

# Administrative Conference of the United States



77th Plenary Session  
June 16, 2022



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**Agenda for 77th Plenary Session**

Thursday, June 16, 2022

10:00 a.m. – 5:00 p.m.

- 10:00 a.m. Call to Order  
Opening Remarks by Chairman Andrew Fois
- 10:10 a.m. Initial Business by Chairman Andrew Fois  
(Vote on Adoption of Minutes of December 2021  
Plenary Session and Resolution Governing Order of  
Business)
- 10:20 a.m. Consider Proposed Recommendation: *Contractors in  
Rulemaking*
- 11:35 a.m. Consider Proposed Recommendation: *Improving Notice of  
Regulatory Changes*
- 12:50 p.m. Update on Pending Projects by Research Director Reeve T.  
Bull; Update on Implementation and Related Matters  
by Vice Chairman Matthew L. Wiener
- 1:05 p.m. Lunch Break
- 2:00 p.m. Review and Discuss Office of the Chairman Project:  
*Nationwide Injunctions and Federal Regulatory  
Programs*
- 2:45 p.m. Consider Proposed Recommendation: *Automated Legal  
Guidance at Federal Agencies*
- 4:00 p.m. Review and Discuss Office of the Chairman Project:  
*Principles for the Disclosure of Federal  
Administrative Materials*
- 5:00 p.m. Closing Remarks and Adjourn



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### 76th Plenary Session

Minutes

December 16, 2021

#### **I. Call to Order and Opening Remarks**

The 76th Plenary Session of the Administrative Conference of the United States (ACUS) commenced on December 16, 2021, at approximately 9:30 a.m. ACUS Vice Chairman Matt Wiener called the meeting to order. He introduced the Council Members and the new members who joined ACUS since the last plenary session.

Vice Chairman Wiener then briefly described the recent work of the agency, including several studies currently being conducted, ongoing roundtables and forums through which the agency provides opportunities for other agencies to share information, and notable agency publications recently or soon to be released. Next, Vice Chairman Wiener described developments in the implementation of past ACUS projects.

#### **II. Initial Business and Introduction to Recommendations**

Before consideration of the proposed recommendations, Vice Chairman Wiener thanked members, committee chairs, staff, and consultants for working hard to complete the proposed recommendations, particularly in light of the ongoing COVID-19 pandemic. Vice Chairman Wiener then reviewed the rules for debating and voting on matters at the Plenary Session. ACUS members then approved the minutes from the 74th and 75th Plenary Sessions and adopted the order of business for the 76th Plenary Session.

#### **III. Proposed Recommendation: Public Access to Agency Adjudicative Proceedings**

Vice Chairman Wiener introduced the proposed Recommendation, thanking Nadine Mancini, Government Member and Chair of the Committee on Adjudication, as well as staff counsels and in-house researchers Jeremy Graboyes, ACUS Director of Public and Interagency Programs, and Mark Thomson, former ACUS Deputy Research Director. Mr. Graboyes provided an overview of the report, and Ms. Mancini discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

#### **IV. Proposed Recommendation: Public Availability of Inoperative Agency Guidance Documents**

Vice Chairman Wiener introduced the proposed Recommendation, thanking Connor Raso, Government Member and Chair of the Committee on Regulation, as well as project

consultant Cary Coglianesi, Public Member, and staff counsel and in-house researcher Todd Rubin, ACUS Counsel for Congressional Affairs and Attorney Advisor. Mr. Rubin provided an overview of the report, and Mr. Raso discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

**V. Proposed Recommendation: Technical Reform of the Congressional Review Act**

Vice Chairman Wiener introduced the proposed Recommendation, thanking Kevin Stack, Public Member and Acting Chair of the Committee on Rulemaking, as well as project consultant Jesse Cross and staff counsel Kazia Nowacki, ACUS Attorney Advisor. Mr. Cross provided an overview of the report, and Mr. Stack discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

**VI. Proposed Recommendation: Regulation of Representatives in Agency Adjudicative Proceedings**

Vice Chairman Wiener introduced the proposed Recommendation, thanking Allyson Ho, Public Member, and Carrie Ricci, Government Member, who both served as Co-Chairs of the Ad Hoc Committee, as well as project consultant George Cohen and staff counsel Gavin Young, ACUS Attorney Advisor. Mr. Cohen provided an overview of the report, and Ms. Ricci discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

**VII. Proposed Recommendation: Quality Assurance Systems in Agency Adjudication**

Vice Chairman Wiener introduced the proposed Recommendation, thanking Aaron Nielson, Public Member and Chair of the Committee on Administration and Management, as well as project consultants Daniel Ho, Public Member, David Marcus, and Gerald Ray, and staff counsels Danielle Schulkin, ACUS Attorney Advisor, and Matthew Gluth, ACUS Attorney Advisor. Mr. Marcus provided an overview of the report, and Mr. Nielson discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

**VIII. Future Projects, Closing Remarks, and Adjournment**

Vice Chairman Wiener then turned to discussion about possible future ACUS projects and invited input from members. After this discussion, Vice Chairman Wiener thanked all participants for their time and then adjourned the 76th Plenary Session.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **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.**

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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](http://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](http://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](http://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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Participation in Meetings**

The 101 statutory members of the Conference as well as liaison representatives, special counsel, 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 counsel, 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

<b>Name</b>	<b>Organization</b>	<b>Title</b>
Ronald A. Cass	Cass & Associates, PC	President
Andrew Fois	Administrative Conference of the U.S.	Chairman
Jeffrey M. Harris	Consovoy McCarthy PLLC	Partner
Leslie B. Kiernan	U.S. Department of Commerce	General Counsel
Donald F. McGahn II	Jones Day	Practice Leader Government Regulation
Michael H. McGinley	Dechert LLP	Partner
Matthew E. Morgan	Barnes & Thornburg LLP	Partner
Adrian Vermeule	Harvard Law School	Ralph S. Tyler, Jr. Professor of Constitutional Law
Matthew L. Wiener	Administrative Conference of the U.S.	Vice Chairman and Executive Director

## Government Members

<b>Name</b>	<b>Organization</b>	<b>Title</b>
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
Krystal J. Brumfield	U.S. General Services Administration	Associate Administrator for the Office of Government-wide Policy



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Daniel Cohen	U.S. Department of Transportation	Assistant General Counsel for Regulation
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	Deputy General Counsel
Scott de la Vega	U.S. Department of the Interior	Associate Solicitor for General Law
Hampton Y. Dellinger	U.S. Department of Justice	Associate Attorney General for the Office of Legal Policy
Elizabeth H. Dickinson	U.S. Food & Drug Administration	Senior Deputy Chief Counsel
Seth R. Frotman	Consumer Financial Protection Bureau	General Counsel
Ami M. Grace-Tardy	U.S. Department of Energy	Assistant General Counsel for Legislation, Regulation, & Energy Efficiency
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	Centers for Medicare & Medicaid Services	Associate General Counsel
Erica Siegmund Hough	Federal Energy Regulatory Commission	Deputy Associate General Counsel
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
Katia Kroutil	Federal Maritime Commission	Assistant General Counsel for General Law & Regulation



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Jeremy Licht	U.S. Department of Commerce	Deputy General Counsel for Strategic Initiatives
Raymond A. Limon	U.S. Merit Systems Protection Board	Acting Chair and Vice Chair
Hilary Malawer	U.S. Department of Education	Deputy General Counsel, Office of the General Counsel
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
Patrick R. Nagle	Social Security Administration	Chief Administrative Law Judge
Raymond Peeler	U.S. Equal Employment Opportunity Commission	Associate Legal Counsel
Mitchell E. Plave	Office of the Comptroller of the Currency	Special Counsel, Bank Activities
Connor N. Raso	U.S. Securities and Exchange Commission	Senior Counsel, Office of General Counsel
Roxanne L. Rothschild	National Labor Relations Board	Executive Secretary
Jay R. Schwarz	Board of Governors of the Federal Reserve System	Senior Counsel, Legal Division
Helen Serassio	U.S. Environmental Protection Agency	Associate General Counsel, Cross-Cutting Issues Law Office
Miriam Smolen	Federal Housing Finance Agency	Senior Deputy General Counsel
Robert F. Stone	Occupational Safety and Health Administration	Sr. Policy Economist, Directorate of Standards and Guidance
Stephanie J. Tatham	Office of Management and Budget	Senior Policy Analyst and Attorney, Office of Information and Regulatory Affairs
David A. Trissell	U.S. Postal Regulatory Commission	General Counsel
Daniel Vice	U.S. Consumer Product Safety Commission	Assistant General Counsel



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Miriam E. Vincent	National Archives and Records Administration	Acting Director, Legal Affairs and Policy Division, Office of the Federal Register
Kenny A. Wright	Federal Trade Commission	Legal Counsel, Office of the General Counsel
Chin Yoo	Federal Communications Commission	Deputy Associate General Counsel
Marian L. Zobler	U.S. Nuclear Regulatory Commission	General Counsel

## Public Members

<b>Name</b>	<b>Organization</b>	<b>Title</b>
Katherine Twomey Allen		Former Deputy Associate Attorney General, Office of the Associate Attorney General, U.S. Department of Justice
Kent H. Barnett	University of Georgia School of Law	Associate Dean for Academic Affairs & J. Alton Hosch Professor of Law
Jack M. Beermann	Boston University School of Law	Professor of Law and Harry Elwood Warren Scholar
Bernard W. Bell	Rutgers Law School	Professor of Law and Herbert Hanooh Scholar
Susan G. Braden		Former Chief Judge, U.S. Court of Federal Claims
Emily S. Bremer	University of Notre Dame Law School	Associate Professor of Law
Cary Coglianese	University of Pennsylvania Carey Law School	Edward B. Shils Professor of Law; Director, Penn Program on Regulation
Ilona R. Cohen	Aledade, Inc.	Chief Legal Officer
Kirti Datla	Earthjustice	Director of Strategic Legal Advocacy



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

John F. Duffy	University of Virginia School of Law	Samuel H. McCoy II Professor of Law and Paul G. Mahoney Research Professor of Law
David Freeman Engstrom	Stanford Law School	Professor of Law, Associate Dean for Strategic Initiatives, and Bernard D. Bergreen Faculty Scholar
Claire J. Evans	Wiley Rein LLP	Partner
Chai R. Feldblum		Former Partner and Director, Workplace Culture Consulting, Morgan Lewis & Bockius LLP
Deepak Gupta	Gupta Wessler PLLC	Partner
Kristin E. Hickman	University of Minnesota Law School	McKnight Presidential Professor in Law; Distinguished McKnight University Professor; Harlan Albert Rogers Professor in Law; and Associate Director, Corporate Institute
Allyson N. Ho	Gibson Dunn & Crutcher LLP	Partner
Daniel E. Ho	Stanford Law School	William Benjamin Scott and Luna M. Scott Professor of Law
Renée M. Landers	Suffolk University Law School	Professor of Law and Faculty Director of the Health and Biomedical Law Concentration
Erika Lietzan	University of Missouri School of Law	William H. Pittman Professor of Law and Timothy J. Heinsz Professor of Law
Elbert Lin	Hunton Andrews Kurth LLP	Timothy J. Heinsz Professor of Law
Michael A. Livermore	University of Virginia School of Law	Edward F. Howrey Professor of Law
Jennifer M. Mascott	George Mason University Antonin Scalia Law School	Assistant Professor of Law and Co-Executive Director, The C. Boyden Gray Center for the Study of the Administrative State



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Aaron L. Nielson	Brigham Young University J. Reuben Clark Law School	Professor of Law
Jennifer Nou	The University of Chicago Law School	Neubauer Family Assistant Professor of Law and Ronald H. Coase Teaching Scholar
Victoria F. Nourse	Georgetown University Law Center	Ralph V. Whitworth Professor in Law
Jesse Panuccio	Boies Schiller Flexner LLP	Partner
Elizabeth P. Papez	Gibson Dunn & Crutcher LLP	Partner
Nicholas R. Parrillo	Yale Law School	William K. Townsend Professor of Law
Eloise Pasachoff	Georgetown University Law Center	Professor of Law, Anne Fleming Research Professor, and Associate Dean for Careers
Jeffrey A. Rosen	American Enterprise Institute	Nonresident Fellow
Bertrall Ross	University of Virginia School of Law	Justice Thurgood Marshall Distinguished Professor of Law
Sidney A. Shapiro	Wake Forest University School of Law	Frank U. Fletcher Chair of Administrative Law Professor of Law
Kate A. Shaw	Yeshiva University Benjamin N. Cardozo School of Law	Professor of Law
Ganesh Sitaraman	Vanderbilt Law School	Chancellor Faculty Fellow; Professor of Law; Director, Program in Law and Government
Kevin M. Stack	Vanderbilt Law School	Lee S. & Charles A. Speir Chair in Law and Director of Graduate Studies
Christopher J. Walker	The Ohio State University Michael E. Moritz College of Law	John W. Bricker Professor of Law
Melissa Feeney Wasserman	The University of Texas at Austin School of Law	Charles Tilford McCormick Professor of Law
Russell R. Wheeler	The Brookings Institution	Visiting Fellow



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adam J. White	American Enterprise Institute	Senior Fellow
Jonathan B. Wiener	Duke University School of Law	William R. & Thomas L. Perkins Professor of Law, Professor of Environmental Policy, and Professor of Public Policy

## Liaison Representatives

<b>Name</b>	<b>Organization</b>	<b>Title</b>
Thomas H. Armstrong	U.S. Government Accountability Office	General Counsel
Casey Q. Blaine	National Transportation Safety Board	Deputy General Counsel
Emily Burns	U.S. House of Representative Committee on Oversight and Reform	Policy Director (Majority)
Lena C. Chang	U.S. Senate Committee on Homeland Security & Governmental Affairs	Governmental Affairs Director and Senior Counsel (Majority)
Tobias A. Dorsey	Executive Office of the President, Office of Administration	Managing Counsel for Legal Policy
Daniel M. Flores	U.S. House of Representatives Committee on Oversight and Reform	Senior Counsel (Minority)
William Funk	ABA Section of Administrative Law & Regulatory Practice	Member and Section Fellow
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### **ACUS PROJECTS, PUBLICATIONS, AND PROGRAMS (Selected)**

#### **ASSEMBLY PROJECTS**

(Directed toward development of recommendations for consideration and adoption by the Assembly)

Artificial Intelligence in Retrospective Review of Agency Rules  
Automated Legal Guidance at Federal Agencies  
Contractors in Rulemakings  
Disclosure of Agency Legal Materials  
Identifying and Reducing Burdens in Administrative Processes  
Improving Notice of Regulatory Changes  
Online Processes in Agency Adjudication  
Precedential Decision Making in Agency Adjudication  
Public Availability of Settlement Agreements in Agency Enforcement Proceedings  
Regulatory Enforcement Manuals  
Virtual Public Engagement in Agency Rulemaking

#### **OFFICE OF THE CHAIRMAN**

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Classification of Agency Guidance  
Federal Administrative Procedure Sourcebook  
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Statement of Principles for the Disclosure of Federal Administrative Materials  
Timing of Judicial Review of Agency Action  
U.S. Patent Small Claims Court

##### *Recent Publications/Resources*

Agency Head Enforcement and Adjudication Functions  
Agency Awards Under Equal Access to Justice Act  
Alternative Dispute Resolution in Agency Administrative Programs  
Handbook on Compiling Administrative Records for Informal Rulemaking  
Proposed Statute to Clarify Statutory Access to Judicial Review of Agency Action  
Sourcebook of Federal Judicial Review Statutes

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Roundtable on Artificial Intelligence in Federal Agencies  
Alternative Dispute Resolution Advisory Group  
Council of Independent Regulatory Agencies  
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Roundtable on State Innovations in Administrative Procedure  
White House Legal Aid Interagency Roundtable  
Working Group on Model Materials for Alternative Dispute Resolution  
Working Group on Model Rules of Representative Conduct

*Website Resources*

Information Interchange Bulletins  
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Updates in Federal Agency Adjudication



## Contractors in Rulemaking

### Committee on Rulemaking

#### Proposed Recommendation | June 16, 2022

1            Agencies rely on private contractors to perform many kinds of services in support of their  
2 rulemaking activities. These services can occur at any stage of the rulemaking process. Functions  
3 that agencies assign to contractors include conducting research undergirding a rule; preparing  
4 regulatory impact analyses; facilitating meetings with interested persons; and tabulating,  
5 categorizing, or summarizing public comments the agency receives. As with other agency  
6 functions, contracting out specific rulemaking functions may help increase staffing flexibility to  
7 ease workloads, lower administrative costs, provide topic-specific expertise or access to  
8 technology that agencies do not possess internally, and provide alternative perspectives on  
9 particular issues.

