



79TH PLENARY SESSION

JUNE 15, 2023

ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agenda for 79th Plenary Session

Thursday, June 15, 2023

9:00 a.m. – 5:00 p.m.

- 9:00 a.m. Call to Order
Opening Remarks by Chair Andrew Fois
Initial Business by Chair Fois
(Vote on Adoption of Minutes of December 2022 Plenary Session,
Bylaw Amendment, and Resolution Governing the Order of Business)
- 9:30 a.m. Remarks by The Honorable Richard L. Revesz, Administrator, Office of
Information and Regulatory Affairs
- 10:00 a.m. Consider Proposed Recommendation: *Disclosure of Agency Legal Materials*
- 11:15 a.m. Consider Proposed Recommendation: *Virtual Public Engagement in Agency
Rulemaking*
- 12:30 p.m. Lunch Break
- 1:30 p.m. Conversation with Loren DeJonge Schulman, Associate Director of
Personnel and Performance Management, Office of Management and
Budget
- 2:15 p.m. Consider Proposed Recommendation: *Artificial Intelligence in Retrospective
Review of Agency Rules*
- 3:30 p.m. Consider Proposed Recommendation: *Online Processes in Agency
Adjudication*
- 4:45 p.m. Closing Remarks and Adjourn



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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.



78th Plenary Session

Minutes
December 15, 2022

I. Call to Order and Opening Remarks

The 78th Plenary Session of the Administrative Conference of the United States (ACUS) commenced at approximately 10 a.m. on December 15, 2022. ACUS Chair Andrew Fois called the meeting to order. He introduced the Council Members and the new members who joined ACUS since the last plenary session.

Chair Fois then 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 ACUS publications that have recently been, or will soon be, released.

II. Initial Business and Introduction to Recommendations

Chair Fois reviewed the rules for debating and voting on matters at the Plenary Session. ACUS members then approved the minutes for the 77th Plenary Session and adopted the resolution governing the order of business at the 78th Plenary Session. Chair Fois then thanked members, committee chairs, staff, and consultants for their diligent work in preparing proposed recommendations for consideration by the Assembly.

III. Consideration of Proposed Recommendation: Precedential Decision Making in Agency Adjudication

Chair Fois introduced the proposed recommendation, thanking: Chair of the Committee on Adjudication Nadine Mancini (Government Member); project consultants Christopher Walker (Senior Fellow), Melissa Wasserman (Public Member), and Matthew Wiener (Special Counsel); and ACUS Staff Counsel Matthew Gluth.

Ms. Wasserman provided an overview of the report, and Ms. Mancini discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed recommendation. Various amendments were considered and adopted. Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

IV. Proposed Recommendation: Regulatory Enforcement Manuals

Chair Fois introduced the proposed recommendation, thanking: Chair of the Committee on Rulemaking Bertrall Ross (Public Member); project consultant Jordan Perkins (Williams Fellow); and ACUS Staff Counsel Alexandra Sybo.

Mr. Perkins provided an overview of the report, and Mr. Ross discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed recommendation. Various amendments were considered and adopted. Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

V. Proposed Recommendation: Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Chair Fois introduced the proposed recommendation, thanking: Chair of the Committee on Regulation Eloise Pasachoff (Public Member); project consultant Elysa Dishman (Brigham Young University J. Reuben Clark Law School); and ACUS Staff Counsel Alexandra Sybo.

Ms. Dishman provided an overview of the report, and Chair Pasachoff discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed Recommendation. Various amendments were considered and adopted. Chair Fois then called for a vote on the Recommendation, as amended, and the Recommendation was adopted.

VI. Panel Discussion: Thomas W. Merrill, *The Chevron Doctrine: Its Rise, Fall and the Future of the Administrative State*

Following consideration and approval of pending Recommendations, Chair Fois recognized and introduced the following panelists and thanked them for their participation: Samuel R. Bagenstos (Government Member), Jack M. Beermann (Public Member), Ronald A. Cass (Council Member), Thomas W. Merrill (Columbia Law School), and Anne J. O'Connell (Council Member). Attorney Advisor Jennifer Selin moderated the panel. After a presentation by Professor Merrill and remarks from the panelists, Ms. Selin opened the floor to questions and comments from Conference members.

VII. Closing Remarks & Adjournment

Chair Fois thanked the panelists for their participation, invited Members to join ACUS staff for an informal reception following adjournment of the Plenary, and thanked Members and staff for their attendance and participation in the day's proceedings. At approximately 5:00 p.m., Chair Fois adjourned the 78th Plenary Session.



Bylaws of the Administrative Conference of the United States

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

§ 302.1 Establishment and Objective

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

§ 302.2 Membership

(a) General

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

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

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

(b) Terms of Non-Government Members

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

(c) Eligibility and Replacements

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

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

(d) Alternates

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

(e) Senior Fellows

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

(f) Special Counsels

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

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

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

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

(b) Special Committees

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

(c) Coordination

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

§ 302.4 Liaison Arrangements

(a) Appointment

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

(b) Term

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

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

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

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

(b) Disqualifications

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

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

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

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

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

§ 302.6 General

(a) Meetings

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

(b) Quorums

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

(c) Proposed Amendments at Plenary Sessions

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

(d) Separate Statements

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

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

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

(e) Amendment of Bylaws

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

(f) Procedure

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



Public Meeting Policies and Procedures

(Updated June 12, 2023)

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 prior to a meeting. The *Federal Register* notice for each plenary session will also include remote access information or instructions for obtaining remote access information.



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Participation in Meetings

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

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

Written Public Comments

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

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

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

Disability or Special Needs Accommodations

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



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Council Members

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

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



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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
Susan M. Davies	U.S. Department of Justice	Acting Assistant Attorney General, Office of Legal Policy
Scott A. de la Vega	U.S. Department of the Interior	Associate Solicitor for General Law, Office of the Solicitor
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
Gina K. Grippando	U.S. International Trade Commission	Assistant General Counsel for Administrative Law
Carson M. Hawley	U.S. Department of Agriculture	Deputy Assistant General Counsel, Marketing, Regulatory, and Food Safety Programs Division
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 Siegmund Hough	Federal Energy Regulatory Commission	Deputy Associate General Counsel



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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
Elizabeth A. M. McFadden	U.S. Securities and Exchange Commission	Deputy General Counsel for General Law
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



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Miriam Smolen	Federal Housing Finance Agency	Senior Deputy General Counsel
Jessica B. Stone	Occupational Safety and Health Administration	Director, Office of Regulatory Analysis - Safety
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

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 Hanoch 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



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Ilona R. Cohen	Aledade, Inc.	Chief Legal Officer
Kirti Datla	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



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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
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	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



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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

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 Representatives Committee on Oversight and Accountability	Policy Director (Minority)
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 Accountability	Senior Counsel (Majority)
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
Douglas C. Geho	U.S. House of Representatives Committee on the Judiciary	Chief Counsel for Antitrust, Commercial & Administrative Law (Majority)



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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
Scott Jorgenson	U.S. Senate Committee on the Judiciary	Associate Counsel (Majority)
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
Katie McInnis	U.S. House of Representatives Committee on the Judiciary	Chief Democratic Counsel, Subcommittee on the Administrative State, Regulatory Reform & Antitrust (Minority)
Mary C. McQueen	National Center for State Courts	President
Mohammad H. Mesbahi	Taxpayer Advocate Service	Advisor to the National Taxpayer Advocate
William S. Meyers	Administrative Office of the U.S. Courts	General Counsel
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



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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
David Rostker	U.S. Small Business Administration Office of Advocacy	Assistant Chief Counsel
Eleni M. Roumel	U.S. Court of Federal Claims	Chief Judge
Christina Salazar	U.S. Senate Committee on Homeland Security & Governmental Affairs	Chief Counsel (Minority)
Max Stier	Partnership for Public Service	President & CEO
Channing Strother	Federal Administrative Law Judges Conference	Member
Ethan V. Torrey	Judicial Conference of the U.S.	Legal Counsel of the Supreme Court of the U.S.
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

Gary D. Bass	The Bauman Foundation	Executive Director
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John F. Cooney		Former Partner, Venable LLP
Steven P. Croley	Ford Motor Company	Chief Policy Officer and General Counsel
Bridget C.E. Dooling	The Ohio State University Moritz College of Law	Assistant Professor of Law
Susan E. Dudley	The George Washington University Regulatory Studies Center	Director
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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
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Edith Ramirez	Hogan Lovells LLP	Partner
Neomi Rao	U.S. Court of Appeals for the District of Columbia Circuit	Circuit Judge
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Teresa Wynn Roseborough	The Home Depot	Executive Vice President, General Counsel and Corporate Secretary
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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
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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



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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
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Former ACUS Acting Chairman,
Vice Chairman, and Executive
Director



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ACUS PROJECTS, PUBLICATIONS, AND PROGRAMS (Selected)

ASSEMBLY PROJECTS

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

Artificial Intelligence in Retrospective Review of Agency Rules
Best Practices for Adjudication Not Involving an Evidentiary Hearing
Congressional Constituent Service Inquiries
Disclosure of Agency Legal Materials
Identifying and Reducing Burdens in Administrative Processes
Improving Timeliness in Agency Adjudication
Individualized Guidance
Online Processes in Agency Adjudication
Public Participation in Agency Adjudication
User Fees
Virtual Public Engagement in Agency Rulemaking

OFFICE OF THE CHAIR

Forthcoming and Ongoing Studies/Publications

Federal Administrative Procedure Sourcebook
Nationwide Injunctions and Federal Regulatory Programs
Statement of Principles for Public Engagement in Agency Rulemaking
Timing of Judicial Review of Agency Action

Recent Publications/Resources

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

Recent Forums

Forum on Assisting Parties in Federal Agency Adjudication
Forum on Enhancing Public Input in Agency Rulemaking
Forum on Underserved Communities and the Regulatory Process
Advice and Consent: Problems and Reforms in the Senate Confirmation of Executive-Branch Appointees

Ongoing Roundtables & Working Groups

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

Website Resources

Information Interchange Bulletins
Judicial Developments
Legislative Updates
Summary of Recent Administrative Law Reform Bills
Updates in Federal Agency Adjudication



Disclosure of Agency Legal Materials

Ad Hoc Committee

Proposed Recommendation for Plenary | June 15, 2023

1 Agencies produce many kinds of legal materials—that is, documents that establish,
2 interpret, apply, explain, or address the enforcement of legal rights and obligations, along with
3 constraints imposed, implemented, or enforced by or upon an agency.¹ Agency legal materials
4 come in many forms, ranging from generally applicable rules, issued after notice and comment,
5 to orders issued in the adjudication of individual cases. Many statutes govern the public
6 disclosure of these materials, including the Freedom of Information Act (FOIA),² the Federal
7 Register Act,³ and the E-Government Act of 2002.⁴ Together, these statutes require agencies to
8 proactively disclose certain materials, either by publishing them in the *Federal Register* or
9 posting them on their websites. Other materials must be made available upon request. Some
10 materials, given their nature or content, are exempt from disclosure.

