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
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.
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 Coglianese, 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.
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

Last updated: July 12, 2019
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.
Public Meeting Policies and Procedures
(Updated December 2, 2020)

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

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

Public Notice of Plenary Sessions and Committee Meetings

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

Public Access to Meetings

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

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

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

The 101 statutory members of the Conference as well as liaison representatives, special 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.
### Council Members

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

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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>James L. Anderson</td>
<td>Federal Deposit Insurance Corporation</td>
<td>Deputy General Counsel, Supervision and Legislation Branch</td>
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<tr>
<td>David J. Apol</td>
<td>U.S. Office of Government Ethics</td>
<td>General Counsel</td>
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<tr>
<td>Gregory R. Baker</td>
<td>Federal Election Commission</td>
<td>Deputy General Counsel for Administration</td>
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<tr>
<td>Eric S. Benderson</td>
<td>U.S. Small Business Administration</td>
<td>Associate General Counsel for Litigation &amp; Claims</td>
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<tr>
<td>Krystal J. Brumfield</td>
<td>U.S. General Services Administration</td>
<td>Associate Administrator for the Office of Government-wide Policy</td>
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<tr>
<td>Daniel Cohen</td>
<td>U.S. Department of Transportation</td>
<td>Assistant General Counsel for Regulation</td>
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<tr>
<td>Michael J. Cole</td>
<td>Federal Mine Safety and Health Review Commission</td>
<td>Senior Attorney, Office of General Counsel</td>
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<tr>
<td>Peter J. Constantine</td>
<td>U.S. Department of Labor</td>
<td>Associate Solicitor, Office of Legal Counsel</td>
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<tr>
<td>Anika S. Cooper</td>
<td>Surface Transportation Board</td>
<td>Deputy General Counsel</td>
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<tr>
<td>Scott de la Vega</td>
<td>U.S. Department of the Interior</td>
<td>Associate Solicitor for General Law</td>
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<td>Hampton Y. Dellinger</td>
<td>U.S. Department of Justice</td>
<td>Associate Attorney General for the Office of Legal Policy</td>
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<td>Elizabeth H. Dickinson</td>
<td>U.S. Food &amp; Drug Administration</td>
<td>Senior Deputy Chief Counsel</td>
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<tr>
<td>Seth R. Frotman</td>
<td>Consumer Financial Protection Bureau</td>
<td>General Counsel</td>
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<tr>
<td>Ami M. Grace-Tardy</td>
<td>U.S. Department of Energy</td>
<td>Assistant General Counsel for Legislation, Regulation, &amp; Energy Efficiency</td>
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<tr>
<td>Gina K. Grippando</td>
<td>U.S. International Trade Commission</td>
<td>Assistant General Counsel for Administrative Law</td>
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<td>Richard J. Hipolit</td>
<td>U.S. Department of Veterans Affairs</td>
<td>Deputy General Counsel for Legal Policy</td>
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<td>Janice L. Hoffman</td>
<td>Centers for Medicare &amp; Medicaid Services</td>
<td>Associate General Counsel</td>
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<tr>
<td>Erica Siegmund Hough</td>
<td>Federal Energy Regulatory Commission</td>
<td>Deputy Associate General Counsel</td>
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<tr>
<td>Paul S. Koffsky</td>
<td>U.S. Department of Defense</td>
<td>Senior Deputy General Counsel and Deputy General Counsel (Personnel and Health Policy)</td>
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<tr>
<td>Alice M. Kottmyer</td>
<td>U.S. Department of State</td>
<td>Attorney Adviser</td>
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<tr>
<td>Katia Kroutil</td>
<td>Federal Maritime Commission</td>
<td>Assistant General Counsel for General Law &amp; Regulation</td>
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<td>Jeremy Licht</td>
<td>U.S. Department of Commerce</td>
<td>Deputy General Counsel for Strategic Initiatives</td>
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<td>Raymond A. Limon</td>
<td>U.S. Merit Systems Protection Board</td>
<td>Acting Chair and Vice Chair</td>
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<td>Hilary Malawer</td>
<td>U.S. Department of Education</td>
<td>Deputy General Counsel, Office of the General Counsel</td>
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<td>Nadine N. Mancini</td>
<td>Occupational Safety and Health Review Commission</td>
<td>General Counsel</td>
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<td>Christina E. McDonald</td>
<td>U.S. Department of Homeland Security</td>
<td>Associate General Counsel for Regulatory Affairs, Office of the General Counsel</td>
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<tr>
<td>Patrick R. Nagle</td>
<td>Social Security Administration</td>
<td>Chief Administrative Law Judge</td>
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<tr>
<td>Raymond Peeler</td>
<td>U.S. Equal Employment Opportunity Commission</td>
<td>Associate Legal Counsel</td>
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<tr>
<td>Mitchell E. Plave</td>
<td>Office of the Comptroller of the Currency</td>
<td>Special Counsel, Bank Activities</td>
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<tr>
<td>Connor N. Raso</td>
<td>U.S. Securities and Exchange Commission</td>
<td>Senior Counsel, Office of General Counsel</td>
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<tr>
<td>Roxanne L. Rothschild</td>
<td>National Labor Relations Board</td>
<td>Executive Secretary</td>
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<tr>
<td>Jay R. Schwarz</td>
<td>Board of Governors of the Federal Reserve System</td>
<td>Senior Counsel, Legal Division</td>
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<tr>
<td>Helen Serassio</td>
<td>U.S. Environmental Protection Agency</td>
<td>Associate General Counsel, Cross-Cutting Issues Law Office</td>
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<tr>
<td>Miriam Smolen</td>
<td>Federal Housing Finance Agency</td>
<td>Senior Deputy General Counsel</td>
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<td>Robert F. Stone</td>
<td>Occupational Safety and Health Administration</td>
<td>Sr. Policy Economist, Directorate of Standards and Guidance</td>
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<td>Stephanie J. Tatham</td>
<td>Office of Management and Budget</td>
<td>Senior Policy Analyst and Attorney, Office of Information and Regulatory Affairs</td>
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<td>David A. Trissell</td>
<td>U.S. Postal Regulatory Commission</td>
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<td>Daniel Vice</td>
<td>U.S. Consumer Product Safety Commission</td>
<td>Assistant General Counsel</td>
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<tr>
<td>Katherine Twomey Allen</td>
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<td>Kent H. Barnett</td>
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<td>University of Pennsylvania Carey Law School</td>
<td>Edward B. Shils Professor of Law; Director, Penn Program on Regulation</td>
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<td>The University of Chicago Law School</td>
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<td>Jeffrey A. Rosen</td>
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<td>Nonresident Fellow</td>
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<td>Sidney A. Shapiro</td>
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<td>Frank U. Fletcher Chair of Administrative Law Professor of Law</td>
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<td>Kate A. Shaw</td>
<td>Yeshiva University Benjamin N. Cardozo School of Law</td>
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<td>Ganesh Sitaraman</td>
<td>Vanderbilt Law School</td>
<td>Chancellor Faculty Fellow; Professor of Law; Director, Program in Law and Government</td>
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<td>Vanderbilt Law School</td>
<td>Lee S. &amp; Charles A. Speir Chair in Law and Director of Graduate Studies</td>
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<td>Christopher J. Walker</td>
<td>The Ohio State University Michael E. Moritz College of Law</td>
<td>John W. Bricker Professor of Law</td>
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<td>Melissa Feeney Wasserman</td>
<td>The University of Texas at Austin School of Law</td>
<td>Charles Tilford McCormick Professor of Law</td>
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<tr>
<td>Russell R. Wheeler</td>
<td>The Brookings Institution</td>
<td>Visiting Fellow</td>
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</table>
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