10           Agencies' use of contractors, however, may also raise distinctive concerns in the  
11 rulemaking context.<sup>1</sup> Agencies must ensure that they comply with relevant legal obligations,  
12 including the prohibition on outsourcing "inherently governmental functions" (IGFs).<sup>2</sup> They also  
13 face a need to exercise their discretion in a way that avoids ethics violations, promotes  
14 efficiency, and ensures that agency officials exercise proper oversight of contractors. With  
15 respect to the prohibition on contracting out IGFs, the Office of Management and Budget's  
16 Circular A-76, *Performance of Commercial Activities*, and the Office of Federal Procurement  
17 Policy's Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*,

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<sup>1</sup> Cf. Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, ¶ 6, 50 Fed. Reg. 28364, 28365 (July 12, 1985).

<sup>2</sup> 48 C.F.R. § 7.503; see also OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). Other relevant legal considerations may be presented under other sources of law.



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18 provide examples of certain IGFs that should not be contracted out.<sup>3</sup> Circular A-76 also describes  
19 activities that are “closely associated” with IGFs and for which agencies should exercise  
20 heightened caution when assigning such functions to contractors.<sup>4</sup>

21 Although neither Circular A-76 nor Policy Letter 11-01 describes contracting functions  
22 related to rulemaking activities in any detail, they generally provide that contractor functions  
23 should be limited to those that *support* the agency’s policymaking activities and do not supplant  
24 the agency’s decision-making role. The risk of contracting out an IGF, or even an activity closely  
25 associated with an IGF, is heightened when a contractor is drafting the text or preamble of a rule,  
26 performing analyses, or presenting strategy options to be used by agency employees in the  
27 rulemaking context. As a practical matter, these concerns may also be greater when agencies  
28 enter into contracts that span multiple years and cover multiple rulemaking functions.

29 Agencies must consider potential ethical issues when contracting out rulemaking  
30 functions. Although contractors are, with a few exceptions, generally not subject to the ethics  
31 laws governing federal employees, there are nevertheless potential ethics-related risks against  
32 which agencies must protect and which may not be addressed adequately under existing  
33 procurement regulations.<sup>5</sup> The risks of conflicts of interest (both organizational and personal)  
34 and misuse of confidential information may be especially salient when contractors support a  
35 policymaking function such as rulemaking.<sup>6</sup> Agencies can mitigate these concerns by

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<sup>3</sup> OMB CIRCULAR A-76, *supra* note 2; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Oct. 12, 2011).

<sup>4</sup> OFPP Policy Letter 11-01 defines “closely associated with IGF” in the context of policy and regulatory development as “support for policy development, such as drafting policy documents and regulations, performing analyses[ and] feasibility studies, and [developing] strategy options.” 76 Fed. Reg. at 56234.

<sup>5</sup> E.g., 48 C.F.R. subparts 3.11 (*Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions*), 9.5 (*Organizational and Consultant Conflicts of Interest*).

<sup>6</sup> See Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48792 (Aug. 9, 2011).



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36 establishing and internally disseminating policies and procedures governing the use and  
37 management of contractors in rulemaking, including any required disclosure related to their use.

38 Agencies will need to consider the practical benefits and challenges of using contractors  
39 to perform functions in furtherance of agency rulemaking. Those considerations might include  
40 the effects of repeated reliance on agencies' in-house capacities, in particular their ability to  
41 maintain necessary career staff with appropriate skills. Agencies may also wish to consider  
42 alternative methods to contracting when they need to expand internal capacity in connection with  
43 rulemaking, such as by using executive branch rotations, fellowship programs, or federally  
44 funded research and development centers, or by making arrangements for assigning temporary  
45 employees under the Intergovernmental Personnel Act.<sup>7</sup>

46 This Recommendation provides guidance to agencies for when they are considering  
47 contracting out certain rulemaking-related functions. Recognizing that agencies' needs vary  
48 enormously, it addresses a range of legal, ethical, prudential, and practical considerations that  
49 agencies should take into account when using contractors.

### RECOMMENDATION

#### Internal Management

- 50 1. Agencies that use contractors to perform rulemaking-related functions should adopt  
51 and publish written policies related to their use. These policies should cover matters  
52 such as:
- 53 a. The types of rulemaking functions considered to be inherently governmental  
54 functions (IGFs) or closely associated with IGFs;
  - 55 b. Internal procedures to ensure that agency employees do not contract out IGFs and  
56 to ensure increased scrutiny when contracting out functions that are closely  
57 associated with IGFs;

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<sup>7</sup> 5 U.S.C. §§ 3371-3375; *see also* 5 C.F.R. part 334.



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- 58 c. Requirements for internal disclosure concerning functions contractors undertake  
59 with regard to specific rulemakings;
- 60 d. Standards for when contractors should identify themselves as such in  
61 communications with the public in connection with rulemakings; and
- 62 e. Ethical rules applicable to contractors.
- 63 2. To enhance their management of contractors, agencies should consider providing  
64 rulemaking-specific training for managers on agency policies and ethical restrictions  
65 applicable to contractors. Agencies should also consider designating an agency office  
66 or officer to answer questions about the use of contractors to perform rulemaking-  
67 related functions and be responsible for deciding whether an activity is an IGF.
- 68 3. When agencies rely on contractors in a rulemaking, they should ensure that agency  
69 employees can identify contractors and are aware of contractors' assigned functions.  
70 Agencies should specifically focus on whether contractors should work in the same  
71 space as agency employees, how and to what extent they may participate in meetings  
72 with agency leadership or other meetings at which substantive policy is decided, and  
73 whether they should be provided with their own agency email addresses.
- 74 4. Agencies should consider ways to share information about contractors in rulemaking  
75 within and across agencies. This might include using existing contracting databases or  
76 schedules to promote greater coordination and efficiency concerning existing  
77 rulemaking contracts, as well as informal sharing of practices for managing  
78 contractors.

### **Ethics**

- 79 5. When selecting and managing contractors for rulemaking-related functions, agencies  
80 should evaluate whether any firm under consideration to serve as a contractor may  
81 have an actual or perceived organizational conflict of interest in connection with any  
82 assigned function. When a potential organizational conflict exists or arises, agencies  
83 should either select another contractor or put in place appropriate protections to  
84 ensure that the contractor's outside interests do not undermine its ability to perform



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85 its assigned functions in a way that does not create an actual or perceived conflict of  
86 interest.

87 6. When contracting out rulemaking-related functions for which there is a risk of a  
88 personal conflict of interest by a covered employee of the contractor, agencies should  
89 provide in the contract that the contractor will not assign functions to any employee  
90 who has an actual or perceived conflict of interest and, as appropriate, provide  
91 employee training on recognizing and disclosing personal conflicts. The contract  
92 should also provide that, in the event that an employee improperly performs a  
93 function despite the existence of a personal conflict of interest, the contractor will  
94 disclose the conflict to the agency and undertake appropriate remedial action.

95 7. When contracting out rulemaking-related functions for which there is a risk of misuse  
96 of confidential information, agencies should provide in the contract that the contractor  
97 will ensure that any employee handling such information has been appropriately  
98 trained on the necessary safeguards. The contract should also provide that the  
99 contractor will disclose any breach of this obligation to the agency and undertake  
100 appropriate remedial actions.

### **Transparency**

101 8. When an agency uses a contractor to perform an activity closely associated with an  
102 IGF in a specific rulemaking, the agency should consider disclosing the contractor's  
103 role in the rulemaking docket, the notice of proposed rulemaking, or the preamble to  
104 the final rule, including, if legally permissible, identifying the contractor.

105 9. Agencies should ensure that their agreements with contractors will allow the agencies  
106 to meet legal requirements for disclosure of information in connection with the  
107 rulemaking process and judicial review.

### **Intergovernmental Guidance**

108 10. The Office of Management and Budget should consider assessing whether current  
109 agency practices align with broader procurement best practices and providing



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110 guidance on contractor-performed functions associated with rulemaking processes.  
111 Among other things, this guidance might provide specific examples of rulemaking-  
112 related functions that qualify as IGFs and should not be contracted out or that are  
113 closely associated with IGFs such that agencies should exercise heightened caution  
114 when contracting out those functions.



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## Contractors in Rulemaking

### Committee on Rulemaking

Proposed Recommendation | June 16, 2022

#### Proposed Amendments

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

1 Agencies rely on private contractors to perform many kinds of services in support of their  
2 rulemaking activities. These services can occur at any stage of the rulemaking process. Functions  
3 that agencies assign to contractors include conducting research undergirding a rule; preparing  
4 regulatory impact analyses; facilitating meetings with interested persons; and tabulating,  
5 categorizing, or summarizing public comments the agency receives. As with other agency  
6 functions, contracting out specific rulemaking functions may help increase staffing flexibility to  
7 ease workloads, lower administrative costs, provide topic-specific expertise or access to  
8 technology that agencies do not possess internally, and provide alternative perspectives on  
9 particular issues.<sup>1</sup>

10 Agencies' use of contractors, however, may also raise distinctive concerns in the  
11 rulemaking context.<sup>2</sup> Agencies must ensure that they comply with relevant applicable legal  
12 obligations, including the prohibition on outsourcing "inherently governmental functions."  
13 (IGFs).<sup>3</sup> They also and face a need to must exercise their discretion in a way that avoids ethics

<sup>1</sup> See Bridget C.E. Dooling & Rachel Augustine Potter, *Contractors in Rulemaking (May 9, 2022) (report to the Admin. Conf. of the U.S.)*.

<sup>2</sup> Cf. Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, ¶ 6, 50 Fed. Reg. 28,364, 28,365 (July 12, 1985).



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14 violations, promotes efficiency, and ensures that agency officials exercise proper oversight of  
15 contractors. With respect to the prohibition on contracting out IGFs, the Office of Management  
16 and Budget’s Circular A-76, *Performance of Commercial Activities*, and the Office of Federal  
17 Procurement Policy’s Policy Letter 11-01, *Performance of Inherently Governmental and Critical*  
18 *Functions*, provide examples of certain IGFs that should not be contracted out.<sup>4</sup> Circular A-76  
19 also describes activities functions that are “closely associated” with IGFs and for which agencies  
20 should exercise heightened caution when assigning such functions to contractors.<sup>5</sup>

21 Although neither Circular A-76 nor Policy Letter 11-01 describes contracting functions  
22 related to rulemaking activities in any detail, they generally provide that contractor functions  
23 should be limited to those that support the agency’s policymaking activities and do not supplant  
24 the agency’s decision-making role. The risk of contracting out an IGF, or even an activity closely  
25 associated with an IGF, is heightened when a contractor is drafting the text or preamble of a rule,  
26 performing analyses, or presenting strategy options to be used by agency employees in the  
27 rulemaking context. As a practical matter, these concerns may also be greater heightened when  
28 agencies enter into contracts that span multiple years and cover multiple rulemaking functions.

29 Among the applicable legal obligations is the prohibition on contracting out “inherently  
30 governmental functions.”<sup>6</sup> Inherently governmental functions are those that are “so intimately  
31 related to the public interest as to require performance by Federal Government employees.”<sup>7</sup>  
32 They include “functions that require either the exercise of discretion in applying Federal

<sup>4</sup> OMB CIRCULAR A-76, *supra* note 23; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, 76 Fed. Reg. 56,227 (Oct. 12, 2011).

<sup>5</sup> OFPP Policy Letter 11-01 defines “closely associated with IGF” in the context of policy and regulatory development as “support for policy development, such as drafting policy documents and regulations, performing analyses [and] feasibility studies, and [developing] strategy options.” 76 Fed. Reg. at 56,234.

<sup>6</sup> See 48 C.F.R. § 7.503; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, 76 Fed. Reg. 56,227 (Oct. 12, 2011) [hereinafter OFPP Policy Letter]; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76 (REVISED), *PERFORMANCE OF COMMERCIAL ACTIVITIES* (2003). The prohibition is reflected in the Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) [hereinafter FAIR Act], and the National Defense Authorization Act (NDAA) for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411–12 (2008).

<sup>7</sup> OFPP Policy Letter, *supra* note 6, § 3, at 56,236; accord FAIR Act, *supra* note 6, § 5, at 2384.

**Commented [CMA1]:** Comment from Senior Fellow Alan Morrison:  
“The discussion of IGF’s and closely associated IGFs at the top of page 2 would be improved if it included an explanation of WHY those functions should not be performed by contractors. I think that the reason is that the actual decisions, and important steps in the decisional process, cannot legally be performed by persons who are not officers of the United States. Indeed, that was one of the flaws identified by the Court in setting aside the statute in *Schechter Poultry*.”