11 Since its establishment, the Administrative Conference has adopted dozens of
12 recommendations encouraging agencies to proactively disclose important legal materials, even
13 beyond what the law currently requires, and to make them publicly available in a readily
14 accessible fashion.⁵ The Conference has identified best practices that, in some cases, Congress
15 could implement through legislative action.

¹ Bernard W. Bell, Cary Coglianesi, Michael Herz, Margaret B. Kwoka & Orly Lobel, Disclosure of Agency Legal Materials 5 (Feb. 23, 2023) (draft report to the Admin. Conf. of the U.S.)

² 5 U.S.C. § 552.

³ 41 U.S.C. Chapter 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁵ Recommendations adopted in recent years include Admin. Conf. of the U.S., Recommendation 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, 88 Fed. Reg. 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); and Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).



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16 Considering the principal statutes governing the disclosure of agency legal materials, the
17 Conference has also identified problems—inconsistencies and uncertainties, for example—that
18 Congress could remedy through statutory reforms. Developed at different times and for different
19 purposes, these statutes contain overlapping requirements that are sometimes difficult to
20 harmonize. Some statutes are quite old—the Federal Register Act, for example, dates from
21 1935—and technological developments and organizational changes have rendered certain
22 provisions outdated or obsolete. Some statutory provisions are vague, which has led to litigation
23 over their meaning and differing agency practices. In a few instances, statutes governing the
24 disclosure of agency legal materials contain drafting errors.⁶

25 To ensure that agencies provide ready public access to important legal materials in the
26 most efficient way possible, this Recommendation identifies several possible statutory reforms
27 that, if enacted by Congress, would provide clear standards as to what legal materials agencies
28 must publish in the *Federal Register*, post on their websites, or otherwise proactively disclose.
29 The Conference recognizes that these statutory reforms would impose additional upfront costs on
30 agencies. At the same time, proactive disclosure of agency legal materials may save staff time or
31 money through a reduction in the volume of FOIA requests or printing costs, or an increase in
32 the speed with which agency staff will be able to respond to remaining FOIA requests.

33 This Recommendation should not be considered as an exhaustive catalog of useful
34 reforms. For example, it does not address the exemptions to FOIA’s general disclosure
35 requirements.⁷ All records identified for proactive disclosure in this Recommendation would still
36 be subject to the exemptions from FOIA, such that if a record were exempt from disclosure upon
37 request, it would be exempt from any proactive disclosure requirement. Congress should also
38 consider timeframes for implementation of the proactive disclosure recommendations, whether
39 for newly created or preexisting agency legal materials.

40 Nothing in this Recommendation should be interpreted to constitute the Conference’s
41 interpretation of the statutes governing the disclosure of agency legal materials. Any
42 recommendation that a statutory provision be amended to “provide” something does not

⁶ See generally Bell et al., *supra* note 1.

⁷ 5 U.S.C. § 552(b).



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43 necessarily mean that the law does not already require it. Nor should this Recommendation be
44 read as superseding the Conference’s many previous recommendations on the disclosure of
45 agency legal materials. Unless and until Congress acts, the Conference encourages agencies to
46 adopt the best practices identified in its many previous recommendations.

RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

- 47 1. Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to paragraph 2 of this
48 Recommendation, that each agency make available on its website:
- 49 a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C.
50 § 554 and 556–557 or otherwise issued after a legally required opportunity for an
51 evidentiary hearing. Each agency should proactively disclose any such opinion or
52 order regardless of whether the agency designates the opinion or order as
53 precedential, published, or other similar designation;
 - 54 b. Written documents that communicate to a member of the public the agency’s
55 decision not to enforce a legal requirement against an individual or entity. Such
56 documents may include decisions to grant an individual or entity a waiver or
57 exemption, and advisory opinions that apply generally applicable legal
58 requirements to specific facts or explain how the agency will exercise its
59 discretion in particular cases;
 - 60 c. Written legal opinions and memoranda issued by or under the authority of its
61 chief legal officers that bind agency officials as a matter of law in the
62 performance of their duties;
 - 63 d. Settlement agreements to which the agency is a party;
 - 64 e. Memoranda of understanding, memoranda of agreement, and other similar inter-
65 agency or inter-governmental agreements that affect a member of the public;
 - 66 f. Any operative agency delegations of legal authority; and
 - 67 g. Any operative orders of succession for agency positions whose occupants must be
68 appointed by the President with the advice and consent of the Senate.



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- 69 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,
70 pursuant to notice and receipt of public comment, except for good cause pursuant to 5
71 U.S.C. § 553, providing that it will not proactively disclose some records described in
72 paragraph 1 of this Recommendation, because individual records do not vary
73 considerably in terms of their factual contexts or the legal issues they raise, or that
74 proactive disclosure of such documents would be misleading. Any such rule should
75 explain which records the agency will not proactively disclose and what other
76 information (e.g., aggregate data, representative samples), if any, the agency will
77 proactively disclose instead to adequately inform the public about agency activities.
- 78 3. Congress should require OMB to ensure that agencies:
- 79 a. develop and post disclosure plans—internal management plans and procedures for
80 making legal materials available online on their websites; and
- 81 b. designate an officer responsible for overseeing the development and
82 implementation of the proactive disclosure plans described in paragraph 3(a), and
83 for overseeing the agency’s compliance with all legal requirements for the
84 proactive disclosure of agency legal materials.
- 85 4. Because various provisions of the E-Government Act, Public Law Number 107-347,
86 governing proactive disclosure are duplicative, contain drafting errors, or are outdated,
87 Congress should amend the statute to:
- 88 a. Delete § 206(b);
- 89 b. Delete “and (b)” in § 207(f)(1)(A)(ii);
- 90 c. Eliminate references to the Interagency Committee on Government Information,
91 which no longer exists. Congress should instead require that the Office of
92 Management and Budget, after consultation with the Federal Web Managers
93 Council, update its guidance on federal agency public websites at least every two
94 years to ensure that agencies present legal materials on their websites in a clear,
95 logical, and readily accessible fashion.
- 96 5. Congress should provide that each agency should post each of its legislative rules on its
97 website, and should, to the extent feasible, include links to related agency legal materials,



98 such as guidance documents explaining the rule or significant adjudicative opinions
99 interpreting or applying it.

Enforcement of Proactive Disclosure Requirements

- 100 6. Congress should provide that a person may use the process described in 5 U.S.C.
101 § 552(a)(3) to request that an agency proactively disclose certain records when the
102 requestor alleges the agency is legally required to proactively disclose the records but has
103 not done so.
- 104 7. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an
105 agency has not proactively disclosed records when legally required to do so, the
106 reviewing court may order the agency to proactively disclose them in the manner
107 required by law. Congress should also provide that a requester must exhaust
108 administrative remedies required by 5 U.S.C. § 552 before filing a complaint in district
109 court to compel an agency to proactively disclose records.

Official Edition of *Federal Register*

- 110 8. Congress should provide that the online version of the *Federal Register*, which is
111 currently an unofficial informational resource, is the official edition of the *Federal*
112 *Register* and eliminate any statutory requirement in 44 U.S.C. Chapter 15 or elsewhere
113 that the printed version of the *Federal Register* is the official edition.

Preparation of Proposed Legislation

- 114 9. The Conference's Office of the Chair should prepare and submit to Congress proposed
115 statutory changes consistent with this Recommendation.



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Disclosure of Agency Legal Materials

Ad Hoc Committee

Proposed Recommendation for Plenary | June 15, 2023

Proposed Amendments

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

1 Agencies produce many kinds of legal materials—that is, documents that establish,
2 interpret, apply, explain, or address the enforcement of legal rights and obligations, along with
3 constraints imposed, implemented, or enforced by or upon an agency.¹ Agency legal materials
4 come in many forms, ranging from generally applicable rules, issued after notice and comment,
5 to orders issued in the adjudication of individual cases. Many statutes govern the public
6 disclosure of these materials, including the Freedom of Information Act (FOIA),² the Federal
7 Register Act,³ and the E-Government Act of 2002.⁴ Together, these statutes require agencies to
8 proactively disclose certain materials, either by publishing them in the *Federal Register* or
9 posting them on their websites. Other materials must be made available upon request. Some
10 materials, given their nature or content, are exempt from disclosure.

11 Since its establishment, the Administrative Conference has adopted dozens of
12 recommendations encouraging agencies to proactively disclose important legal materials, even
13 beyond what the law currently requires, and to make them publicly available in a readily

¹ Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, Disclosure of Agency Legal Materials 5 (Feb. 23/May 30, 2023) (draft report to the Admin. Conf. of the U.S.).

² 5 U.S.C. § 552.

³ 41 U.S.C. ch. 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

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

I suggest adding "Proactive" to the title "Disclosure of Agency Legal Materials" lest someone think this is about FOIA-requested disclosures.

DRAFT June 9, 2023



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14 accessible fashion.⁵ The Conference has identified best practices that, in some cases, Congress
15 could implement through legislative action.

16 Considering the principal statutes governing the disclosure of agency legal materials, the
17 Conference has also identified problems—inconsistencies and uncertainties, for example—that
18 Congress ~~sh~~ould remedy through statutory reforms. Developed at different times and for
19 different purposes, these statutes contain overlapping requirements that are sometimes difficult to
20 harmonize. Some statutes are quite old—the Federal Register Act, for example, dates from
21 1935—and technological developments and organizational changes have rendered certain
22 provisions outdated ~~or obsolete~~. Some statutory provisions are vague, which has led to litigation
23 over their meaning and to differing agency practices. ~~In a few instances, statutes governing the~~
24 ~~disclosure of agency legal materials contain drafting errors.~~⁶

25 To ensure that agencies provide ready public access to important legal materials in the
26 most efficient ~~way possible~~manner, this Recommendation identifies several ~~possible~~ statutory
27 reforms that, if enacted by Congress, would provide clear standards as to what legal materials
28 agencies must publish in the *Federal Register*, post on their websites, or otherwise proactively
29 disclose. ~~The Conference recognizes that these statutory reforms would impose additional~~ initial
30 upfront and ongoing costs on agencies. At the same time, proactive disclosure of agency legal
31 materials may save staff time or money through a reduction in the volume of FOIA requests or
32 printing costs, or an increase in the speed with which agency staff will be able to respond to
33 remaining FOIA requests. In assigning responsibilities for overseeing the development and
34 implementation of the proactive disclosure plans and for overseeing the agency's compliance

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

I suggest that "could" be changed to "should." Agencies "can" almost always do something; the issue is, should they.

Commented [CA3]: Proposed Amendment from Council #1

Commented [CMA4]: Proposed Amendment #1 from Government Member Stephanie Tatham:

We agree that there will be up-front technical costs, operational burden, and agency budget impacts associated with both the proactive disclosures and recommended legal requirements and suggest that some of these costs will be ongoing. Did agencies express views on whether they have the capacity to make this kind of information available absent additional appropriations?

⁵ Recommendations adopted in recent years include Admin. Conf. of the U.S., Recommendation 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, 88 Fed. Reg. 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); and Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

⁶ See generally Bell et al., *supra* note 1.