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<tr>
<th>Name</th>
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<tr>
<td>Thomas H. Armstrong</td>
<td>U.S. Government Accountability Office</td>
<td>General Counsel</td>
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<td>Casey Q. Blaine</td>
<td>National Transportation Safety Board</td>
<td>Deputy General Counsel</td>
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<td>Emily Burns</td>
<td>U.S. House of Representative Committee on Oversight and Reform</td>
<td>Policy Director (Majority)</td>
</tr>
<tr>
<td>Lena C. Chang</td>
<td>U.S. Senate Committee on Homeland Security &amp; Governmental Affairs</td>
<td>Governmental Affairs Director and Senior Counsel (Majority)</td>
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<td>Tobias A. Dorsey</td>
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<td>Managing Counsel for Legal Policy</td>
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<td>Daniel M. Flores</td>
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<td>Senior Counsel (Minority)</td>
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<td>William Funk</td>
<td>ABA Section of Administrative Law &amp; Regulatory Practice</td>
<td>Member and Section Fellow</td>
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<td>U.S. Senate Committee on Homeland Security &amp; Governmental Affairs</td>
<td>General Counsel (Minority)</td>
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<td>Claire Green</td>
<td>Social Security Advisory Board</td>
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<tr>
<td>Nathan Kaczmarek</td>
<td>The Federalist Society, Vice President and Director, Regulatory Transparency Project and Article I Initiative</td>
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<td>H. Alexander Manuel</td>
<td>ABA National Conference of the Administrative Law Judiciary, Member and Committee Chair</td>
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<td>U.S. Small Business Administration Office of Advocacy, Director of Interagency Affairs</td>
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<td>Judicial Conference of the U.S., Counselor to the Chief Justice</td>
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<td>U.S. District Court for the District of Columbia, District Judge</td>
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<td>Alayna R. Ness</td>
<td>U.S. Coast Guard, Attorney Advisor, Office of Regulations &amp; Administrative Law</td>
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<td>Cornelia T.L. Pillard</td>
<td>U.S. Court of Appeals for the District of Columbia Circuit, Judge</td>
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<td>Lauren Alder Reid</td>
<td>U.S. Department of Justice, Executive Office for Immigration Review, Assistant Director for the Office of Policy</td>
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Senior Fellows