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33 Government authority or the making of value judgments in making decisions for the Federal  
34 Government . . . .”<sup>8</sup>

35 Whereas “determining” the content of a regulation is an inherently governmental  
36 function,<sup>9</sup> providing “[s]ervices that involve or relate to the development of regulations” is not.<sup>10</sup>  
37 Rather, the provision of such services is considered to be “closely associated with the  
38 performance of inherently governmental functions.”<sup>11</sup> When agencies allow contractors to  
39 perform functions closely associated with inherently governmental functions, they must  
40 exercise heightened caution.<sup>12</sup> They must, in particular, “give special consideration to Federal  
41 employee performance of [such] functions and, when such work is performed by contractors,  
42 provide greater attention and an enhanced degree of management oversight of the contractors’  
43 activities to ensure that contractors’ duties do not expand to include performance of inherently  
44 government functions.”<sup>13</sup>

45 Agencies must also consider potential ethical issues when contracting out rulemaking  
46 functions. Although Because contractors are, with a few exceptions, generally not subject to the  
47 ethics laws governing federal employees, there are nevertheless potential ethics-related risks  
48 against which agencies must protect and which may not be addressed adequately under existing  
49 procurement regulations.<sup>14</sup> The risks of conflicts of interest (both organizational and personal)  
50 and misuse of confidential information may be especially salient when contractors support a  
51 policymaking function such as rulemaking.<sup>15</sup> Agencies can mitigate these concerns risks by

<sup>8</sup> OFPP Policy Letter, *supra* note 6, § 3(a), at 56,236; accord FAIR Act, *supra* note 6, § 5(2)(B), at 2385.

<sup>9</sup> 48 C.F.R. § 7.503(c)(5); accord OFPP Policy Letter, *supra* note 6, app. A, ex. 7, at 56,240.

<sup>10</sup> 48 C.F.R. § 7.503(d)(4); accord OFPP Policy Letter, *supra* note 6, app. B, ex. 1(d), at 56,241.

<sup>11</sup> OFPP Policy Letter, *supra* note 6, app. B, at 56,241; accord 48 C.F.R. § 7.503(d).

<sup>12</sup> See OFPP Policy Letter, *supra* note 6, § 4(a)(2), at 56,236.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., 48 C.F.R. subparts 3.11 (Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions), 9.5 (Organizational and Consultant Conflicts of Interest).

<sup>15</sup> See Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

**Commented [CA2]:** Proposed Amendment from Council:

The Council proposes striking much of the language in lines 11-28 and replacing it with what appears in lines 29-44. The main reason for this amendment is to supply a definition of “inherently governmental function,” which is missing from the Committee’s Recommendation. The amendment also brings up the definition of “activities closely associated with inherently governmental functions” from the footnote (previously footnote 5) to the above-the-line text.

**Commented [CMA3]:** Proposed Amendment from Senior Fellow Alan Morrison #1:

“This makes it clearer that potential ethical issues arising from conflicts that the contractor might have must be considered, which is, I think, the problem at issue here.”



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52 establishing and internally disseminating policies and procedures governing the use and  
53 management of contractors in rulemaking, ~~which may include including~~ any ~~required disclosure~~  
54 ~~related to their use~~ ~~ment that the agency disclose its use of contractors.~~

55 ~~In addition to legal and ethical issues, A~~ agencies ~~will also need to consider the practical~~  
56 ~~benefits and e~~ ~~challenges~~ ~~downsides~~ of using contractors to perform ~~rulemaking-related~~ functions  
57 ~~in furtherance of agency rulemaking, including whether. Those considerations might include the~~  
58 ~~effects of~~ repeated reliance ~~on contractors might compromise agencies' in-house capacities, in~~  
59 ~~particular~~ their ability to maintain necessary career staff with appropriate skills. Agencies may  
60 also wish to consider alternative methods to contracting when they need to expand internal  
61 capacity in connection with rulemaking, such as ~~by~~ using executive branch rotations, fellowship  
62 programs, or federally funded research and development centers, or by ~~making arrangements for~~  
63 assigning temporary employees under the Intergovernmental Personnel Act.<sup>16</sup>

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

"This paragraph is not about benefits at all, but about problems, and the opening sentence does not convey that."

64 This Recommendation provides guidance to agencies for when they are considering  
65 contracting out certain rulemaking-related functions. Recognizing that agencies' needs vary  
66 enormously, it addresses a range of legal, ethical, prudential, and practical considerations that  
67 agencies should take into account when using contractors.

**RECOMMENDATION**

**Internal Management**

- 68 1. Agencies that use contractors to perform rulemaking-related functions should adopt and  
69 publish written policies related to their use. These policies should cover matters such as:
- 70 a. The types of rulemaking functions considered to be inherently governmental  
71 functions ~~(IGFs)~~ or closely associated with ~~IGFs~~ ~~inherently governmental~~  
72 ~~functions~~;

<sup>16</sup> See 5 U.S.C. §§ 3371 ~~– 3375~~; see also 5 C.F.R. part 334.



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- 73 b. Internal procedures to ensure that agency employees do not contract out IGFs  
74 inherently governmental functions and to ensure increased scrutiny when  
75 contracting out functions that are closely associated with IGFsinherently  
76 governmental functions;
- 77 c. Requirements for internal disclosure concerning functions contractors undertake  
78 with regard to specific rulemakings;
- 79 d. Standards for when contractors should identify themselves as such in  
80 communications with the public in connection with rulemakings; and
- 81 e. Ethical rules applicable to contractors, including their employees.
- 82 2. To enhance their management of contractors, agencies should consider providing  
83 rulemaking-specific training for managers-employees on agency policies and ethical  
84 restrictions applicable to contractors. Agencies should also consider designating an  
85 agency office or officer to answer questions about the use of contractors to perform  
86 rulemaking-related functions and be responsible for deciding whether an activity is an  
87 IGFinherently governmental functions.
- 88 3. When agencies rely on contractors in a rulemaking, they should ensure that agency  
89 employees can identify contractors and are aware of contractors' assigned functions.  
90 Agencies should specifically focus on whether contractors should work in the same space  
91 as agency employees, how and to what extent they may participate in meetings with  
92 agency leadership or other meetings at which substantive policy is decided, and whether  
93 they should be provided with their own agency email addresses.
- 94 4. Agencies should consider ways to share information about contractors in rulemaking  
95 within and across agencies. This might include using existing contracting databases or  
96 schedules to promote greater coordination and efficiency concerning existing rulemaking  
97 contracts, as well as informal sharing of practices for managing contractors.

**Commented [CMA5]:** Comments from Public Member Jack Beermann & Senior Fellow Alan Morrison:

Not sure what is meant by this. Disclosure of what? Please clarify the subject of disclosure that is recommended.

**Commented [CMA6]:** Proposed Amendment from Senior Fellow Alan Morrison #3:

"Individual employees may have conflicts, even if the contractor does not."



**Ethics**

- 98 5. When selecting and managing contractors for rulemaking-related functions, agencies  
99 should evaluate whether any firm under consideration to serve as a contractor may have  
100 an actual or perceived organizational conflict of interest in connection with any assigned  
101 function. When a potential organizational conflict exists or arises, agencies should either  
102 select another contractor or put in place appropriate protections to ensure that the  
103 contractor’s outside interests do not undermine its ability to perform its assigned  
104 functions in a way that does not create an actual or perceived conflict of interest.
- 105 6. When contracting out rulemaking-related functions for which there is a risk of a personal  
106 conflict of interest by a covered employee of the contractor, agencies should provide in  
107 the contract that the contractor will not assign functions to any employee who has an  
108 actual or perceived conflict of interest and, as appropriate, provide employee training will  
109 train employees on recognizing and disclosing personal conflicts. The contract should  
110 also provide that, in the event that an employee improperly performs a function despite  
111 the existence of a personal conflict of interest, the contractor will disclose the conflict to  
112 the agency and undertake appropriate remedial action.
- 113 7. When contracting out rulemaking-related functions for which there is a risk of misuse of  
114 confidential information, agencies should provide in the contract that the contractor will  
115 ensure that any employee handling such information has been appropriately trained on  
116 the necessary safeguards. The contract should also provide that the contractor will  
117 disclose any breach of this obligation misuse of confidential information to the agency  
118 and undertake appropriate remedial actions.

**Transparency**

- 119 8. When an agency uses a contractor to perform an activity closely associated with an IGF  
120 in a specific rulemaking, the agency should consider disclosing the contractor’s role in  
121 the rulemaking docket, the notice of proposed rulemaking, or-and the preamble to the

**Commented [CMA7]:** Comment from Public Member Jack Beermann:

“I think we need a definition of ‘covered employee.’ It is not clear to me what that refers to.”

**Commented [CMA8]:** Proposed Amendment from Public Member Jack Beermann #1:

“I found the word ‘improperly’ confusing. I think it would be better just to delete the word because I believe the remainder of the sentence covers the conflict of interest without it, and the word implies that perhaps there is something else wrong with the way the employee performed the function.”

**Commented [CMA9]:** Proposed Amendment from Public Member Jack Beermann #2:

“I suggest changing ‘breach of this obligation’ to ‘misuse of confidential information’ because the only obligation mentioned is to put something in the contract and it is my understanding that the intent is to refer to misuse of confidential information.”



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122 final rule. Agencies should, including, if legally permissible unless legally precluded,  
123 also disclose the identity of the contractor.  
124 9. Agencies should ensure that their agreements/contracts with contractors will allow the  
125 agencies to meet legal requirements for disclosure of information in connection with the  
126 rulemaking process and judicial review.

**Intergovernmental Guidance**

127 10. The Office of Management and Budget should consider assessing whether current agency  
128 practices align with broader procurement best practices and providing whether to provide  
129 guidance on contractor-performed functions associated with rulemaking processes.  
130 Among other things, this guidance might provide specific examples of rulemaking-  
131 related functions that qualify as IGFs inherently governmental functions and should not  
132 be contracted out or that are closely associated with IGFs inherently governmental  
133 functions such that agencies should exercise heightened caution when contracting out  
134 those functions.

**Commented [CMA10]:** Proposed Amendment from Senior Fellow Alan Morrison #4:

"I would change 'if legally permissible' (which generally limits disclosure) to 'unless legally precluded' which generally favors disclosure."

**Commented [CMA11]:** Proposed Amendment from Public Member Jack Beermann #3



## Improving Notice of Regulatory Changes

### Committee on Regulation

#### Proposed Recommendation | June 16, 2022

1           The federal government issues hundreds of thousands of pages of enacted statutes,  
2 legislative rules, guidance documents, adjudicative orders, notices, and other materials each year  
3 that affect administrative programs. Federal law generally requires that the public be notified of  
4 these changes through publication in official sources such as the *Statutes at Large*, *Federal*  
5 *Register*, *Code of Federal Regulations*, or on an official government website.

6           Such publication is, as a legal matter, generally considered to provide constructive notice  
7 to potentially interested persons.<sup>1</sup> Nevertheless, the sheer volume of such materials and the  
8 manner in which they are published and presented can make it difficult for potentially interested  
9 persons to keep track of regulatory developments, especially without the aid of legal counsel or  
10 reference guides such as agency manuals, digests, or instructions that synthesize dispersed  
11 agency pronouncements into a coherent whole.<sup>2</sup> Although large, well-resourced entities generally  
12 find publication in official sources such as the *Federal Register* sufficient to provide effective  
13 notice of regulatory changes, smaller entities with less internal expertise and fewer resources

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<sup>1</sup> See, e.g., 5 U.S.C. § 552(a); 44 U.S.C. § 1507. Constitutional due process may require additional notice in some circumstances; as technologies such as email and the internet evolve, courts may hold in some circumstances that publication in a statutorily prescribed manner is insufficient to provide notice to an affected party. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (due process requires notice that is reasonably calculated to provide the best notice practical under the circumstances and therefore constructive notice by publication is insufficient if other better methods such as notice by mail are available); *Higashi v. United States*, 225 F.3d 1343, 1348–49 (Fed. Cir. 2000) (holding that *Mullane* applies in the case of rescission of an executive order but finding, as a factual matter, that the agency provided adequate notice under the *Mullane* standard). Agencies should be aware of this possibility when developing and implementing plans to notify potentially interested persons of significant regulatory changes.

<sup>2</sup> Joshua Galperin & E. Donald Elliott, *Providing Effective Notice of Regulatory Changes* (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).



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14 may find it more difficult to track regulatory changes or pay lawyers and consultants to do so.  
15 Historically underserved communities<sup>3</sup> also often do not get effective notice of regulatory  
16 changes.

17 Even larger, well-resourced persons may have difficulty tracking regulatory changes that  
18 are not published in the *Federal Register*, such as guidance documents announcing new  
19 interpretations of law or proposals to exercise a discretionary power, as well as changes in law  
20 announced through adjudicative decisions. Similarly, well-resourced and sophisticated persons  
21 may struggle to understand regulatory changes that emerge not from a single pronouncement but  
22 from a combination of agency materials without reference guides such as digests, manuals, or  
23 summaries that assemble these dispersed materials into a coherent whole.

24 Without actual notice of regulatory changes, individuals may miss out on benefits to  
25 which the law entitles them, regulated persons may find themselves subject to enforcement  
26 actions for noncompliance with legal requirements of which they were unaware, and other  
27 potentially interested persons may be unaware of regulatory developments that affect them.

28 By taking steps to promote actual notice of regulatory changes, agencies can promote  
29 compliance with legal requirements, thereby reducing the need for enforcement proceedings.  
30 Such steps also promote fairness and transparency and encourage greater public participation in  
31 agency decision making. When agencies communicate with the public, seek public input, and  
32 understand public perspectives, they generate greater understanding and acceptance of agency  
33 actions.<sup>4</sup>

34 Although agencies must comply with legal requirements for notice, agencies can take  
35 additional steps to improve notice of regulatory changes. This is of particular importance when a  
36 change is significant, meaning it could reasonably be expected to change the behavior of

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<sup>3</sup> Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

<sup>4</sup> Admin. Conf. of U.S., Forum, Underserved Communities and the Regulatory Process, Panel 1: Identifying Underserved Communities, Admin. Conf. of U.S. (2021).



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37 regulated parties or regulatory beneficiaries.<sup>5</sup> An agency might consider strategies such as  
38 publishing information about the change on its website, issuing a press release or fact sheet  
39 summarizing and explaining the change, communicating the change using social media or email  
40 lists, holding a public meeting to explain and answer questions about the change, and updating  
41 agency reference guides that comprehensively summarize dispersed agency pronouncements into  
42 a coherent whole and explain how a change fits into a broader regulatory scheme. Agencies  
43 might also design their websites to organize and present information in a way that makes  
44 significant regulatory changes clear and obvious to users and allow users to identify particular  
45 topics on which they wish to receive email alerts.

