MEMORANDUM

From:	Todd Phillips, Attorney Advisor
To:	Ad hoc Committee of the Committee on Administration and Management and the Committee on Adjudication
Date:	September 28, 2018, **Edited:** October 16, 2018
Re:	Public Availability of Adjudication Rules

Introduction

This project examines the extent to which agencies make rules governing adjudications available online, how they present those rules on their websites, and the extent to which they lay out the legal authorities under which rules are promulgated and distinguish between binding rules and other documents that may not bind litigants. This project was inspired by ACUS staff findings that adjudication rules are sometimes not on agency websites or are otherwise difficult to find. ACUS is undertaking this project as part of a larger initiative that aims to promote proactive disclosure of key agency documents.[1]

I served as the in-house researcher for this project. The Office of the Chairman decided that the best way for me to present my findings and recommendations is through a visual demonstration of agency websites at our first meeting rather than through a conventional report. This approach will provide both for the optimal clarity of presentation and allow the Committee members—many of them with expertise in our subject—to contribute their knowledge and perspectives.

This memorandum provides the necessary background—much of it drawn from prior ACUS reports and recommendations cited and linked below, which I encourage Committee members to review—for discussion and provides my tentative recommendations. Specifically, Section I identifies the types of adjudications that are the focus of this project and thereby defines the scope of the recommendations. Section II identifies the sources of procedural rules. Section III identifies the relevant statutory provisions governing the disclosure of agency procedural rules and related materials. Finally, Section IV offers my tentative recommendations for improving public access to agency procedural rules.

As a technical matter, the term procedural rules can encompass many different types of agency documents, including guidance documents. This memorandum refers to those binding procedural rules issued by an agency to govern its adjudications, often codified in the Code of Federal Regulations (CFR), as "rules of practice." "These rules work in concert with the agency's enabling act and the general APA," and provide "procedural rights that the agency was not required to provide by statute or due process."[2] This distinction is explained more fully below.

---

[1] Related projects include a recommendation on promoting the availability of adjudication materials and an ongoing study on the public availability of guidance documents. *See* Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017); Admin. Conf. of the U.S., *Public Availability of Agency Guidance*, https://www.acus.gov/research-projects/public-availability-agency-guidance.

[2] CHARLES KOCH, 2 ADMINISTRATIVE LAW AND PRACTICE 8—9 (3d ed.); ABA, GUIDE TO FEDERAL ADMINISTRATIVE ADJUDICATION § 1.03 (2d ed.).

Section I – Type of Adjudications

For purposes of classifying agency adjudications, this report will use the three-part typology set forth in Recommendation 2016-4 – *Evidentiary Hearings Not Required by the Administrative Procedure Act*[3] and the associated consultant report written by Professor Michael Asimow.[4] Under this typology, there are three types of adjudications:

1) Type A adjudications refer "to adjudicatory systems governed by the [main] adjudications sections of the" Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556, 557.[5] These sections generally apply when a statute requires the adjudication to be determined "on the record after opportunity for agency hearing," though there is conflicting caselaw about when the provisions apply.[6] The hearings in Type A (sometimes called APA adjudications) are usually presided over by an administrative law judge (ALJ) appointed under 5 U.S.C. § 3105. Adjudications governed by the adjudications sections of the APA are what are traditionally known as "formal adjudications."

2) Type B adjudications are those "that consist[] of legally required evidentiary hearings," generally required by a statute, executive order, or regulation.[7] Though they are often—though not always—"formal" in the manner and presentation of evidence, Type B adjudications are not regulated by the APA's adjudication provisions in 5 U.S.C. §§ 554 and 556–557. They are presided over by a non-ALJ (often called an administrative judge).

3) Type C adjudications are all adjudications that do not qualify as Type A or B. Such adjudications are "quite informal,"[8] and do not "occur through legally required evidentiary hearings."[9] Type C adjudications are "an enormous category, consisting of many millions of adjudications each year"[10] and lack "any unifying procedural element, which makes prescription of best practices infeasible."[11]

This project addresses only Type A and Type B adjudications, and the proposed recommendations are drafted accordingly.

Section II – Sources of Adjudication Rules

---

[3] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312 (Dec. 23, 2016).
[4] Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* 4, ADMIN. CONF. OF THE U.S. (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf. Professor Asimow has completed a forthcoming adjudication sourcebook for ACUS that, among other things, expands upon the discussion of the types of adjudication identified in his report. MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 4 (2018).
[5] Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* 2, ADMIN. CONF. OF THE U.S. (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf.
[6] *See, e.g.*, *id.*, at 8.
[7] Admin. Conf. of the U.S., Recommendation 2016-4, *supra* note 3, at 94,314.
[8] *Id.*
[9] Asimow, *supra* note 5, at 5.
[10] Admin. Conf. of the U.S., Recommendation 2016-4, *supra* note 3, at 94,315 n.4.
[11] Asimow, *supra* note 5, at 3.