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<td>Warren Belmar</td>
<td>Capitol Counsel Group LLC</td>
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<td>Boris Bershteyn</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
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<td>Stephen G. Breyer</td>
<td>Supreme Court of the U.S.</td>
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<td>U.S. Department of Homeland Security</td>
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<td>James Ming Chen</td>
<td>Michigan State University College of Law</td>
<td>Justin Smith Morrill Chair in Law and Professor of Law</td>
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<td>H. Clayton Cook, Jr.</td>
<td>Cook Maritime Finance</td>
<td>Attorney &amp; Counselor at Law</td>
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<td>John F. Cooney</td>
<td>Former Partner, Venable LLP</td>
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<td>Ford Motor Company</td>
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<td>The George Washington University</td>
<td>Research Professor</td>
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<td>Neil R. Eisner</td>
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<td>George Mason University Antonin Scalia Law School</td>
<td>Distinguished Adjunct Professor of Law</td>
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<td>Cornell Law School</td>
<td>William G. McRoberts Research Professor in Administration of the Law Emerita</td>
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<td>Michael A. Fitzpatrick</td>
<td>Google</td>
<td>Head of Global Regulatory Affairs</td>
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<td>Federal Labor Relations Authority</td>
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<td>Arthur Kaplan Professor of Law</td>
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<td>Supreme Court of the U.S.</td>
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<td>Paul D. Kamenar</td>
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<td>Sally Katzen</td>
<td>New York University School of Law</td>
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<td>Professor of Practice, Distinguished Scholar in Residence, and Co-Director of the Legislative and Regulatory Process Clinic</td>
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<td>New York University School of Law</td>
<td>Dean Emeritus and Lawrence King Professor of Law</td>
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<td>General Counsel</td>
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<td>Professor of Law and Willard H. Pedrick Distinguished Research Scholar Emeritus</td>
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<td>The Home Depot</td>
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<td>Jonathan R. Siegel</td>
<td>The George Washington University Law School</td>
<td>F. Elwood &amp; Eleanor Davis Research Professor of Law</td>
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<td>Lon B. Smith</td>
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<td>Loren A. Smith</td>
<td>U.S. Court of Federal Claims</td>
<td>Senior Judge</td>
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<td>The Lanier Law Firm</td>
<td>Of Counsel</td>
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<td>Thomas M. Susman</td>
<td>American Bar Association</td>
<td>Strategic Advisor, Governmental Affairs and International Policy Coordinator</td>
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<td>James J. Tozzi</td>
<td>The Center for Regulatory Effectiveness</td>
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<td>Paul R. Verkuil</td>
<td>National Academy of Public Administration</td>
<td>Senior Fellow</td>
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<td>Georgetown University Law Center</td>
<td>Professor of Law; Co-Director, Institute for Public Representation</td>
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<td>U.S. Court of Appeals for the Second Circuit</td>
<td>Senior Circuit Judge</td>
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<td>Senior Vice Chancellor and Chief Legal Officer</td>
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<td>Blake Emerson</td>
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<td>Professor of Practice in Administrative Law</td>
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<td>David M. Pritzker</td>
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<td>Former Deputy General Counsel, Administrative Conference of the U.S.</td>
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</table>
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

Forthcoming and Ongoing Studies/Publications

Classification of Agency Guidance
Federal Administrative Procedure Sourcebook
Nationwide Injunctions and Federal Regulatory Programs
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

Recent Forums

Forum on Enhancing Public Input in Agency Rulemaking
Forum on Underserved Communities and the Regulatory Process
Advice and Consent: Problems and Reforms in the Senate Confirmation of Executive-Branch Appointees
Ongoing Roundtables & Working Groups

Roundtable on Artificial Intelligence in Federal Agencies
Alternative Dispute Resolution Advisory Group
Council of Independent Regulatory Agencies
Council on Federal Agency Adjudication
Interagency Roundtable
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
Statutory Review Program
Summary of Recent Administrative Law Reform Bills
Updates in Federal Agency Adjudication
Agencies rely on private contractors to perform many kinds of services in support of their rulemaking activities. These services can occur at any stage of the rulemaking process. Functions that agencies assign to contractors include conducting research undergirding a rule; preparing regulatory impact analyses; facilitating meetings with interested persons; and tabulating, categorizing, or summarizing public comments the agency receives. As with other agency functions, contracting out specific rulemaking functions may help increase staffing flexibility to ease workloads, lower administrative costs, provide topic-specific expertise or access to technology that agencies do not possess internally, and provide alternative perspectives on particular issues.

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

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2 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.
provide examples of certain IGFs that should not be contracted out. Circular A-76 also describes activities that are “closely associated” with IGFs and for which agencies should exercise heightened caution when assigning such functions to contractors.

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

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

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4 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.

5 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).

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

Agencies will need to consider the practical benefits and challenges of using contractors
to perform functions in furtherance of agency rulemaking. Those considerations might include
the effects of repeated reliance on agencies’ in-house capacities, in particular their ability to
maintain necessary career staff with appropriate skills. Agencies may also wish to consider
alternative methods to contracting when they need to expand internal capacity in connection with
rulemaking, such as by using executive branch rotations, fellowship programs, or federally
funded research and development centers, or by making arrangements for assigning temporary
employees under the Intergovernmental Personnel Act.\(^\text{7}\)

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

**RECOMMENDATION**

**Internal Management**

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

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\(^\text{7}\) 5 U.S.C. §§ 3371-3375; see also 5 C.F.R. part 334.
c. Requirements for internal disclosure concerning functions contractors undertake with regard to specific rulemakings;
d. Standards for when contractors should identify themselves as such in communications with the public in connection with rulemakings; and
e. Ethical rules applicable to contractors.

2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for managers on agency policies and ethical restrictions applicable to contractors. Agencies should also consider designating an agency office or officer to answer questions about the use of contractors to perform rulemaking-related functions and be responsible for deciding whether an activity is an IGF.

3. When agencies rely on contractors in a rulemaking, they should ensure that agency employees can identify contractors and are aware of contractors’ assigned functions. Agencies should specifically focus on whether contractors should work in the same space as agency employees, how and to what extent they may participate in meetings with agency leadership or other meetings at which substantive policy is decided, and whether they should be provided with their own agency email addresses.

4. Agencies should consider ways to share information about contractors in rulemaking within and across agencies. This might include using existing contracting databases or schedules to promote greater coordination and efficiency concerning existing rulemaking contracts, as well as informal sharing of practices for managing contractors.

