78TH PLENARY SESSION

DECEMBER 15, 2022

ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agenda for 78th Plenary Session
Thursday, December 15, 2022
10:00 a.m. – 5:00 p.m.

10:00 a.m.	Call to Order Opening Remarks by Chair Andrew Fois
10:10 a.m.	Initial Business by Chair Fois (Vote on Adoption of Minutes of June 2022 Plenary Session and Resolution Governing the Order Business)
10:20 a.m.	Consider Proposed Recommendation: *Precedential Decision Making in Agency Adjudication*
11:35 a.m.	Consider Proposed Recommendation: *Regulatory Enforcement Manuals*
12:50 p.m.	Update on Pending Projects by Research Director, Acting Jeremy Graboyes
1:00 p.m.	Lunch Break
2:00 p.m.	Consider Proposed Recommendation: *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*
3:15 p.m.	Panel Discussion: Thomas W. Merrill, *The* Chevron *Doctrine: Its Rise, Fall, and the Future of the Administrative State*
4:45 p.m.	Closing Remarks and Adjourn

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Resolution Governing the Order of Business

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

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

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

77th Plenary Session

Minutes
June 16, 2022

I. Call to Order and Opening Remarks

The 77th Plenary Session of the Administrative Conference of the United States (ACUS) commenced at approximately 10:00 a.m. on June 16, 2022. ACUS Chairman Andrew Fois called the meeting to order. He introduced the Council Members and the new members who joined ACUS since the last plenary session, and he thanked ACUS Vice Chairman and Executive Director Matthew Wiener for his service as Acting Chairman for almost the past six years.

Chairman Fois then thanked several individuals who assisted in his recent confirmation as ACUS Chairman, and he briefly described the recent work of the agency, including several studies currently being conducted, ongoing roundtables and forums through which ACUS provides opportunities for other agencies to share information, and notable agency publications recently or soon to be released.

II. Initial Business and Introduction to Recommendations

Chairman Fois reviewed the rules for debating and voting on matters at the Plenary Session. ACUS members then approved the minutes from the 76th Plenary Session and adopted the order of business for the 77th Plenary Session. Chairman Fois then thanked members, committee chairs, staff, and consultants for their work in completing the proposed recommendations, and he requested that Vice Chairman Wiener preside over the debate on the proposed recommendations and the discussion of the Office of the Chairman projects.

III. Proposed Recommendation: Contractors in Rulemaking

Vice Chairman Wiener introduced the proposed Recommendation, thanking: Chair of the Committee on Rulemaking Cary Coglianese, Public Member; project consultants Bridget Dooling, Senior Fellow, and Rachel Potter; and staff counsel Kazia Nowacki, ACUS Attorney Advisor. Ms. Potter provided an overview of the report, and Mr. Coglianese 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: Improving Notice of Regulatory Changes

Vice Chairman Wiener introduced the proposed Recommendation, thanking: Chair of the Committee on Regulation Connor Raso, Government Member; project consultants Joshua Galperin and Donald Elliott, Senior Fellow; and staff counsel Matthew Gluth, ACUS Attorney Advisor. Mr. Galperin 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. Update on Pending ACUS Projects and Implementation

Vice Chairman Wiener recognized Reeve Bull, ACUS Research Director, for a presentation on pending Assembly projects—intended to result in a formal recommendation of the Assembly—as well as projects being undertaken by the Office of the Chairman, which are not intended to result in such a recommendation. Mr. Bull discussed some of these projects, including: *Artificial Intelligence in Retrospective Review of Agency Rules*; *Classification of Agency Guidance*; *Disclosure of Agency Legal Materials*; *Identifying and Reducing Burdens in Administrative Processes*; *Working Group on Model Rules of Representative Conduct*; *Nationwide Injunctions and Federal Regulatory Programs*; *Online Processes in Agency Adjudication*; *Precedential Decision Making in Agency Adjudication*; *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*; *Regulatory Enforcement Manuals*; *Statement of Principles for the Disclosure of Federal Administrative Materials*; *Timing of Judicial Review of Agency Action*; *U.S. Patent Small Claims Court*; and *Virtual Public Engagement in Agency Rulemaking*.

Vice Chairman Wiener then recognized Jeremy Graboyes, ACUS Director of Public and Interagency Programs, who described the work of the Implementation Advisory Group in assisting the Office of the Chairman in its implementation efforts. Next, Vice Chairman Wiener described developments in the implementation of past ACUS projects.

VI. Office of the Chairman Project: Nationwide Injunctions and Federal Regulatory Programs

Vice Chairman Wiener briefly described the pending Office of the Chairman project *Nationwide Injunctions and Federal Regulatory Programs,* and he introduced project consultants Zachary Clopton, Mila Sohoni, and Jed Stiglitz. Mr. Clopton was unable to attend the Plenary Session. Ms. Sohoni and Mr. Stiglitz presented initial findings from their research and posed questions for consideration by ACUS members. Vice Chairman Wiener then recognized members for comments and questions about this project.

VII. Proposed Recommendation: Automated Legal Guidance at Federal Agencies

Vice Chairman Wiener introduced the proposed Recommendation, thanking: Chair of the Committee on Administration and Management Aaron Nielson, Public Member; project consultants Joshua Blank and Leigh Osofsky; and staff counsel Alexandra Sybo, ACUS Attorney

Advisor. Mr. Blank 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. Office of the Chairman Project: Statement of Principles for the Disclosure of Federal Administrative Materials

Vice Chairman Wiener recognized Mr. Graboyes, who briefly described the pending Office of the Chairman project *Statement of Principles for the Disclosure of Federal Administrative Materials*. In-house researcher Todd Rubin, ACUS Attorney Advisor and Counsel for Congressional Affairs, then provided an overview of the draft statement. Members were then recognized to offer comments and questions about this project.

IX. Closing Remarks and Adjournment

Chairman Fois thanked all participants for their time and adjourned the 77th Plenary Session at approximately 4:00 p.m.

Bylaws of the Administrative Conference of the United States

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

§ 302.1 Establishment and Objective

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

§ 302.2 Membership

(a) General

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

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

member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

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

(c) Eligibility and Replacements

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

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

(d) Alternates

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

(e) Senior Fellows

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

(f) Special Counsels

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

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

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

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

(b) Special Committees

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

(c) Coordination

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

§ 302.4 Liaison Arrangements

(a) Appointment

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

(b) Term

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

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

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

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

(b) Disqualifications

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly

authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

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

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

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

§ 302.6 General

(a) Meetings

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

(b) Quorums

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

(c) Proposed Amendments at Plenary Sessions

Any amendment to a committee-proposed recommendation that a member wishes to move at a plenary session should be submitted in writing in advance of that session by the date established by the Chairman. Any such pre-submitted amendment, if supported by a proper motion at the plenary session, shall be considered before any amendments that were not pre-submitted. An amendment to an amendment shall not be subject to this rule.

(d) Separate Statements

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

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

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

(e) Amendment of Bylaws

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

(f) Procedure

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

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Meeting Policies and Procedures

(Updated December 2, 2020)

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

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

Public Notice of Plenary Sessions and Committee Meetings

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

Public Access to Meetings

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

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

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

Public Participation in Meetings

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

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

Written Public Comments

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

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

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

Disability or Special Needs Accommodations

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

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Council Members

Name	Organization	Title
Funmi Olorunnipa Badejo	Palantir Technologies	Head of Compliance
Ronald A. Cass	Cass & Associates, PC	President
Kristen Clarke	U.S. Department of Justice	Assistant Attorney General for Civil Rights
Andrew Fois	Administrative Conference of the U.S.	Chairman
Leslie B. Kiernan	U.S. Department of Commerce	General Counsel
Fernando R. Laguarda	AmeriCorps	General Counsel
Matthew E. Morgan	Barnes & Thornburg LLC	Partner
Anne Joseph O'Connell	Stanford Law School	Adelbert H. Sweet Professor of Law
Nitin Shah	Shopify	Director and Associate General Counsel, Regulatory Affairs & Compliance
Jonathan C. Su	Latham & Watkins LLP	Partner
Adrian Vermeule	Harvard Law School	Ralph S. Tyler, Jr. Professor of Constitutional Law

Government Members

Name	Organization	Title
James L. Anderson	Federal Deposit Insurance Corporation	Deputy General Counsel, Supervision and Legislation Branch
David J. Apol	U.S. Office of Government Ethics	General Counsel

Samuel R. Bagenstos	U.S. Department of Health & Human Services	General Counsel
Gregory R. Baker	Federal Election Commission	Deputy General Counsel for Administration
Eric S. Benderson	U.S. Small Business Administration	Associate General Counsel for Litigation & Claims
Krystal J. Brumfield	U.S. General Services Administration	Associate Administrator for the Office of Government-wide Policy
Daniel Cohen	U.S. Department of Transportation	Assistant General Counsel for Regulation
Michael J. Cole	Federal Mine Safety and Health Review Commission	Senior Attorney, Office of General Counsel
Peter J. Constantine	U.S. Department of Labor	Associate Solicitor, Office of Legal Counsel
Anika S. Cooper	Surface Transportation Board	Deputy General Counsel
Scott A. de la Vega	U.S. Department of the Interior	Associate Solicitor for General Law, Office of the Solicitor
Hampton Y. Dellinger	U.S. Department of Justice	Assistant Attorney General, Office of Legal Policy
Seth R. Frotman	Consumer Financial Protection Bureau	General Counsel
Ami Grace-Tardy	U.S. Department of Energy	Assistant General Counsel for Legislation, Regulation, & Energy Efficiency
David Grahn	U.S. Department of Agriculture	Principal Deputy General Counsel
Gina K. Grippando	U.S. International Trade Commission	Assistant General Counsel for Administrative Law
Richard J. Hipolit	U.S. Department of Veterans Affairs	Deputy General Counsel for Legal Policy
Janice L. Hoffman	Centers for Medicare & Medicaid Services	Associate General Counsel, Centers for Medicare & Medicaid Services Division