46 An agency's strategy for a particular regulatory change will depend, in large part, on the  
47 agency's objectives; the nature, purpose, and significance of the regulatory change; and the  
48 needs of the intended audience. This Recommendation provides a framework for developing  
49 effective notice strategies and for evaluating their effectiveness for future improvement.<sup>6</sup>

50 This Recommendation acknowledges differences across agencies in terms of the number  
51 and kinds of significant regulatory changes they make, the types of potentially interested persons  
52 with whom they engage, and their resources and capacities for providing notice. Appropriate  
53 notice strategies will therefore differ between agencies. Accordingly, although it is likely that  
54 agencies following this Recommendation will employ some of the strategies enumerated, this

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<sup>5</sup> Reference to 'significant' regulatory changes in this Recommendation does not refer to 'significant' or 'major' rules as those terms are used in Executive Order 12,866 and the Congressional Review Act.

<sup>6</sup> The Administrative Conference in recent years has issued several recommendations on providing public access to legal materials related to administrative programs, including agency guidance documents, adjudicative rules, and adjudicative decisions. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 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). This Recommendation expands on those recommendations by specifically addressing strategies for improving public notice of significant regulatory changes that agencies make through such materials.



55 Recommendation should not be understood as necessarily advising agencies to employ every  
56 strategy for every significant regulatory change.

## RECOMMENDATION

### Developing and Reviewing Notice Plans

- 57 1. Agencies should develop written notice plans, as appropriate, for providing effective  
58 notice of significant regulatory changes, meaning changes in law or policy, however  
59 announced, that can reasonably be expected to alter the behavior of potentially  
60 interested persons. Notice plans should:
- 61 a. Identify potentially interested persons for the agency’s significant regulatory  
62 changes;
  - 63 b. Specify strategies the agency proposes to use to provide notice;
  - 64 c. Assess the expected costs and benefits of each strategy; and
  - 65 d. Establish processes and metrics for evaluating the effectiveness of each strategy.
- 66 2. In developing their notice plans, agencies should consider the range of persons that  
67 may be interested in the agency’s significant regulatory changes and the optimal  
68 approach to tailoring notice to each of the different types of persons. Persons who may  
69 be interested include regulated entities and regulatory beneficiaries; organizations and  
70 individuals; large and small entities; well-resourced and under-resourced entities; and  
71 intermediaries, including for-profit and nonprofit organizations.
- 72 3. In developing their notice plans, agencies should consider the variety of legal  
73 materials, including legislative rules, guidance documents, and adjudicative decisions,  
74 through which significant regulatory changes are made and the optimal approach to  
75 tailoring notice based upon the nature of each change and the range of persons it  
76 affects.
- 77 4. In developing their notice plans, agencies should obtain feedback from potentially  
78 interested persons regarding which methods for providing notice they consider most  
79 effective. Methods for obtaining feedback could include convening focus groups,



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- 80 liaising with intermediary organizations, or taking broad surveys of potentially  
81 interested persons.
- 82 5. In developing their notice plans, agencies should consider providing potentially  
83 interested persons with means for identifying areas of interest for which they wish to  
84 receive notice.
- 85 6. Agencies should consider whether individual significant regulatory changes might  
86 warrant additional strategies not included in the agency's notice plan, either because  
87 they affect persons not previously regulated or new regulatory beneficiaries, or  
88 because the potentially interested persons have specific needs for effective notice.
- 89 7. Agencies should periodically evaluate which strategies are most effective at notifying  
90 potentially interested persons, including historically underserved communities, of  
91 significant regulatory changes. In doing so, agencies should obtain feedback from  
92 potentially interested persons regarding which methods for providing notice they  
93 consider most effective and suggestions for improvement.

### **Strategies for Providing Effective Notice**

- 94 8. Although no single technique will work for all agencies or in all circumstances, in  
95 assessing the strategies they wish to undertake both as a general matter and with  
96 regard to specific significant regulatory changes, agencies should consider whether  
97 such strategies:
- 98 a. Are cost-effective;
- 99 b. Are likely to increase compliance and reduce the need for enforcement;
- 100 c. Are targeted to reach members of historically underserved communities and small  
101 or under-resourced potentially interested persons who may have less capacity to  
102 monitor changes;
- 103 d. Reduce the administrative burden for regulated persons to assemble changes that  
104 emerge from a combination of agency materials;
- 105 e. Have proven effective when used by other agencies to provide actual notice; and



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- 106            f. Provide opportunities for interested persons to identify areas about which they  
107            would like to receive notice about significant regulatory changes.
- 108            9. Agencies should consider publishing in the *Federal Register* regulatory changes for  
109            which they anticipate the most widespread public interest, even if not required to do so  
110            by law. In so doing, they should assess whether the benefits of making the change  
111            permanently available to a broad audience justify the costs of publication. Agencies  
112            should consider publishing brief notices of availability in the *Federal Register* alerting  
113            potentially interested persons when they publish significant regulatory changes in the  
114            form of agency guidance documents on their websites.
- 115            10. Agencies should seek to organize and present material on their websites in a way that  
116            makes significant regulatory changes clear and obvious to potentially interested  
117            persons and provides clear instructions to users regarding how to access materials  
118            announcing significant regulatory changes.
- 119            11. Agencies should consider optimizing their websites to improve the visibility of  
120            significant regulatory changes in commercial search engines.
- 121            12. Agencies should consider publishing summaries of legal materials organized by topic.  
122            This approach is particularly useful in providing notice when regulatory changes  
123            emerge from different agencies or when agencies announce policy through  
124            adjudications or guidance documents, because it can be difficult for potentially  
125            interested persons to synthesize the changes. Agencies that do publish such summaries  
126            should revise those summaries promptly to reflect significant regulatory changes.  
127            Agencies must, however, balance the benefits of providing such summaries of the law  
128            against the costs in terms of staff time and potential oversimplification of the  
129            applicable law.
- 130            13. Agencies should consider issuing press releases when they make significant regulatory  
131            changes. This approach is particularly useful in alerting both potentially interested  
132            persons about new or expanded regulatory requirements that have not previously  
133            affected them and small or under-resourced potentially interested persons who may  
134            have less capacity to monitor changes.



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- 135 14. Agencies should consider developing and using email distribution lists to inform  
136 potentially interested persons about significant regulatory changes. Email distribution  
137 lists are an effective way to provide notice to targeted groups of discrete and defined  
138 potentially interested persons, such as specific community or advocacy groups, at low  
139 cost. Agencies should, however, bear in mind the following limitations of listservs and  
140 email lists:
- 141 a. Email distribution lists are less effective in providing notice to large groups of  
142 individuals or those not previously affected by regulatory requirements;
  - 143 b. Potentially interested persons must know that lists exist and affirmatively sign up  
144 for them; and
  - 145 c. Overuse of email distribution lists could result in a significant regulatory change  
146 being obscured by less relevant messages. Agencies can mitigate this risk by  
147 allowing users to opt in to narrowly defined topics.
- 148 15. Agencies should consider providing electronic means for interested persons to identify  
149 particular issues on which they wish to receive automated notice.
- 150 16. Agencies should consider using social media tools, which are inexpensive and far-  
151 reaching, to publicize significant regulatory changes.
- 152 17. Agencies should consider using blogs on their websites to inform potentially interested  
153 persons about significant regulatory changes. Blogs allow agencies to tailor notice to  
154 the interests and needs of particular groups and provide notice in ways that are  
155 accessible to those groups.
- 156 18. Agencies should consider hosting public meetings or participating in conferences or  
157 other meetings convened by outside organizations to share information and answer  
158 questions about significant regulatory changes. Agencies, however, must balance the  
159 advantages of such meetings against the cost in terms of staff time and administration.
- 160 19. When agencies host public meetings to share information about significant regulatory  
161 changes, they should generally provide a means for potentially interested persons to  
162 attend or participate remotely, to expand access for members of historically  
163 underserved communities, small or under-resourced potentially interested persons,



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- 164 potentially interested persons who live far from where the agency holds meetings, and  
165 potentially interested persons who face other accessibility issues.
- 166 20. Agencies should consider training and equipping front-line agency employees,  
167 including those in field offices, to answer questions about significant regulatory  
168 changes and to work with community organizations and other intermediaries to  
169 provide notice of changes. These agency employees may be particularly effective in  
170 providing notice to underserved communities.
- 171 21. Agencies should consider identifying and working with intermediary organizations  
172 such as states, trade associations, professional associations, commercial and non-profit  
173 trainers, advocacy groups, and newsletter publishers, which can assist in providing  
174 effective notice to different groups of potentially interested persons, particularly  
175 historically underserved communities.

### **Oversight and Assessment**

- 176 22. Agencies should consider designating an officer or office to coordinate and support the  
177 development, implementation, and evaluation of notice plans. This officer or office  
178 should:
- 179 a. Be responsible for evaluating the effectiveness of the agency's notice plan;
  - 180 b. Keep abreast of technological developments for improving notice strategies, such  
181 as new social media platforms or improved methods for indexing and organizing  
182 documents on the agency's website;
  - 183 c. Evaluate practices that other agencies use to provide notice of significant  
184 regulatory changes; and
  - 185 d. Make recommendations for improving the agency's practices and procedures for  
186 providing effective notice of significant regulatory changes to potentially  
187 interested persons.
- 188 23. Agencies should share information with each other about their experiences with and  
189 practices for improving notice of significant regulatory changes.



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## Improving Notice of Regulatory Changes

### Committee on Regulation

Proposed Recommendation | June 16, 2022

#### Proposed Amendments

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

1 Federal administrative programs are governed by large and complex systems of statutes,  
2 rules, and other materials setting forth policies. Although the law generally requires these  
3 materials to be made publicly available,<sup>1</sup> individuals and organizations often lack the resources  
4 or expertise to track and understand regulatory changes that might affect them. This is  
5 particularly true for small entities and members of communities that have been historically  
6 underserved by government programs.<sup>2</sup> Without effective notice of regulatory changes,  
7 interested persons may miss out on benefits to which the law entitles them or find themselves  
8 subject to enforcement actions for noncompliance with legal requirements of which they were  
9 unaware. A lack of effective notice may also make it less likely that regulated parties will come  
10 into compliance without the need for an agency to undertake an enforcement action.<sup>3</sup> The federal  
11 government issues hundreds of thousands of pages of enacted statutes, legislative rules, guidance  
12 documents, adjudicative orders, notices, and other materials each year that affect administrative  
13 programs. Federal law generally requires that the public be notified of these changes through  
14 publication in official sources such as the *Statutes at Large*, *Federal Register*, *Code of Federal*  
15 *Regulations*, or on an official government website.

<sup>1</sup> See, e.g., 1 U.S.C. § 112; 5 U.S.C. § 552(a); 44 U.S.C. § 1505.

<sup>2</sup> Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

<sup>3</sup> See Joshua Galperin & E. Donald Elliott, Providing Effective Notice of Regulatory Changes (May 17, 2022) (report to the Admin. Conf. of the U.S.).



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16 Such publication is, as a legal matter, generally considered to provide constructive notice  
17 to potentially interested persons.<sup>4</sup> Nevertheless, the sheer volume of such materials and the  
18 manner in which they are published and presented can make it difficult for potentially interested  
19 persons to keep track of regulatory developments, especially without the aid of legal counsel or  
20 reference guides such as agency manuals, digests, or instructions that synthesize dispersed  
21 agency pronouncements into a coherent whole.<sup>5</sup> Although large, well-resourced entities generally  
22 find publication in official sources such as the *Federal Register* sufficient to provide effective  
23 notice of regulatory changes, smaller entities with less internal expertise and fewer resources  
24 may find it more difficult to track regulatory changes or pay lawyers and consultants to do so.  
25 Historically underserved communities<sup>6</sup> also often do not get effective notice of regulatory  
26 changes.

27 Even larger, well-resourced persons may have difficulty tracking regulatory changes that  
28 are not published in the *Federal Register*, such as guidance documents announcing new  
29 interpretations of law or proposals to exercise a discretionary power, as well as changes in law  
30 announced through adjudicative decisions. Similarly, well-resourced and sophisticated persons  
31 may struggle to understand regulatory changes that emerge not from a single pronouncement but  
32 from a combination of agency materials without reference guides such as digests, manuals, or  
33 summaries that assemble these dispersed materials into a coherent whole.

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<sup>4</sup> See, e.g., 5 U.S.C. § 552(a); 44 U.S.C. § 1507. Constitutional due process may require additional notice in some circumstances; as technologies such as email and the internet evolve, courts may hold in some circumstances that publication in a statutorily prescribed manner is insufficient to provide notice to an affected party. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (due process requires notice that is reasonably calculated to provide the best notice practical under the circumstances and therefore constructive notice by publication is insufficient if other better methods such as notice by mail are available); *Higashi v. United States*, 225 F.3d 1343, 1348–49 (Fed. Cir. 2000) (holding that *Mullane* applies in the case of rescission of an executive order but finding, as a factual matter, that the agency provided adequate notice under the *Mullane* standard). Agencies should be aware of this possibility when developing and implementing plans to notify potentially interested persons of significant regulatory changes.

<sup>5</sup> Joshua Galperin & E. Donald Elliott, *Providing Effective Notice of Regulatory Changes* (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).

<sup>6</sup> Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).



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Without actual notice of regulatory changes, individuals may miss out on benefits to which the law entitles them, regulated persons may find themselves subject to enforcement actions for noncompliance with legal requirements of which they were unaware, and other potentially interested persons may be unaware of regulatory developments that affect them.

By taking steps to promote actual notice of regulatory changes, agencies can promote compliance with legal requirements, thereby reducing the need for enforcement proceedings. Such steps also promote fairness and transparency and encourage greater public participation in agency decision making. When agencies communicate with the public, seek public input, and understand public perspectives, they generate greater understanding and acceptance of agency actions.<sup>7</sup>

Although agencies must comply with legal requirements for notice, agencies can take additional a variety of steps to improve notice of regulatory changes. This is of particular importance when a change is significant, meaning that it could reasonably be expected to change the behavior of regulated parties or regulatory beneficiaries.<sup>8</sup> An agency might consider strategies such as publishing information about the change on its website, issuing a press release or fact sheet summarizing and explaining the change, communicating the change using social media or email lists, holding a public meeting to explain and answer questions about the change, and creating and updating agency reference guides that comprehensively summarize dispersed agency pronouncements into a coherent whole and explain how a change fits into a broader regulatory scheme. Agencies might should also design their websites to organize and present information in a way that makes significant regulatory changes clear and obvious to users and allow users them to identify particular topics on which they wish to receive email alerts.

<sup>7</sup> Admin. Conf. of U.S., Forum, Underserved Communities and the Regulatory Process, Panel I: Identifying Underserved Communities, Admin. Conf. of U.S. (2021).

<sup>8</sup> Reference to "significant" regulatory changes in this Recommendation does not refer is not limited to "significant" or "major" rules as those terms are used in Executive Order 12,866 and the Congressional Review Act.