Ethics

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

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

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

Transparency

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

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

Intergovernmental Guidance

10. The Office of Management and Budget should consider assessing whether current agency practices align with broader procurement best practices and providing
guidance on contractor-performed functions associated with rulemaking processes. Among other things, this guidance might provide specific examples of rulemaking-related functions that qualify as IGFs and should not be contracted out or that are closely associated with IGFs such that agencies should exercise heightened caution when contracting out those functions.
Agencies rely on private contractors to perform many kinds of services in support of their rulemaking activities. These services can occur at any stage of the rulemaking process. Functions that agencies assign to contractors include conducting research undergirding a rule; preparing regulatory impact analyses; facilitating meetings with interested persons; and tabulating, categorizing, or summarizing public comments the agency receives. As with other agency functions, contracting out specific rulemaking functions may help increase staffing flexibility to ease workloads, lower administrative costs, provide topic-specific expertise or access to technology that agencies do not possess internally, and provide alternative perspectives on particular issues.2

Agencies’ use of contractors, however, may also raise distinctive concerns in the rulemaking context.1 Agencies must ensure that they comply with relevant applicable legal obligations, including the prohibition on outsourcing “inherently governmental functions.”3 (IGFs). They also and face a need must exercise their discretion in a way that avoids ethics

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1 See Bridget C.E. Dooling & Rachel Augustine Potter, Contractors in Rulemaking (May 9, 2022) (report to the Admin. Conf. of the U.S.).
violations, promotes efficiency, and ensures that agency officials exercise proper oversight of contractors. With respect to the prohibition on contracting out IGFs, the Office of Management and Budget’s Circular A-76, Performance of Commercial Activities, and the Office of Federal Procurement Policy’s Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, provide examples of certain IGFs that should not be contracted out. Circular A-76 also describes activities functions that are “closely associated” with IGFs and for which agencies should exercise heightened caution when assigning such functions to contractors.

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

Among the applicable legal obligations is the prohibition on contracting out “inherently governmental functions.” Inherently governmental functions are those that are “so intimately related to the public interest as to require performance by Federal Government employees.”

They include “functions that require either the exercise of discretion in applying Federal


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


7 OFPP Policy Letter, supra note 6, § 3, at 56,236; accord FAIR Act, supra note 6, § 5, at 2384.
Government authority or the making of value judgments in making decisions for the Federal Government...

Whereas “determining” the content of a regulation is an inherently governmental function, providing “[s]ervices that involve or relate to the development of regulations” is not. Rather, the provision of such services is considered to be “closely associated with the performance of inherently governmental functions.” When agencies allow contractors to perform functions closely associated with inherently governmental functions, they must exercise heightened caution. They must, in particular, “give special consideration to Federal employee performance of [such] functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors’ activities to ensure that contractors’ duties do not expand to include performance of inherently governmental functions.”

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

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8 OFPP Policy Letter, supra note 6, § 3(a), at 56,236; accord FAIR Act, supra note 6, § 5(2)(B), at 2385.
9 48 C.F.R. § 7.503(c)(5); accord OFPP Policy Letter, supra note 6, app. A, ex. 7, at 56,240.
12 See OFPP Policy Letter, supra note 6, § 4(a)(2), at 56,236.
13 Id.
14 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).
establishing and internally disseminating policies and procedures governing the use and
management of contractors in rulemaking, which may include including any required disclosure
related to their use that the agency disclose its use of contractors.

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

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

RECOMMENDATION

Internal Management

1. Agencies that use contractors to perform rulemaking-related functions should adopt and
publish written policies related to their use. These policies should cover matters such as:
   a. The types of rulemaking functions considered to be inherently governmental
      functions, IGFs, or closely associated with IGFs, inherently governmental
      functions.

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.”

b. Internal procedures to ensure that agency employees do not contract out inherently governmental functions and to ensure increased scrutiny when contracting out functions that are closely associated with inherently governmental functions.

c. Requirements for internal disclosure concerning functions contractors undertake with regard to specific rulemakings.

d. Standards for when contractors should identify themselves as such in communications with the public in connection with rulemakings; and

e. Ethical rules applicable to contractors, including their employees.

2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for managers and employees on agency policies and ethical restrictions applicable to contractors. Agencies should also consider designating an agency office or officer to answer questions about the use of contractors to perform rulemaking-related functions and be responsible for deciding whether an activity is an inherently governmental function.

3. When agencies rely on contractors in a rulemaking, they should ensure that agency employees can identify contractors and are aware of contractors’ assigned functions. Agencies should specifically focus on whether contractors should work in the same space as agency employees, how and to what extent they may participate in meetings with agency leadership or other meetings at which substantive policy is decided, and whether they should be provided with their own agency email addresses.

4. Agencies should consider ways to share information about contractors in rulemaking within and across agencies. This might include using existing contracting databases or schedules to promote greater coordination and efficiency concerning existing rulemaking 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

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

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

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

Transparency

8. When an agency uses a contractor to perform an activity closely associated with an IGF in a specific rulemaking, the agency should consider disclosing the contractor’s role in the rulemaking docket, the notice of proposed rulemaking, and the preamble to the
final rule. Agencies should, including if legally permissible unless legally precluded also disclose the identity of the contractor.

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

Intergovernmental Guidance

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

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

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

1 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 recission 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.

may find it more difficult to track regulatory changes or pay lawyers and consultants to do so. Historically underserved communities also often do not get effective notice of regulatory changes.

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

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.

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

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regulated parties or regulatory beneficiaries. 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 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 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 to identify particular topics on which they wish to receive email alerts.

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

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

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5 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.

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

RECOMMENDATION

Developing and Reviewing Notice Plans

1. Agencies should develop written notice plans, as appropriate, for providing effective notice of significant regulatory changes, meaning changes in law or policy, however announced, that can reasonably be expected to alter the behavior of potentially interested persons. Notice plans should:
   a. Identify potentially interested persons for the agency’s significant regulatory changes;
   b. Specify strategies the agency proposes to use to provide notice;
   c. Assess the expected costs and benefits of each strategy; and
   d. Establish processes and metrics for evaluating the effectiveness of each strategy.