Erica Sigmund Hough	Federal Energy Regulatory Commission	Deputy Associate General Counsel
Phillip C. Hughey	Federal Maritime Commission	General Counsel
Burke W. Kappler	Attorney and Chief of Staff	Federal Trade Commission
Paul S. Koffsky	U.S. Department of Defense	Senior Deputy General Counsel and Deputy General Counsel (Personnel and Health Policy)
Alice M. Kottmyer	U.S. Department of State	Attorney Adviser
Jeremy Licht	U.S. Department of Commerce	Deputy General Counsel for Strategic Initiatives
Raymond A. Limon	U.S. Merit Systems Protection Board	Board Member
Philip J. Lindenmuth	Internal Revenue Service	Executive Counsel to the Chief Counsel
Hilary Malawer	U.S. Department of Education	Deputy General Counsel, Office of the General Counsel
Nadine N. Mancini	Occupational Safety and Health Review Commission	General Counsel
Christina E. McDonald	U.S. Department of Homeland Security	Associate General Counsel for Regulatory Affairs, Office of the General Counsel
Patrick R. Nagle	Social Security Administration	Chief Administrative Law Judge
Raymond Peeler	U.S. Equal Employment Opportunity Commission	Associate Legal Counsel
Mitchell E. Plave	Office of the Comptroller of the Currency	Special Counsel, Bank Activities
Roxanne L. Rothschild	National Labor Relations Board	Executive Secretary
Jay R. Schwarz	Board of Governors of the Federal Reserve System	Senior Counsel, Legal Division

Helen Serassio	U.S. Environmental Protection Agency	Associate General Counsel
Miriam Smolen	Federal Housing Finance Agency	Senior Deputy General Counsel
Robert F. Stone	Occupational Safety and Health Administration	Director, Office of Regulatory Analysis (Health); Directorate of Standards and Guidance
Stephanie J. Tatham	Office of Management and Budget	Senior Policy Analyst and Attorney, Office of Information and Regulatory Affairs
David A. Trissell	U.S. Postal Regulatory Commission	General Counsel
Daniel Vice	U.S. Consumer Product Safety Commission	Assistant General Counsel
Miriam E. Vincent	National Archives and Records Administration	Acting Director, Legal Affairs and Policy Division, Office of the Federal Register
Chin Yoo	Federal Communications Commission	Deputy Associate General Counsel
Marian L. Zobler	U.S. Nuclear Regulatory Commission	General Counsel

Public Members

Name	Organization	Title
Katherine Twomey Allen		Former Deputy Associate Attorney General, U.S. Department of Justice
Kent H. Barnett	University of Georgia School of Law	J. Alton Hosch Associate Professor of Law

Jack M. Beermann	Boston University School of Law	Professor of Law and Harry Elwood Warren Scholar
Bernard W. Bell	Rutgers Law School	Professor of Law and Herbert Hannoch Scholar
Maggie Blackhawk	New York University School of Law	Professor of Law
Susan G. Braden	The Office of Judge Susan G. Braden (Ret.) LLC	Former Chief Judge, U.S. Court of Federal Claims
Emily S. Bremer	University of Notre Dame Law School	Associate Professor of Law
Ilona R. Cohen	Aledade, Inc.	Chief Legal Officer
Kirti Dalta	Earthjustice	Director of Strategic Legal Advocacy
Jennifer B. Dickey	U.S. Chamber Litigation Center	Associate Chief Counsel
John F. Duffy	University of Virginia School of Law	Samuel H. McCoy II Professor of Law and Paul G. Mahoney Research Professor of Law
David Freeman Engstrom	Stanford Law School	Professor of Law, Associate Dean for Strategic Initiatives, and Bernard D. Bergreen Faculty Scholar
Claire J. Evans	Wiley Rein LLP	Partner
Chai R. Feldblum		Former Partner and Director, Workplace Culture Consulting at Morgan Lewis & Bockius LLP
Abbe R. Gluck	Yale Law School and Yale Medical School	Professor of Law and Faculty Director of the Solomon Center for Health Law and Policy; Professor of Internal Medicine
Deepak Gupta	Gupta Wessler PLLC	Partner

Kristin E. Hickman	University of Minnesota Law School	McKnight Presidential Professor in Law, Distinguished McKnight University Professor, Harlan Albert Rogers Professor in Law, and Associate Director, Corporate Institute
Allyson N. Ho	Gibson Dunn & Crutcher LLP	Partner
Daniel E. Ho	Stanford Law School	William Benjamin Scott & Luna M. Scott Professor of Law
Thomas M. Johnson, Jr.	Wiley Rein LLP	Partner
David E. Lewis	Vanderbilt University	Rebecca Webb Wilson University Distinguished Professor
Erika Lietzan	University of Missouri School of Law	William H. Pittman Professor of Law and Timothy J. Heinsz Professor of Law
Elbert Lin	Hunton Andrews Kurth LLP	Partner
Michael A. Livermore	University of Virginia School of Law	Edward F. Howrey Professor of Law
Jennifer A. Mascott	The C. Boyden Gray Center for the Study of the Administrative State, George Mason University Antonin Scalia Law School	Assistant Professor of Law and Co-Executive Director
Aaron L. Nielson	Brigham Young University J. Reuben Clark Law School	Professor of Law
Victoria F. Nourse	Georgetown University Law Center	Ralph V. Whitworth Professor in Law
Jesse Panuccio	Boies Schiller Flexner LLP	Partner
Elizabeth P. Papez	Gibson Dunn & Crutcher LLP	Partner
Eloise Pasachoff	Georgetown University Law Center	Professor of Law, Anne Fleming Research Professor, and Associate Dean for Careers

Jeffrey A. Rosen	American Enterprise Institute	Nonresident Fellow
Bertrall Ross II	University of Virginia School of Law	Justice Thurgood Marshall Distinguished Professor of Law
Kate A. Shaw	Yeshiva University Benjamin N. Cardozo School of Law	Professor of Law
Ganesh Sitaraman	Vanderbilt Law School	Chancellor Faculty Fellow; Professor of Law; Director, Program in Law and Government
Mila Sohoni	University of San Diego School of Law	Associate Dean of Faculty and Professor of Law
Kevin M. Stack	Vanderbilt Law School	Lee S. & Charles A. Speir Chair in Law and Director of Graduate Studies
Kate Todd	Ellis George Cipollone O'Brien Annaguey LLP	Partner
Melissa Feeney Wasserman	University of Texas at Austin School of Law	Charles Tilford McCormick Professor of Law
Adam J. White	American Enterprise Institute	Senior Fellow
Jonathan B. Wiener	Duke University School of Law	William R. & Thomas L. Perkins Professor of Law

Liaison Representatives

Name	Organization	Title
Thomas H. Armstrong	U.S. Government Accountability Office	General Counsel
Eleanor Barrett	The American Law Institute	Deputy Director
Casey Q. Blaine	National Transportation Safety Board	Deputy General Counsel

Emily Burns	U.S. House of Representative Committee on Oversight and Reform	Policy Director (Majority)
Lena C. Chang	U.S. Senate Committee on Homeland Security & Governmental Affairs	Governmental Affairs Director and Senior Counsel (Majority)
Tobias A. Dorsey	Executive Office of the President, Office of Administration	Deputy General Counsel
Daniel M. Flores	U.S. House of Representatives Committee on Oversight and Reform	Senior Counsel (Minority)
William Funk	Lewis & Clark Law School; ABA Section of Administrative Law & Regulatory Practice	Lewis & Clark Distinguished Professor of Law Emeritus; Member and Section Fellow; Fellow of the Administrative Law and Regulatory Practice Section
Ryan Giles	U.S. Senate Homeland Security & Governmental Affairs Committee	General Counsel (Minority)
Claire Green	Social Security Advisory Board	Staff Director
Will A. Gunn	Legal Services Corporation	Vice President for Legal Affairs and General Counsel
Kristen L. Gustafson	National Oceanic & Atmospheric Administration	Deputy General Counsel
Eileen Barkas Hoffman	Federal Mediation & Conciliation Service	Commissioner, ADR and International Services
Nathan Kaczmarek	The Federalist Society	Vice President and Director, Regulatory Transparency Project, and Article I Initiative
Allison C. Lerner	Council of the Inspectors General on Integrity and Efficiency	Chairperson
Daniel S. Liebman	Pension Benefit Guaranty Corporation	Deputy General Counsel

Charles A. Maresca	U.S. Small Business Administration Office of Advocacy	Director of Interagency Affairs
Thomas P. McCarthy	Federal Administrative Law Judges Conference	Member
Mary C. McQueen	National Center for State Courts	President
Mohammad H. Mesbahi	Taxpayer Advocate Service	Advisor to the National Taxpayer Advocate
Danette L. Mincey	ABA National Conference of the Administrative Law Judiciary	Delegate
Randolph D. Moss	U.S. District Court for the District of Columbia	District Judge
Alayna R. Ness	U.S. Coast Guard	Attorney Advisor, Office of Regulations & Administrative Law
Cornelia T.L. Pillard	U.S. Court of Appeals for the District of Columbia Circuit	Judge
Lauren Alder Reid	Assistant Director for the Office of Policy	U.S. Department of Justice Executive Office for Immigration Review
Eleni M. Roumel	U.S. Court of Federal Claims	Chief Judge
Max Stier	Partnership for Public Service	President & CEO
Elliott Tomlinson	U.S. Senate Committee on the Judiciary	Counsel (Minority)
Susan K. Ullman	U.S. Office of Special Counsel	General Counsel
David L. Welch	U.S. Federal Labor Relations Authority	Chief Judge

Christopher Wright Durocher	American Constitution Society	Vice President of Policy and Program

Senior Fellows

Name	Organization	Title
Gary D. Bass	The Bauman Foundation	Executive Director
Warren Belmar	Capitol Counsel Group LLC	Managing Director
Jodie Z. Bernstein		Former Counsel, Kelley Drye & Warren LLP
Boris Bershteyn	Skadden Arps Slate Meagher & Flom LLP	Partner
Marshall J. Breger	The Catholic University Columbus School of Law	Professor of Law
Stephen G. Breyer	Supreme Court of the U.S.	Associate Justice
Amy P. Bunk	U.S. Department of Homeland Security	Attorney Advisor
James Ming Chen	Michigan State University College of Law	Justin Smith Morrill Chair in Law and Professor of Law
Betty Jo Christian		Former Senior Counsel, Steptoe & Johnson LLP
Cary Coglianese	University of Pennsylvania Carey Law School	Edward B. Shils Professor of Law; Director, Penn Program on Regulation
H. Clayton Cook, Jr.	Cook Maritime Finance	Attorney & Counselor at Law
John F. Cooney		Former Partner, Venable LLP
Steven P. Croley	Ford Motor Company	Chief Policy Officer and General Counsel