**Commented [CA1]:** Proposed Amendment from Council #1:

The Council proposes this amendment to simplify the language and eliminate unnecessary points. With respect to original footnote 1 (shown in the redline as footnote 4) in particular, the Council thinks it is unnecessary and overbroad. The Council does not agree that, as the footnote suggests, publication of a statute in the Statutes at Large (or the U.S. Code), a legislative rule in the Federal Register, and so forth would fail to satisfy due process. (Of course, notice by publication of certain agency actions in an adjudication or similar proceeding might well not satisfy due process, but that is not the concern of this Recommendation.) It may be that the Committee intended a narrower point in footnote 1. If so, the Committee may wish to offer a revision for the Assembly's consideration. The Council still might question the relevance of the footnote to the Recommendation.

**Commented [CMA2]:** Proposed Amendment from Special Counsel Jeffrey Lubbers #1:

See footnote 8 for proposed edits.

**Commented [CMA3]:** Proposed Amendment from Public Member Jack Beermann #1:

"I would add the words 'creating and' before the word 'updating' to suggest that such guides are created where they do not already exist to update."

**Commented [CA4]:** Proposed Amendment from Council #2

**Commented [CA5]:** Proposed Amendment from Council #3



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56 An agency’s strategy for a particular regulatory change will depend, in large part, on the  
57 agency’s objectives; the nature, purpose, and significance of the regulatory change; and the  
58 needs of the intended audience. This Recommendation provides a framework for developing  
59 effective notice strategies and for evaluating their effectiveness for future improvement.<sup>9</sup>

Commented [CA6]: Inquiry from Council #1:  
Can the Committee provide more specificity as to what's intended here?

60 This Recommendation acknowledges differences across agencies in terms of the number  
61 and kinds of significant regulatory changes they make, the types of potentially interested persons  
62 with whom they engage, and their resources and capacities for providing notice. Appropriate  
63 notice strategies will therefore differ between-among agencies. Accordingly, although it is likely  
64 that agencies following this Recommendation will employ some of the strategies enumerated,  
65 this Recommendation should not be understood as necessarily advising agencies to employ every  
66 strategy for every significant regulatory change.

Commented [CA7]: Inquiry from Council #2:  
Can the Committee provide more specificity as to what's intended here?

RECOMMENDATION

Developing and Reviewing Notice Plans

- 67 1. Agencies should develop written notice plans, as appropriate, for providing effective  
68 notice of significant regulatory changes. ~~meaning changes~~A significant regulatory  
69 change is any change in law or policy, however announced, that can reasonably be  
70 expected to alter the behavior of ~~potentially~~ interested persons, meaning persons who

<sup>9</sup> The Administrative Conference in recent years has issued several recommendations on providing public access to legal materials related to administrative programs, including agency guidance documents, adjudicative rules, and adjudicative decisions. See, e.g., Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 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). This Recommendation expands on those recommendations by specifically addressing strategies for improving public notice of significant regulatory changes that agencies make through such materials.



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- 71 ~~may be interested in or affected by the agency’s significant regulatory changes.~~ Notice
- 72 plans should:
- 73 a. Identify potentially interested persons for the agency’s significant regulatory
- 74 changes;
- 75 b. Specify strategies the agency proposes to use to provide notice;
- 76 c. Assess the expected costs and benefits of each strategy; and
- 77 d. Establish processes and metrics for evaluating the effectiveness of each strategy.
- 78 2. In developing their notice plans, agencies should consider the ~~range categories~~ of persons
- 79 that may be interested in the agency’s significant regulatory changes and the optimal
- 80 approach to tailoring notice to each of the different ~~types categories~~ of persons. ~~Persons~~
- 81 ~~who may be interested include regulated entities and regulatory beneficiaries;~~
- 82 ~~organizations and individuals; large and small entities; well resourced and under~~
- 83 ~~resourced entities; and intermediaries, including for profit and nonprofit organizations.~~
- 84 3. In developing their notice plans, agencies should consider the variety of legal materials,
- 85 including legislative rules, guidance documents, and adjudicative decisions, through
- 86 which significant regulatory changes are made and the optimal approach to tailoring
- 87 notice based upon the nature of each change and the ~~range categories~~ of persons it affects.
- 88 4. In developing their notice plans, agencies should obtain feedback from potentially
- 89 interested persons ~~regarding as to~~ which methods for providing notice they consider most
- 90 effective, ~~consistent with the Paperwork Reduction Act.~~ ~~Methods for obtaining feedback~~
- 91 ~~could include convening focus groups, liaising with intermediary organizations, or taking~~
- 92 ~~broad surveys of potentially interested persons.~~
- 93 5. ~~In~~ developing their notice plans, agencies should consider providing potentially interested
- 94 persons with means for identifying areas of interest for which they wish to receive notice.
- 95 6. Agencies should consider whether individual significant regulatory changes might
- 96 warrant additional strategies not included in the agency’s notice plan, either because they
- 97 affect persons not previously regulated or new regulatory beneficiaries, or because the
- 98 potentially interested persons have specific needs for effective notice.

**Commented [CMA8]:** Proposed Amendment from Special Counsel Jeffrey Lubbers #2:

"Recommendation 1 seems awkward. I would use the same language used in #2--'Identify persons who may be interested in the agency's significant regulatory changes'--(you could also add 'or affected by' after 'interested in')"

Note from the Office of the Chairman: If the Assembly accepts this change, conforming changes would be made in the preamble and throughout the recommendation, including removing "potentially" from before "interested persons."

**Commented [CA9]:** Proposed Amendment from Council #4

**Commented [CMA10]:** Proposed Amendment from Special Counsel Jeffrey Lubbers #3

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

**Commented [CA12]:** Inquiry from Council #3:

Can the Committee provide more specificity as to what's intended here?



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99 7. Agencies should periodically evaluate which strategies are most effective at notifying  
100 potentially interested persons, including historically underserved communities, of  
101 significant regulatory changes. In doing so, agencies should obtain feedback from  
102 potentially interested persons regarding which methods for providing notice they consider  
103 most effective and suggestions for improvement.

**Strategies for Providing Effective Notice**

104 8. Although no single technique will work for all agencies or in all circumstances, in  
105 assessing the strategies they wish to undertake both as a general matter and with regard to  
106 specific significant regulatory changes, agencies should consider whether such strategies:  
107 a. Are cost-effective;  
108 b. Are likely to increase compliance and reduce the need for enforcement;  
109 c. Are targeted to reach members of historically underserved communities and ~~small~~  
110 ~~or under-resourced~~ other potentially interested persons who may have less  
111 capacity to monitor changes;  
112 d. Reduce the administrative burden for regulated persons to assemble changes that  
113 emerge from a combination of agency materials;  
114 e. Have proven effective when used by other agencies to provide ~~actual~~ notice; and  
115 f. Provide opportunities for interested persons to identify areas about which they  
116 would like to receive notice ~~about of~~ significant regulatory changes.

117 9. Agencies should consider publishing in the *Federal Register* regulatory changes for  
118 which they anticipate the most widespread public interest, even ~~if-when~~ not required ~~by~~  
119 ~~law to do so by law~~. ~~In so doing, they should assess whether the benefits of making the~~  
120 ~~change permanently available to a broad audience justify the costs of publication.~~

121 9.10. ~~When agencies publish guidance documents announcing significant regulatory~~  
122 ~~changes on their websites, they~~ Agencies should consider publishing ~~brief notices of~~  
123 ~~availability~~ in the *Federal Register* alerting potentially interested persons ~~when they~~

Commented [CA13]: Proposed Amendment from Council #6 (see parallel amendments at lines 143 and 173-174)

Commented [CA14]: Proposed Amendment from Council #7



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publish significant regulatory changes in the form of agency guidance documents on their websites that the documents are available.

~~10~~11. Agencies should seek to organize and present material on their websites in a way that makes significant regulatory changes clear and obvious to potentially interested persons and provides clear instructions to users regarding how to access materials announcing significant regulatory changes.

~~11~~12. Agencies should consider optimizing their websites to improve the visibility of significant regulatory changes in commercial search engines.

~~12~~13. Agencies should consider publishing summaries of legal materials organized by topic. This approach is particularly useful in providing notice when regulatory changes emerge from different agencies or when agencies announce policy through adjudications or guidance documents, because it can be difficult for potentially interested persons to synthesize the changes. Agencies that do publish such summaries should revise those summaries promptly to reflect significant regulatory changes. Agencies must, however, balance the benefits of providing such summaries of the law against the costs in terms of staff time and potential oversimplification of the applicable law.

~~13~~14. Agencies should consider issuing press releases when they make significant regulatory changes. This approach is particularly useful in alerting both potentially interested persons about new or expanded regulatory requirements that have not previously affected them and ~~small or under-resourced~~ potentially interested persons who may have less capacity to monitor changes.

~~14~~15. Agencies should consider developing and using email distribution lists to inform potentially interested persons about significant regulatory changes. Email distribution lists are an effective way to provide notice to targeted groups of discrete and defined potentially interested persons, such as specific community or advocacy groups, at low cost. Agencies should, however, bear in mind the following limitations of ~~listservs and~~ email ~~distribution~~ lists:

**Commented [CA15]:** Proposed Amendment from Council #6 (see parallel amendments at lines 109-110 and 173-174)

**Commented [CMA16]:** Proposed Amendment from Public Member Jack Beermann #2



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- 151 a. Email distribution lists are less effective in providing notice to large groups of  
152 individuals or those not previously affected by regulatory requirements;  
153 b. Potentially interested persons must know that lists exist and affirmatively sign up  
154 for them; and  
155 c. Overuse of email distribution lists could result in a significant regulatory change  
156 being obscured by less relevant messages. Agencies can mitigate this risk by  
157 allowing users to opt in to narrowly defined topics.

158 ~~15-16.~~ Agencies should consider providing electronic means for interested persons to  
159 identify particular issues on which they wish to receive automated notice.

160 ~~16-17.~~ Agencies should consider using social media ~~tools~~, which are inexpensive and far-  
161 reaching, to publicize significant regulatory changes.

162 ~~17-18.~~ Agencies should consider using blogs on their websites to inform potentially  
163 interested persons about significant regulatory changes. Blogs allow agencies to tailor  
164 notice to the interests and needs of particular groups and provide notice in ways that are  
165 accessible to those groups.

166 ~~18-19.~~ Agencies should consider hosting public meetings or participating in conferences  
167 or other meetings convened by outside organizations to share information and answer  
168 questions about significant regulatory changes. Agencies ~~must, however, must~~ balance  
169 the advantages of such meetings against the cost in terms of staff time and administration.

170 ~~19-20.~~ When agencies host public meetings to share information about significant  
171 regulatory changes, they should generally provide a means for potentially interested  
172 persons to attend or participate remotely. ~~By so doing, to they can~~ expand access for  
173 members of historically underserved communities, ~~small or under-resourced potentially~~  
174 ~~interested persons,~~ potentially interested persons who live far from where the agency  
175 holds meetings, and potentially interested persons who face other accessibility issues.

176 ~~20-21.~~ Agencies should consider training and equipping front-line agency employees,  
177 including those in field offices, to answer questions about significant regulatory changes  
178 ~~and to work with community organizations and other intermediaries to provide notice of~~

**Commented [CA17]:** Inquiry from Council #4:

Can the Committee provide more specificity as to what's intended here? Did the Committee intend to use language similar to that at lines 53-55 of the Preamble?

**Commented [CA18]:** Proposed Amendment from Council #6 (see parallel amendments at lines 109-110 and 143)



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179 ~~changes. These agency employees may be particularly effective in providing notice to~~  
180 ~~underserved communities.~~

181 ~~21-22.~~ Agencies should consider identifying and working with states and intermediary  
182 organizations (c.g., such as states, trade associations, professional associations,  
183 commercial and non-profit trainers community organizations, and advocacy groups), ~~and~~  
184 ~~newsletter publishers, which~~ that can assist in providing effective notice to different  
185 groups of potentially interested persons, particularly historically underserved  
186 communities.

**Commented [CA19]:** Proposed Amendment from Council #8

**Commented [CA20]:** Inquiry from Council #5:

Can the Committee provide more specificity as to what's intended here?

### Oversight and Assessment

187 ~~22-23.~~ Agencies should consider designating an officer or office to coordinate and  
188 support the development, implementation, and evaluation of notice plans. This officer or  
189 office should:

- 190 a. Be responsible for evaluating the effectiveness of the agency's notice plan;
- 191 b. Keep abreast of technological developments for improving notice strategies, such  
192 as new social media platforms or improved methods for indexing and organizing  
193 documents on the agency's website;
- 194 c. Evaluate practices that other agencies use to provide notice of significant  
195 regulatory changes; and
- 196 d. Make recommendations for improving the agency's practices and procedures for  
197 providing effective notice of significant regulatory changes to potentially  
198 interested persons.

199 ~~23-24.~~ Agencies should share information with each other about their experiences with  
200 and practices for improving notice of significant regulatory changes.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### MEMORANDUM

To: ACUS Assembly  
From: Reeve T. Bull (Research Director), Jeremy S. Graboyes (Director of Public and Interagency Programs), and Alexandra F. Sybo (Attorney Advisor)  
Date: June 3, 2022  
Subject: 77th Plenary Session: Discussion of Nationwide Injunctions and Federal Regulatory Programs Project

As reflected on the Plenary Session agenda, there is a segment scheduled from 2:00 pm to 2:45 pm to discuss an ongoing Office of the Chairman project titled *Nationwide Injunctions and Federal Regulatory Programs*. This project undertakes an empirical study of how nationwide injunctions and equivalent or similar equitable remedies (including “universal” vacatur and set-aside, as the Department of Justice has used that term)—together “nationwide injunctive relief”—affect the administration of federal regulatory programs. The study will examine (1) the use, frequency, and characteristics of nationwide injunctive relief in challenges to agency action, with a particular focus on agency rules; (2) how agencies understand the scope of judgments vacating and setting aside agency rules under the Administrative Procedure Act (APA); (3) how agencies respond to nationwide injunctive relief in carrying out their rulemaking activities; and (4) other implications of nationwide injunctive relief for the day-to-day administration of regulatory programs. The report will not offer the consultants’ views as to when, if ever, nationwide injunctions should be used.

Professors Zachary Clopton, Mila Sohoni, and Jed Stiglitz, the consultants for the project, will provide a short presentation on their research. They have identified both questions for which they would like to receive feedback at the Plenary Session (Part A below) and for which they are interested in receiving written feedback after the Plenary Session (Part B below). If you wish to provide written feedback, please send it to Attorney Advisor Alexandra Sybo ([asybo@acus.gov](mailto:asybo@acus.gov)).

