17, 2020

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).

Federal agencies and their component units[1] participate in thousands of court cases every year. Most such cases result in "agency litigation materials," which this R~~r~~ecommendation defines as including agencies' publicly filed pleadings, briefs, and settlements, as well as court decisions, bearing on agencies' regulatory or enforcement activities.

Commented [CA1]: Proposed Amendment from Council # 1. Explanation: The Council presumes that the inclusion of this comma reflects the Committee's intent and, in any event, believes this change should be made.

Public access to agency litigation materials is desirable for at least two reasons. First, because agency litigation materials often clarify how the federal government interprets and aims to enforce federal law, they can help people understand their legal obligations. Second, public access to agency litigation materials promotes accountable and transparent government. Those two reasons distinguish agency litigation materials from litigation filings by private parties.

However valuable public access to agency litigation materials might be, federal law does little to mandate it. When it comes to agencies' own litigation filings, only the Freedom of Information Act (FOIA) requires disclosure, and then only when members of the public specify the materials in which they are interested (and no FOIA exception applies).[2] In the same vein, the

Commented [CA2]: Proposed Amendment from Council # 2

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[2] *See* 5 U.S.C. § 552(a)(3).

E-Government Act of 2002 requires federal courts to make their written opinions, including opinions in cases involving federal agencies, available on websites.[3] But that requirement has not always made judicial opinions readily accessible to the public, partly because most courts' websites lack functions and features that would allow users to easily identify cases about specific topics or agencies.

The most comprehensive source of agency litigation materials is the federal courts' Public Access to Court Electronic Records (PACER) service, which provides the public with instantaneous access to virtually every document filed in every federal court. But PACER searches often cost money, and the costs can add up quickly, especially when users are uncertain about what cases or documents they are trying to find. PACER's limited search functionality also makes it difficult to find cases involving particular agencies, statutes, regulations, or types of agency action. For example, a person interested in identifying ongoing cases to which the United States Fish and Wildlife Service (FWS) is a party would have to search for a host of terms—including "United States Fish and Wildlife Service," "U.S. Fish and Wildlife Service," and the names of FWS's recent directors—just to come close to identifying all such cases. Even after conducting all those searches, the person would still have to scroll through and eliminate search results involving state fish-and-wildlife agencies and private citizens with the same names as FWS's recent directors. Similarly, were a person interested in finding cases about FWS's listing of species under the Endangered Species Act (ESA), PACER would not afford that person any way to filter search results to include only cases about ESA listings. The person's only option would be to open and review documents in potentially thousands of cases.

The cost and time involved in performing this type of research limit PACER's usefulness as a tool for locating and searching agency litigation materials. And although paid legal services,

[3] *See* 44 U.S.C. § 3502(a).

such as Westlaw and Lexis, have far greater search capabilities than PACER, their costs can dissuade many individuals and researchers.

Agency litigation webpages, by contrast, can be a convenient way for the public to examine agency litigation materials. For purposes of this Recommendation, an agency litigation webpage is a webpage on an agency's website that systematically catalogs and links to agency litigation materials that may aid the public in understanding the agency's regulatory or enforcement activities. When agencies maintain up-to-date, search-friendly agency litigation webpages, the public can visit them and quickly find important filings in court cases concerning matters of interest. Agency litigation webpages thus make it easier for the public to learn about the law and to hold government accountable for agencies' actions.

Several federal agencies already maintain agency litigation webpages.[4] A survey of websites for ~~25~~ twenty-five federal agencies ~~of all stripes~~ revealed a range of practices regarding agency litigation webpages.[5] The survey suggests that most federal agencies do not maintain active agency litigation webpages. Among those that do, the quality of the agency litigation webpages varies appreciably. Some contain vast troves of agency litigation materials; others contain much more limited collections. Some are updated regularly; others are updated only sporadically. Some are easy to locate and search; others are not. In short, there appears to be no standard practice for publishing and maintaining agency litigation webpages, save that all the surveyed agency litigation webpages contained only the publicly filed versions of agency

[4] *See* Mark Thomson, Report on Agency Litigation Webpages ~~at~~ 14–16 (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/report-agency-litigation-webpages-112420.