Bridget C.E. Dooling	The George Washington University Regulatory Studies Center	Research Professor
Susan E. Dudley	The George Washington University Regulatory Studies Center	Director
Neil R. Eisner		Former Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation
E. Donald Elliott	George Mason University Antonin Scalia Law School	Distinguished Adjunct Professor of Law
Cynthia R. Farina	Cornell Law School	William G. McRoberts Research Professor in Administration of the Law Emerita
Fred F. Fielding	Ellis George Cipollone O'Brien Annaguey LLP	Of Counsel
Michael A. Fitzpatrick	Brunswick Group	Partner
David C. Frederick	Kellogg Hansen Todd Figel & Frederick PLLC	Partner
H. Russell Frisby, Jr.	The HRF Group LLC	President
Brian C. Griffin	Clean Energy Systems, Inc.	Chairman of the Board
Susan Tsui Grundmann	U.S. Federal Labor Relations Authority	Member
Michael E. Herz	Yeshiva University Benjamin N. Cardozo School of Law	Arthur Kaplan Professor of Law
Elena Kagan	Supreme Court of the U.S.	Associate Justice
Paul D. Kamenar		Former Senior Executive Counsel, Washington Legal Fund

John M. Kamensky		Emeritus Fellow, IBM Center for The Business of Government
Sally Katzen	New York University School of Law	Professor of Practice and Distinguished Scholar in Residence; Co-director of the Legislative & Regulatory Process Clinic
Renée M. Landers	Suffolk University Law School	Professor of Law and Director Health Law Concentration
Richard J. Leighton		Former Partner, Keller and Heckman LLP
Robert J. Lesnick		Former Chief Judge, Federal Mine Safety and Health Review Commission
Ronald M. Levin	Washington University in St. Louis School of Law	William R. Orthwein Distinguished Professor of Law
Daniel R. Levinson		Former Inspector General, U.S. Department of Health & Human Services Office of Inspector General
Jerry L. Mashaw	Yale Law School	Sterling Professor Emeritus of Law and Professional Lecturer in Law
Randolph J. May	The Free State Foundation	President
Nina A. Mendelson	University of Michigan Law School	Joseph L. Sax Collegiate Professor of Law
David M. Michaels	The George Washington University Milkin Institute School of Public Health	Professor
James C. Miller III	King & Spalding LLP	Senior Advisor
Alan B. Morrison	The George Washington University Law School	Lerner Family Associate Dean for Public Interest & Public Service

Jennifer Nou	The University of Chicago Law School	Neubauer Family Assistant Professor of Law and Ronald H. Coase Teaching Scholar
David W. Ogden	Wilmer Cutler Pickering Hale & Dorr LLP	Partner
Nina E. Olson	Center for Taxpayer Rights	Executive Director
Theodore B. Olson	Gibson Dunn & Crutcher LLP	Partner
Lee Liberman Otis	The Federalist Society	Senior Vice President and Faculty Division Director
Nicholas R. Parrillo	Yale Law School	William K. Townsend Professor of Law
Sallyanne Payton	University of Michigan Law School	William W. Cook Professor of Law Emerita
Richard J. Pierce, Jr.	The George Washington University Law School	Lyle T. Alverson Professor of Law
S. Jay Plager	U.S. Court of Appeals for the Federal Circuit	Senior Circuit Judge
Edith Ramirez	Hogan Lovells LLP	Partner
Neomi Rao	U.S. Court of Appeals for the District of Columbia Circuit	Circuit Judge
Richard L. Revesz	New York University School of Law	AnBryce Professor of Law and Dean Emeritus
Carrie F. Ricci	U.S. Department of the Army	General Counsel
Jonathan Rose	Arizona State University Sandra Day O'Connor College of Law	Professor of Law and Willard H. Pedrick Distinguished Research Scholar Emeritus

Teresa Wynn Roseborough	The Home Depot	Executive Vice President, General Counsel and Corporate Secretary
Eugene Scalia	Gibson Dunn & Crutcher LLP	Partner
Robert F. Schiff		Former Chief of Staff to the Chairman, National Labor Relations Board
Sidney A. Shapiro	Wake Forest University School of Law	Frank U. Fletcher Chair of Administrative Law and Professor of Law
Catherine M. Sharkey	New York University School of Law	Segal Family Professor of Regulatory Law & Policy
Jane C. Sherburne	Sherburne PLLC	Owner
David C. Shonka	Redgrave LLP	Partner
Carol Ann Siciliano		Former Associate General Counsel, U.S. Environmental Protection Agency
Jonathan R. Siegel	The George Washington University Law School	F. Elwood & Eleanor Davis Research Professor of Law
Lon B. Smith		Former National Counsel for Special Projects, Office of the Chief Counsel, Internal Revenue Service
Loren A. Smith	U.S. Court of Federal Claims	Senior Judge
Peter L. Strauss	Columbia Law School	Betts Professor of Law Emeritus
Thomas M. Susman	American Bar Association	Strategic Advisor, Governmental Affairs and International Policy Coordinator
James J. Tozzi	The Center for Regulatory Effectiveness	Member, Board of Directors
Paul R. Verkuil	National Academy of Public Administration	Senior Fellow

John M. Vittone		Former Chief Administrative Law Judge, U.S. Department of Labor
David C. Vladeck	Georgetown University Law Center	Professor of Law; Co-Director, Institute for Public Representation
Christopher J. Walker	University of Michigan Law School	Professor of Law
John M. Walker, Jr.	U.S. Court of Appeals for the Second Circuit	Senior Circuit Judge
Geovette E. Washington	University of Pittsburgh	Senior Vice Chancellor and Chief Legal Officer
William H. Webster	Milbank LLP	Consulting Partner
Edward L. Weidenfeld	The Weidenfeld Law Firm, PC	Founder
Russell R. Wheeler	The Brookings Institution	Visiting Fellow
Richard E. Wiley	Wiley Rein LLP	Partner
Allison M. Zieve	Public Citizen Litigation Group	Director

Special Counsel

Name	Organization	Title
Blake Emerson	UCLA School of Law	Assistant Professor of Law
Andrew Emery	The Regulatory Group	President
Jeffrey S. Lubbers	American University Washington College of Law	Professor of Practice in Administrative Law

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

David M. Pritzker — Former Deputy General Counsel, Administrative Conference of the U.S.

Matthew L. Wiener — Former ACUS Acting Chairman, Vice Chairman, and Executive Director

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Precedential Decision Making in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | December 15, 2022

Agencies use many different mechanisms to ensure efficiency, consistency, predictability, and uniformity when adjudicating cases, including designating some or all of their appellate decisions as precedential. Agencies can also use precedential decision making to communicate how they interpret legal requirements or intend to exercise discretionary authority.[1]

A decision is precedential when an agency adjudicator must follow the decision's holding in subsequent cases, unless the precedent is distinguishable or until it is overruled.[2] It is a tenet of our system of justice that like cases be treated alike. The effective use of precedential decisions advances this tenet by promoting values of consistency, predictability, and uniformity, as well as allowing for policymaking and encouraging efficiency. Additionally, effective use of precedential decisions can help agencies provide notice to the public about developments in substantive law.

Many agencies use some form of precedential decision making. Some agencies treat all appellate decisions as precedential, while others treat only some appellate decisions as

---

[1] Other mechanisms include appellate review, rulemaking, quality assurance programs, aggregate decision making, and declaratory orders. See, e.g., Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

[2] See Christopher J. Walker, Melissa Wasserman, and Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (Oct. 17, 2022) (draft report to the Admin. Conf. of the U.S.).

precedential. Additionally, some agencies highlight useful nonprecedential decisions by labeling them "adopted," "informative," "notable," or a similar term. In any of these cases, precedential decisions can come from an agency head or heads, adjudicators exercising the agency's authority to review hearing-level decisions, adjudicators who review hearing-level decisions but whose decisions are subject to (usually discretionary) agency-head review, or adjudicators other than the agency head who have statutory authority to issue final decisions. Rarely do hearing-level adjudicators issue precedential decisions.

This Recommendation provides best practices for agencies in considering whether and how to use precedential decisions in their adjudicative systems. It begins by recommending that agencies consider whether they issue appellate decisions that lend themselves to use as precedent and, if they do, whether to treat all or some appellate decisions as precedential. For agencies that treat only some decisions as precedential, the Recommendation sets forth criteria for deciding which ones to treat as such, and it identifies procedures for agencies to use or consider using when designating decisions as precedential, such as the solicitation of public input.

For agencies that use some form of precedential decision making, this Recommendation provides best practices for identifying decisions as precedential and making information about such decisions available internally and to the public. Some of these practices build on the Freedom of Information Act's requirement that agencies post on their websites all final orders and opinions and its general prohibition against agencies relying on, using, or citing an order or opinion as precedent against a private party if it has not been indexed and posted online.[3]

The Recommendation concludes by urging agencies to address their use of, and procedures for, precedential decision making in procedural rules published in the *Federal Register* and *Code of Federal Regulations*.

[3] See 5 U.S.C. § 552(a)(2)(A).

RECOMMENDATION

Use of Precedential Decision Making

1. Agencies should determine whether, and if so when, to treat appellate decisions as precedential, meaning that an adjudicator must follow the decision's holding in subsequent cases, unless the precedent is distinguishable or until it is overruled. In determining whether to treat all, some, or no appellate decisions as precedential, agencies should consider:
    a. The extent to which they issue decisions that would be useful as precedent and are written in a form that lends itself to use as precedent;
    b. The extent to which they issue decisions that mainly concern only case-specific factual determinations or the routine application of well-established policies, rules, and interpretations to case-specific facts; and
    c. The extent to which they issue such a large volume of decisions that adjudicators cannot reasonably be expected to identify which decisions should control future decisions.
2. Agencies that treat only some appellate decisions as precedential should consider treating a decision as precedential if it:
    a. Addresses an issue of first impression;
    b. Clarifies or explains a point of law or policy that has caused confusion among adjudicators or litigants;
    c. Emphasizes or calls attention to an especially important point of law or policy that has been overlooked or inconsistently interpreted or applied;
    d. Clarifies a point of law or policy by resolving conflicts among, or by harmonizing or integrating, disparate cases on the same subject;
    e. Overrules, modifies, or distinguishes existing precedents;
    f. Accounts for changes in law or policy, whether resulting from a new statute, agency rule, or federal court decision;

g. Addresses an issue that the agency must address on remand from a federal court; or

h. May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.

3. Agencies should not prohibit parties from citing nonprecedential decisions in written or oral arguments.

4. Even if agencies do not treat a decision as precedential, they should consider identifying certain cases as "adopted," "informative," "notable," or a similar term that denotes their usefulness to adjudicators.