2. In developing their notice plans, agencies should consider the range of persons that may be interested in the agency’s significant regulatory changes and the optimal approach to tailoring notice to each of the different types of persons. Persons who may be interested include regulated entities and regulatory beneficiaries; organizations and individuals; large and small entities; well-resourced and under-resourced entities; and intermediaries, including for-profit and nonprofit organizations.

3. In developing their notice plans, agencies should consider the variety of legal materials, including legislative rules, guidance documents, and adjudicative decisions, through which significant regulatory changes are made and the optimal approach to tailoring notice based upon the nature of each change and the range of persons it affects.

4. In developing their notice plans, agencies should obtain feedback from potentially interested persons regarding which methods for providing notice they consider most effective. Methods for obtaining feedback could include convening focus groups,
liaising with intermediary organizations, or taking broad surveys of potentially interested persons.

5. In developing their notice plans, agencies should consider providing potentially interested persons with means for identifying areas of interest for which they wish to receive notice.

6. Agencies should consider whether individual significant regulatory changes might warrant additional strategies not included in the agency’s notice plan, either because they affect persons not previously regulated or new regulatory beneficiaries, or because the potentially interested persons have specific needs for effective notice.

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

**Strategies for Providing Effective Notice**

8. Although no single technique will work for all agencies or in all circumstances, in assessing the strategies they wish to undertake both as a general matter and with regard to specific significant regulatory changes, agencies should consider whether such strategies:

   a. Are cost-effective;

   b. Are likely to increase compliance and reduce the need for enforcement;

   c. Are targeted to reach members of historically underserved communities and small or under-resourced potentially interested persons who may have less capacity to monitor changes;

   d. Reduce the administrative burden for regulated persons to assemble changes that emerge from a combination of agency materials;

   e. Have proven effective when used by other agencies to provide actual notice; and
f. Provide opportunities for interested persons to identify areas about which they would like to receive notice about significant regulatory changes.

9. Agencies should consider publishing in the *Federal Register* regulatory changes for which they anticipate the most widespread public interest, even if not required to do so by law. In so doing, they should assess whether the benefits of making the change permanently available to a broad audience justify the costs of publication. Agencies should consider publishing brief notices of availability in the *Federal Register* alerting potentially interested persons when they publish significant regulatory changes in the form of agency guidance documents on their websites.

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

12. 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. 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. 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 lists:

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

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

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

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

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

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

20. Agencies should consider training and equipping front-line agency employees,
including those in field offices, to answer questions about significant regulatory
changes and to work with community organizations and other intermediaries to
provide notice of changes. These agency employees may be particularly effective in
providing notice to underserved communities.

21. Agencies should consider identifying and working with intermediary organizations
such as states, trade associations, professional associations, commercial and non-profit
trainers, advocacy groups, and newsletter publishers, which can assist in providing
effective notice to different groups of potentially interested persons, particularly
historically underserved communities.

Oversight and Assessment

22. Agencies should consider designating an officer or office to coordinate and support the
development, implementation, and evaluation of notice plans. This officer or office
should:
a. Be responsible for evaluating the effectiveness of the agency’s notice plan;
b. Keep abreast of technological developments for improving notice strategies, such
   as new social media platforms or improved methods for indexing and organizing
documents on the agency’s website;
c. Evaluate practices that other agencies use to provide notice of significant
   regulatory changes; and

d. Make recommendations for improving the agency’s practices and procedures for
   providing effective notice of significant regulatory changes to potentially
   interested persons.

23. Agencies should share information with each other about their experiences with and
practices for improving notice of significant regulatory changes.
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).

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

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

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

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4 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 recission 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.


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.7

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.8 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 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 to identify particular topics on which they wish to receive email alerts.

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."8

Commented [CA4]: Proposed Amendment from Council #2

Commented [CA5]: Proposed Amendment from Council #3

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8 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.
An agency’s strategy for a particular regulatory change will depend, in large part, on the agency’s objectives; the nature, purpose, and significance of the regulatory change; and the needs of the intended audience. This Recommendation provides a framework for developing effective notice strategies and for evaluating their effectiveness for future improvement.\(^7\)

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

**RECOMMENDATION**

**Developing and Reviewing Notice Plans**

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

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may be interested in or affected by the agency’s significant regulatory changes. Notice plans should:

a. Identify potentially interested persons for the agency’s significant regulatory changes;

b. Specify strategies the agency proposes to use to provide notice;

c. Assess the expected costs and benefits of each strategy; and

d. Establish processes and metrics for evaluating the effectiveness of each strategy.

2. In developing their notice plans, agencies should consider the range categories of persons that may be interested in the agency’s significant regulatory changes and the optimal approach to tailoring notice to each of the different types categories of persons. Persons who may be interested include regulated entities and regulatory beneficiaries; organizations and individuals; large and small entities; well-resourced and under-resourced entities; and intermediaries, including for-profit and nonprofit organizations.

3. In developing their notice plans, agencies should consider the variety of legal materials, including legislative rules, guidance documents, and adjudicative decisions, through which significant regulatory changes are made and the optimal approach to tailoring notice based upon the nature of each change and the range categories of persons it affects.

4. In developing their notice plans, agencies should obtain feedback from potentially interested persons regarding as to which methods for providing notice they consider most effective, consistent with the Paperwork Reduction Act. Methods for obtaining feedback could include convening focus groups, liaising with intermediary organizations, or taking broad surveys of potentially interested persons.

5. In developing their notice plans, agencies should consider providing potentially interested persons with means for identifying areas of interest for which they wish to receive notice.