[5] *See id.* at 12–19 (identifying variations in agency practices). The survey conducted for this Recommendation covered all kinds of agencies—big and small, independent and not, regulatory and benefit-oriented, and so forth—with the aim of covering a broad and at least somewhat representative cross-section of federal agencies. In particular, the survey focused on agencies that are frequently in federal court or that are parties to a significant number of high-profile cases.

litigation materials, with all confidential material—such as trade secrets and personally identifiable~~ying~~ information—redacted.

An inspection of agencies' litigation webpages suggests four general features that make an agency litigation webpage useful. First, an agency's litigation webpage must be easy to find. Second, it must contain a representative and up-to-date collection of agency litigation materials. Third, those materials must be easy to search and sort. And fourth, the agency's litigation webpage must give visitors the information they need to understand the materials on the webpage, including information about materials the agency omitted from the webpage and the criteria the agency employed to determine which materials to include on the webpage.

Agency litigation webpages can promote transparency and accountability. The Administrative Conference recognizes, however, that creating and maintaining a useful agency litigation webpage takes time, money, and effort. An agency's decision to launch an agency litigation webpage will necessarily be informed by considerations ~~like~~ such as the agency's mission, litigation portfolio, existing technological capacity, budget, and the anticipated benefits—~~public-facing and internal~~to the agency and the public—of creating an agency litigation webpage. Further, an agency's decisions about what content to include on an agency litigation webpage should be tailored to the agency's ~~unique~~ particular circumstances. An agency that litigates thousands of cases each year, for example, could choose to feature only a representative sample of agency litigation materials on its agency litigation webpage.

Similarly, an agency that litigates many repetitive, fact-based cases could reasonably choose to post documents from just a few ~~example~~ representative cases instead of posting documents from all of its cases.[6] And an agency that litigates many different types of cases, some

[6] *Cf.* Admin~~istrative~~ Conf~~erence~~ of the U~~nited~~ S~~tates~~, Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039, 31,040 (July 5, 2017) ("Agencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials.").

of obviously greater interest to the public than others, might appropriately restrict the contents of its agency litigation webpage to agency litigation materials from the types of cases that are of greater public interest, particularly when the agency determines that the resources required to post more agency litigation materials can be better applied elsewhere.

Since the decision to create and maintain an agency litigation webpage involves balancing factors that will differ from agency to agency, this Recommendation should not be read to suggest that agency litigation webpages be created and maintained by all agencies, especially those that litigate thousands of cases each year. Nor should this Recommendation be read as dictating the precise contents or structure of agency litigation webpages. While encouraging the creation and maintenance of agency litigation webpages, the Administrative Conference recognizes that an agency's particular~~unique~~ circumstances might ultimately militate against creating an agency litigation webpage or might support only the creation of a comparatively limited ~~agency litigation webpage~~version.

At bottom, this Recommendation simply offers best practices and factors for agencies to consider in making their agency litigation materials available on their websites, should the agencies choose to do so. The Recommendation leaves the weighing and balancing of those factors to the sound discretion of individual agencies.

Most federal agencies do not have independent litigation authority, but are represented in court by the Department of Justice (DOJ). Under current practice, in most cases, agencies designate a liaison with DOJ, and that person is added as a recipient of court filings. As a result, the client agency has automatic access to all filings made through the Case Management/Electronic Case Files (CM/ECF) system (also known as PACER). In that way, client agencies should have full access to court filings made by DOJ on their behalf and be able to implement this Recommendation.

Commented [CMA3]: Proposed Amendment from Senior Fellow Alan B. Morrison

RECOMMENDATION

Providing Access to Agency Litigation Materials

1. Agencies should ~~consider~~ provid~~eing~~ access on their websites to publicly filed pleadings, briefs, and settlements, as well as court decisions bearing on agencies' regulatory or enforcement activities (collectively "agency litigation materials"). In doing so, agencies should recognize that some types of agency litigation materials, such as court opinions, may be of greater significance than others, such as pleadings.
2. Should an agency choose to post such material, an agency with a large volume of court litigation could decide not to post documents from every case. The agency might, for instance, post examples of filings from routine litigation and all or a portion of the filings from cases raising important or unusual questions.
3. In determining whether to provide access to agency litigation materials on their websites, and in determining which types of agency litigation materials to include on their websites, among the factors agencies should consider are the following:
    a. The internal benefits of maintaining a webpage providing access to certain types of agency litigation materials;
    b. The public's interest in having ready access to certain categories of the agency's litigation materials;
    c. The availability and cost of other technological services that may more reliably and effectively give access to agency litigation material because of its scale or volume and the wide variety of issues and matters involved;
    d. The extent to which providing access to agency litigation materials on the agency's website will advance the agency's mission;
    e. The costs of creating and maintaining a webpage providing access to the types of agency litigation materials the agency sees fit to include;