Processes and Procedures for Designating Precedential Decisions

5. Agencies' procedures for designating decisions as precedential should not be unduly time consuming or resource intensive.

6. Prior to designating an appellate decision as precedential, agencies should consider soliciting input from appellate adjudicators not involved in deciding the case.

7. Agencies should consider implementing a procedure that allows for the issuance of precedential decisions to resolve important questions in cases pending before hearing-level adjudicators. One such procedure could permit an interlocutory appeal of an otherwise unappealable order or the transfer of an entire case to the appellate adjudicator, whether at the request of a party, upon referral by the hearing-level adjudicator, or on the motion of the appellate adjudicator.

8. Agencies should also consider accepting nominations from adjudicators, other agency officials, the parties, and the public on whether any existing nonprecedential appellate decision should be designated as precedential.

9. Agencies should assess the value of amicus participation or public comment in precedential decision making and should consider actively soliciting amicus participation or public comments in cases of significance or high interest, for example by publishing a notice in the *Federal Register* and on their websites and by directly alerting those persons likely to be especially interested in the matter. In determining whether amicus

participation or public comments would be valuable, agencies should consider the extent to which a case addresses broad policy questions whose resolution requires consideration of general or legislative facts as opposed to adjudicative facts particular to the parties.

10. When an agency rejects or disavows the holding of a precedential decision, it should expressly overrule the decision, in whole or in part as the circumstances dictate, and explain why it is doing so.

Availability of Precedential Decisions

11. Agencies that treat only some appellate decisions as precedential should clearly identify precedential decisions as such. Such agencies should also identify those precedential decisions in digests and indexes of cases that agencies make publicly available.
12. Agencies' websites, digests, and indices should clearly indicate when a precedential decision has been overruled or modified.
13. Agencies should ensure that precedential decisions are effectively communicated to their adjudicators.
14. Agencies should update any manuals, bench books, or other explanatory materials to reflect developments in law or policy effected through precedential decisions.
15. Agencies should consider posting on their websites brief summaries of precedential decisions, a digest of precedential decisions, and an index, organized topically, of precedential decisions.
16. Agencies should consider tracking, on their own or in coordination with commercial databases, and make available to agency officials and the public the subsequent history of precedential decisions, including whether they have been remanded, set aside, modified following remand by a federal court, or superseded by statute or other agency action, such as a rule.

Rules on Precedential Decision Making

17. As part of their rules of practice, published in the *Federal Register* and codified in the *Code of Federal Regulations*, agencies should adopt rules regarding precedential decision making. These rules should:
    a. State whether all, some, or none of the agency's appellate decisions are treated as precedential;
    b. Describe the criteria and process for designating decisions as precedential, if the agency considers some but not all of its decisions as precedential;
    c. Specify who has authority to designate decisions as precedential, if the agency considers some but not all of its decisions as precedential;
    d. Explain the legal effect of precedential decisions in subsequent cases;
    e. Define any terms the agency uses to identify useful nonprecedential decisions, such as "adopted," "informative," or "notable," and describe the criteria and process for designating these decisions;
    f. Explain for what purposes a party may cite a nonprecedential decision, and how the agency will consider it;
    g. Describe any opportunities for amicus or other public participation in precedential decision making; and
    h. Explain how precedential decisions are clearly identified as precedential, how they are identified when overturned, and how they are made available to the public.
18. Agencies should use clear and consistent terminology in their rules relating to precedential decisions. Agencies that distinguish between "published" decisions and "nonpublished" or "unpublished" decisions (or some other such terminology) should identify in their rules of practice the relationship between these terms and the terms "precedential" and "nonprecedential."
19. When materially revising existing or adopting new procedural regulations on the subjects addressed above, agencies should use notice-and-comment procedures or other

mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs outweigh the benefits of doing so.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Precedential Decision Making in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | December 15, 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).

It is a tenet of our system of justice that like cases be treated alike. Agencies use many different mechanisms to ensure such consistency, predictability, and uniformity when adjudicating cases, including designating some or all of their appellate decisions as precedential.[1] Agencies can also use precedential decision making to communicate how they interpret legal requirements or intend to exercise discretionary authority, as well as to increase efficiency in their adjudicative systems.[2] ~~Agencies use many different mechanisms to ensure efficiency, consistency, predictability, and uniformity when adjudicating cases, including designating some or all of their appellate decisions as precedential. Agencies can also use precedential decision making to communicate how they interpret legal requirements or intend to exercise discretionary authority.[3]~~

[1] Other mechanisms include appellate review, rulemaking, quality assurance programs, aggregate decision making, and declaratory orders. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

[2] *See* Christopher J. Walker, Melissa Wasserman, ~~and~~& Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (~~Oct~~Dec. ~~17~~6, 2022) (~~draft~~ report to the Admin. Conf. of the U.S.).

~~[3] Other mechanisms include appellate review, rulemaking, quality assurance programs, aggregate decision making, and declaratory orders. *See*, e.g., Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems*~~

~~A decision is precedential when an agency adjudicator must follow the decision's holding in subsequent cases, unless the precedent is distinguishable or until it is overruled.[4] It is a tenet of our system of justice that like cases be treated alike. The effective use of precedential decisions advances this tenet by promoting values of consistency, predictability, and uniformity, as well as allowing for policymaking and encouraging efficiency. Additionally, effective use of precedential decisions can help agencies provide notice to the public about developments in substantive law.~~

An agency's decision is precedential when that same agency's adjudicators must follow the decision's holding interpreting the agency's authority, unless the precedent is distinguishable or until it is overruled. Many agencies use some form of precedential decision making. Some agencies treat all agency appellate decisions as precedential, while others treat only some appellate decisions as precedential. Additionally, some agencies highlight useful nonprecedential decisions by labeling them ~~"adopted,"~~ "informative," "notable," or a similar term. In any of these cases, precedential decisions can come from an agency head or heads, adjudicators exercising the agency's authority to review hearing-level decisions, adjudicators who review hearing-level decisions but whose decisions are subject to (usually discretionary) agency-head review, or adjudicators other than the agency head who have statutory authority to issue final decisions. Rarely do hearing-level adjudicators issue precedential decisions.

This Recommendation provides best practices for agencies in considering whether and how to use precedential decisions in their adjudicative systems. It begins by recommending that agencies ~~consider~~ determine whether they issue appellate decisions that may lend themselves to use as precedent and, if they do, whether to treat all or some appellate decisions as precedential. For agencies that treat only some decisions as precedential, the Recommendation sets forth

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan B. Morrison #1

Commented [CMA2]: Proposed Amendment from Senior Fellow Alan B. Morrison #2

Commented [CA3]: Proposed Amendment from Council #1

Commented [CA4]: Proposed Amendment from Council #2 (see parallel amendment at line 80 below)

~~*in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).~~

~~[4] *See* Christopher J. Walker, Melissa Wasserman, and& Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (OctDec. 176, 2022) (draft report to the Admin. Conf. of the U.S.).~~

criteria for deciding which ones to treat as such, and it identifies procedures for agencies to ~~use~~ ~~or~~ consider using when designating decisions as precedential~~, such as the solicitation of public input~~.

Commented [CMA5]: Proposed Amendment from Senior Fellow Alan B. Morrison #3

For agencies that use some form of precedential decision making, this Recommendation provides best practices for identifying decisions ~~as~~ which are precedential and making information about such decisions available internally and to the public. Some of these practices build on the Freedom of Information Act's requirement that agencies post on their websites all final orders and opinions and its general prohibition against agencies relying on, using, or citing an order or opinion as precedent against a private party if it has not been indexed and posted online.[5]

The Recommendation concludes by urging agencies to address their use of, and procedures for, precedential decision making in procedural rules published in the *Federal Register* and *Code of Federal Regulations*.

RECOMMENDATION

Use of Precedential Decision Making

1. Agencies should determine whether, and if so when, to treat their appellate decisions as precedential, meaning that an adjudicator must follow the decision's holding in subsequent cases, unless the ~~precedent is~~facts of the decision are distinguishable or until ~~it~~ the holding is overruled. In determining whether to treat all, some, or no appellate decisions as precedential, agencies should consider:
    a. The extent to which they issue decisions that would be useful as precedent and are written in a form that lends itself to use as precedent;

[5] *See* 5 U.S.C. § 552(a)(2)(A).

b. The extent to which they issue decisions that mainly concern only case-specific factual determinations or the routine application of well-established policies, rules, and interpretations to case-specific facts; and

c. The extent to which they issue such a large volume of decisions ~~that~~ from which adjudicators cannot reasonably be expected to identify those which ~~decisions~~ should control future decisions.

2. Agencies that treat only some appellate decisions as precedential should consider treating a decision as precedential if it:

a. Addresses an issue of first impression;

b. Clarifies or explains a point of law or policy that has caused confusion among adjudicators or litigants;

c. Emphasizes or calls attention to an especially important point of law or policy that has been overlooked or inconsistently interpreted or applied;

d. Clarifies a point of law or policy by resolving conflicts among, or by harmonizing or integrating, disparate cases on the same subject;

e. Overrules, modifies, or distinguishes existing precedents;

f. Accounts for changes in law or policy, whether resulting from a new statute, federal court decision, or agency rule~~, or federal court decision~~;

g. Addresses an issue that the agency must address on remand from a federal court; or

h. May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.

3. Agencies should not prohibit parties from citing nonprecedential decisions in written or oral arguments.

4. ~~Even if agencies do not treat a decision as precedential, they~~Agencies should consider identifying ~~certain cases~~nonprecedential decisions that may be useful to adjudicators by designating them ~~as "adopted,"~~ "informative," "notable," or a similar term ~~that denotes their usefulness to adjudicators~~.

Commented [CA6]: Proposed Amendment from Council #3 (see parallel amendment at line 23 above)

~~5. Agencies' procedures for designating decisions as precedential should not be unduly time consuming or resource intensive.~~

~~6.~~5. Prior to designating an appellate decision as precedential, agencies should consider soliciting input from appellate adjudicators not involved in deciding the case.