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35 with all legal requirements for the proactive disclosure of agency legal materials agencies may
36 wish to consider existing officials and the potential for overlapping or shared responsibilities.⁷

37 This Recommendation should not be considered as an exhaustive catalog of useful
38 reforms. For example, it does not address whether the exemptions ~~to~~ from FOIA's general
39 disclosure requirements⁸ should be amended, or recommend actions that may be at odds with
40 FOIA. The statutory reforms proposed in this Recommendation therefore would not require
41 agencies to proactively disclose matters exempted or excluded from FOIA's general disclosure
42 requirements, including "inter-agency or intra-agency memorandums or letters that would not be
43 available by law to a party other than an agency in litigation with the agency." All records
44 identified for proactive disclosure in this Recommendation would still be subject to the
45 exemptions from FOIA, such that if a record were exempt from disclosure upon request, it would
46 be exempt from any proactive disclosure requirement. Congress should also consider timeframes
47 for implementation of the proactive disclosure recommendations, whether for newly created or
48 preexisting agency legal materials.

49 Nothing in this Recommendation should be interpreted to constitute the Conference's
50 interpretation of the statutes governing the disclosure of agency legal materials. Any
51 recommendation that a statutory provision be amended to "provide" something does not
52 necessarily mean that the law does not already require it. Nor should this Recommendation be
53 read as superseding the Conference's many previous recommendations on the disclosure of
54 agency legal materials. In the absence of congressional action Unless and until Congress acts, the
55 Conference encourages agencies to adopt the best practices identified in these and its many
56 previous recommendations.

Commented [CMA5]: Proposed Amendment #2 from Government Member Steph Tatham:

Current-law FOIA, at 5 USC 552(j), states "Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level.)", and directs the Chief FOIA Officer to have agency-wide responsibility for efficient and appropriate compliance with "this section" [the FOIA, including the proactive disclosure provisions.], among other FOIA-related responsibilities.

This recommended new officer has agency-wide responsibility for ensuring compliance with requirements to proactively disclose legal materials, including under FOIA 552(a)(2), as contemplated in Rec. 1. The contemplated new officer has substantial responsibilities which duplicate responsibilities already held by the Chief FOIA Officer, but each has responsibilities the other does not. The Chief FOIA Officer ensures compliance with non-proactive FOIA disclosures and proactive FOIA disclosures of non-legal materials and has other FOIA responsibilities, and the proposed new official ensures compliance with proactive disclosures of legal materials outside the FOIA context (including under the E-Government Act and the Federal Register Act, noted in lines 5-7) and develops the disclosure plans in Rec 3.a.. Agencies may wish to consider the overlapping and shared responsibilities of existing officials as they assign these new responsibilities.

Commented [CA6]: Proposed Amendment from Council #2 (see parallel amendments at lines 54 and 82-83):

The proposed amendment is intended to make clearer that the proposed reforms would not require agencies to proactively disclose matters currently exempted or excluded from disclosure.

Commented [CMA7]: Proposed Amendment #3 from Senior Fellow Alan Morrison:

I think the conference would like agencies to follow these, as well as its prior recommendations, even if Congress does not act. For that reason, I suggest adding "these and" after "identified in."

⁷ For example, 5 USC 552(j), requires agencies to designate a Chief FOIA officer.

⁸ 5 U.S.C. § 552(b).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

- 57 1. Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to ~~P~~paragraph 2 of this
58 Recommendation and the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), that
59 each agency make available on its website:
- 60 a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C.
61 § 554 and 556–557 or otherwise issued after a legally required opportunity for
62 an evidentiary hearing. Each agency should proactively disclose any such opinion
63 or order regardless of whether the agency designates the opinion or order as
64 precedential, published, or other similar designation;
 - 65 b. Written documents that communicate to a member of the public the agency’s
66 decision not to enforce a legal requirement against an individual or entity. Such
67 documents may include decisions to grant an individual or entity a waiver or
68 exemption, and advisory opinions that apply generally applicable legal
69 requirements to specific facts or explain how the agency will exercise its
70 discretion in particular cases;
 - 71 c. Written legal opinions and memoranda issued by or under the authority of its
72 chief legal officers that bind agency officials as a matter of law in the
73 performance of their duties;
 - 74 d. Settlement agreements to which the agency is a party;
 - 75 e. Memoranda of understanding, memoranda of agreement, and other similar inter-
76 agency or inter-governmental agreements that affect a member of the public;
 - 77 f. Any operative agency delegations of legal authority; ~~and~~
78 g. Any operative orders of succession for agency positions whose occupants must be
79 appointed by the President with the advice and consent of the Senate; ~~and~~
80 g-h. Any statutory or agency determinations of first assistant positions to positions
81 whose occupants must be appointed by the President with the advice and consent
82 of the Senate.

Commented [CA8]: Proposed Amendment from Council #2
(see parallel amendments at lines 35-42 and 82-83)

Commented [CA9]: Proposed Amendment from Council #3:
Under the Federal Vacancies Reform Act, first assistants are the default acting official.



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- 83 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,
 84 pursuant to notice and receipt of public comment, except for good cause pursuant to 5
 85 U.S.C. § 553, providing that it will not proactively disclose some records described in
 86 Paragraph 1 of this Recommendation and subject to the exemptions and exclusions in 5
 87 U.S.C. § 552(b) and (c), because individual records in the relevant category do not vary
 88 considerably in terms of their factual contexts or the legal issues they raise, or that
 89 proactive disclosure of such documents would be misleading. Any such rule should
 90 explain which records the agency will not proactively disclose and what other
 91 information (e.g., aggregate data, representative samples), if any, the agency will
 92 proactively disclose instead to adequately inform the public about agency activities.
- 93 3. Congress should require ~~the Office of Management and Budget (OMB) to ensure that~~
 94 ~~agencies to:~~
- 95 a. ~~De~~develop and post disclosure plans—internal management plans and procedures
 96 for making legal materials available online on their websites; and
 - 97 b. ~~De~~esignate ~~an officer or officers~~ responsible for overseeing the development and
 98 implementation of the proactive disclosure plans described in Paragraph 3(a),
 99 and for overseeing the agency’s compliance with all legal requirements for the
 100 proactive disclosure of agency legal materials.
- 101 4. Because various provisions of the E-Government Act, ~~Public Law Number No.~~ 107-
 102 347, governing proactive disclosure are duplicative, contain drafting errors, or are
 103 outdated, Congress should amend the statute to:
- 104 a. Delete § 206(b);
 - 105 b. Delete “and (b)” in § 207(f)(1)(A)(ii);
 - 106 c. Eliminate references to the Interagency Committee on Government Information,
 107 which no longer exists. Congress should instead require that ~~OMB~~the Office of
 108 ~~Management and Budget~~, after consultation with ~~the Federal Web Managers~~
 109 ~~Council~~other relevant inter-agency bodies, periodically update its guidance on
 110 federal agency public websites at least every two years to ensure that agencies
 111 present legal materials, as appropriate, on their websites in a clear, logical, and
 112 readily accessible fashion.

Commented [CA10]: Proposed Amendment from Council #4:
 Why couldn't agencies issue these regulations without notice and comment under the agency management/organization/practice exceptions to the APA? These seem like the paragon example of what could be covered -- see Public Citizen v. Department of State, 276 F.3d 634 (D.C. Cir. 2002).

Commented [CA11]: Proposed Amendment from Council #2 (see parallel amendments at lines 35-42 and 54)

Commented [CMA12]: Proposed Amendment #3 from Government Member Stephanie Tatham:
 Thank you for thinking of OMB but we recommend that the Conference revert to the more direct formulation that places responsibilities on the agencies this recommendation would seek to obligate. OMB is not currently well-situated to provide this oversight.

Commented [CMA13]: Proposed Amendment #4 from Government Member Stephanie Tatham:
 Or officers?

Commented [CMA14]: Proposed Amendment #5 from Government Member Stephanie Tatham:
 Suggest referring to other relevant inter-agency bodies, as there are several with which OMB may consult (i.e., Federal Web Managers Council, federal Chief Information Officers Council, Federal Records Management Council, etc.) and as the relevant bodies may change and evolve over time.

Commented [CA15]: Proposed Amendment from Council #5:
 The proposed amendment would give OMB discretion to update its guidance as needed and consistent with available resources and other priorities.

Commented [CMA16R15]: Comment from Government Member Stephanie Tatham:
 OMB seeks to update this guidance periodically, as needed.

Commented [CMA17]: Proposed Amendment #6 from Government Member Stephanie Tatham:
 We recommend a qualifier to indicate that this is not all legal materials.



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- 113 5. Congress should provide that each agency should post each of its legislative rules on its
114 website, and should, to the extent feasible, include links to related agency legal materials,
115 such as guidance documents explaining the rule or significant adjudicative opinions
116 interpreting or applying it.

Enforcement of Proactive Disclosure Requirements

- 117 6. Congress should provide that a person may use the process described in 5 U.S.C.
118 § 552(a)(3) to request that an agency proactively disclose certain existing records when
119 the requestor alleges the agency is legally required to proactively disclose the records but
120 has not done so.
- 121 7. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an
122 agency has not proactively disclosed records when legally required to do so, the
123 reviewing court may order the agency to ~~proactively disclose them~~ make them available to
124 the general public in the manner required by the proactive disclosure provisions of 5
125 U.S.C. § 552(a), in the manner required by law. Congress should also provide that a
126 requester must exhaust administrative remedies required by 5 U.S.C. § 552 before filing a
127 complaint in district court to compel an agency to proactively disclose records.

Official Edition of *Federal Register*

- 128 8. Congress should provide that the online version of the *Federal Register*, which is
129 currently an unofficial informational resource, is the official edition of the *Federal*
130 *Register* and eliminate any statutory requirement in 44 U.S.C. Chapter 15 or elsewhere
131 that the printed version of the *Federal Register* is the official edition.

Preparation of Proposed Legislation

- 132 9. The Conference's Office of the Chair should prepare and submit to Congress proposed
133 statutory changes consistent with this Recommendation.

Commented [CMA18]: Comment #7 from Government Member Stephanie Tatham:

Is this referring to regulatory text or also the preamble? Suggest that a link to the e-CFR and/or Federal Register notice (GovInfo?) should suffice.

Commented [CMA19]: Proposed Amendment #8 from Government Member Stephanie Tatham:

Certain already-existing records? Or certain categories of records, such that future-created records might be within the scope of the request? If the latter, how could an agency issue a final "determination" on the request if it is impossible to ever have fully discharged its obligations to the requester?

Commented [CA20]: Proposed Amendment from Council #6:

The proposed amendment is intended to clarify the nature of the remedy.