There are a variety of sources for rules that govern agency adjudications. The principal ones I've identified for the committee's consideration are as follows:

- The due process clause of the Fifth Amendment to the U.S. Constitution;
- Statutes, including the APA and agency organic statutes;
- Agency rules of practice, as defined above;
- Agency precedents as set forth in decisions rendered by the agency official(s) (administrator, board, commission, etc.) authorized by law to engage in an action designated as "final" under 5 U.S.C. § 704;[12]
- Standing orders and practice procedures of adjudicators (that is, adjudicator-specific rules applicable in all cases before the adjudicator); and
- Agency-specific forms that litigants are required to use.

In addition, agencies may publish various guidance documents, which typically would take the form of general statements of policy, that provide additional information for agency adjudicators and lawyers as well as outside litigants that participate in adjudications. These documents may take a variety of forms and could include, among other things:

- Explanatory materials and summaries of procedures appearing on agency websites;
- ALJ bench books;
- Guides for litigants; and
- Litigation manuals for agency trial attorneys.

It will, of course, be important for purposes of the recommendations to distinguish between binding procedural rules (especially what are called "rules of practice" above)—which is to say, rules that establish legally enforceable rights and duties in an adjudication (and later on judicial review), such as the right to cross-examination, the right to representation, etc.—and non-binding procedural rules.[13] The category of documents encompassed by the latter set of bullet points consists of (or mostly consists of) documents that are non-binding, whether they are characterized as "rules of agency . . . procedure,"[14] "general statements of policy,"[15] or both, under the APA. (I will refer to the latter documents generically as "guidance documents" to align the terminology here with prevailing agency usage.) While the sorts of guidance documents in question may be binding in the sense that, "as an internal agency management matter," they "direct some [agency] employees to act in conformity with" agency "policy,"[16] they will not confer any legally enforceable rights on a party in an agency adjudication. An example would be a case handling manual that directs an agency lawyer to adjudicate a case in a certain matter.

---

[12] Another possible source of binding precedents is decisions of the United States Supreme Court. (Whether and when lower-court decisions are binding on the agency is a complicated question that need not be addressed here. *See* Samuel Estreicher and Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989). I do not think that they need to be addressed in this project, but it is a question the Committee may wish to consider.)

[13] At least since United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), the federal courts have insisted that agencies follow their own binding procedural rules. The issue will be addressed in a brief supplemental memorandum.

[14] 5 U.S.C. § 553(b)(3)(A).

[15] *Id.*

[16] Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,728 (Dec. 29, 2017); *see also* OMB Good Guidance Practices § II(2)(h), 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).

That leaves the question of how to distinguish binding from non-binding procedural rules. That the rules were not the result of a notice-and-comment process will not render them non-binding: § 553(b)(3)(A) explicitly exempts "rules of . . . agency procedure" from its notice-and-comment requirements. (Agencies of course sometimes voluntary agree to solicit public comment.[17]) Whether a rule is binding or not will ultimately depend on whether it is reasonably interpreted to create legally enforceable rights, and that will require careful attention to the language used. *See, e.g.*, Patterson v. Comm'r of SSA, 846 F.3d 656 (4th Cir.) (holding that an SSA procedural rule providing that an adjudicator "must" weight the evidence in a certain matter "militates against" the conclusion that the rule "offers only non-binding guidance for the benefit" of the adjudicator; RICHARD J. PIERCE , JR., ADMINISTRATIVE LAW TREATISE § 6.5 (5th ed. 2010) (noting that whether a procedural rule is binding or non-binding turns on analysis of whether the rule confers valuable procedural rights on parties or is merely intended to aid the agency in establishing orderly procedures for conducting its business). It is in the agency's interest to clearly disclaim any binding effect if that is its intention.

Section III – Statutes Governing Publication of Adjudication Rules

The following legal authorities (reproduced in Appendix 1) are relevant to the Committee's discussion: the APA, the Freedom of Information Act (FOIA), the Federal Register Act, and the E-Government Act.