6. Agencies should consider implementing ~~a~~ procedures by which appellate adjudicators can issue precedential decisions to resolve ~~that allows for the issuance of precedential decisions to resolve~~ important questions ~~in cases pending before hearing-level adjudicators~~that arise during hearing-level proceedings. Options include procedures by which, on an interlocutory basis or after a hearing-level decision has been issued:

   a. Hearing-level adjudicators may certify specific questions in cases or refer entire cases for precedential decision making;

   b. Appellate adjudicators on their own motion may review specific questions in cases or entire cases for precedential decision making; and

   ~~.~~c. Parties may request that appellate adjudicators review specific questions in cases or entire cases for precedential decision making. ~~One such procedure could permit an interlocutory appeal of an otherwise unappealable order or the transfer of an entire case to the appellate adjudicator, whether at the request of a party, upon referral by the hearing-level adjudicator, or on the motion of the appellate adjudicator.~~

~~8.~~7. Agencies should ~~also~~ consider ~~accepting nominations from~~establishing a process by which adjudicators, other agency officials, ~~the~~ parties, and the public can request that a specific ~~on whether any existing~~ nonprecedential appellate decision ~~should~~ be designated as precedential.

~~9.~~8. Agencies should ~~assess the value of~~consider soliciting amicus participation or public comments in ~~precedential decision making and should consider actively soliciting amicus participation or public comments in~~ cases in which they expect to designate a decision as precedential, particularly in cases of significance or high interest. That could be done, for

Commented [CA7]: Proposed Amendment from Council #4

Commented [CA8]: Proposed Amendment from Council #5

Commented [CMA9]: Comment from Senior Fellow Alan B. Morrison #4:"Instead of 'nominations' which usually refers to an individual, I would use 'suggestions' or 'recommendations'."

Commented [CA10]: Proposed Amendment from Council #6

Commented [CA11]: Proposed Amendment from Council #7

example, by publishing a notice in the *Federal Register* and on their websites and by directly alerting those persons likely to be especially interested in the matter. In determining whether amicus participation or public comments would be valuable in a particular case, agencies should consider the extent to which ~~a~~ the case addresses broad policy questions whose resolution requires consideration of general or legislative facts as opposed to adjudicative facts particular to the parties.

~~10.~~9. When an agency rejects or disavows the holding of a precedential decision, it should expressly overrule the decision, in whole or in part as the circumstances dictate, and explain why it is doing so.

Availability of Precedential Decisions

~~11.~~10. Agencies that treat only some appellate decisions as precedential should clearly identify precedential decisions as such. Such agencies should also identify those precedential decisions in digests and indexes ~~of cases~~ that agencies make publicly available.

~~12.~~11. Agencies' websites, as well as their digests, and ~~indices~~indexes of decisions should clearly indicate when a precedential decision has been overruled or modified.

~~13.~~12. Agencies should ensure that precedential decisions are effectively communicated to their adjudicators.

~~14.~~13. Agencies should update any manuals, bench books, or other explanatory materials to reflect developments in law or policy effected through precedential decisions.

~~15.~~14. Agencies should consider posting on their websites brief summaries of precedential decisions, a digest of precedential decisions, and an index, organized topically, of precedential decisions.

~~16.~~15. Subject to available resources, ~~Agencies~~ agencies should consider tracking, on their own or in coordination with commercial databases, and making available to agency officials and the public the subsequent history of precedential decisions, including whether they have been remanded, set aside, modified following remand by a federal court, or superseded by statute or other agency action, such as a rule.

Commented [CA12]: Proposed Amendment from Council #8

~~17.~~16. As part of their rules of practice, published in the *Federal Register* and codified in the *Code of Federal Regulations*, agencies should adopt rules regarding precedential decision making. These rules should:

a. State whether all, some, or none of the agency's appellate decisions are treated as precedential;

b. Describe the criteria and process for designating decisions as precedential, if the agency considers some but not all of its decisions as precedential;

c. Specify who has authority to designate decisions as precedential, if the agency considers some but not all of its decisions as precedential;

d. Explain the legal effect of precedential decisions in subsequent cases;

e. Define any terms the agency uses to identify useful nonprecedential decisions, such as "adopted," "informative," or "notable," and describe the criteria and process for designating these decisions;

f. Explain for what purposes a party may cite a nonprecedential decision, and how the agency will consider it;

g. Describe any opportunities for amicus or other public participation in precedential decision making; and

h. Explain how precedential decisions are clearly identified as precedential, how they are identified when overturned, and how they are made available to the public.

~~18.~~17. Agencies should use clear and consistent terminology in their rules relating to precedential decisions. Agencies that distinguish between "published" decisions and "nonpublished" or "unpublished" decisions (or some other such terminology) should identify in their rules of practice the relationship between these terms and the terms "precedential" and "nonprecedential."

~~19.~~18. Agencies should consider soliciting public input ~~When~~ when they materially ~~revising~~ revise existing or adopt~~ing~~ new procedural regulations on the subjects addressed

Commented [CMA13]: Comment from Senior Fellow Alan B. Morrison #5: "Instead of 'consider' I would use 'treat' or 'use'."

above, ~~agencies should use notice-and-comment procedures or other mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A),~~ unless the costs outweigh the benefits of doing so in a particular instance.

Commented [CA14]: Proposed Amendment from Council #9

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Regulatory Enforcement Manuals

Committee on Rulemaking

Proposed Recommendation | December 15, 2022

Many agencies are responsible for detecting, investigating, and prosecuting potential violations of the laws they administer. Statutes and agency rules govern the exercise of agencies' enforcement authority and direct the activities of enforcement personnel. Agencies' policies explain and interpret relevant statutes and rules; establish standards, priorities, and procedures for detecting and investigating suspected violations, issuing complaints against suspected violators, and prosecuting cases before an administrative body or a federal court; describe how enforcement staff interact with other agency personnel and persons outside the agency; and set forth processes for soliciting and receiving complaints about alleged violations from members of the public.

Many agencies have developed documents, often called "enforcement manuals," that provide their personnel with a single, comprehensive resource regarding enforcement-related laws and policies. Enforcement manuals provide a way for agencies to effectively communicate such policies, which would otherwise be dispersed within a voluminous body of separate documents, and to ensure that agency enforcement is internally consistent, fair, efficient, effective, and legally sound.[1] Although enforcement manuals should not necessarily bind agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency management matter, to direct enforcement personnel to act in conformity with an enforcement manual.[2] Because enforcement manuals are a form of agency guidance, the public should not

[1] *See* Jordan Perkins, Regulatory Enforcement Manuals 1, 9 (Sept. 28, 2022) (draft report to the Admin. Conf. of the United States).

[2] *See* Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 3, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).

necessarily rely upon them.

The Freedom of Information Act (FOIA) requires agencies to post on their websites "administrative staff manuals and instructions to staff that affect a member of the public."[3] To be sure, several courts of appeals have held that this provision does not apply to some portions of enforcement manuals. But whatever the exact scope of this provision, the policies underlying it are relevant. Like other internal manuals, enforcement manuals can also be a useful, practical resource for the public. By providing public access to enforcement manuals, agencies can improve awareness of and compliance with relevant policies and promote transparency more generally. However, disclosure of some portions of enforcement manuals might also enable persons to circumvent the law by revealing forms of noncompliance that will not lead to investigation or enforcement. Avoiding such disclosures is both legitimate and important. Accordingly, FOIA exempts from disclosure records or information that "would disclose techniques and procedures for law enforcement investigations or prosecutions" or "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[4] FOIA also allows agencies to withhold records that fall within the attorney work-product privilege. This exemption may encompass information provided to enforcement personnel about litigation strategies and legal theories, the disclosure of which would adversely affect the integrity of adversarial proceedings.[5] Agencies cannot rely on these exemptions reflexively, however. All or part of a manual can be withheld only if "the agency reasonably foresees that disclosure would harm an interest protected by" an exemption; absent such foreseeable harm, the manual should or must be disclosed.[6]

This Recommendation offers agencies best practices for developing, managing, and disseminating enforcement manuals. It builds on several recommendations the Administrative

[3] 5 U.S.C. § 552(a)(2)(C).

[4] *Id.* § 552(b)(7)(E).

[5] *See* ACLU of N. Cal. v. U.S. DOJ, 880 F.3d 473, 486–88 (9th Cir. 2018); Nat'l Ass'n of Crim. Def. Lawyers v. U.S. DOJ Exec. Off. for U.S. Attys., 844 F.3d 246, 254 (D.C. Cir. 2016).

[6] 5 U.S.C. § 552(a)(8)(A).

Conference has previously adopted regarding the development, management, and dissemination of agency procedural rules and guidance documents.[7] In offering these recommendations, the Conference recognizes that enforcement manuals may not be appropriate for all agencies, given differences in the volume and complexity of documents that govern their enforcement activities, resources available to agencies, and the differing informational needs of persons affected by or interested in agency enforcement activities.

RECOMMENDATION

Developing Enforcement Manuals

1. Subject to available resources, agencies responsible for investigating and prosecuting potential violations of the laws that they administer should develop an enforcement manual—that is, a document that provides personnel a single, comprehensive resource for enforcement-related statutes, rules, and policies—if doing so would improve the communication of enforcement-related policies to agency personnel and promote the fair and efficient performance of enforcement functions consistent with established policies.
2. In developing enforcement manuals, agencies should consider, among other things:
    a. Identifying the office or individual within the agency under whose name and authority the manual is being issued;
    b. Identifying which offices within the agency are directed to act in conformity with the manual;
    c. Describing the manual's purpose, scope, organization, and legal effect, including a disclaimer, if applicable, that the manual should not bind the agency as a whole and that the public should not necessarily rely upon the manual;
    d. Identifying the office or individual within the agency that is empowered to

[7] *See* Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Recommendation 2017-5, *supra* note 2.

receive, and potentially to act on, any complaint that the agency personnel who are conducting an investigation or other enforcement action are engaging in unlawful or inappropriate conduct;

e. Identifying the statutes and rules that govern the agency's enforcement activities;

f. Explaining how and by whom the manual is developed, periodically reviewed for accuracy, and updated;

g. Describing procedures for soliciting and receiving information about alleged violations from persons outside the agency;

h. Identifying criteria used to classify the severity of alleged violations, recommend or assess penalties or other remedies, or prioritize investigations or prosecutions;

i. Describing procedures for conducting investigations, inspections, audits, or similar processes;

j. Describing policies governing communications between enforcement personnel and other agency personnel, the subjects of enforcement actions, and other persons outside the agency;

k. Explaining procedures for determining if records or information are legally protected, and procedures for handling such records or information;

l. Addressing when and how agency personnel may publicly disclose information about an enforcement proceeding, such as by issuing a press release;

m. Identifying guidelines for informally adjudicating or negotiating settlements with the subjects of enforcement actions; and

n. Describing criteria for the selection among enforcement alternatives, procedures for formally initiating agency adjudicative or judicial proceedings, and making criminal referrals.