Virtual Public Engagement in Agency Rulemaking

Committee on Rulemaking

Proposed Recommendation for Plenary | June 15, 2023

1 The law often requires agencies to give interested persons an opportunity to participate in
2 rulemakings.¹ Presidential directives, including Executive Order 14,094, *Modernizing*
3 *Regulatory Review*, also instruct agencies to proactively engage a range of interested or affected
4 persons, including underserved communities and program beneficiaries.² And as a matter of best
5 practice, the Administrative Conference has encouraged agencies to consider additional
6 opportunities for public engagement.³

7 Interested persons are often able to learn about participation opportunities through notice
8 in the *Federal Register* and participate in the rulemaking by submitting written data, views, and
9 arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

10 Agencies may also provide opportunities for oral presentation, whether before or after an
11 NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or
12 listening session—what this Recommendation refers to as a “public rulemaking engagement.”
13 Agencies may provide a public rulemaking engagement because a statute, presidential directive,

¹ See, e.g., 5 U.S.C. § 553(c).

² 88 Fed. Reg. 21,879 (Apr. 6, 2023).

³ Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).



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14 or agency rule or policy requires one or because such engagement would improve agency
15 decision making and promote public participation in regulatory policymaking.⁴ The Conference
16 has encouraged agencies to hold public rulemaking engagements when it would be beneficial to
17 do so and to explore more effective options for notice, to ensure interested persons are aware of
18 and understand regulatory developments that affect them. Agencies also directly engage with
19 people and organizations that are interested in and affected by their rules, and the Conference has
20 encouraged them to do so consistent with rules governing the integrity of the rulemaking
21 process.⁵

22 Effective public engagement requires overcoming barriers to participation, including
23 geographical constraints, resource limitations, and language barriers. For example, to ensure that
24 all people affected by a rulemaking are aware of the rulemaking and opportunities to participate,
25 the Conference has recommended that agencies conduct outreach that targets members of the
26 public with relevant views who do not typically participate in rulemaking or may otherwise not
27 be represented.

28 In recent years, and especially during the COVID-19 pandemic, agencies increasingly
29 have used widely available, internet-based videoconferencing software to engage with the
30 public.⁶ By reducing some barriers that people—especially members of historically underserved
31 communities—encounter, virtual public engagement can help broaden participation in agency
32 rulemakings.⁷

33 This Recommendation encourages agencies to offer virtual options when they determine
34 it would be beneficial to hold a public rulemaking engagement or directly engage with specific
35 people and organizations. It also offers best practices for planning, improving notice of, and

⁴ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin. Conf. of the U.S.).

⁵ See Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).

⁶ This mirrors developments with respect to the use of virtual hearings in agency adjudication. See Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021).

⁷ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking (May 25, 2023) (report to the Admin. Conf. of the U.S.).



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36 managing public rulemaking engagements, as well as ensuring that members of the public can
37 easily access materials related to virtual public rulemaking engagements (e.g., agendas,
38 recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials).
39 This Recommendation builds on many previous recommendations of the Conference regarding
40 public participation in agency rulemaking, including Recommendation 2018-7, *Public*
41 *Engagement in Rulemaking*, which, among other things, encourages agencies to develop
42 comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, “*Ex*
43 *Parte*” *Communications in Informal Rulemaking*, which offers best practices for engaging with
44 members of the public while safeguarding the integrity of agency rulemaking.

RECOMMENDATION

Virtual Public Engagement Planning

- 45 1. Each agency that engages in rulemaking should utilize internet-based videoconferencing
46 software as a way to broaden engagement with interested persons in a cost-effective way,
47 including through outreach that targets members of the public with relevant views who
48 do not typically participate in rulemaking or may otherwise not be represented. As part of
49 its overall policy for public engagement in rulemaking (described in Recommendation
50 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends
51 to use internet-based videoconferencing to engage with the public.
- 52 2. Each agency should ensure that its policies regarding informal communications between
53 agency personnel and individual members of the public related to a rulemaking
54 (described in Recommendation 2014-4, “*Ex Parte*” *Communications in Informal*
55 *Rulemaking*) cover communications that take place virtually.
- 56 3. Each agency should prepare and post to a publicly available website guidance on the
57 conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening
58 session, or other live event that is rulemaking related and open to the general public—and
59 ensure employees involved with such engagements are familiar with that guidance.



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- 60 4. When an agency plans to hold a public rulemaking engagement, it should allow for
61 interested persons to observe the engagement remotely and, when feasible, provide input
62 and ask questions remotely.
- 63 5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel
64 should collaborate with personnel who oversee communications, public affairs, public
65 engagement, and other relevant activities for the agency to ensure the engagement
66 reaches the targeted audience and facilitates effective participation from interested
67 persons, including groups that are affected by the rulemaking and have otherwise been
68 underrepresented in the agency's administrative process.

Notice

- 69 6. An agency should include, as applicable, the following information in the public notices
70 for a public rulemaking engagement with a virtual or remote component:
- 71 a. The date and time of the engagement, at the beginning of the notice;
 - 72 b. Options for remote attendance, including a direct link or instructions to obtain a
73 direct link to the internet-based videoconference event and alternative remote
74 attendance options for members of the public without access to broadband
75 internet, at the beginning of the notice;
 - 76 c. A plain-language summary of the rulemaking and description of the engagement's
77 purpose and agenda and the nature of the public input, if any, the agency is
78 seeking to obtain through the engagement;
 - 79 d. A link to the webpage described in Paragraph 7;
 - 80 e. Information about opportunities for members of the public to speak during the
81 engagement, including any directions for requesting to speak and any moderation
82 policies, such as limits on the time for speaking;
 - 83 f. The availability of closed captioning, language interpretation, and
84 telecommunications relay services and access instructions;
 - 85 g. The availability and location of a recording, a transcript, a summary, or minutes;
86 and



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- 87 h. Contact information for a person who can answer questions about the engagement
88 or arrange accommodations.
- 89 7. To encourage participation in a public rulemaking engagement, the agency should create
90 a dedicated webpage for each such engagement that includes the information described in
91 Paragraph 6. The webpage should include, as applicable:
- 92 a. A link to the internet-based videoconferencing event, its registration page, or
93 information for alternative remote attendance options for members of the
94 public without access to broadband internet;
- 95 b. A link to the *Federal Register* notice;
- 96 c. Any materials associated with the engagement, such as an agenda, a program,
97 speakers' biographies, a draft rule, the rulemaking docket, or questions for
98 participants;
- 99 d. A livestream of the engagement for the public to observe while it is occurring;
100 and
- 101 e. Any recording, transcript, summary, or minutes after the engagement has
102 ended.
- 103 8. The Office of the Federal Register (OFR) should update the *Document Drafting*
104 *Handbook* to provide agencies guidance on drafting *Federal Register* notices for public
105 rulemaking engagements with virtual or remote components that include the information
106 described in Paragraph 6.
- 107 9. OFR and the eRulemaking Program should update the “Document Details” sidebar on
108 FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is
109 a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

Managing Virtual Public Engagements

- 110 10. When feasible, each agency should allow interested persons to observe a livestream of
111 the public rulemaking engagement remotely at any time while it is occurring and should
112 not require members of the public to register. Agencies may want to set a registration
113 deadline for those wishing to speak or requiring accommodations.



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- 114 11. To manage participant expectations, an agency should communicate the following
115 matters, among others, to participants at the beginning of the event:
- 116 a. The purpose and goal of the engagement;
 - 117 b. The moderation policies, including those governing speaking time limits and
118 whether or why the agency can or cannot respond to oral statements made by
119 participants;
 - 120 c. The management of the public speaking queue;
 - 121 d. Whether the chat function, if using an internet-based videoconferencing
122 platform, will be disabled or monitored and, if monitored, whether the chat
123 will be included in the record;
 - 124 e. How participants can access the rulemaking materials throughout the meeting;
125 and
 - 126 f. Whether the event will be recorded or transcribed and where it will be made
127 available.
- 128 12. Each agency should ensure it has adequate support to run public rulemaking
129 engagements, including their virtual and other remote components. Adequate support
130 might include technological or troubleshooting assistance, a third-party moderating
131 service, or a sufficient number of staff members available.

Recordings and Transcripts

- 132 13. When an agency holds a public rulemaking engagement, it should record, transcribe,
133 summarize, or prepare meeting minutes of the engagement unless doing so would
134 adversely affect the willingness of public participants to provide input or ask questions.
- 135 14. Each agency should make any recording, transcript, summary, or minutes of a public
136 rulemaking engagement available in any public docket associated with the rulemaking
137 and on the webpage described in Paragraph 7, and should do so in a timely manner.



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Virtual Public Engagement in Agency Rulemaking

Committee on Rulemaking

Proposed Recommendation for Plenary | June 15, 2023

Proposed Amendments

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

1 The law often requires agencies to give interested persons an opportunity to participate in
2 rulemakings.¹ Presidential directives, including Executive Order 14,094, *Modernizing*
3 *Regulatory Review*, also instruct agencies to proactively engage a range of interested or affected
4 persons, including underserved communities and program beneficiaries.² And as a matter of best
5 practice, the Administrative Conference has encouraged agencies to consider additional
6 opportunities for public engagement.³

7 Interested persons are often able to learn about participation opportunities through notice
8 in the *Federal Register* and participate in the rulemaking by submitting written data, views, and
9 arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

¹ See, e.g., 5 U.S.C. § 553(c).

² 88 Fed. Reg. 21,879 (Apr. 6, 2023).

³ Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).

DRAFT June 9, 2023



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10 Agencies may also provide opportunities for oral presentation, whether before or after an
11 NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or
12 listening session—what this Recommendation refers to as a “public rulemaking engagement.”
13 Agencies may provide a public rulemaking engagement because a statute, presidential directive,
14 or agency rule or policy requires one or because such engagement would improve agency
15 decision making and promote public participation in regulatory policymaking.⁴ The Conference
16 has encouraged agencies to hold public rulemaking engagements when it would be beneficial to
17 do so and to explore more effective options for notice, to ensure interested persons are aware of
18 and understand regulatory developments that affect them. Agencies also directly engage with
19 people and organizations that are interested in and affected by their rules, and the Conference has
20 encouraged them to do so consistent with rules governing the integrity of the rulemaking
21 process.⁵

22 When agencies engage with the public, they must ensure that they meet all legal
23 accessibility requirements.⁶ Effective public engagement also requires that agencies identify and
24 address overcoming barriers to participation, including geographical constraints, resource
25 limitations, and language barriers. For example, to ensure that all people affected by a
26 rulemaking are aware of the rulemaking and opportunities to participate, the Conference has
27 recommended that agencies conduct outreach that targets members of the public with relevant
28 views who do not typically participate in rulemaking or may otherwise not be represented.⁷

29 In recent years, and especially during the COVID-19 pandemic, agencies increasingly
30 have used widely available, internet-based videoconferencing software to engage with the

⁴ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin. Conf. of the U.S.).

⁵ See Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).

⁶ See, e.g., Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

⁷ E.g., Admin. Rec. 2021-3, *Early Public Input on Regulatory Alternatives*, ¶ 3, 86 Fed. Reg. 36,082, 36,082–36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 1(b), 84 Fed. Reg. 2146, 2147 (Feb. 6, 2019).