#### **A. Questions For Discussion at the Plenary Session**

1. The consultants are seeking to understand whether the form of relief affects how agencies respond to court decisions related to rules. In the interviews, the consultants have asked agency officials questions such as “Does it matter if a court permanently enjoins the enforcement of a rule nationwide versus vacates the rule? Does it matter if the relief—whether interim or final—applies universally or only to the parties?” If you have any thoughts on how the form of relief might affect how agencies respond to court decisions concerning rules, the consultants would be grateful to hear your thoughts at the session. The consultants would be particularly grateful for concrete examples of instances in which an agency might have responded differently if the form of relief had been different.

2. Some have argued recently that the APA should be understood to authorize courts to set aside rules only “as to the plaintiffs,” as opposed to “universally.” The consultants are interested in your understanding of the scope of relief authorized by the APA. The consultants are also interested in your view of how this plaintiff-specific understanding, if widely adopted by courts, would affect agency operations.
3. The consultants are seeking to understand whether the prospect of nationwide injunctions or universal vacatur affects the manner in which agencies regulate. For example, are agencies proceeding via adjudication rather than rulemaking in order to avoid broad-gauged relief that enjoins, stays, or vacates a rule or a rule-like agency action? If you have any thoughts on whether agencies are doing this, or on how they might do this, the consultants would be grateful to hear your thoughts at the session.

**B. Topics for Written Feedback from Plenary Session Attendees**

1. The consultants are seeking to learn about instances in which an agency has non-acquiesced, either on an intra-circuit or an inter-circuit basis, to a court decision that “set aside” a rule or a rule-like agency action. The cleanest example the consultants have so far found is an instance in which the EPA apparently continued to enforce regulatory guidance that the Eighth Circuit had earlier vacated because it was procedurally invalid and in excess of the EPA’s statutory authority. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 877 (8th Cir. 2013) (vacating “blending rule” announced in an EPA letter); *Iowa League of Cities v. Env’t Prot. Agency*, 2021 WL 6102534, at \*1 (8th Cir. Dec. 22, 2021) (noting EPA’s non-acquiescence outside the Eighth Circuit and granting mandamus limited to the Eighth Circuit). If you are aware of other examples, the consultants would be grateful to know of them.
2. The consultants are seeking instances in which agencies have publicly announced an intention to non-acquiesce in a court decision that stayed, enjoined the enforcement of, or vacated a rule or a rule-like agency action. If you are aware of such instances, the consultants would be grateful to know of them.



## Automated Legal Guidance at Federal Agencies

### Committee on Administration and Management

#### Proposed Recommendation | June 16, 2022

1 Federal agencies increasingly automate the provision of legal guidance to the public  
2 through online tools and other technologies.<sup>1</sup> The Internal Revenue Service, for example,  
3 encourages taxpayers to seek answers to questions regarding various tax credits and deductions  
4 through its online “Interactive Tax Assistant,” and the United States Citizenship and Immigration  
5 Services suggests that potential green card holders and citizens with questions about their  
6 immigration rights communicate with its interactive chatbot, “Emma.” Almost a dozen federal  
7 agencies have either implemented or piloted such automated legal guidance tools in just the past  
8 three years.<sup>2</sup>

9 Automated legal guidance tools can take several forms. The most common are chatbots  
10 and virtual assistants. The simplest chatbots provide standardized responses based on keywords  
11 included in a user’s question. Although the terms can overlap, virtual assistants tend to be more  
12 versatile than chatbots and can often perform additional tasks such as making an appointment or  
13 filling out a form in response to a conversation.<sup>3</sup> More robust tools rely on natural language

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<sup>1</sup> This Recommendation defines “guidance” broadly to include interpretive rules, general statements of policy, and other materials considered to be guidance documents under other, separate definitions adopted by government agencies. See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

<sup>2</sup> They include the Internal Revenue Service, United States Citizenship and Immigration Services, the Department of Education, the Social Security Administration, the Patent and Trademark Office, the Army, the General Services Administration, the Veterans Benefits Administration, the Food and Drug Administration, the National Institutes of Health, and the Environmental Protection Agency.

<sup>3</sup> See Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance at Federal Agencies* 1, 10 (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14 processing, or artificial intelligence to interpret natural language and generate an individualized  
15 response.<sup>4</sup>

16 Agencies use automated legal guidance tools for a number of reasons. These reasons  
17 include efficiently allocating limited staff resources, improving user experience and service  
18 delivery, and enhancing the quality, consistency, speed, and predictability of guidance provided  
19 to the public. Because they are always available from any location and can efficiently and  
20 effectively provide answers to common questions, automated legal guidance tools have the  
21 potential to revolutionize the provision of agency guidance to the public.

22 As with other forms of guidance, there also is an issue regarding the extent to which users  
23 are able to rely upon automated legal guidance. Agencies generally take the position that users  
24 cannot rely upon automated legal guidance, and that automated legal guidance does not bind the  
25 agency. Critics argue, however, that automated legal guidance tools can oversimplify or misstate  
26 the law or offer users guidance that does not apply well to their factual circumstances. Although  
27 the same can be said for other explanatory materials, such as brochures and fact sheets,  
28 automated legal guidance tools pose unique concerns because they can appear to be human.  
29 Users may perceive the kind of instantaneous and seemingly personalized responses provided by  
30 an automated legal guidance tool to be more authoritative or persuasive than a guidance  
31 document.

32 The Administrative Conference has adopted several recommendations on the  
33 development, use, and public availability of agency guidance documents.<sup>5</sup> This Recommendation

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<sup>4</sup> See Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Blank & Osofsky, *supra* note 3.

<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014).



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34 builds on those recommendations by identifying best practices for agencies to consider when  
35 they develop, use, and manage automated legal guidance tools. The use of these tools may not be  
36 suitable for all agencies and administrative programs. Moreover, even when automated legal  
37 guidance tools are used, agencies should expect that they will need to provide additional  
38 guidance through other channels, including live person-to-person support. This Recommendation  
39 provides best practices to guide agencies when considering using automated legal guidance tools.

### RECOMMENDATION

#### **Design and Management**

- 40 1. Agencies should explore the possible benefits of offering automated legal guidance tools,  
41 including enhancing administrative efficiency and helping the public understand complex  
42 laws using plain language. This is especially true for those agencies that have a high  
43 volume of individual interactions with members of the public who may not be familiar  
44 with legal requirements.
- 45 2. Agencies should also weigh the potential downsides of automated legal guidance tools,  
46 including oversimplifying the law, letting guidance appear more personalized than it  
47 actually is, and not adequately disclosing that users cannot rely on the guidance to bind  
48 the agency.
- 49 3. Agencies using automated legal guidance tools should design and manage them in ways  
50 that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.
- 51 4. Agencies should ensure that automated legal guidance tools do not displace other agency  
52 mechanisms for increasing access to the underlying law.
- 53 5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the  
54 substance embedded in automated legal guidance tools and should publish these  
55 procedures on their websites. These procedures should incorporate periodic user testing  
56 and other forms of evaluation by internal and external researchers to ensure accessibility  
57 and effectiveness.



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- 58 6. The General Services Administration should regularly evaluate the relative costs and  
59 benefits of using outside vendors for the introduction of automated legal guidance tools  
60 and share such information with agencies.  
61

### **Accessibility**

- 62 7. Agencies should utilize human-centered design methodologies, empirical customer  
63 research, and user testing, as described and defined in Executive Order 14,058,  
64 *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in*  
65 *Government* (86 Fed. Reg. 71,357, Dec. 13, 2021) in designing and maintaining their  
66 automated legal guidance tools.
- 67 8. Agencies should, consistent with applicable laws and policies, design automated legal  
68 guidance tools to ensure that they meet the needs of the particular populations that are  
69 intended to utilize the automated legal guidance tools.
- 70 9. Agencies should periodically review and reconfigure automated legal guidance tools to  
71 ensure that they meet the needs of the particular populations that are intended to utilize  
72 the automated legal guidance tools.
- 73 10. Agencies should ensure that information provided by automated legal guidance tools is  
74 stated in plain language understandable by the particular populations that are intended to  
75 utilize the automated legal guidance tools, consistent with the Plain Writing Act of 2010;  
76 Recommendation 2017-3, *Plain Language in Regulatory Drafting* (82 Fed. Reg. 61,728,  
77 Dec. 14, 2017); and other applicable laws and policies.
- 78 11. Agencies should design automated legal guidance tools to put users in contact with a  
79 human customer service representative to whom users can address questions in the event  
80 that a question is not answered by the automated legal guidance tools or if the users are  
81 having difficulty using an automated legal guidance tool.



## Transparency

- 82 12. When the underlying law is unclear or unsettled, or when the legal guidance depends  
83 upon the facts of the particular situation, agencies should be transparent about the  
84 limitations of the advice the user is receiving. To the extent practicable, agencies should  
85 also provide access through automated legal guidance tools to the legal materials  
86 underlying the tools, including relevant statutes, rules, and judicial or adjudicative  
87 decisions.
- 88 13. Agencies should disclose how they store and use the data obtained through automated  
89 legal guidance tools.
- 90 14. Agencies should update the content of automated legal guidance tools to reflect legal  
91 developments or correct errors in a timely manner. Agencies should also maintain an  
92 electronic, publicly accessible, searchable archive that identifies and explains such  
93 updates. Agencies should ensure that the date on which the tool was last updated.
- 94 15. When automated legal guidance tools provide programmed responses to users' questions,  
95 agencies should publish the questions and responses to provide an immediate and  
96 comprehensive source of information regarding the automated legal guidance tools.  
97 Agencies should post this information in an appropriate location on their websites and  
98 make it accessible through the automated legal guidance tool to which it pertains.
- 99 16. When automated legal guidance tools learn to provide different answers to users'  
100 questions over time, agencies should publish information related to how the machine  
101 learning process was developed and how it is maintained and updated. Agencies should  
102 post this information in an appropriate location on their websites and make it accessible  
103 through the automated legal guidance tool to which it pertains.
- 104 17. Agencies that use automated legal guidance tools should provide users an option to  
105 provide feedback or report errors.
- 106 18. When applicable, agencies should provide disclaimers that the automated legal guidance  
107 tool is not human.

108



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### **Reliance**

- 109        19. Agencies should allow users to obtain a written record of their communication with  
110            automated legal guidance tools and should include date and time stamps for the  
111            information provided.
- 112        20. Agencies should consider whether, or under what circumstances, a person's good faith  
113            reliance on guidance provided by an automated legal guidance tool should serve as a  
114            defense against a penalty or other consequences for noncompliance with an applicable  
115            legal requirement, and it should prominently announce that decision to users.
- 116        21. If an agency takes the position that it can depart from an interpretation or explanation  
117            provided by an automated legal guidance tool in a subsequent investigative or  
118            adjudicative proceeding, including in the application of penalties for noncompliance, it  
119            should prominently announce its position to users.



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## Automated Legal Guidance at Federal Agencies

### Committee on Administration and Management

Proposed Recommendation | June 16, 2022

#### Proposed Amendments

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

1 Federal agencies increasingly automate the provision of legal guidance to the public  
2 through online tools and other technologies.<sup>1</sup> The Internal Revenue Service, for example,  
3 encourages taxpayers to seek answers to questions regarding various tax credits and deductions  
4 through its online “Interactive Tax Assistant,” and the United States Citizenship and Immigration  
5 Services suggests that potential green card holders and citizens with questions about their  
6 immigration rights communicate with its interactive chatbot, “Emma.” Almost a dozen federal  
7 agencies have either implemented or piloted such automated legal guidance tools in just the past  
8 three years.<sup>2</sup>

9 Automated legal guidance tools can take several forms. The most common are chatbots  
10 and virtual assistants. The simplest chatbots provide standardized responses based on keywords

<sup>1</sup> This Recommendation defines “guidance” broadly to include interpretive rules, general statements of policy, and other materials that agencies considered to be guidance documents under other, separate definitions adopted by government agencies. See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

<sup>2</sup> They include the Department of the Army, Internal Revenue Service, United States Citizenship and Immigration Services, the Department of Education, the Environmental Protection Agency, the General Services Administration, the Food and Drug Administration, the Internal Revenue Service, the Social Security Administration, the National Institutes of Health, the Patent and Trademark Office, the Army, the General Services Administration, the Social Security Administration, and the Veterans Benefits Administration, the Food and Drug Administration, the National Institutes of Health, and the Environmental Protection Agency.

Commented [CMA1]: Proposed Amendment from Special Counsel Jeffrey Lubbers #1:

Please see proposed edits in footnote 2.



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11 included in a user’s question. Although the terms can overlap, virtual assistants tend to be more  
12 versatile than chatbots and can often perform additional tasks such as making an appointment or  
13 filling out a form in response to a conversation.<sup>3</sup> More robust tools rely on natural language  
14 processing, or artificial intelligence to interpret natural language and generate an individualized  
15 response.<sup>4</sup>

16 Agencies use automated legal guidance tools for a number of reasons. These reasonsThey  
17 include efficiently allocating limited staff resources, improving user experience and service  
18 delivery, and enhancing the quality, consistency, speed, and predictability of guidance, as well  
19 as the speed with which it is provided to the public. Because they are always available from any  
20 location and can efficiently and effectively provide answers to common questions, automated  
21 legal guidance tools have the potential to revolutionize the provision of agency guidance to the  
22 public.

23 Agencies generally take the position that users cannot rely on automated legal guidance.  
24 As this Recommendation recognizes, agencies must be clear in disclosing this position to users.  
25 That is true, of course, of all forms of guidance documents.<sup>5</sup> Automated legal guidance may,  
26 however, create an especially heightened risk of a user’s relying on the guidance issued in a way  
27 that the issuing agency does not intend. Since users often enter specific facts relating to their  
28 circumstances, users may assume that the automated guidance tool is giving a customized  
29 response that has accounted for all of the facts that have been entered, which may or may not be  
30 the case. As with other forms of guidance, there also is an issue regarding the extent to which  
31 users are able to rely upon automated legal guidance. Agencies generally take the position that

**Commented [CA2]:** Proposed Amendment from Council #1:

The Council finds the original language unclear concerning why automated legal guidance poses an especially large risk of a user’s relying on guidance issued in the way an agency does not intend, among other things. It has suggested the following revision for the Committee’s consideration.

**Commented [CA3]:** Inquiry from Council:

Here and elsewhere, does “users” refer only to direct users of automated legal guidance tools or to third-parties as well? If the latter, then should an amendment be made?

<sup>3</sup> See Joshua D. Blank & Leigh Osofsky, Automated Legal Guidance at Federal Agencies 1, 10 (May 26, 2022) (report to the Admin. Conf. of the U.S.).

<sup>4</sup> See Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Blank & Osofsky, *supra* note 3.