3. Agencies should ensure that the contents of enforcement manuals are presented in a clear, logical, and comprehensive fashion, and include a table of contents and an index.

Managing Enforcement Manuals

4. Agencies should periodically review their enforcement manuals and update them as

needed to ensure they accurately reflect current law and policies. When agencies update their enforcement manuals, they should prominently display the date of the update and identify what changes were made.

5. Agencies with enforcement manuals should develop procedures for managing them and keeping them up to date. These procedures should address:
    a. How often the enforcement manual, in whole or in part, is reviewed for accuracy and updated if necessary;
    b. Which office or individual within the agency is responsible for periodically reviewing the enforcement manual, in whole or in part; and
    c. How and by whom changes to the enforcement manual are drafted, reviewed, approved, and implemented.
6. To ensure that enforcement personnel can easily access current versions of enforcement manuals, agencies should make enforcement manuals available in a searchable, electronic format in an appropriate location on an internal network.
7. Agencies should solicit feedback on their enforcement manuals from their personnel and consider that feedback in managing their manuals.

Disseminating Enforcement Manuals to the Public

8. Agencies should make enforcement manuals, or portions thereof, publicly available on their websites when doing so would improve public awareness of relevant policies and compliance with legal requirements or promote transparency more generally, and if they have adequate resources available to ensure publicly available enforcement manuals remain up to date. Agencies should not include information in publicly available versions of enforcement manuals that would enable persons to circumvent the law or reflect litigation strategies or legal theories, the disclosure of which would adversely affect the integrity of adversarial proceedings.
9. When agencies post publicly available versions of enforcement manuals, they should post the manuals in an easily identified location on their websites, in a user-friendly format, and with an introduction sufficient to ensure that potentially interested persons, including

members of historically underserved communities, can easily find and use them.

10. Agencies should provide notice to the public when they issue or revise a publicly available enforcement manual, for example by placing a notice on the agency's website, issuing a press release, making an announcement on social media, or publishing a notice of availability in the *Federal Register*.
11. Agencies that make enforcement manuals publicly available should solicit feedback on them in a public forum from a wide range of persons interested in or affected by agency enforcement proceedings.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Regulatory Enforcement Manuals

Committee on Rulemaking

Proposed Recommendation | December 15, 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).

Many agencies are responsible for detecting, investigating, and prosecuting potential violations of the laws they administer. Statutes and agency rules govern the exercise of agencies' enforcement authority and direct the activities of enforcement personnel. Agencies' policies (a) explain and interpret relevant statutes and rules; (b) establish standards, priorities, and procedures for detecting and investigating suspected violations, issuing complaints against suspected violators, and prosecuting cases before an administrative body or a federal court; (c) describe how enforcement staff interact with other agency personnel and persons outside the agency; and (d) set forth processes for soliciting and receiving complaints about alleged violations from members of the public.

Many agencies have developed documents, often called "enforcement manuals," that provide their personnel with a single, comprehensive resource regarding enforcement-related laws and policies. Enforcement manuals provide a way for agencies to effectively communicate such policies, which would otherwise be dispersed within a voluminous body of separate documents, and to ensure that agency enforcement is internally consistent, fair, efficient, effective, and legally sound.[1] Although enforcement manuals should not necessarily bind agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency

Commented [CMA1]: Proposed Amendment #1 from Senior Fellow Alan B. Morrison (see parallel amendment at line 60):

"Line 15 - on the binding effect of manuals on the agency, is the correct word 'should' or 'do'? Same point for line 60."

[1] *See* Jordan Perkins, Regulatory Enforcement Manuals 1, 9 (~~Sept. 28~~Dec. 9, 2022) (~~draft~~ report to the Admin. Conf. of the United States).

management matter, to direct enforcement personnel to act in conformity with an enforcement manual.[2] Because enforcement manuals are generally a form of agency guidance, the public should not necessarily rely upon them.

Commented [CA2]: Proposed Amendment from Council #1

Enforcement manuals can also be a useful, practical resource for the public. The Freedom of Information Act (FOIA) requires agencies to post on their websites "administrative staff manuals and instructions to staff that affect a member of the public."[3] Although ~~To be sure,~~ several courts of appeals have held that this provision ~~simply~~ does not apply to some portions of enforcement manuals.[4] ~~But whatever the exact scope of this provision, the policies underlying it are relevant. Like other internal manuals, enforcement manuals can also be a useful, practical resource for the public. By~~ by providing public access to ~~enforcement manuals~~them, agencies can improve awareness of and compliance with relevant policies ~~and~~ while promoting~~e~~ transparency more generally.

Enforcement manuals may contain information that agencies should not disclose. ~~However, d~~Disclosure of some portions of enforcement manuals might, for example, ~~also~~ enable persons to circumvent the law by revealing forms of noncompliance that will not lead to investigation or enforcement. ~~Avoiding such disclosures is both legitimate and important.~~ Accordingly, FOIA exempts from disclosure records or information that "would disclose techniques and procedures for law enforcement investigations or prosecutions" or "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[5] FOIA also allows agencies to withhold records that fall within the attorney work-product privilege. This exemption may encompass information provided to enforcement personnel about litigation strategies and legal theories, the disclosure of which

[2] *See* Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 3, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).

[3] 5 U.S.C. § 552(a)(2)(C).

[4] *See, e.g.*, Smith v. N.T.S.B., 981 F.2d 1326 (D.C. Cir. 1993); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973).

[5] *Id.* § 552(b)(7)(E).

cwould adversely affect the integrity of adversarial proceedings.[6] Agencies cannot rely on these exemptions reflexively, however. Since 2016, agencies may withhold information under FOIA ~~All or part of a manual can be withheld~~ only if they "~~the agency~~ "reasonably foresee~~s~~ that disclosure would harm an interest protected by" an exemption or if disclosure is prohibited by law.[7]~~;~~ In other circumstances~~absent such foreseeable harm~~, agencies should or must disclose their enforcement manuals, or at least the non-exempt portions of the manual, ~~the manual should or must be disclosed.~~[8]

This Recommendation offers agencies best practices for developing, managing, and disseminating enforcement manuals. It builds on several recommendations the Administrative Conference has previously adopted regarding the development, management, and dissemination of agency procedural rules and guidance documents.[9] In offering these recommendations, the Conference recognizes that enforcement manuals may not be appropriate for all agencies, given differences in the volume and complexity of documents that govern their enforcement activities, resources available to agencies, and the differing informational needs of persons affected by or interested in agency enforcement activities.

Commented [CA3]: Proposed Amendment from Council #2:

The Council proposes this amendment to simplify the language.

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

"Consider adding after 'manual' 'or at least the non-exempt portions of the manual'."

RECOMMENDATION

Developing Enforcement Manuals

1. Subject to available resources, agencies responsible for investigating and prosecuting potential violations of the laws that they administer should develop an enforcement

[6] *See* ACLU of N. Cal. v. U.S. DOJ, 880 F.3d 473, 486–88 (9th Cir. 2018); Nat'l Ass'n of Crim. Def. Lawyers v. U.S. DOJ Exec. Off. for U.S. Attys., 844 F.3d 246, 254 (D.C. Cir. 2016).

[7] 5 U.S.C. § 552(a)(8)(A).

[8] ~~5 U.S.C. § 552(a)(8)(A).~~

[9] *See* Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Recommendation 2017-5, *supra* note 2.

manual—that is, a document that provides personnel a single, comprehensive resource for enforcement-related statutes, rules, and policies—if doing so would improve the communication of enforcement-related policies to agency personnel and promote the fair and efficient performance of enforcement functions consistent with established policies.

2. In developing enforcement manuals, agencies should consider, among other things:
   a. Identifying the office or individual within the agency under whose name and authority the manual is being issued;
   b. Identifying which offices within the agency are directed to act in conformity with the manual;
   c. Describing the manual's purpose, scope, and organization;~~, and~~
   d. Describing the manual's legal effect, including a disclaimer, if applicable, that the manual should not bind the agency as a whole and that the public should not necessarily rely upon the manual;
   ~~e.~~e. Identifying any safe harbors (i.e., descriptions of conduct that the agency will not treat as a violation of a statute or rule) upon which regulated entities may rely;
   ~~d.~~f. Identifying the office or individual within the agency that is empowered to receive, and potentially to act on, any complaint that the agency personnel who are conducting an investigation or other enforcement action are engaging in unlawful or inappropriate conduct;
   ~~e.~~g. Identifying the statutes and rules that govern the agency's enforcement activities;
   ~~f.~~h. Describing criteria for selecting among options available to the agency to compel remedial action, procedures for formally initiating agency adjudicative or judicial proceedings, and criteria for making criminal referrals;
   ~~g. Explaining how and by whom the manual is developed, periodically reviewed for accuracy, and updated;~~
   ~~h.~~i. Describing procedures for soliciting and receiving information about alleged violations of law from persons outside the agency;
   ~~i.~~j. Identifying criteria used to classify the severity of alleged violations, recommend or assess penalties or other remedies, or prioritize investigations or prosecutions;

Commented [CMA5]: Proposed Amendment from Special Counsel Jeffrey Lubbers:

"In recommendation 2, I would reorder a few of the paragraphs. I think paragraph d should be moved after g since they cover the same issue, I would also switch paragraphs m and n since settlements seem a better topic to end with."

Commented [CA6]: Proposed Amendment from Council #3

Commented [CMA7]: Proposed Amendment #1 from Senior Fellow Alan B. Morrison (see parallel amendment at line 15):

"On the binding effect of manuals on the agency, is the correct word 'should' or 'do'?"

Commented [CMA8]: Comment #1 from Senior Fellow Alan B. Morrison:

"I do not know what the phrase 'and that the public should not necessarily rely upon the manual' means. Perhaps it is not necessary and may provide more confusion than illumination."

Commented [CA9]: Proposed Amendment from Council #4

Commented [CMA10]: Comment #2 from Senior Fellow Alan B. Morrison:

"Should the public also report conduct that is inconsistent with the manual also?"

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

The Council proposes this amendment to clarify what is meant by the term "enforcement alternatives."

Commented [CA12]: Proposed Amendment from Council #6:

Re-ordered the list.

Commented [CMA13]: Proposed Amendment #3 from Senior Fellow Alan B. Morrison:

"I think you mean violations of law (not the manual). If so, I would insert 'of law' after violations."