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31 public.⁸ By reducing some barriers that people—especially members of historically underserved
32 communities—encounter, virtual public engagement can help broaden participation in agency
33 rulemakings.⁹ At the same time, virtual engagements may present barriers to access for some
34 people, such as low-income individuals for whom it may be difficult to obtain access to high-
35 quality personal devices or private internet services, individuals in rural areas who lack access to
36 broadband internet, individuals whose disabilities prevent effective engagement in virtual
37 proceedings or make it difficult to set up and manage the necessary technology, and individuals
38 with limited English proficiency. Some individuals may also have difficulty, feel uncomfortable,
39 or lack experience using a personal device or internet-based videoconferencing software to
40 participate in an administrative proceeding.¹⁰

Commented [CA1]: Proposed Amendment from Council #1

41 This Recommendation encourages agencies to offer virtual options when they determine
42 it would be beneficial to hold a public rulemaking engagement or directly engage with specific
43 people and organizations. It also offers best practices for planning, improving notice of, and
44 managing public rulemaking engagements, as well as ensuring that members of the public can
45 easily access materials related to virtual public rulemaking engagements (e.g., agendas,
46 recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials).
47 This Recommendation builds on many previous recommendations of the Conference regarding
48 public participation in agency rulemaking, including Recommendation 2018-7, *Public*
49 *Engagement in Rulemaking*, which, among other things, encourages agencies to develop
50 comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, “*Ex*
51 *Parte*” *Communications in Informal Rulemaking*, which offers best practices for engaging with
52 members of the public while safeguarding the integrity of agency rulemaking.

⁸ This mirrors developments with respect to the use of virtual hearings in agency adjudication. See Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021).

⁹ Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking* (May 25, 2023) (report to the Admin. Conf. of the U.S.).

¹⁰ *Cf. Recommendation 2021-4, supra note 8.*



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RECOMMENDATION

Virtual Public Engagement Planning

- 53 1. ~~Each agency~~ that engages in rulemaking generally should utilize internet-based
54 videoconferencing software as a way to broaden engagement with interested persons in a
55 cost-effective way, including through outreach that targets members of the public with
56 relevant views who do not typically participate in rulemaking or may otherwise not be
57 represented. As part of its overall policy for public engagement in rulemaking (described
58 in Recommendation 2018-7, *Public Engagement in Rulemaking*), each agency should
59 explain how it intends to use internet-based videoconferencing to engage with the public.
- 60 2. Each agency should ensure that its policies regarding informal communications between
61 agency personnel and individual members of the public related to a rulemaking
62 (described in Recommendation 2014-4, *“Ex Parte” Communications in Informal*
63 *Rulemaking*) cover communications that take place virtually.
- 64 3. Each agency should prepare and post to a publicly available website guidance on the
65 conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening
66 session, or other live event that is rulemaking related and open to the general public—and
67 ensure employees involved with such engagements are familiar with that guidance.
- 68 4. When an agency plans to hold a public rulemaking engagement, it should allow for
69 interested persons to observe the engagement remotely and, when feasible, provide input
70 and ask questions remotely.
- 71 5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel
72 should collaborate with personnel who oversee communications, public affairs, public
73 engagement, and other relevant activities for the agency to ensure the engagement
74 reaches the targeted audience and facilitates effective participation from interested
75 persons, including groups that are affected by the rulemaking and have otherwise been
76 underrepresented in the agency’s administrative process.

Commented [CA2]: Proposed Amendment from Council #2

This proposed amendment would recognize that the costs of using videoconferencing as a way to broaden public engagement may outweigh the benefits of doing so in some circumstances.



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Notice

- 77 6. An agency should include, as applicable, the following information in the public notices
78 for a public rulemaking engagement with a virtual or remote component:
79 a. The date and time of the engagement, at the beginning of the notice;
80 b. Options for remote attendance, including a direct link or instructions to obtain a
81 direct link to the internet-based videoconference event and alternative remote
82 attendance options for members of the public without access to broadband
83 internet, at the beginning of the notice;
84 c. A plain-language summary of the rulemaking and description of the engagement's
85 purpose and agenda and the nature of the public input, if any, the agency is
86 seeking to obtain through the engagement;
87 d. A link to the webpage described in Paragraph 7;
88 e. Information about opportunities for members of the public to speak during the
89 engagement, including any directions for requesting to speak and any moderation
90 policies, such as limits on the time for speaking;
91 f. The availability of **services such as** closed captioning, language interpretation, and
92 telecommunications relay services and access instructions;
93 g. The availability and location of a recording, a transcript, a summary, or minutes;
94 and
95 h. Contact information for a person who can answer questions about the engagement
96 or arrange accommodations.
- 97 7. To encourage participation in a public rulemaking engagement, the agency **generally**
98 should create a dedicated webpage for each such engagement that includes the
99 information described in Paragraph 6. The webpage should include, as applicable:
100 a. A link to the internet-based videoconferencing event, its registration page, or
101 information for alternative remote attendance options for members of the
102 public without access to broadband internet;
103 b. A link to the *Federal Register* notice;

Commented [CA3]: Proposed Amendment from Council #3:

This proposed amendment would clarify that the list of services provided in the Recommendation is not exclusive.

Commented [CA4]: Proposed Amendment from Council #4:

This proposed amendment would recognize that the costs of creating a dedicated webpage for a public rulemaking engagement may outweigh the benefits of doing so in some circumstances.



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- 104 c. Any materials associated with the engagement, such as an agenda, a program,
105 speakers' biographies, a draft rule, the rulemaking docket, or questions for
106 participants;
107 d. A livestream of the engagement for the public to observe while it is occurring;
108 and
109 e. Any recording, transcript, summary, or minutes after the engagement has
110 ended.
- 111 8. The Office of the Federal Register (OFR) should update the *Document Drafting*
112 *Handbook* to provide agencies guidance on drafting *Federal Register* notices for public
113 rulemaking engagements with virtual or remote components that include the information
114 described in Paragraph 6.
- 115 9. OFR and the eRulemaking Program should update the "Document Details" sidebar on
116 FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is
117 a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

Managing Virtual Public Engagements

- 118 10. When feasible, each agency should allow interested persons to observe a livestream of
119 the public rulemaking engagement remotely at any time while it is occurring and should
120 not require members of the public to register. Agencies may want to set a registration
121 deadline for those wishing to speak or requiring accommodations.
- 122 11. To manage participants' expectations, an agency should communicate the following
123 matters, among others, to participants at the beginning of the event:
- 124 a. The purpose and goal of the engagement;
- 125 b. The moderation policies, including those governing speaking time limits and
126 whether or why the agency ~~can~~ will or ~~cannot~~ will not respond to oral
127 statements made by participants;
- 128 c. The management of the public speaking queue;



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- 129 d. Whether the chat function, if using an internet-based videoconferencing
130 platform, will be disabled or monitored and, if monitored, whether the chat
131 will be included in the record;
132 e. How participants can access the rulemaking materials throughout the meeting;
133 and
134 f. Whether the event will be recorded or transcribed and where it will be made
135 available.
- 136 12. As agency resources allow, Each agency should ensure it has adequate support to run
137 public rulemaking engagements, including their virtual and other remote components.
138 Adequate support might include technological or troubleshooting assistance, a third-party
139 moderating service, or a sufficient number of staff members available.

Recordings and Transcripts

- 140 13. When an agency holds a public rulemaking engagement, it should record, transcribe,
141 summarize, or prepare meeting minutes of the engagement unless doing so would
142 adversely affect the willingness of public participants to provide input or ask questions.
- 143 14. Each agency should in a timely manner, make any recording, transcript, summary, or
144 minutes of a public rulemaking engagement available in any public docket associated
145 with the rulemaking and on the webpage described in Paragraph 7, and should do so in a
146 timely manner.

Commented [CA5]: Proposed Amendment from Council #5:

This proposed amendment would acknowledge that agencies will need to consider their available resources in providing support for public rulemaking engagements.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Artificial Intelligence Algorithmic Tools in Retrospective Review of Agency Rules

Committee on Regulation

Proposed Recommendation for Plenary | June 15, 2023

1 Retrospective review is the process by which agencies assess existing rules and decide
2 whether they need to be revisited. Consistent with longstanding executive-branch policy, the
3 Administrative Conference has endorsed the practice of retrospective review of agency rules
4 (including those that incorporate standards by reference), encouraged regulatory agencies to
5 cultivate a culture of retrospective review, and urged agencies to establish plans to conduct
6 retrospective reviews periodically.¹ The Conference has also recognized, however, that agencies
7 often have limited resources available to conduct retrospective reviews. To encourage agencies
8 to undertake retrospective reviews despite resource limitations, the Conference has identified
9 opportunities for agencies to conserve resources, for example by taking advantage of internal and
10 external sources of information and expertise.²

11 New technologies may offer additional opportunities for agencies to conserve resources
12 and conduct more robust retrospective review in a cost-effective manner. Most significantly,
13 algorithmic tools may enable agencies to automate some tasks associated with retrospective
14 review. An algorithmic tool is a computerized process that uses a series of rules or inferences
15 drawn from data to transform specified inputs into outputs to make decisions or support decision
16 making.³ The use of such tools may also help agencies identify issues that they otherwise might

¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2021-2, *Periodic Retrospective Review*, 86 Fed. Reg. 36,080 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,783 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012); Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

² Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

³ Algorithmic tools include, but are not limited to, applications that use artificial intelligence techniques.

Commented [RC1]: Proposed Amendment from Regulation Committee:

The Committee voted to replace the original title of this Recommendation (*Artificial Intelligence in Retrospective Review of Agency Rules*).

DRAFT May 23, 2023



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17 not detect. The General Services Administration (GSA) and several other agencies have already
18 begun experimenting with the use of algorithmic tools to conduct some tasks in service of
19 retrospective review or similar functions.⁴

20 Although algorithmic tools hold out the promise of lowering the cost of completing
21 governmental tasks and improving the quality, consistency, and predictability of agencies’
22 decisions, agencies’ use of algorithmic tools also raises important concerns.⁵ Statutes, executive
23 orders, and agency policies highlight many such concerns.⁶ In a prior Statement, the Conference
24 itself described concerns about transparency (especially given the proprietary nature of some
25 artificial intelligence (AI) systems) harmful bias, technical capacity, procurement, data usage and
26 storage, privacy, security, and the full or partial displacement of human decision making and
27 discretion that may arise when agencies rely on AI tools.⁷ There are also practical challenges
28 associated with algorithmic tools—including the potentially high startup costs associated with
29 developing or procuring them, the need to develop internal capacity and expertise to use them
30 appropriately, related needs in staffing and training, and the need for ongoing maintenance and
31 oversight—which may lead agencies to rely on the algorithmic tools developed and used by GSA
32 and other agencies.

33 The Conference recognizes that agencies may be able to leverage algorithmic tools to
34 more efficiently, cost-effectively, and accurately identify rules (including those that incorporate
35 standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate
36 cross-references, or might benefit from resolving issues with intersecting or overlapping rules or
37 standards. Because agencies have only recently begun using algorithmic tools to support

⁴ Catherine M. Sharkey, *Algorithmic Retrospective Review of Agency Rules* (May 3, 2023) (report to the Admin. Conf. of the U.S.).

⁵ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Feb. 2020) (report to the Admin. Conf. of the U.S.).