6. Agencies should consider whether individual significant regulatory changes might warrant additional strategies not included in the agency’s notice plan, either because they affect persons not previously regulated or new regulatory beneficiaries, or because the 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?
7. Agencies should periodically evaluate which strategies are most effective at notifying potentially interested persons, including historically underserved communities, of significant regulatory changes. In doing so, agencies should obtain feedback from potentially interested persons regarding which methods for providing notice they consider most effective and suggestions for improvement.

**Strategies for Providing Effective Notice**

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

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

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

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

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 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.

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.

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

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

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

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

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

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

20. Agencies should consider training and equipping front-line agency employees, including those in field offices, to answer questions about significant regulatory changes and to work with community organizations and other intermediaries to provide notice of
changes. These agency employees may be particularly effective in providing notice to underserved communities.

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Agencies should consider identifying and working with states and intermediary organizations (e.g., such as states, trade associations, professional associations, commercial and non-profit trainers, community organizations, and advocacy groups), and newsletter publishers, which can assist in providing effective notice to different groups of potentially interested persons, particularly historically underserved communities.

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Oversight and Assessment

Agencies should consider designating an officer or office to coordinate and support the development, implementation, and evaluation of notice plans. This officer or office should:

a. Be responsible for evaluating the effectiveness of the agency’s notice plan;

b. Keep abreast of technological developments for improving notice strategies, such as new social media platforms or improved methods for indexing and organizing documents on the agency’s website;

c. Evaluate practices that other agencies use to provide notice of significant regulatory changes; and

d. Make recommendations for improving the agency’s practices and procedures for providing effective notice of significant regulatory changes to potentially interested persons.

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Agencies should share information with each other about their experiences with and practices for improving notice of significant regulatory changes.
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).

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

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

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1 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).

2 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.

processing, or artificial intelligence to interpret natural language and generate an individualized response.4

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

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

The Administrative Conference has adopted several recommendations on the development, use, and public availability of agency guidance documents.5 This Recommendation


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

**RECOMMENDATION**

**Design and Management**

1. Agencies should explore the possible benefits of offering automated legal guidance tools, including enhancing administrative efficiency and helping the public understand complex laws using plain language. This is especially true for those agencies that have a high volume of individual interactions with members of the public who may not be familiar with legal requirements.

2. Agencies should also weigh the potential downsides of automated legal guidance tools, including oversimplifying the law, letting guidance appear more personalized than it actually is, and not adequately disclosing that users cannot rely on the guidance to bind the agency.

3. Agencies using automated legal guidance tools should design and manage them in ways that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.

4. Agencies should ensure that automated legal guidance tools do not displace other agency mechanisms for increasing access to the underlying law.

5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the substance embedded in automated legal guidance tools and should publish these procedures on their websites. These procedures should incorporate periodic user testing and other forms of evaluation by internal and external researchers to ensure accessibility and effectiveness.
6. The General Services Administration should regularly evaluate the relative costs and benefits of using outside vendors for the introduction of automated legal guidance tools and share such information with agencies.

Accessibility


8. Agencies should, consistent with applicable laws and policies, design automated legal guidance tools to ensure that they meet the needs of the particular populations that are intended to utilize the automated legal guidance tools.

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

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

11. Agencies should design automated legal guidance tools to put users in contact with a human customer service representative to whom users can address questions in the event that a question is not answered by the automated legal guidance tools or if the users are having difficulty using an automated legal guidance tool.
Transparency

12. When the underlying law is unclear or unsettled, or when the legal guidance depends upon the facts of the particular situation, agencies should be transparent about the limitations of the advice the user is receiving. To the extent practicable, agencies should also provide access through automated legal guidance tools to the legal materials underlying the tools, including relevant statutes, rules, and judicial or adjudicative decisions.

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

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

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

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

17. Agencies that use automated legal guidance tools should provide users an option to provide feedback or report errors.

18. When applicable, agencies should provide disclaimers that the automated legal guidance tool is not human.
Reliance

19. Agencies should allow users to obtain a written record of their communication with automated legal guidance tools and should include date and time stamps for the information provided.

20. Agencies should consider whether, or under what circumstances, a person's good faith reliance on guidance provided by an automated legal guidance tool should serve as a defense against a penalty or other consequences for noncompliance with an applicable legal requirement, and it should prominently announce that decision to users.

21. If an agency takes the position that it can depart from an interpretation or explanation provided by an automated legal guidance tool in a subsequent investigative or adjudicative proceeding, including in the application of penalties for noncompliance, it should prominently announce its position to users.
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 through online tools and other technologies. The Internal Revenue Service, for example, encourages taxpayers to seek answers to questions regarding various tax credits and deductions through its online “Interactive Tax Assistant,” and the United States Citizenship and Immigration Services suggests that potential green card holders and citizens with questions about their immigration rights communicate with its interactive chatbot, “Emma.” Almost a dozen federal agencies have either implemented or piloted such automated legal guidance tools in just the past three years.2

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

1 This Recommendation defines “guidance” broadly to include interpretive rules, general statements of policy, and other materials that agencies consider 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).

2 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.
included in a user’s question. Although the terms can overlap, virtual assistants tend to be more versatile than chatbots and can often perform additional tasks such as making an appointment or filing out a form in response to a conversation. More robust tools rely on natural language processing or artificial intelligence to interpret natural language and generate an individualized response.

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

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

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

The Administrative Conference has adopted several recommendations on the development, use, and public availability of agency guidance documents. This Recommendation builds on those recommendations by identifying best practices for agencies to consider when they develop, use, and manage automated legal guidance tools. In identifying these best practices, the Conference recognizes that automated legal guidance tools may not be suitable for all agencies and administrative programs and that, moreover, even when agencies use them, automated legal guidance tools are used, agencies should expect that they will need to provide additional guidance through other channels, including live person-to-person support. This Recommendation provides best practices to guide agencies when considering using automated legal guidance tools.