~~j.~~k. Describing procedures for conducting investigations, inspections, audits, or similar processes;

~~k.~~l. Describing policies governing communications between enforcement personnel and other agency personnel, the subjects of enforcement actions, and other persons outside the agency;

~~l.~~m. Explaining procedures for determining if records or information are legally protected from unauthorized disclosure, and procedures for handling such records or information;

~~m. Addressing when and how agency personnel may publicly disclose information about an enforcement proceeding, such as by issuing a press release;~~

n. Identifying guidelines for both ~~-~~informally adjudicating and ~~or~~ negotiating settlements with the subjects of enforcement actions; ~~and~~

~~o. Describing criteria for the selection among enforcement alternatives, procedures for formally initiating agency adjudicative or judicial proceedings, and making criminal referrals.~~

o. Addressing when agency personnel may publicly disclose information about an enforcement proceeding, such as by issuing a press release, and the nature of information that may be disclosed; and

p. Explaining how and by whom the manual is developed, periodically reviewed for accuracy, and updated;

3. Agencies should ensure that the contents of enforcement manuals are presented in a clear, logical, and comprehensive fashion, and include a table of contents and an index.

Managing Enforcement Manuals

4. Agencies should periodically review their enforcement manuals and update them as needed to ensure that they accurately reflect current law and policies. When agencies update their enforcement manuals, the~~y~~ manuals should prominently display the date of the update and identify what changes were made.

5. Agencies with enforcement manuals should develop procedures for ~~managing them and~~

Commented [CA14]: Proposed Amendment from Council #7

Commented [CMA15]: Comment #3 from Senior Fellow Alan B. Morrison:

"Does this mean that ACUS does not recommend that anything else that agencies produce besides manuals should be 'clear, logical, and comprehensive'? Perhaps all that is needed is a reminder to include a table of contents and an index, if that."

Commented [CA16]: Proposed Amendment from Council #8 (see parallel amendment at line 105):

It is unclear what the term "managing" means.

keeping them up to date. These procedures should address:

a. How often the enforcement manual, in whole or in part, is reviewed for accuracy and updated if necessary;

b. Which office or individual within the agency is responsible for periodically reviewing the enforcement manual, in whole or in part; and

c. How and by whom changes to the enforcement manual are drafted, reviewed, approved, and implemented.

6. To ensure that enforcement personnel can easily access current versions of enforcement manuals, agencies should make enforcement manuals available in a searchable, electronic format in an appropriate location on an internal network.

7. Agencies should solicit feedback on their enforcement manuals from their personnel and consider that feedback in ~~managing~~ revising their manuals.

Commented [CA17]: Proposed Amendment from Council #8 (see parallel amendment at line 93):

It is unclear what the term "managing" means.

Disseminating Enforcement Manuals to the Public

8. Agencies should make their enforcement manuals, or portions of their manuals~~thereof~~, publicly available on their websites when doing so would improve public awareness of relevant policies and compliance with legal requirements or promote transparency more generally, and if they have adequate resources available to ensure publicly available enforcement manuals remain up to date. Agencies should not include information in publicly available versions of enforcement manuals that would ~~enable persons to circumvent the law or~~ reflect litigation strategies or legal theories, the disclosure of which would adversely affect the integrity of adversarial proceedings, or enable persons to circumvent the law.

Commented [CMA18]: Comment #4 from Senior Fellow Alan B. Morrison:

"I do not think that the harm from disclosure is that described in these two lines. I am not sure it is needed at all since there are two good reasons/concerns in lines 111-12."

9. When agencies post publicly available versions of enforcement manuals, they should post the manuals in an easily identified location on their websites, in a user-friendly format, and with an introduction sufficient to ensure that potentially interested persons—, including members of historically underserved communities, who may be unfamiliar with the existence, purpose, and legal effect of enforcement manuals—, can easily find and use them.

Commented [CA19]: Proposed Amendment from Council #9:

The Council proposes this amendment to clarify why agencies should consider the needs of members of communities that have been historically underserved by agency programs.

10. When a~~A~~gencies issue or revise publicly available enforcement manuals, they should provide notice to the public of such actions, ~~when they issue or revise a publicly available enforcement manual,~~ for example by placing a notice on the agency's website, issuing a press release, making an announcement on social media, or publishing a notice of availability in the *Federal Register*.
11. Agencies that make enforcement manuals publicly available should solicit feedback on them ~~in a public forum~~ from a wide range of persons interested in or affected by agency enforcement proceedings.

Commented [CA20]: Proposed Amendment from Council #10:

The Council proposes striking the phrase "in a public forum" because an agency might also solicit feedback through direct outreach.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Committee on Regulation

Proposed Recommendation | December 15, 2022

Many statutes grant administrative agencies authority to adjudicate whether persons have violated the law and, for those found to have done so, order them to pay a civil penalty, provide specific relief, or take some other remedial action.[1] Some administrative enforcement proceedings result in a final agency adjudicative decision. But in many, perhaps most, such proceedings, a settlement is reached, either before or after an adjudication is formally initiated.[2]

Settlements can play an important role in administrative enforcement proceedings by allowing parties to resolve disputes more efficiently and effectively. Indeed, both the Administrative Procedure Act and Administrative Dispute Resolution Act (ADRA) recognize the importance of settlements in resolving enforcement proceedings,[3] and the Administrative Conference has similarly recommended that agencies consider using alternative means of dispute resolution.[4]

---

[1] This Recommendation addresses only settlements reached in administrative enforcement proceedings, not those reached in federal-court cases brought by agencies. For purposes of this Recommendation, "enforcement proceedings" is used broadly to include both investigative and trial-like adjudicative proceedings, whether the parties to the proceeding include the agency or instead only non-agency parties. The Administrative Conference addressed settlement agreements reached in court cases in Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021).

[2] Michael Asimow, Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions 1 (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.).

[3] *See* 5 U.S.C. §§ 554(c)(2), 556(c)(6)–(8), 571–584.

[4] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶¶ 8, 12, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016); Admin. Conf. of the U.S.,

Unlike final orders and opinions issued in the adjudication of cases, settlement agreements ordinarily do not definitively resolve disputed factual and legal matters, authoritatively decide whether a violation has taken place, or establish binding precedent. Nevertheless, public access to them can be desirable for several reasons. First, disclosure of settlement agreements can help regulated entities and the general public understand how the agency interprets the laws and regulations it enforces and exercises its enforcement authority. Second, public access to settlement agreements promotes accountable and transparent government. The public has an interest in evaluating how agencies enforce the law and use public funds. Third, high-profile settlements, such as those that involve high dollar amounts or require changes in business practices, often attract significant public interest. Fourth, the terms of a settlement agreement may also affect the interests of third parties, such as consumers, employees, or local communities.[5]

However valuable public access to settlement agreements might be, federal law generally does little to mandate their proactive disclosure. Generally applicable statutes such as the Freedom of Information Act (FOIA) and ADRA typically require disclosure only when members of the public specifically request the agreements in which they are interested. They do not generally require proactive disclosure on agency websites, as FOIA does for final adjudicative orders and opinions.[6] Nevertheless, many agencies do post settlement agreements on their websites.[7]

There may, of course, be reasons for agencies not to proactively disclose settlement agreements. Settlement agreements, or information contained within them, may be exempted or

Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 86-8, *Acquiring the Services of 'Neutrals' for Alternative Means of Dispute Resolution*, 51 Fed. Reg. 46,990 (Dec. 30, 1986); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986).

[5] *See* Elysa Dishman, Public Availability of Settlement Agreements in Agency Enforcement Proceedings 1, 6-7 (September 30, 2022) (draft report to the Admin. Conf. of the U.S.).

[6] *See* 5 U.S.C. § 552(a)(2).

[7] *See* Dishman, *supra* note 5, at 21.

protected from disclosure. Confidential commercial information, for example, is exempted from disclosure under FOIA.[8] As a policy matter, the promise of confidentiality may encourage candor, help parties to achieve consensus, and yield more efficient resolution of disputes. And as a practical matter, there may be little public interest in large volumes of factually and legally similar settlement agreements, such that the costs to agencies required to proactively disclose them might outweigh the benefits of proactive disclosure to the public.

This Recommendation encourages agencies to develop policies that recognize the benefits of proactively disclosing settlement agreements in administrative enforcement proceedings and account for countervailing interests. It builds on several other recommendations of the Administrative Conference that encourage agencies to proactively disclose other important materials related to the adjudication of cases, including orders and opinions, supporting records, adjudication rules and policies, and litigation materials.[9] In offering the best practices that follow, the Conference recognizes that settlement agreements vary widely in many respects, including in their terms, their effects on the interests of third parties, and the degree of public interest they attract. It also recognizes that not all agencies can bring the same resources to bear in providing public access to settlement agreements.

RECOMMENDATION

1. To inform regulated entities and the general public about administrative enforcement, agencies should develop policies addressing when to post on their websites settlement agreements reached in administrative enforcement proceedings—that is, those proceedings in which a civil penalty or other coercive remedy was originally sought

[8] 5 U.S.C. § 552(b)(4).

[9] *See* Recommendation 2020-6, *supra* note 1; Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

against a person for violating the law. Settlement agreements addressed in these policies should include those reached before adjudicative proceedings are formally initiated.

2. In determining which settlement agreements to post on its website, an agency should consider factors including:
    a. The extent to which disclosure would help regulated entities and the general public understand how the agency interprets the laws and regulations it enforces and exercises its enforcement authority;
    b. The extent to which disclosure would promote accountability and transparency, such as by allowing the public to evaluate agency administrative enforcement and use of public funds;
    c. The extent to which particular types of settlement agreements are likely to attract public interest;
    d. The extent to which disclosure might deter regulated entities from reaching settlements and resolving disputes expeditiously;
    e. The extent to which disclosure, even after redaction or anonymization, would adversely affect sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors; and
    f. The extent to which disclosure would impose significant administrative costs on the agency or, conversely, whether it would save the agency time or money by reducing the volume of requests for disclosure.
3. An agency that chooses generally not to post individual settlement agreements on its website—for example because agreements are confidential or do not vary considerably in terms of their factual contexts or the legal issues they raise—should consider other means to provide information about settlements, including by posting on its website:
    a. A form or template commonly used for settlement agreements;
    b. A representative sample of settlement agreements;
    c. Settlement agreements that entail especially significant legal issues;

d. Settlement agreements that, because of their facts, are likely to attract significant public interest;
e. A summary of each settlement or settlement trends; and
f. A sortable or searchable database that lists information about settlement agreements, such as case types, dates, case numbers, parties, and key terms.