<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 11 – 12, 84 Fed. Reg. 38,931, 38,933 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, ¶¶ 6, 11, 84 Fed. Reg. 38,927, 38,929 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶¶ 4 – 6, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).



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32 ~~users cannot rely upon automated legal guidance, and that automated legal guidance does not~~  
33 ~~bind the agency. Critics argue, however, that automated legal guidance tools can oversimplify or~~  
34 ~~misstate the law or offer users guidance that does not apply well to their factual circumstances.~~  
35 ~~Although the same can be said for other explanatory materials, such as brochures and fact sheets,~~  
36 ~~automated legal guidance tools pose unique concerns because they can appear to be human.~~  
37 ~~Users may perceive the kind of instantaneous and seemingly personalized responses provided by~~  
38 ~~an automated legal guidance tool to be more authoritative or persuasive than a guidance~~  
39 ~~document.~~

40 The Administrative Conference has adopted several recommendations on the  
41 development, use, and public availability of agency guidance documents.<sup>6</sup> This Recommendation  
42 builds on those recommendations by identifying best practices for agencies to consider when  
43 they develop, use, and manage automated legal guidance tools. ~~In identifying these best~~  
44 ~~practices, the Conference recognizes that automated legal guidance~~~~The use of these~~ tools may  
45 not be suitable for all agencies and administrative programs ~~and that.~~ ~~Moreover,~~ even when  
46 ~~agencies use them~~ ~~automated legal guidance tools are used,~~ agencies ~~should expect that they will~~  
47 need to provide additional guidance ~~through by other channels~~ ~~means,~~ including live person-to-  
48 person support. ~~This Recommendation provides best practices to guide agencies when~~  
49 ~~considering using automated legal guidance tools.~~

Commented [CA4]: Proposed Amendment from Council #2

RECOMMENDATION

Design and Management

<sup>6</sup> See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014).



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- 50 1. Agencies should explore the possible benefits of offering automated legal guidance tools,  
51 including enhancing administrative efficiency and helping the public understand complex  
52 laws using plain language. This is especially true for those agencies that have a high  
53 volume of individual interactions with members of the public who may not be familiar  
54 with legal requirements.
- 55 2. Agencies should also weigh the potential downsides of automated legal guidance tools,  
56 including potentially oversimplifying the law creating confusion as to whether and when  
57 the agency intends users to rely on the guidance issued. To avoid such confusion,  
58 agencies should follow the recommendations set forth in Paragraphs 18–20, letting  
59 guidance appear more personalized than it actually is, and not adequately disclosing that  
60 users cannot rely on the guidance to bind the agency.
- 61 3. Agencies using automated legal guidance tools should design and manage them in ways  
62 that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.
- 63 4. Agencies should ensure that automated legal guidance tools do not displace other agency  
64 mechanisms for increasing access to the underlying law.
- 65 5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the  
66 substance embedded in automated legal guidance tools and should publish these  
67 procedures on their websites. These procedures should incorporate periodic user testing  
68 and other forms of evaluation by internal and external researchers to ensure accessibility  
69 and effectiveness.
- 70 6. The General Services Administration should regularly evaluate the relative costs and  
71 benefits of using outside vendors for the introduction-production of automated legal  
72 guidance tools and share such information with agencies.

**Accessibility**

- 73 7. Agencies should utilize human-centered design methodologies, empirical customer  
74 research, and user testing, as described and defined in Executive Order 14,058,  
75 *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in*

**Commented [CA5]:** Proposed Amendment from Council #3:

The Council finds the original language unclear as to the potential downsides unique to automated legal guidance tools and what the agency might do to mitigate them. It has suggested this revision for the Committee's consideration.



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76 *Government* (86 Fed. Reg. 71,357, Dec. 13, 2021) in designing and maintaining their  
77 automated legal guidance tools.

- 78 8. Agencies should, consistent with applicable laws and policies, design **and periodically**  
79 **review and (when necessary) reconfigure** automated legal guidance tools to ensure that  
80 they meet the needs of the particular populations that are intended to utilize the  
81 automated legal guidance tools.

82 ~~9. Agencies should periodically review and reconfigure automated legal guidance tools to~~  
83 ~~ensure that they meet the needs of the particular populations that are intended to utilize~~  
84 ~~the automated legal guidance tools.~~

85 ~~10.9.~~ Agencies should ensure that information provided by automated legal guidance  
86 tools is stated in plain language understandable by the particular populations that are  
87 intended to **use utilize these automated legal guidance** tools, consistent with the Plain  
88 Writing Act of 2010; Recommendation 2017-3, *Plain Language in Regulatory Drafting*  
89 (82 Fed. Reg. 61,728, Dec. 14, 2017); and other applicable laws and policies.

90 ~~11.10.~~ Agencies should design automated legal guidance tools to put users in contact  
91 with a human customer service representative to whom **users they** can address questions  
92 in the event that a question is not answered by **the an** automated legal guidance tools or if  
93 the users are having difficulty using **an automated legal guidance the** tool.

### Transparency

94 ~~12.11.~~ When the underlying law is unclear or unsettled, or when the **application of the**  
95 **law is especially fact-dependent legal guidance depends upon the facts of the particular**  
96 **situation**, agencies should be transparent about the limitations of the advice the user is  
97 receiving. To the extent practicable, agencies should also provide access through



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98 automated legal guidance tools to the legal materials underlying the tools, including  
99 relevant statutes, rules, and judicial or adjudicative decisions.

100 ~~13~~.12. Agencies should disclose how they store and use the data obtained through  
101 automated legal guidance tools.

102 ~~14~~.13. Agencies should update the content of automated legal guidance tools to reflect  
103 legal developments or correct errors in a timely manner. Agencies should also maintain  
104 an electronic, publicly accessible, searchable archive that identifies and explains ~~such the~~  
105 updates. Agencies should ~~ensure that provide~~ the date on which the tool was last updated.

106 ~~15~~.14. When automated legal guidance tools provide programmed responses to users’  
107 questions, agencies should publish the questions and responses to provide an immediate  
108 and comprehensive source of information regarding the ~~automated legal guidance~~ tools.  
109 Agencies should post this information in an appropriate location on their websites and  
110 make it accessible through the automated legal guidance tool to which it pertains.

111 ~~16~~.15. When automated legal guidance tools learn to provide different answers to users’  
112 questions over time, agencies should publish information related to how the machine  
113 learning process was developed and how it is maintained and updated. Agencies should  
114 post this information in an appropriate location on their websites and make it accessible  
115 through the automated legal guidance tool to which it pertains.

116 ~~17~~.16. Agencies that use automated legal guidance tools should provide users ~~an~~  
117 ~~option~~ the ability to provide ~~offer~~ feedback or report errors.

118 ~~18~~.17. When applicable, agencies should provide disclaimers that the automated legal  
119 guidance tool is not human.

**Reliance**

120 ~~19~~.18. ~~When feasible, A~~ agencies should allow users to obtain a written record of their  
121 communication with automated legal guidance tools and should include date and time  
122 stamps for the information provided.

123 ~~20~~.19. Agencies should consider whether, or under what circumstances, a person's good  
124 faith reliance on guidance provided by an automated legal guidance tool should serve as a

**Commented [CMA6]:** Comment from Public Member Jack Beermann:

This recommendation “seems way in the weeds and may involve disclosing proprietary information of contractors. Is it really necessary?”

**Commented [CMA7]:** Proposed Amendment from Special Counsel Jeffrey Lubbers #2:

“My reason for suggesting this (I realize that feasibility is an implied condition for many of them) is that this requirement might discourage agencies from using these tools, and the report doesn't even give one example of an agency that does this now.”



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125 defense against a penalty or other consequences for noncompliance with an applicable  
126 legal requirement, and it should prominently announce that decision to users.  
127 ~~21-20.~~ If an agency takes the position that it can depart from an interpretation or  
128 explanation provided by an automated legal guidance tool ~~in a subsequent investigative~~  
129 ~~or adjudicative proceeding,~~ including in the application of penalties for noncompliance, it  
130 should prominently announce its position to users.

**Commented [CMA8]:** Proposed Amendment from Public Member Jack Beermann:

“Not sure about the phrase ‘in a subsequent investigative or adjudicative proceeding’ because this principle may apply in other contexts. I recommend deleting it.”



OFFICE OF THE CHAIRMAN  
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## **STATEMENT OF PRINCIPLES FOR THE DISCLOSURE OF FEDERAL ADMINISTRATIVE MATERIALS**

*This Statement was prepared by the Office of the Chairman of the Administrative Conference of the United States (ACUS) based on recommendations adopted by the ACUS Assembly. The Statement was not adopted by the ACUS Assembly and does not necessarily reflect the views of ACUS (including its Council, committees, or members).*

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### **Recommended Citation**

Admin. Conf. of the U.S., Office of the Chairman, Statement of Principles for the Disclosure of Federal Administrative Materials (June 16, 2022).

# Statement of Principles for the Disclosure of Federal Administrative Materials

*INITIAL OFFICE OF THE CHAIRMAN DRAFT FOR REVIEW BY THE ASSEMBLY AT THE 77TH PLENARY SESSION*

**June 16, 2022**

1           Various statutes govern which records agencies must proactively disclose, i.e., disclose to  
2 the general public without having received a request to do so from a member of the public. The  
3 Freedom of Information Act (FOIA),<sup>1</sup> the Federal Register Act,<sup>2</sup> the Federal Records Act,<sup>3</sup> the  
4 Administrative Procedure Act,<sup>4</sup> and the E-Government Act of 2002<sup>5</sup> require proactive disclosure  
5 of certain records. In addition, some statutes require agencies to disclose certain records on  
6 request.<sup>6</sup> Other laws, including the Privacy Act, either require or authorize agencies to withhold  
7 certain records from disclosure.<sup>7</sup>

8           The Administrative Conference of the United States (ACUS) has issued dozens of  
9 recommendations pertaining to agencies' proactive disclosure of records that agencies generate  
10 or receive while engaged in rulemaking, adjudication, licensing, investigation, or other  
11 administrative processes, or that they generate during judicial review of agency rules and orders.  
12 This Statement of Principles refers to these records as "administrative materials." Examples of  
13 administrative materials include requests for information; advance notices of proposed  
14 rulemaking; notices of proposed rulemaking; public comments; rules (i.e., procedural  
15 regulations, substantive regulations, and guidance documents); adjudicative orders and opinions;  
16 and court filings related to judicial review of a rule or order. Proactive disclosure of

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<sup>1</sup> 5 U.S.C. § 552(a)(1)–(2).

<sup>2</sup> 44 U.S.C. § 1505.

<sup>3</sup> *Id.* § 3102.

<sup>4</sup> 5 U.S.C. § 553(b).

<sup>5</sup> 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services).

<sup>6</sup> 5 U.S.C. § 552(a)(1)–(2).

<sup>7</sup> *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a.

17 administrative materials promotes transparency of agency processes, enhances efficiency by  
18 reducing the need for members of the public to file requests for agency records and agencies to  
19 respond to such requests, and promotes the legitimacy and accountability of agency decisions.

20 This Statement sets forth common principles and best practices derived from the dozens  
21 of relevant ACUS recommendations.<sup>8</sup> It is intended to help guide agencies' proactive disclosure  
22 of administrative materials in the most equitable, effective, and efficient way possible for both  
23 the public and agencies. It is focused exclusively on best practices under existing law.<sup>9</sup> It will be  
24 continuously updated as ACUS adopts new recommendations pertaining to agencies' proactive  
25 disclosure of administrative materials.<sup>10</sup>

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<sup>8</sup> The Appendix lists these recommendations.

<sup>9</sup> An ongoing ACUS project, *Disclosure of Agency Legal Materials*, contemplates possible amendments to the principal statutes (including FOIA and the Federal Register Act) governing the proactive disclosure or publication of administrative materials.

<sup>10</sup> In addition to *Disclosure of Agency Legal Materials*, there are several other ongoing ACUS projects that may result in recommendations that, if adopted by the Assembly, will be incorporated into this Statement of Principles. Visit <https://www.acus.gov/research-projects> for a list of ongoing projects.

## STATEMENT OF PRINCIPLES

### **Proactively Disclosing Administrative Materials on Agency Websites and in the *Federal Register***

- 26 1. Agencies should proactively disclose on their websites administrative materials that  
27 affect the rights and interests of members of the public. These include, among other  
28 materials:
- 29 a. Rules (i.e., procedural regulations, substantive regulations, and guidance  
30 documents);
  - 31 b. Adjudicative opinions and orders;
  - 32 c. Descriptions of agencies' organization and functions;
  - 33 d. Solicitations of public feedback (e.g., advance notices of proposed rulemaking  
34 (ANPRMs), requests for information (RFIs), notices of proposed rulemaking  
35 (NPRMs));
  - 36 e. Materials that an agency considered during the course of a rulemaking (e.g.,  
37 public comments, studies, advisory committee reports, transcripts, recordings of  
38 meetings);
  - 39 f. Decisions and supporting materials (e.g., pleadings, motions, briefs) issued and  
40 filed in adjudicative proceedings; and
  - 41 g. Publicly filed pleadings, briefs, and settlements, as well as court decisions bearing  
42 on agencies' regulatory or enforcement activities.
- 43 2. In lieu of disclosing all administrative materials of a single type (e.g., all adjudicative  
44 opinions, substantively identical comments submitted as part of a mass comment  
45 campaign) on agency websites, agencies should, in certain circumstances, consider  
46 disclosing a representative sample of these materials or a sample that is particularly well  
47 reasoned. Disclosing samples of these materials may be especially appropriate when the  
48 agency has generated or received a large number of them, they are individually of little  
49 public interest, and they raise similar legal and factual issues.
- 50 3. Agencies should organize administrative materials on their websites to maximize the  
51 probability that members of the public will find the information for which they are  
52 looking. In addition to posting links to PDF versions of administrative materials on  
53 agency websites, agencies should, as appropriate:

- 54 a. Create a webpage dedicated to a particular kind of administrative material (e.g., a  
55 dedicated guidance documents webpage) and ensure that this dedicated page is  
56 easily reachable from the agency’s homepage;
- 57 b. Index, tag, or place administrative materials in sortable tables;
- 58 c. Ensure that website search engines capture administrative materials; and
- 59 d. Ensure that related electronic docket pages that house administrative materials are  
60 linked to one another.
- 61 4. Agencies should present rules (i.e., procedural regulations, substantive regulations, and  
62 guidance documents), and adjudicative opinions and orders on agency websites in a way  
63 that ensures the public can understand their context and legal effect by, among other  
64 methods:
- 65 a. Including a publication date within these materials, as appropriate;
- 66 b. Clearly marking materials that are inoperative (i.e., no longer in effect) by, for  
67 example, including a rescission date;
- 68 c. Explaining the legal effect of these materials, including whether they have legal  
69 effect on members of the public, legal effect on the agency itself, or are purely  
70 explanatory in nature;
- 71 d. Distinguishing between precedential and non-precedential materials; and
- 72 e. Including links within inoperative versions of these materials to any operative  
73 versions, and links within operative versions to any inoperative versions.
- 74 5. Agencies should keep webpages and electronic dockets housing administrative materials  
75 up to date. At a minimum, agencies should fix any broken links and include notations  
76 indicating when the page or electronic docket was last updated.
- 77 6. Agencies should submit at least the following administrative materials for publication in  
78 the *Federal Register* and, as appropriate, the *Code of Federal Regulations*, in addition to  
79 proactively publishing them on agency websites:
- 80 a. Substantive and procedural regulations;
- 81 b. Generally applicable guidance documents;
- 82 c. Descriptions of the agency’s organization and functions;
- 83 d. Solicitations of public feedback (e.g., ANPRMs, RFIs, and NPRMs); and
- 84 e. Subsequent changes to the foregoing materials.