⁶ *See, e.g.*, AI Training Act, Pub. L. No. 117-207, 136 Stat. 2237 (Oct. 17, 2022); Exec. Order No. 14,091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 Fed. Reg. 10,825 (Feb. 16, 2023); Exec. Order No. 13,960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78,939 (Dec. 3, 2020); Exec. Order No. 13,859, *Maintaining American Leadership in Artificial Intelligence*, 84 Fed. Reg. 3967 (Feb. 11, 2019).

⁷ Admin. Conf. of the U.S., *Statement #20, Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).



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38 retrospective review, this Recommendation does not address the potential use of those tools to
39 perform more complex tasks—such as identifying rules that may need to be modified,
40 strengthened, or eliminated to better achieve statutory goals or reduce regulatory burdens—for
41 which the potential risks and benefits are still unclear and which may raise additional issues
42 regarding agency decision making, including those highlighted above. This Recommendation
43 offers best practices for agencies to acquire, use, and assess algorithmic tools for retrospective
44 review in a way that accords with applicable legal requirements and promotes accuracy,
45 efficiency, transparency, and accountability.

RECOMMENDATION

- 46 1. Agencies should assess whether they can use algorithmic tools to more efficiently, cost-
47 effectively, and accurately identify rules (including those that incorporate standards by
48 reference), that are outmoded or redundant, contain typographic errors or inaccurate
49 cross-references, or might benefit from resolving issues with intersecting or overlapping
50 rules or standards.
- 51 2. When agencies contemplate using an algorithmic tool to support retrospective review,
52 they should consider whether it would be most efficient, cost-effective, and accurate to
53 develop a new tool in-house, implement a tool developed and made available by another
54 agency, or procure a tool from a commercial vendor or contractor. In making this
55 determination, agencies should assess whether there is an existing tool that meets their
56 needs and, in so doing, consult with other agencies that have experience using
57 algorithmic tools to support retrospective review. If there is no such tool, agencies should
58 consider whether they have sufficient in-house expertise and capacity to develop an
59 adequate tool.
- 60 3. Agencies should ensure that regulatory decision makers who use algorithmic tools to
61 support retrospective review (a) have adequate training on the capabilities and risks of
62 those tools and (b) carefully assess the output for further consideration.
- 63 4. To promote transparency and build internal expertise, agencies should, when developing
64 or selecting an algorithmic tool to support retrospective review, ensure that the source



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- 65 code for the tool is publicly available and interoperable with other government systems.
66 If agencies do not use an algorithmic tool that is open-source, they should ensure that key
67 information about the tool's development, operation, and use is available to agency
68 personnel and the public.
- 69 5. When agencies publish retrospective review plans and descriptions of specific
70 retrospective reviews, as described in Recommendation 2021-2, *Periodic Retrospective*
71 *Review*, they should disclose whether, and if so, explain how, they plan to use or used
72 algorithmic tools to support retrospective review. Additionally, when agencies
73 incorporate retrospective reviews in their Learning Agendas and Annual Evaluation
74 Plans, as described in Recommendation 2021-2, they should include information about
75 the use of algorithmic tools.
 - 76 6. When the analysis deriving from a retrospective review using an algorithmic tool will
77 influence a new rulemaking, agencies should be transparent about their use of the tool
78 and explain how the tool contributed to the decision to develop the new rule.
 - 79 7. The General Services Administration should continue to explore options for developing,
80 acquiring, and using algorithmic tools to support retrospective review and share its
81 findings and capabilities with other agencies.
 - 82 8. The Office of Management and Budget should provide guidance on the use of
83 algorithmic tools to support retrospective review.
 - 84 9. Agencies should share their experiences in using these tools and, to manage risk and
85 monitor internal processes, consider developing their own internal evaluation and
86 oversight mechanisms for algorithmic tools used in retrospective review, both for initial
87 approval of a tool and, as applicable, for regular oversight of the tool.



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Artificial Intelligence Algorithmic Tools in Retrospective Review of Agency Rules

Committee on Regulation

Proposed Recommendation for Plenary | June 15, 2023

Proposed Amendments

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

1 Retrospective review is the process by which agencies assess existing rules and decide
2 whether they need to be revisited. Consistent with longstanding executive-branch policy, the
3 Administrative Conference has endorsed the practice of retrospective review of agency rules
4 (including those that incorporate standards by reference), encouraged regulatory agencies to
5 cultivate a culture of retrospective review, and urged agencies to establish plans to conduct
6 retrospective reviews periodically.¹ The Conference has also recognized, however, that agencies
7 often have limited resources available to conduct retrospective reviews. To encourage agencies
8 to undertake retrospective reviews despite resource limitations, the Conference has identified
9 opportunities for agencies to conserve resources, for example by taking advantage of internal and
10 external sources of information and expertise.²

11 New technologies may offer additional opportunities for agencies to conserve resources
12 and conduct more robust retrospective review in a cost-effective manner. ~~Most significantly~~

¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2021-2, *Periodic Retrospective Review*, 86 Fed. Reg. 36,080 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,783 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012); Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

² Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan Morrison:

I suggest adding "Using" or "Use of" before "Algorithmic Tools" (if adopted).

Commented [RC2]: Proposed Amendment from Regulation Committee:

The Committee voted to replace the original title of this Recommendation from *Artificial Intelligence in Retrospective Review of Agency Rules* to *Algorithmic Tools in Retrospective Review of Agency Rules*.

DRAFT June 9, 2023



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13 **Among these**, algorithmic tools may enable agencies to automate some tasks associated with
14 retrospective review. An algorithmic tool is a computerized process that uses a series of rules or
15 inferences drawn from data to transform specified inputs into outputs to make decisions or
16 support decision making.³ The use of such tools may also help agencies identify issues that they
17 otherwise might not detect. The General Services Administration (GSA) and several other
18 agencies have already begun experimenting with the use of algorithmic tools to conduct some
19 tasks in service of retrospective review or similar functions.⁴

20 Although algorithmic tools hold out the promise of lowering the cost of completing
21 governmental tasks and improving the quality, consistency, and predictability of agencies'
22 decisions, agencies' use of algorithmic tools also raises important concerns.⁵ Statutes, executive
23 orders, and agency policies highlight many such concerns.⁶ In a prior Statement, the Conference
24 itself described concerns about transparency (especially given the proprietary nature of some
25 artificial intelligence (AI) systems), harmful bias, technical capacity, procurement, data usage
26 and storage, privacy, security, and the full or partial displacement of human decision making and
27 discretion that may arise when agencies rely on AI tools.⁷ **There are also practical challenges**
28 **associated with the development and use of agency-specific** algorithmic tools ~~including the~~
29 ~~potentially high startup costs associated with developing or procuring them, the need to develop~~
30 ~~internal capacity and expertise to use them appropriately, related needs in staffing and training,~~
31 ~~and the need for ongoing maintenance and oversight~~—which may lead agencies to rely on the
32 algorithmic tools developed and used by GSA and other agencies. **These challenges include the**

³ Algorithmic tools include, but are not limited to, applications that use artificial intelligence techniques.

⁴ Catherine M. Sharkey, Algorithmic Retrospective Review of Agency Rules (May 3, 2023) (report to the Admin. Conf. of the U.S.).

⁵ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies (Feb. 2020) (report to the Admin. Conf. of the U.S.).

⁶ See, e.g., AI Training Act, Pub. L. No. 117-207, 136 Stat. 2237 (Oct. 17, 2022); Exec. Order No. 14,091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 10,825 (Feb. 16, 2023); Exec. Order No. 13,960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 Fed. Reg. 78,939 (Dec. 3, 2020); Exec. Order No. 13,859, Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 (Feb. 11, 2019).

⁷ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

Commented [CA3]: Proposed Amendment from Council #1:

The present wording of lines 28-32 are a bit confusing. The Council recommends that on line 28, following "associated with" and preceding "algorithmic tools" inserting "development and use of agency-specific" to make the recommendation more clear.



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33 potentially high startup costs associated with developing or procuring them, the need to develop
34 internal capacity and expertise to use them appropriately, related needs in staffing and training,
35 and the need for ongoing maintenance and oversight.

36 The Conference recognizes that agencies may be able to leverage algorithmic tools to
37 more efficiently, cost-effectively, and accurately identify rules (including those that incorporate
38 standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate
39 cross-references, or might benefit from resolving issues with intersecting or overlapping rules or
40 standards. Because agencies have only recently begun using algorithmic tools to support
41 retrospective review, this Recommendation does not address the potential use of those tools to
42 perform more complex tasks—such as identifying rules that may need to be modified,
43 strengthened, or eliminated to better achieve statutory goals or reduce regulatory burdens—for
44 which the potential risks and benefits are still unclear and which may raise additional issues
45 regarding agency decision making, including those highlighted above. This Recommendation
46 offers identifies best practices for agencies to acquire, use, and assess algorithmic tools for
47 retrospective review in a way that accords with applicable legal requirements and promotes
48 accuracy, efficiency, transparency, and accountability. To encourage coordination and
49 collaboration across the executive branch, this Recommendation also encourages the General
50 Services Administration to continue to explore options for developing, acquiring, and using
51 algorithmic tools to support retrospective review and share its findings and capabilities with
52 other agencies, and the Office of Management and Budget to provide guidance on the use of
53 these tools to support retrospective review.

RECOMMENDATION

- 54 1. Agencies should assess whether they can use algorithmic tools to more efficiently, cost-
55 effectively, and accurately identify rules (including those that incorporate standards by
56 reference) that are outmoded or redundant, contain typographic errors or inaccurate
57 cross-references, or might benefit from resolving issues with intersecting or overlapping
58 rules or standards.

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

This proposed amendment is intended to clarify that this Recommendation not only identifies best practices for individual agencies but also makes recommendations to GSA and OMB to encourage cross-agency coordination and collaboration.



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- 59 2. When agencies contemplate using an algorithmic tool to support retrospective review,
60 they should consider whether it would be most efficient, cost-effective, and accurate to
61 develop a new tool in-house, implement a tool developed and made available by another
62 agency, or procure a tool from a commercial vendor or contractor. In making this
63 determination, agencies should assess whether there is an existing tool that meets their
64 needs and, in so doing, consult with other agencies that have experience using
65 algorithmic tools to support retrospective review. If there is no such tool, agencies should
66 consider whether they have sufficient in-house expertise and capacity to develop an
67 adequate tool.
- 68 3. Agencies should ensure that regulatory decision makers who use algorithmic tools to
69 support retrospective review (a) have adequate training on the capabilities and risks of
70 those tools and (b) carefully assess the output ~~before relying on it for further~~
71 ~~consideration.~~
- 72 4. ~~To promote transparency and build internal expertise, agencies should, when developing~~
73 ~~or selecting an algorithmic tool to support retrospective review, ensure that the source~~
74 ~~code for the tool is publicly available and interoperable with other government~~
75 ~~systems consider open-source options and those that would maximize interoperability~~
76 ~~with other government systems.~~ If agencies do not use an algorithmic tool that is open-
77 source, they should ensure that key information about the tool's development, operation,
78 and use is available to agency personnel and the public.
- 79 5. When agencies publish retrospective review plans and descriptions of specific
80 retrospective reviews, as described in Recommendation 2021-2, *Periodic Retrospective*
81 *Review*, they should disclose whether, and if so, explain how, they plan to use or used
82 algorithmic tools to support retrospective review. Additionally, when agencies
83 incorporate retrospective reviews in their Learning Agendas and Annual Evaluation
84 Plans, as described in Recommendation 2021-2, they should include information about
85 the use of algorithmic tools.