4. When an agency posts settlement agreements or information about settlement agreements on its website, it should redact any information that is sensitive or otherwise protected from disclosure. An agency should also consider using pseudonyms for private persons in settlement agreements that include sensitive personal information.
5. An agency posting settlement agreements on its website should do so in a timely manner.
6. An agency should present settlement agreements or information about settlement agreements on its website in a clear, logical, readily accessible, and comprehensive fashion. In so doing, the agency should consider providing access to the settlement agreements or information about them through:
    a. A webpage dedicated to agency enforcement activities that is easily accessed from the agency's homepage, a site map, and site index;
    b. A webpage dedicated to an individual enforcement proceeding, such as a docket webpage, that also includes any associated materials (e.g., case summaries, press releases, related adjudication materials, links to any related actions); and
    c. A search engine that allows users to easily locate settlement agreements and sort, narrow, or filter them by case type, date, case number, party, and keyword.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Committee on Regulation

Proposed Recommendation | December 15, 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).

Many statutes grant administrative agencies authority to adjudicate whether persons have violated the law and, for those found to have done so, order them to pay a civil penalty, provide specific relief, or take some other remedial action.[1] Some administrative enforcement proceedings result in a final agency adjudicative decision. But in many, perhaps most, such proceedings, a settlement is reached, either before or after an adjudication is formally initiated.[2]

Settlements can play an important role in administrative enforcement proceedings by allowing parties to resolve disputes more efficiently and effectively. Indeed, both the Administrative Procedure Act and Administrative Dispute Resolution Act (ADRA) recognize the importance of settlements in resolving enforcement proceedings,[3] and the Administrative

[1] This Recommendation addresses only settlements reached in administrative enforcement proceedings, not those reached in federal court cases brought by agencies. For purposes of this Recommendation, "enforcement proceedings" is used broadly to include both investigative and trial-like adjudicative proceedings, whether the parties to the proceeding include the agency or instead only non-agency parties. The Administrative Conference addressed settlement agreements reached in court cases in Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021).

[2] Michael Asimow, Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions 1 (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.).

[3] *See* 5 U.S.C. §§ 554(c)(2), 556(c)(6)–(8), 571–584.

Conference has similarly recommended that agencies consider using alternative means of dispute resolution.[4]

Unlike final orders and opinions issued in the adjudication of cases, settlement agreements ordinarily do not definitively resolve disputed factual and legal matters, authoritatively decide whether a violation has taken place, or establish binding precedent. Nevertheless, public access to settlement agreements can be desirable for several reasons. First, disclosure of settlement agreements can help regulated entities and the general public understand how the agency interprets the laws and regulations it enforces and exercises its enforcement authority. Second, public access to settlement agreements can help promotes accountable and transparent government. The public has an interest in evaluating how agencies enforce the law and use public funds. By disclosing how agencies interact with different regulated entities, public access may also help guard against bias. Third, high-profile settlements, such as those that involve large dollar amounts or require changes in business practices, often attract significant public interest. Fourth, the terms of a settlement agreement may also affect the interests of third parties, such as consumers, employees, or local communities.[5]

Commented [CA1]: Proposed Amendment from Council #1

Commented [CA2]: Proposed Amendment from Council #2 (see parallel amendment at line 65)

However valuable public access to settlement agreements might be, federal law generally does little to mandate their proactive disclosure. Generally applicable statutes such as the Freedom of Information Act (FOIA) and ADRA typically require disclosure only when members of the public specifically request the agreements in which they are interested. They do not generally require proactive disclosure on agency websites, as FOIA does for final adjudicative

[4] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶¶ 8, 12, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016); Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 51 Fed. Reg. 46,990 (Dec. 30, 1986); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986).

[5] *See* Elysa Dishman, Public Availability of Settlement Agreements in Agency Enforcement Proceedings 1, 6–7 (~~September~~ Nov. 30, 2022) (~~draft~~ report to the Admin. Conf. of the U.S.).

orders and opinions.[6] Nevertheless, many agencies do post settlement agreements on their websites.[7]

There may, of course, be reasons for agencies not to proactively disclose settlement agreements. Settlement agreements, or information contained within them, may be exempted or protected from disclosure. Confidential commercial information, for example, is exempted from disclosure under FOIA.[8] In addition, the promise of confidentiality may encourage candor, help parties to achieve consensus, and yield more efficient resolution of disputes. And as a practical matter, there may be little public interest in large volumes of factually and legally similar settlement agreements, such that the costs to agencies required to proactively disclose them, especially costs associated with deleting sensitive or protected information, might outweigh the benefits of proactive disclosure to the public.

Commented [CA3]: Proposed Amendment from Council #3 (see footnote)

Commented [CA4]: Proposed Amendment from Council #4

This Recommendation encourages agencies to develop policies that recognize the benefits of proactively disclosing settlement agreements in administrative enforcement proceedings and account for countervailing interests. It builds on several other recommendations of the Administrative Conference that encourage agencies to proactively disclose other important materials related to the adjudication of cases, including orders and opinions, supporting records, adjudication rules and policies, and litigation materials.[9] In offering the best practices that follow, the Conference recognizes that settlement agreements vary widely in many respects, including in their terms, their effects on the interests of third parties, and the degree of public interest they attract. It also recognizes that not all agencies can bring the same resources to bear in providing public access to settlement agreements.

[6] *See* 5 U.S.C. § 552(a)(2).

[7] *See* Dishman, *supra* note 5, at 21.

[8] 5 U.S.C. § 552(b)(4); *compare* Seife v. FDA, 43 F.4th 231 (2d. Cir. 2022), *with* Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 836 (N.D. Cal. 2019).

[9] *See* Recommendation 2020-6, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

RECOMMENDATION

1. To inform regulated entities and the general public about administrative enforcement, agencies should develop policies addressing whether and when to post on their websites settlement agreements reached in administrative enforcement proceedings—that is, those proceedings in which a civil penalty or other coercive remedy was originally sought against a person for violating the law. Settlement agreements addressed in these policies should include those reached before and after adjudicative proceedings are formally initiated.
2. In determining which settlement agreements to post on its website, an agency should consider factors including:
    a. The extent to which disclosure would help regulated entities and the general public understand how the agency interprets the laws and regulations it enforces and exercises its enforcement authority;
    b. The extent to which disclosure would promote accountability and transparency, such as by allowing the public to evaluate agency administrative enforcement and use of public funds, and help guard against bias;
    c. The extent to which particular types of settlement agreements are likely to attract public interest;
    d. The extent to which disclosure might deter regulated entities from reaching settlements and resolving disputes expeditiously;
    e. The extent to which disclosure, even after redaction or anonymization, would adversely affect sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors; and
    f. The extent to which disclosure would impose significant administrative costs on the agency or, conversely, whether it would save the agency time or money by reducing the volume of requests for disclosure.
3. An agency that chooses generally not to post individual settlement agreements on its website—for example because agreements are confidential or do not vary considerably in

Commented [CA5]: Proposed Amendment from Council #5

Commented [CMA6]: Proposed Amendment from Special Counsel Jeffrey Lubbers

Commented [CA7]: Proposed Amendment from Council #2 (see parallel amendment at lines 20-21)

Commented [CMA8]: Comment #1 from Senior Fellow Alan B. Morrison:"My principal question relates to whether settlement agreements can ever be confidential - see line 75. I would like to discuss this at the plenary."

terms of their factual contexts or the legal issues they raise—should consider other means to provide information about settlements, including by posting on its website:

a. A form or template commonly used for settlement agreements;
b. A representative sample of settlement agreements;
c. Settlement agreements that entail especially significant legal issues;
d. Settlement agreements that, because of their facts, are likely to attract significant public interest;
e. A summary of each settlement or settlement trends; and
f. A sortable or searchable database that lists information about settlement agreements, such as case types, dates, case numbers, parties, and key terms.

4. When an agency posts settlement agreements or information about settlement agreements on its website, it should redact any information that is sensitive or otherwise protected from disclosure, and delete identifying details to the extent required to prevent a clearly unwarranted invasion of personal privacy. ~~. An agency should also consider using pseudonyms for private persons in settlement agreements that include sensitive personal information.~~
5. An agency posting settlement agreements on its website should do so in a timely manner.
6. An agency should present settlement agreements or information about settlement agreements on its website in a clear, logical, and readily accessible~~, and comprehensive~~ fashion. In so doing, the agency should consider providing access to the settlement agreements or information about them through:
   a. A webpage dedicated to agency enforcement activities that is easily accessed from the agency's homepage, a site map, and site index;
   b. A webpage dedicated to an individual enforcement proceeding, such as a docket webpage, that also includes any associated materials (e.g., case summaries, press releases, related adjudication materials, links to any related actions); and
   c. A search engine that allows users to easily locate settlement agreements and sort, narrow, or filter them by case type, date, case number, party, and keyword.

Commented [CMA9]: Comment #2 from Senior Fellow Alan B. Morrison:"I am not sure (line 87) that 'sensitive' information can be protected as there is no FOIA exemption for that. Also, since the parties are in control of what goes in the settlement agreement - other than the legal terms which should be public - I am not clear why there should be any sensitive information in such agreements at all. But if there is, then I would add 'posted' at the end of line 88."

Commented [CA10]: Proposed Amendment from Council #6

Commented [CA11]: Proposed Amendment from Council #7

Commented [CMA12]: Comment #3 from Senior Fellow Alan B. Morrison:"I would insert after 'homepage,' the phrase 'and includes' and delete the comma after 'map' to make clear that the desired access is from the home page and not from the site map or site index."

Commented [CMA13]: Comment #4 from Senior Fellow Alan B. Morrison:"I do not understand the meaning of 'case summaries,' especially the plural since the subsection refers to an individual proceeding."

7. When an agency posts settlement agreements on its website, it should include a statement that settlement agreements are provided only for informational purposes and do not establish precedent that controls decision making in unrelated cases.

Commented [CA14]: Proposed Amendment from Council #8

STAY INFORMED ABOUT ACUS

- NEWS & EVENTS
- COMMITTEE MEETINGS
- PROJECT UPDATES

VISIT US AT WWW.ACUS.GOV OR FOLLOW US ON SOCIAL MEDIA

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1120 20th Street NW · Suite 706 South · Washington, D.C. 20036