RECOMMENDATION

Design and Management

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1. Agencies should explore the possible benefits of offering automated legal guidance tools, including enhancing administrative efficiency and helping the public understand complex laws using plain language. This is especially true for those agencies that have a high volume of individual interactions with members of the public who may not be familiar with legal requirements.

2. Agencies should also weigh the potential downsides of automated legal guidance tools, including potentially oversimplifying the law creating confusion as to whether and when the agency intends users to rely on the guidance issued. To avoid such confusion, agencies should follow the recommendations set forth in Paragraphs 18–20, letting guidance appear more personalized than it actually is, and not adequately disclosing that users cannot rely on the guidance to bind the agency.

3. Agencies using automated legal guidance tools should design and manage them in ways that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.

4. Agencies should ensure that automated legal guidance tools do not displace other agency mechanisms for increasing access to the underlying law.

5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the substance embedded in automated legal guidance tools and should publish these procedures on their websites. These procedures should incorporate periodic user testing and other forms of evaluation by internal and external researchers to ensure accessibility and effectiveness.

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

Accessibility

7. Agencies should utilize human-centered design methodologies, empirical customer research, and user testing, as described and defined in Executive Order 14,058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in...
8. Agencies should, consistent with applicable laws and policies, design and periodically review and (when necessary) reconfigure automated legal guidance tools to ensure that they meet the needs of the particular populations that are intended to utilize the automated legal guidance tools.

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

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

11. Agencies should design automated legal guidance tools to put users in contact with a human customer service representative to whom users can address questions in the event that a question is not answered by the automated legal guidance tool or if the users are having difficulty using the automated legal guidance tool.

**Transparency**

12. When the underlying law is unclear or unsettled, or when the application of the law is especially fact-dependent, legal guidance depends upon the facts of the particular situation, agencies should be transparent about the limitations of the advice the user is receiving. To the extent practicable, agencies should also provide access through
automated legal guidance tools to the legal materials underlying the tools, including relevant statutes, rules, and judicial or adjudicative decisions.

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

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

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

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

17. Agencies that use automated legal guidance tools should provide users an option to provide feedback or report errors.

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

Reliance

19. When feasible, Agencies should allow users to obtain a written record of their communication with automated legal guidance tools and should include date and time stamps for the information provided.

20. Agencies should consider whether, or under what circumstances, a person’s good 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.”
defense against a penalty or other consequences for noncompliance with an applicable legal requirement, and it should prominently announce that decision to users.

21.20. If an agency takes the position that it can depart from an interpretation or explanation provided by an automated legal guidance tool in a subsequent investigative or adjudicative proceeding, including in the application of penalties for noncompliance, it should prominently announce its position to users.

Commented [CMAB]: 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."
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).

Recommended Citation

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

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

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

\(^1\) 5 U.S.C. § 552(a)(1)–(2).
\(^2\) 44 U.S.C. § 1505.
\(^3\) Id. § 3102.
\(^4\) 5 U.S.C. § 553(b).
\(^6\) 5 U.S.C. § 552(a)(1)–(2).
administrative materials promotes transparency of agency processes, enhances efficiency by reducing the need for members of the public to file requests for agency records and agencies to respond to such requests, and promotes the legitimacy and accountability of agency decisions.

This Statement sets forth common principles and best practices derived from the dozens of relevant ACUS recommendations. It is intended to help guide agencies’ proactive disclosure of administrative materials in the most equitable, effective, and efficient way possible for both the public and agencies. It is focused exclusively on best practices under existing law. It will be continuously updated as ACUS adopts new recommendations pertaining to agencies’ proactive disclosure of administrative materials.

8 The Appendix lists these recommendations.

9 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.

10 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

1. Agencies should proactively disclose on their websites administrative materials that affect the rights and interests of members of the public. These include, among other materials:
   a. Rules (i.e., procedural regulations, substantive regulations, and guidance documents);
   b. Adjudicative opinions and orders;
   c. Descriptions of agencies’ organization and functions;
   d. Solicitations of public feedback (e.g., advance notices of proposed rulemaking (ANPRMs), requests for information (RFIs), notices of proposed rulemaking (NPRMs));
   e. Materials that an agency considered during the course of a rulemaking (e.g., public comments, studies, advisory committee reports, transcripts, recordings of meetings);
   f. Decisions and supporting materials (e.g., pleadings, motions, briefs) issued and filed in adjudicative proceedings; and
   g. Publicly filed pleadings, briefs, and settlements, as well as court decisions bearing on agencies’ regulatory or enforcement activities.

2. In lieu of disclosing all administrative materials of a single type (e.g., all adjudicative opinions, substantively identical comments submitted as part of a mass comment campaign) on agency websites, agencies should, in certain circumstances, consider disclosing a representative sample of these materials or a sample that is particularly well reasoned. Disclosing samples of these materials may be especially appropriate when the agency has generated or received a large number of them, they are individually of little public interest, and they raise similar legal and factual issues.

3. Agencies should organize administrative materials on their websites to maximize the probability that members of the public will find the information for which they are looking. In addition to posting links to PDF versions of administrative materials on agency websites, agencies should, as appropriate:
a. Create a webpage dedicated to a particular kind of administrative material (e.g., a dedicated guidance documents webpage) and ensure that this dedicated page is easily reachable from the agency’s homepage;

b. Index, tag, or place administrative materials in sortable tables;

c. Ensure that website search engines capture administrative materials; and
d. Ensure that related electronic dockets that house administrative materials are linked to one another.