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

This proposed amendment is intended to clarify what is meant by "further consideration."

Commented [CA6]: Proposed Amendment from Council #4:

These are worthy factors for consideration, but "ensure" is too strong and clashes with the reality that best-in-class tools often will not be open-source, and ensuring interoperability with other government systems is challenging given the current patchwork of government IT systems. Accordingly, the Council proposes the following language.



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- 86 6. When the analysis deriving from a retrospective review using an algorithmic tool will
87 influence a new rulemaking, agencies should be transparent about their use of the tool
88 and explain how the tool contributed to the decision to develop the new rule.
- 89 ~~7.1. The General Services Administration should continue to explore options for developing,
90 acquiring, and using algorithmic tools to support retrospective review and share its
91 findings and capabilities with other agencies.~~
- 92 ~~8.1. The Office of Management and Budget should provide guidance on the use of
93 algorithmic tools to support retrospective review.~~
- 94 7. Agencies should share their experiences **with each other** in using these tools, **and to**
95 manage risk and monitor internal processes, **agencies should** consider developing their
96 own internal evaluation and oversight mechanisms for algorithmic tools used in
97 retrospective review, both for initial approval of a tool and, as applicable, for regular
98 oversight of the tool.
- 99 **8. The General Services Administration should continue to explore options for developing,
100 acquiring, and using algorithmic tools to support retrospective review and share its
101 findings and capabilities with other agencies.**
- 102 **9. The Office of Management and Budget should consider providing guidance on the use
103 of algorithmic tools to support retrospective review.**

Commented [CA7]: Proposed Amendment from Council #5:

This proposed amendment is intended to clarify with whom agencies should share their experiences.

Commented [CMA8]: Proposed Amendment from Government Member Stephanie Tatham (OMB):

We appreciate this suggestion and the helpful empirical research supporting this draft Recommendation and will consider it.

More immediately, OMB is working to implement the President's directive in Executive Order 14094 Section 2(d) to consider guidance or tools to modernize the notice-and-comment process, including to address mass, computer-generated (such as those generated through artificial intelligence), or fraudulent comments. We appreciate the Conference's early leadership in studying and calling attention to these important issues in Recommendation 2021-1.



Online Processes in Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Plenary | June 15, 2023

1 Millions of people each year navigate adjudication systems administered by federal
2 agencies to, among other actions, access benefits and services, answer charges of legal
3 noncompliance, and settle disputes with third parties. Individuals participating in these systems
4 often expend substantial time and resources completing forms, submitting evidence and
5 arguments, and monitoring their cases, while agencies expend substantial time and resources
6 processing submissions, managing dockets, and providing case updates.

7 To improve accuracy, efficiency, and accessibility, and fulfill legal obligations to develop
8 electronic business processes,¹ agencies increasingly have deployed online processes by which
9 parties, their representatives, and other interested persons can perform routine tasks such as
10 filing, serving, and viewing forms, briefs, evidence, and other case records or materials.² These
11 processes range from simple email-based systems to robust online self-help portals that allow
12 users to update contact information, communicate with agencies, complete forms, submit and
13 view case records or materials, and perform other tasks. These processes ideally link with
14 agencies' own electronic case management systems,³ which serves also to reduce the time

¹ See, e.g., 21st Century Integrated Digital Experience Act, Pub. L. No. 115-336, 132 Stat. 5025 (2018); Exec. Order No. 14,058, 86 Fed. Reg. 71357 (Dec. 16, 2021); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-19-21, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, TRANSITION TO ELECTRONIC RECORDS (June 28, 2019); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-23-07, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, UPDATE TO TRANSITION TO ELECTRONIC RECORDS (December 23, 2022); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-11, SEC. 280 (2020).

² Matthew A. Gluth, *Online Processes in Agency Adjudication* (April 16, 2023) (draft report to the Admin. Conf. of the U.S.).

³ See Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,683 (June 29, 2018).



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15 agency staff spend receiving paper records, converting them into an electronic format, and
16 associating them with case files.

17 If properly deployed, these processes make adjudicative systems easier to use and more
18 accessible to the public, reduce the administrative burden on agency staff, and increase the
19 accuracy of information collected during adjudication. However, these processes can also pose
20 significant risks, including increased burdens due to poor design, exposure of agencies' computer
21 systems to malware and other security threats, and ongoing costs of maintenance and upgrades.
22 In designing and implementing online processes, agencies should not only address these risks but
23 also ensure that they meet all legal accessibility requirements.⁴ In addition, agencies should make
24 user resources available in languages other than English.⁵

25 Examples of agencies with online adjudication processes include the Social Security
26 Administration, Department of Veterans Affairs, and U.S. Citizenship and Immigration Services,
27 which have launched robust customer service portals that provide a single, user-friendly website
28 that let parties perform tasks at many stages of adjudication from case initiation through appeal.
29 Others have only recently begun to develop online processes, particularly in response to office
30 closures during the COVID-19 pandemic.

31 This Recommendation encourages agencies to develop online processes and provides
32 best practices for agencies to consider when doing so. Of course, agencies have different needs,
33 serve different communities, and have different resources available to them. Further, what works
34 best for one agency may not be appropriate for another. This Recommendation identifies steps
35 that agencies can consider at any stage of developing online processes to improve the accuracy,
36 efficiency, and accessibility of their adjudicative systems.

RECOMMENDATION

Accessing Online Processes in Adjudicative Systems

⁴ See, e.g., Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

⁵ See, e.g., Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 11, 2000).



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- 37 1. Agencies' online processes should work effectively with relevant electronic case
38 management systems (eCMS) and agency websites where adjudication materials are
39 made publicly available.
- 40 2. Agencies should develop online self-help portals that allow users, as applicable and when
41 feasible, to:
- 42 a. Update contact information, including email addresses, phone numbers, and
43 physical addresses;
 - 44 b. Complete and submit forms;
 - 45 c. File briefs, evidence, and other documents;
 - 46 d. Receive service of documents, including documents filed by other parties and
47 agency notices and orders;
 - 48 e. View and download case documents;
 - 49 f. Make payments (e.g., filing fees, application fees, civil penalties);
 - 50 g. Schedule meetings, conferences, hearings, and other appointments;
 - 51 h. Access virtual appointments;
 - 52 i. View case status information and information about deadlines, appointments, and
53 wait times, when agencies can reliably predict them;
 - 54 j. Receive reminders about upcoming deadlines and appointments; and
 - 55 k. Receive notifications about new documents, status changes, and other
56 developments in their cases.
- 57 3. Online self-help portals should allow different functionality, with appropriate
58 permissions, for different types of users, including agency staff and contractors, parties,
59 intervenors, representatives and their staff, amici curiae, and the public.
- 60 4. Agencies should ensure online self-help portals employ security mechanisms, such as
61 firewalls and encryption, to protect sensitive user information and maintain the system's
62 integrity. Agencies should also ensure self-help portals employ mechanisms to
63 authenticate users when necessary. Agencies that authenticate users by requiring them to
64 register for and log in to online self-help portals should allow users to use Login.gov or



65 other universal logins used by government agencies. These security mechanisms should
66 not compromise the ability of non-authenticated users to access public documents.

Electronic Filing and Forms

- 67 5. Agencies should permit, and consider requiring, parties to file documents electronically.
68 If agencies require electronic filing, they should implement exceptions for when
69 electronic filing would be impossible or impracticable or a party has demonstrated good
70 cause for using an alternative means of submission.
- 71 6. Agencies should ensure that their processes for electronic filing allow users, as applicable
72 and when feasible, to:
- 73 a. File documents in batches;
 - 74 b. File documents of a large enough size to encompass common filings;
 - 75 c. File documents in multiple file formats, except that users should be required to
76 file documents in a format that cannot be edited, such as Portable Document
77 Format (PDF), unless a specific procedure requires parties to submit documents
78 that can be edited (e.g., a proposed order);
 - 79 d. Notify the agency that documents being filed contain legally protected or other
80 sensitive information; and
 - 81 e. Notify the agency that documents are being filed under seal or in camera.
- 82 7. Agencies without an eCMS should allow participants in an adjudication to file briefs,
83 exhibits, and other documents electronically by emailing them to a designated agency
84 email address, uploading them to a web-accessible file-hosting service, or transferring
85 them to the agency using a secure file transfer protocol (SFTP).
- 86 8. Agencies with an eCMS should develop tools that can be used to submit documents
87 directly into the eCMS. These tools should require users to provide, or allow the system
88 to capture, information about their submission, such as document type, purpose, or date,
89 which would be stored as structured metadata in the eCMS, so long as it would not be
90 confusing or burdensome for users.



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- 91 9. Agencies with an eCMS should consider developing application programming interfaces
92 (APIs) that allow users, such as representatives, who use their own eCMS to directly and
93 securely transfer data between a user’s eCMS and the agency’s eCMS, without needing
94 to use a self-help portal as an intermediary.
- 95 10. Agencies that have forms or templates for use in adjudications (e.g., applications,
96 appointment of representative, hearing requests, requests for agency appellate review,
97 subpoena requests) should post PDF versions of the forms or templates on their websites
98 and allow users to complete, sign, and submit them electronically. Agencies should adapt
99 frequently used forms as web-based forms that users can complete and submit using a
100 web browser. When feasible, web-based forms should:
- 101 a. Be prepopulated with information about a user or case that the agency already has
102 collected in an eCMS or other database; and
 - 103 b. Be based on prepopulated data and previous responses, requiring users to answer
104 only questions that are relevant to them.
- 105 11. Except when explicitly prohibited by statute, agencies should allow participants in
106 adjudications to sign documents electronically and, as applicable, should accept as valid
107 electronic signatures:
- 108 a. A form or document submitted through an agency’s online self-help portal while
109 registered for and logged in to the portal;
 - 110 b. A cryptographic digital signature;
 - 111 c. A scanned or other graphical representation of a handwritten signature;
 - 112 d. A conformed signature (e.g., “/s/ Jane Doe”); and
 - 113 e. An email used to transmit the document.
- 114 12. Agencies should consider whether to review some or all electronically filed documents
115 before associating them with a case file. For example, agencies should ensure that
116 documents are associated with the correct case file, that they comport with agency rules,
117 and that they do not disclose legally protected or other sensitive information, such as
118 when a party files or requests to file a document under seal or in camera.

Electronic Service



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- 119 13. Agencies should allow electronic service, except when electronic service would be
120 impossible or impracticable or a party has good cause for needing alternative means of
121 delivery.
- 122 14. Agencies with an eCMS should provide automated service through notice when a
123 document has been filed through the web portal.
- 124 15. Agencies without an eCMS should allow parties to serve documents to other parties
125 electronically, by emailing documents to other parties. Agencies that allow parties to
126 submit documents using a file-hosting service or SFTP should ensure that all parties are
127 notified when new documents become available.