85 7. With respect to inoperative administrative materials, agencies should consider disclosing  
86 those that have certain indicia of significance, including those that would be useful for  
87 understanding changes in law or policy, that generated reliance interests while operative,  
88 or that have received extensive media attention.

### Illustrations

89 (With respect to Paragraph 2): For instance, with respect to adjudicative opinions and  
90 orders, agencies may decide to disclose a subset of such opinions and orders that are  
91 particularly well reasoned and clear or that provide needed policy clarifications. *See*  
92 *Admin. Conf. of the U.S., Recommendation 2013-1, Improving Consistency in Social*  
93 *Security Disability Adjudications*, ¶ 3. With respect to public comments received in  
94 response to rulemakings, agencies may decide to disclose a single, representative  
95 example of nearly identical comments received. *See Admin. Conf. of the U.S.,*  
96 *Recommendation 2021-1, Managing Mass, Computer-Generated, and Falsely Attributed*  
97 *Comments*, ¶ 3.

98 (With respect to Paragraphs 3 and 4): One particularly important application of these  
99 principles is with respect to guidance documents on agency websites. ACUS has  
100 recommended that agencies create webpages dedicated to guidance documents and that  
101 these webpages contain a plain language explanation (sometimes known as “explainers”)  
102 that explain that guidance documents lack the force of law for members of the public.  
103 The combined effect of grouping guidance documents together into a single page, along  
104 with the inclusion of a statement on this page that describes their legal effect, is to ensure  
105 that members of the public can easily find relevant guidance documents and understand  
106 their legal effect. *See Admin. Conf. of the U.S., Recommendation 2019-3, Public*  
107 *Availability of Agency Guidance Documents*, ¶ 7; *Admin. Conf. of the U.S.,*  
108 *Recommendation 2019-1, Agency Guidance Through Interpretive Rules*, ¶ 4; *Admin.*  
109 *Conf. of the U.S., Recommendation 2017-5, Agency Guidance Through Policy*  
110 *Statements*, ¶ 4.

## Using Supplemental Methods to Proactively Disclose Administrative Materials to Members of the Public

- 111 8. Agencies should consider using supplemental methods to improve public access to and  
112 awareness of proactively disclosed administrative materials. Possible approaches include:
- 113 a. Proactively bringing administrative materials to the attention of interested persons  
114 who do not normally monitor the agency’s website or the agency’s *Federal*  
115 *Register* entries for developments;
  - 116 b. Training agency employees to effectively disseminate administrative materials;
  - 117 c. Taking steps to overcome or minimize geographical, language, resource, or other  
118 barriers to learning about or accessing administrative materials, including by  
119 publishing administrative materials in languages other than English and in  
120 locations frequented by underrepresented communities, such as immigration court  
121 waiting rooms;
  - 122 d. Creating digests, indexes, and guides that synthesize administrative materials in  
123 easy-to-understand ways;
  - 124 e. Disseminating administrative materials via social media channels, including  
125 agency blogs;
  - 126 f. Disseminating administrative materials via email distribution lists;
  - 127 g. Issuing press releases to announce the availability of administrative materials;
  - 128 h. Publishing administrative materials in specialized publications read by interested  
129 members of the public; and
  - 130 i. Distributing administrative materials during webinars and in-person meetings.
- 131 9. Agencies should consider the following factors, among others, in deciding whether to use  
132 supplemental methods and which ones to use:
- 133 a. Whether there are members of the public who are likely affected by the  
134 administrative material but do not normally follow the *Federal Register* or the  
135 agency’s website;
  - 136 b. Whether the agency has adequate resources to undertake these activities; and
  - 137 c. Whether the specific supplemental methods the agency contemplates undertaking  
138 are the most cost-effective ways, of all the supplemental methods the agency  
139 could feasibly undertake, to reach the target audience.

140 10. With respect to copyrighted material that agencies have incorporated by reference into  
141 regulations or intend to incorporate by reference into regulations, agencies should ensure  
142 that the material is reasonably available to the public. Agencies should try to obtain  
143 consent from the copyright holder to publish the copyrighted material. If the copyright  
144 holder does not grant this consent, the agency should work with the copyright holder and,  
145 through the use of technological solutions (e.g., publishing a read-only version of the  
146 material), low-cost publication, or other appropriate means, promote the availability of  
147 the materials while respecting the copyright owner’s interest in protecting its intellectual  
148 property.

**Illustration**

149 (With respect to Paragraph 8): This principle is especially important in the rulemaking  
150 context. By taking steps, beyond publication, to bring rulemaking materials to the  
151 attention of all interested persons, the agency is maximizing the probability that it  
152 receives useful input as part of the notice-and-comment process. *See, e.g.,* Admin. Conf.  
153 of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*; Admin.  
154 Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*.

## Protecting Personally Identifiable Information, Trade Secrets, and Other Legally Protected Information Contained Within Agency Administrative Materials

- 155 11. Agencies should, in general, review administrative materials before proactively  
156 disclosing them to determine if they contain personally identifiable information, trade  
157 secrets, and other legally protected information. If they find such material they should, as  
158 appropriate:
- 159 a. Redact the material;
  - 160 b. Present the material in aggregate or summarized form; or
  - 161 c. Place the material in a physical reading room.
- 162 12. Agencies should offer members of the public the opportunity to request that personal  
163 information or trade secrets pertaining to themselves or a dependent appearing within a  
164 publicly available administrative material be removed from public view. Upon such a  
165 request, agencies should either remove the material or should promptly notify the  
166 requestor that they have decided not to do so.

### Illustration

167 (With respect to Paragraph 11): Two especially important applications of this principle  
168 are with respect to (1) adjudication materials and (2) public submissions in response to an  
169 NPRM. These records, which agencies often disclose in their publicly available  
170 electronic adjudicative and rulemaking dockets respectively, sometimes contain  
171 personally identifiable information, trade secrets, and other legally protected information.  
172 Sometimes, agencies can protect this information from public disclosure by redacting it  
173 from the record and disclosing the remainder of the record. However, this strategy may  
174 not always be sufficient to protect legally protected information. In these situations,  
175 agencies should consider posting a summary of the record, rather than the record itself,  
176 along with a statement that explains why the record as a whole was not disclosed. *See*  
177 *Admin. Conf. of the U.S., Recommendation 2020-2, Protected Materials in Public*  
178 *Rulemaking Dockets*, ¶¶ 6–10; *Recommendation 2017-1, Adjudication Materials on*  
179 *Agency Websites*, ¶ 1. Placing these records in a physical reading room rather than in an  
180 online docket may be appropriate to protect copyrighted materials within the records. *See*  
181 *Admin. Conf. of the U.S., Recommendation 2013-4, The Administrative Record in*  
182 *Informal Rulemaking*, ¶ 2.

## Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials

- 183 13. Agencies should create written procedures that explain:
- 184 a. The kinds of administrative materials they proactively disclose to the public;
- 185 b. How agencies organize administrative materials on their websites;
- 186 c. The methods agencies use to disclose administrative materials to the public and an
- 187 any supplemental methods, such as those described in Paragraph 8, that agencies
- 188 use to improve public access to or awareness of proactively disclosed materials;
- 189 and
- 190 d. How agencies protect personally identifiable information, trade secrets, and other
- 191 legally protected information contained within administrative materials.
- 192 14. Agencies should seek public input on these procedures as they are formulating them.
- 193 After they have finalized these procedures, they should disclose them on their websites
- 194 and seek further public input on the extent to which these procedures have, in practice,
- 195 promoted the public availability of administrative materials.
- 196 15. Agencies should periodically review these procedures to assess their performance in
- 197 making administrative materials available and to identify opportunities for improvement.

### Illustration

198 (With respect to Paragraph 13): One especially important application of this principle is

199 with respect to written procedures for the proactive disclosure of inoperative guidance

200 documents. Creating and adhering to written procedures for the proactive disclosure of

201 inoperative guidance documents can give the public important insights into how

202 agencies' positions have changed over time. This is because agency positions are often

203 announced in guidance documents that, although disclosed on agency websites, are not

204 always published in the *Federal Register*. When an agency removes such a document

205 from its website after the document becomes inoperative, it can be virtually impossible

206 for the public to track how an agency's position has changed over time. However, when

207 an agency has a written procedure that provides for maintaining certain inoperative

208 guidance documents on its website, it holds itself accountable to the public for ensuring

209 that those documents remain on its website. And when an agency adheres to these written

210 procedures, members of the public gain access to a rich history of agency decision

211 making, benefiting regulated entities, beneficiaries of regulations, and other members of  
212 the public. *See* Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of*  
213 *Inoperative Agency Guidance Documents*, ¶ 1.

## APPENDIX

### **Proactively Disclosing Administrative Materials on Agency Websites and in the *Federal Register***

214 Admin. Conf. of the U.S., Recommendations:

- 215 • 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, ¶¶ 1–4
- 216 • 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ¶¶ 3–7
- 217 • 2020-6, *Agency Litigation Webpages*
- 218 • 2020-5, *Publication of Policies Governing Agency Adjudicators*
- 219 • 2020-3, *Agency Appellate Systems*, ¶ 19
- 220 • 2020-1, *Rules on Rulemakings*, ¶ 3
- 221 • 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 7–10
- 222 • 2019-1, *Agency Guidance Through Interpretive Rules*, ¶ 4
- 223 • 2018-7, *Public Engagement in Rulemaking*, ¶ 9
- 224 • 2018-6, *Improving Access to Regulations.gov’s Rulemaking Dockets*
- 225 • 2018-5, *Public Availability of Adjudication Rules*
- 226 • 2017-5, *Agency Guidance Through Policy Statements*, ¶ 7
- 227 • 2017-1, *Adjudication Materials on Agency Websites*
- 228 • 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*
- 229 • 2014-6, *Petitions for Rulemaking*, ¶ 14
- 230 • 2014-4, *Ex Parte Communications in Informal Rulemaking*, ¶¶ 7, 9
- 231 • 2014-3, *Guidance in the Rulemaking Process*, ¶ 8
- 232 • 2013-5, *Social Media in Rulemaking*
- 233 • 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 2
- 234 • 2013-1, *Improving Consistency in Social Security Disability Adjudications*, ¶ 3
- 235 • 2011-8, *Agency Innovations in E-Rulemaking*, ¶ 4
- 236 • 2011-2, *Rulemaking Comments*, ¶ 3
- 237 • 2011-1, *Legal Considerations in e-Rulemaking*, ¶¶ 4–5
- 238 • 82-2, *Resolving Disputes Under Federal Grant Programs*, ¶ 12
- 239 • 76-2, *Strengthening the Informational and Notice-Giving Functions of the Federal*
- 240 *Register*, ¶ 1
- 241 • 75-1, *Licensing Decisions of the Federal Banking Agencies*, ¶ 4
- 242 • 71-3, *Articulation of Agency Policies*

### **Using Supplemental Methods to Proactively Disclose Administrative Materials to Members of the Public**

243 Admin. Conf. of the U.S., Recommendations:

- 244 • 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, ¶ 9
- 245 • 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, ¶ 6
- 246 • 2021-6, *Public Access to Agency Adjudicative Proceedings*, ¶ 1
- 247 • 2021-3, *Early Input on Regulatory Alternatives*

- 248 • 2020-2, *Protected Materials in Public Rulemaking Dockets*, ¶ 2
- 249 • 2020-1, *Rules on Rulemakings*, ¶ 3
- 250 • 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 11–12
- 251 • 2018-7, *Public Engagement in Rulemaking*
- 252 • 2016-4, *Evidentiary Hearings Not Required by the APA*, ¶ 28
- 253 • 2014-4, *Ex Parte Communications in Informal Rulemaking*, ¶ 5
- 254 • 2013-5, *Social Media in Rulemaking*
- 255 • 2012-3, *Immigration Removal Adjudication*, ¶ 17
- 256 • 2011-5, *Incorporation by Reference*, ¶ 3

**Protecting Personally Identifiable Information, Trade Secrets, and Other Legally Protected Information Contained Within Agency Administrative Materials**

257 Admin. Conf. of the U.S., Recommendations:

- 258 • 2021-3, *Early Input on Regulatory Alternatives*, ¶ 6
- 259 • 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ¶¶ 8–
- 260 10
- 261 • 2020-6, *Agency Litigation Webpages*, ¶ 4
- 262 • 2020-2, *Protected Materials in Public Rulemaking Dockets*
- 263 • 2018-4, *Recusal Rules for Administrative Adjudicators*, ¶ 6
- 264 • 2017-7, *Regulatory Waivers and Exemptions*, ¶ 9
- 265 • 2017-1, *Adjudication Materials on Agency Websites*, ¶ 1
- 266 • 2013-1, *Improving Consistency in Social Security Disability Adjudications*, ¶ 3
- 267 • 2011-1, *Legal Considerations in e-Rulemaking*, ¶¶ 1–2
- 268 • 72-8, *Adverse Actions Against Federal Employees*, ¶ 7

**Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials**

269 Admin. Conf. of the U.S. Recommendations:

- 270 • 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, ¶ 1
- 271 • 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ¶ 11
- 272 • 2020-6, *Agency Litigation Webpages*, ¶ 5
- 273 • 2020-2, *Protected Materials in Public Rulemaking Dockets*, ¶¶ 1–2
- 274 • 2020-1, *Rules on Rulemakings*, ¶ 2
- 275 • 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*, ¶ 6
- 276 • 2019-3, *Public Availability of Agency Guidance Documents*, ¶ 1
- 277 • 2014-4, *Ex Parte Communications in Informal Rulemaking*, ¶¶ 1–3
- 278 • 2013-4, *The Administrative Record in Informal Rulemaking*, ¶¶ 10–11
- 279 • 93-3, *Peer Review in the Award of Discretionary Grants*, ¶ 4



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