Commented [CMA4]: Proposed Amendment from Public Member Emily S. Bremer

Commented [CA5]: Proposed Amendment from Council # 3

Commented [CMA6]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers: I suggest a reordering of the subparts as follows: (d), (a), (e), (b), (f), (g), (c), (h).

f. The nature of the agency's litigation portfolio, including the quantity of litigation materials the agency generates each year;
g. The degree to which the agency's existing technological capacity can accommodate the creation and maintenance of a webpage providing access to certain types of agency litigation materials; and
h. The risk of disclosure or ~~wide~~ increased dissemination of confidential or sensitive information of private litigants.

4. In determining which agency litigation materials to include on their websites, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy ~~and~~ or business interests implicated by the disclosure of agency litigation materials. Each agency should implement a protocol to ensure that, before a document is posted to the agency's litigation webpage, the document has been reviewed and determined not to contain confidential information, such as trade secrets and personal identifying information.
5. Agencies should disclose materials in a way that gives a full and accurate picture of their litigating positions. To provide proper context, agencies should:
   a. Use objective, clear, and publicly posted criteria to determine which agency litigation materials the agencies will publish on their websites;
   b. Regularly review their websites to ensure the agency litigation materials posted there (especially court opinions) are complete and up-to-date, and consider including notations regarding when material on the webpage was last updated;
   c. Provide appropriate context for agency litigation materials, at least when failure to do so might confuse or mislead the public;
   d. Explain the types of litigation in which the agency is involved and other ways to search for any additional agency litigation materials not included on the agency's litigation webpage, as well as opposing counsel's litigation filings;

e. When resources permit, consider posting opposing parties' litigation filings when they are significant or important to understanding an issue;
f. Neither present litigation materials as a means of setting policy, nor use those materials to circumvent rulemaking processes; and
g. Ensure that descriptions of agency litigation materials, if any, fairly reflect the litigation.

6. Agencies that choose to post significant quantities of agency litigation materials on their websites should consider grouping together links to those materials on a single, dedicated webpage (an "agency litigation webpage"). If an agency is organized so that its component units have their own litigation portfolios, some or all of the component units may wish to have their own agency litigation webpages, or the agency may wish to maintain an agency litigation webpage compiling litigation materials from or relating to the agency's component units.

Making It Easy to Locate Agency Litigation Webpages

7. Agencies that post agency litigation materials on their websites should make sure that website users can easily locate those materials. Agencies can accomplish this goal by:
   a. Displaying links to agency litigation webpages in readily visible locations on the homepage for the agency's website; and
   b. Maintaining a search engine and a site map or index, or both, on the agency's homepage.
8. When an agency collects its component units' litigation materials on a single agency litigation webpage, those component ~~units should post links, on their websites, to the agency's litigation webpage~~units' websites should clearly note that fact and include links to the agency's litigation webpage. When an agency's component units maintain their own litigation webpages, the agency's website should clearly note that fact and include links to the component units' litigation webpages.

Commented [CA7]: Proposed Amendment from Council # 4

9. Agencies and their component units should have substantial flexibility in organizing materials. Agencies should consider grouping together materials from the same and related cases on their agency litigation webpages. Agencies might, for example, consider providing a separate docket page for each case, with a link to the docket page on their agency litigation webpages. Agencies should also consider linking to the grouped-together materials when issuing press releases concerning a particular litigation.
10. Agencies should consider offering general and advanced search and filtering options within their agency litigation webpages. The search and filtering options could, for instance, allow users to sort, narrow, or filter searches according to criteria ~~like~~ such as action or case type, date, topic, case number, party name, a relevant statute or regulation, or specific words and phrases, along with any other criteria the agency decides are especially useful given its litigation activities.

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