4. Agencies should present rules (i.e., procedural regulations, substantive regulations, and guidance documents), and adjudicative opinions and orders on agency websites in a way that ensures the public can understand their context and legal effect by, among other methods:

a. Including a publication date within these materials, as appropriate;

b. Clearly marking materials that are inoperative (i.e., no longer in effect) by, for example, including a rescission date;

c. Explaining the legal effect of these materials, including whether they have legal effect on members of the public, legal effect on the agency itself, or are purely explanatory in nature;

d. Distinguishing between precedential and non-precedential materials; and
e. Including links within inoperative versions of these materials to any operative versions, and links within operative versions to any inoperative versions.

5. Agencies should keep webpages and electronic dockets housing administrative materials up to date. At a minimum, agencies should fix any broken links and include notations indicating when the page or electronic docket was last updated.

6. Agencies should submit at least the following administrative materials for publication in the Federal Register and, as appropriate, the Code of Federal Regulations, in addition to proactively publishing them on agency websites:

a. Substantive and procedural regulations;

b. Generally applicable guidance documents;

c. Descriptions of the agency’s organization and functions;

d. Solicitations of public feedback (e.g., ANPRMs, RFIs, and NPRMs); and

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

Illustrations

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

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

8. Agencies should consider using supplemental methods to improve public access to and awareness of proactively disclosed administrative materials. Possible approaches include:
   a. Proactively bringing administrative materials to the attention of interested persons who do not normally monitor the agency’s website or the agency’s *Federal Register* entries for developments;
   b. Training agency employees to effectively disseminate administrative materials;
   c. Taking steps to overcome or minimize geographical, language, resource, or other barriers to learning about or accessing administrative materials, including by publishing administrative materials in languages other than English and in locations frequented by underrepresented communities, such as immigration court waiting rooms;
   d. Creating digests, indexes, and guides that synthesize administrative materials in easy-to-understand ways;
   e. Disseminating administrative materials via social media channels, including agency blogs;
   f. Disseminating administrative materials via email distribution lists;
   g. Issuing press releases to announce the availability of administrative materials;
   h. Publishing administrative materials in specialized publications read by interested members of the public; and
   i. Distributing administrative materials during webinars and in-person meetings.

9. Agencies should consider the following factors, among others, in deciding whether to use supplemental methods and which ones to use:
   a. Whether there are members of the public who are likely affected by the administrative material but do not normally follow the *Federal Register* or the agency’s website;
   b. Whether the agency has adequate resources to undertake these activities; and
   c. Whether the specific supplemental methods the agency contemplates undertaking are the most cost-effective ways, of all the supplemental methods the agency could feasibly undertake, to reach the target audience.
10. With respect to copyrighted material that agencies have incorporated by reference into regulations or intend to incorporate by reference into regulations, agencies should ensure that the material is reasonably available to the public. Agencies should try to obtain consent from the copyright holder to publish the copyrighted material. If the copyright holder does not grant this consent, the agency should work with the copyright holder and, through the use of technological solutions (e.g., publishing a read-only version of the material), low-cost publication, or other appropriate means, promote the availability of the materials while respecting the copyright owner’s interest in protecting its intellectual property.

Illustration

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

11. Agencies should, in general, review administrative materials before proactively disclosing them to determine if they contain personally identifiable information, trade secrets, and other legally protected information. If they find such material they should, as appropriate:

   a. Redact the material;
   b. Present the material in aggregate or summarized form; or
   c. Place the material in a physical reading room.

12. Agencies should offer members of the public the opportunity to request that personal information or trade secrets pertaining to themselves or a dependent appearing within a publicly available administrative material be removed from public view. Upon such a request, agencies should either remove the material or should promptly notify the requestor that they have decided not to do so.

Illustration

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

13. Agencies should create written procedures that explain:

   a. The kinds of administrative materials they proactively disclose to the public;
   b. How agencies organize administrative materials on their websites;
   c. The methods agencies use to disclose administrative materials to the public and any supplemental methods, such as those described in Paragraph 8, that agencies use to improve public access to or awareness of proactively disclosed materials; and
   d. How agencies protect personally identifiable information, trade secrets, and other legally protected information contained within administrative materials.

14. Agencies should seek public input on these procedures as they are formulating them.

   After they have finalized these procedures, they should disclose them on their websites and seek further public input on the extent to which these procedures have, in practice, promoted the public availability of administrative materials.

15. Agencies should periodically review these procedures to assess their performance in making administrative materials available and to identify opportunities for improvement.

Illustration

(With respect to Paragraph 13): One especially important application of this principle is with respect to written procedures for the proactive disclosure of inoperative guidance documents. Creating and adhering to written procedures for the proactive disclosure of inoperative guidance documents can give the public important insights into how agencies’ positions have changed over time. This is because agency positions are often announced in guidance documents that, although disclosed on agency websites, are not always published in the Federal Register. When an agency removes such a document from its website after the document becomes inoperative, it can be virtually impossible for the public to track how an agency’s position has changed over time. However, when an agency has a written procedure that provides for maintaining certain inoperative guidance documents on its website, it holds itself accountable to the public for ensuring that those documents remain on its website. And when an agency adheres to these written procedures, members of the public gain access to a rich history of agency decision.
making, benefiting regulated entities, beneficiaries of regulations, and other members of
the public. See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of
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 Register, ¶ 1
240  • 75-1, Licensing Decisions of the Federal Banking Agencies, ¶ 4
241  • 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
Protecting Personally Identifiable Information, Trade Secrets, and Other Legally Protected Information Contained Within Agency Administrative Materials

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

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

Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials

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

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