Management of Sensitive Documents

- 128 16. Agencies that redact legally protected or other sensitive information from documents
129 before making them available to other parties or publicly available should clarify whether
130 parties should submit redacted versions of documents or whether the agency will make
131 the necessary redactions.

Fees and Other Payments

- 132 17. Agencies that require filing fees, application fees, payment of civil penalties, or other
133 payments should accept electronic payments.

Scheduling, Notifications, and Reminders

- 134 18. Agencies should provide an online tool for parties to schedule meetings, conferences,
135 hearings, and other appointments efficiently and at times that are reasonably convenient
136 for all participants.
- 137 19. Agencies with an eCMS should provide automatic notifications or reminders to users
138 about important events and developments, such as when (a) a new document has been
139 submitted and is available to view; (b) an agency notice or order is available to view; (c)
140 the case status changes; (d) a meeting, conference, hearing, or other appointment is
141 scheduled or upcoming; and (e) a filing deadline is approaching. Notifications and



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142 reminders should be available in an online self-service portal and sent by email and/or by
143 text message, according to user preferences.

Developing and Improving Online Processes

- 144 20. When designing and implementing online processes, agencies should consult potential
145 users and relevant stakeholders, including parties, representatives, adjudicators and
146 adjudicative staff, agency personnel who represent the government in adjudicative
147 proceedings, and personnel who provide customer service or oversee customer
148 experience functions for the agency. Agencies should also continuously solicit feedback
149 from users on their online processes, for example through online surveys and listening
150 sessions, and should use that feedback to identify and prioritize improvements.
- 151 21. When designing or working with a contractor to design their online processes, agencies
152 should create systems that can be expanded to incorporate new technologies without
153 requiring replacement.
- 154 22. Agencies should ensure that their online processes function on multiple platforms
155 including, when practicable, on mobile devices.

Guidance, Training, and Outreach

- 156 23. Agencies should update their rules of practice to permit or, when appropriate, require the
157 use of online processes.
- 158 24. Agencies should develop self-help materials (e.g., instruction manuals, reference guides,
159 instructional videos) and, if needed, hold training sessions to help agency personnel and
160 the public understand how to use the agency's online processes. Materials intended for
161 the public should be posted in an appropriate location on the agency's website and made
162 accessible through any online self-help portal.
- 163 25. Agencies should conduct public outreach if needed to encourage parties and
164 representatives to adopt their online processes, in particular prior to making an online
165 process mandatory.



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166 26. Agencies should make staff available to assist all users of the agency’s online processes,
167 including agency personnel, and should inform users when such assistance is available
168 (e.g., during normal business hours).



Online Processes in Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Plenary | June 15, 2023

1 Millions of people each year navigate adjudication systems administered by federal
2 agencies to, among other actions, access benefits and services, answer charges of legal
3 noncompliance, and settle disputes with third parties. Individuals participating in these systems
4 often expend substantial time and resources completing forms, submitting evidence and
5 arguments, and monitoring their cases, while agencies expend substantial time and resources
6 processing submissions, managing dockets, and providing case updates.

7 To improve accuracy, efficiency, and accessibility, and fulfill legal obligations to develop
8 electronic business processes,¹ agencies increasingly have deployed online processes by which
9 parties, their representatives, and other interested persons can perform routine tasks such as
10 filing, serving, and viewing forms, briefs, evidence, and other case records or materials.² These
11 processes range from simple email-based systems to robust online self-help portals that allow
12 users to update contact information, communicate with agencies, complete forms, submit and
13 view case records or materials, and perform other tasks. These processes ideally link with
14 agencies' own electronic case management systems,³ which serves also to reduce the time

¹ See, e.g., 21st Century Integrated Digital Experience Act, Pub. L. No. 115-336, 132 Stat. 5025 (2018); Exec. Order No. 14,058, 86 Fed. Reg. 71,357 (Dec. 16, 2021); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-19-21, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, TRANSITION TO ELECTRONIC RECORDS (June 28, 2019); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-23-07, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, UPDATE TO TRANSITION TO ELECTRONIC RECORDS (December Dec. 23, 2022); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR No. A-11, SEC. 280 (2020).

² Matthew A. Gluth, [Online Processes in Agency Adjudication](#) (April 16 May 24, 2023) (draft report to the Admin. Conf. of the U.S.).

³ See Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,683 (June 29, 2018).



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15 agency staff spend receiving paper records, converting them into an electronic format, and
16 associating them with case files.

17 If properly deployed, these processes make adjudicative systems easier to use and more
18 accessible to the public, reduce the administrative burden on agency staff, and increase the
19 accuracy of information collected during adjudication. However, these processes can also pose
20 significant risks, including increased burdens due to poor design, exposure of agencies' computer
21 systems to malware and other security threats, and ongoing costs of maintenance and upgrades.
22 In designing and implementing online processes, agencies should not only address these risks but
23 also ensure that they meet all legal accessibility requirements.⁴ In addition, agencies should make
24 user resources available in languages other than English.⁵

25 Examples of agencies with online adjudication processes include the Social Security
26 Administration, Department of Veterans Affairs, and U.S. Citizenship and Immigration Services,
27 which have launched robust customer service portals ~~that provide a single, user-friendly website~~
28 that let parties perform tasks at many stages of adjudication from case initiation through appeal.
29 Others have only recently begun to develop online processes, particularly in response to office
30 closures during the COVID-19 pandemic.

31 This Recommendation encourages agencies to develop online processes and provides
32 best practices for agencies to consider when doing so. Of course, agencies have different needs,
33 serve different communities, and have different resources available to them. Further, what works
34 best for one agency may not be appropriate for another. This Recommendation identifies steps

⁴ See, e.g., Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

⁵ See, e.g., Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 11, 2000).



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35 that agencies can consider at any stage of developing online processes to improve the accuracy,
36 efficiency, and accessibility of their adjudicative systems.

RECOMMENDATION

Accessing Online Processes in Adjudicative Systems

- 37 1. Agencies' online processes should work effectively with relevant electronic case
38 management systems (eCMS) and agency websites where adjudication materials are
39 made publicly available.
- 40 2. Agencies should develop online self-help portals that allow users, as applicable and when
41 feasible, to:
- 42 a. Update contact information, including email addresses, phone numbers, and
43 physical addresses;
 - 44 b. Complete and submit forms;
 - 45 c. File briefs, evidence, and other documents;
 - 46 d. Receive service of documents, including documents filed by other parties and
47 agency notices and orders;
 - 48 e. View and download case documents;
 - 49 f. Make payments (e.g., filing fees, application fees, civil penalties);
 - 50 g. Schedule meetings, conferences, hearings, and other appointments;
 - 51 h. Access virtual appointments;
 - 52 i. View case status information and information about deadlines, appointments, and
53 wait times, when agencies can reliably predict them;
 - 54 j. Receive reminders about upcoming deadlines and appointments; and
 - 55 k. Receive notifications about new documents, status changes, and other
56 developments in their cases.
- 57 3. Online self-help portals should allow different functionality, with appropriate
58 permissions, for different types of users, including agency staff and contractors, parties,
59 intervenors, representatives and their staff, amici curiae, and the public.



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- 60 4. Agencies should ensure online self-help portals employ security mechanisms, such as
61 firewalls and encryption, to protect sensitive user information and maintain the system's
62 integrity. Agencies should also ensure self-help portals employ mechanisms to
63 authenticate users when necessary. Agencies that authenticate users by requiring them to
64 register for and log in to online self-help portals should allow users to use Login.gov or
65 other universal logins used by government agencies. These security mechanisms should
66 not compromise the ability of non-authenticated users to access public documents.

Electronic Filing and Forms

- 67 5. Agencies should permit, and consider requiring, parties to file documents electronically.
68 If agencies require electronic filing, they should implement exceptions for when
69 electronic filing would be impossible or impracticable or a party has demonstrated good
70 cause for using an alternative means of submission.
- 71 6. Agencies should ensure that their processes for electronic filing allow users, as applicable
72 and when feasible, to:
- 73 a. File documents in batches;
 - 74 b. File documents of a large enough size to encompass common filings;
 - 75 c. File documents in multiple file formats, except that users should be required to
76 file documents in a format that cannot be edited, such as Portable Document
77 Format (PDF), unless a specific procedure requires parties to submit documents
78 that can be edited (e.g., a proposed order);
 - 79 d. Notify the agency that documents being filed contain legally protected or other
80 sensitive information; and
 - 81 e. Notify the agency that documents are being filed under seal or in camera.
- 82 7. Agencies without an eCMS should allow participants in an adjudication to file briefs,
83 exhibits, and other documents electronically by emailing them to a designated agency
84 email address, uploading them to a web-accessible file-hosting service, or transferring
85 them to the agency using a secure file transfer protocol (SFTP).



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- 86 8. Agencies with an eCMS should develop tools that can be used to submit documents
87 directly into the eCMS. These tools should require users to provide, or allow the system
88 to capture, information about their submission, such as document type, purpose, or date,
89 which would be stored as structured metadata in the eCMS, so long as it would not be
90 confusing or burdensome for users.
- 91 9. Agencies with an eCMS should consider developing application programming interfaces
92 (APIs) that allow users, such as representatives, who use their own eCMS to **directly and**
93 **securely transfer data directly and securely** between a user's eCMS and the agency's
94 eCMS, without needing to use a self-help portal as an intermediary.
- 95 10. Agencies that have forms or templates for use in adjudications (e.g., applications,
96 appointment of representative, hearing requests, requests for agency appellate review,
97 subpoena requests) should post PDF versions of the forms or templates on their websites
98 and allow users to complete, sign, and submit them electronically. Agencies should adapt
99 frequently used forms as web-based forms that users can complete and submit using a
100 web browser. When feasible, web-based forms should:
- 101 a. Be prepopulated with information about a user or case that the agency already has
102 collected in an eCMS or other database; and
 - 103 b. Be based on prepopulated data and previous responses, requiring users to answer
104 only questions that are relevant to them.
- 105 11. Except when explicitly prohibited by statute, agencies should allow participants in
106 adjudications to sign documents electronically and, as applicable, **should** accept as valid
107 electronic signatures:
- 108 a. A form or document submitted through an agency's online self-help portal while
109 registered for and logged in to the portal;
 - 110 b. A cryptographic digital signature;
 - 111 c. A scanned or other graphical representation of a handwritten signature;
 - 112 d. A conformed signature (e.g., "/s/ Jane Doe"); and
 - 113 e. An email used to transmit the document.



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114 12. Agencies should consider whether to review some or all electronically filed documents
115 before associating them with a case file. For example, agencies should ensure that
116 documents are associated with the correct case file, that they comport with agency rules,
117 and that they do not disclose legally protected or other sensitive information, such as
118 when a party files or requests to file a document under seal or in camera.

Electronic Service

119 13. Agencies should allow electronic service, except when electronic service would be
120 impossible or impracticable or a party has good cause for needing alternative means of
121 delivery.

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