The APA defines the term "rules" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[18] As a default matter, an agency wishing to promulgate a rule is required to publish a notice of proposed rulemaking in the *Federal Register* and provide "interested persons an opportunity to participate . . . through submission of written data, views, or arguments."[19] However, the APA exempts from the mandatory notice and comment requirement "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[20]

Despite the APA's notice and comment exemption for rules of practice, agencies are required to publish all "rules of procedure" and "substantive rules of general applicability adopted as authorized by law" in the *Federal Register*.[21] Adjudication rules are rules of procedure and are often adopted as authorized by an agency organic statute or the APA. As such, adjudication rules must be published in the *Federal Register* prior to taking effect.

The E-Government Act, in amending the Paperwork Reduction Act, provides that "each agency . . . shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register" under FOIA.[22] As FOIA

---

[17] *See* Sec. and Exchange Comm'n, *Amendments to the Commission's Rules of Practice*, 80 Fed. Reg. 60,091, 60,097 (Oct. 5, 2015).
[18] 5 U.S.C. § 551(4).
[19] *Id.* § 553(c).
[20] *Id.* § 553(b)(3)(A). These non-legislative rules are those which are "technical regulation[s] of the form of agency action and proceedings," and do not include rules "to determine whether claims . . . are meritorious." Pickus v. U.S. Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974).
[21] *Id.* §§ 552(a)(1)(C)–(D); 44 U.S.C. § 1505(a)(2).
[22] E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).

requires adjudicatory rules to be published in the Federal Register, the E-Government Act requires their publication online.

Finally, agencies are also required to codify all documents of general applicability and legal effect in the *Code of Federal Regulations* (CFR).[23] Pursuant to its statutory authorization,[24] the Administrative Committee of the Federal Register has issued regulations reaffirming agencies' obligations to publish all such documents in the *Federal Register* and codify them in the CFR.[25] The Office of the Federal Register (OFR) cannot compel an agency to publish or codify such documents, and it is therefore incumbent upon agencies to ensure that they meet these obligations. Nevertheless, for any document an agency submits, OFR works with the agencies to ensure that they are properly placed in the *Federal Register* and codified in the CFR.

Section IV – Recommendations

Below are recommendations offered for the Committee's consideration.[26] There are associated screenshots in Appendix 2 for several of the recommendations; those recommendations have been identified with an asterisk.

Recommendation 1. *Agencies should publish all relevant procedural rules and statutes that apply to agency adjudications on their websites, including (a) the relevant provisions of the APA (5 U.S.C. § 554—58); (b) statutory provisions providing procedural rules for adjudication; (c) rules of practice; (d) relevant agency precedents, which often are catalogued in explanatory materials; (e) guidance documents that provide relevant information on adjudicative procedures, including guides designed for agency litigants and adjudicators, excepting those for which a FOIA exemption that the agency intends to invoke exists (e.g., manuals, bench books, etc.); and (f) ALJ practice procedures.*

**** Recommendation 2.*** *In publishing the materials pursuant to Recommendation 1, agencies should focus on presenting the materials in a clear, logical, and comprehensive fashion. An example of such presentation is provided by the Office of Medicare Hearings and Appeals' Legal Authorities site. This site displays the statutes, rules of practice, and selected guidance applicable to different types of adjudications in an easy-to-read table. Such a table should delineate between binding and nonbinding materials.*

**** Recommendation 3.*** *Rules of practice, usually codified in the CFR, should be accessible on agency websites in one easily searchable file. This is used by the Securities and Exchange Commission when it put its rules on its website, for example. This is preferable to linking to the Federal Register document in which the rules are promulgated, which will contain distracting background information, or providing a series of links to the e-CFR, which requires the user to click through multiple documents. If rules of practice are codified in the CFR, the numbering system in the searchable file should mirror the CFR's numbering system.*

---

[23] 44 U.S.C. § 1510.
[24] *Id.* § 1506.
[25] 1 C.F.R. 5.5, 5.5, 5.9, pt. 21.
[26] The terminology used below is consistent with the discussion in this memo, but the committee may wish to modify it as appropriate.

Recommendations 4. *Agencies should consider publishing explanatory guidance documents aimed at providing an overview of relevant agency precedents.*

**** Recommendation 5.*** *Guidance documents should note at the beginning or atop the first page whether or to what extent they are binding. For example, the Federal Mine Safety and Health Review Commission has a guide with a box at the top explicitly stating it "is not binding legal authority."*

Recommendation 6. *To facilitate ease of understanding, explanatory guidance documents should adhere to ACUS's Recommendation 2017-3 – Plain Language in Regulatory Drafting.*[27] *The agency should tailor these documents to meet the needs of the litigants who typically appear before the agency. For example, an agency with many pro se litigants may wish to provide detailed, step-by-step instructions covering each step of the litigation process.*

**** Recommendation 7.*** *Explanatory guidance documents should cite, where applicable, to the statutes, rules of practices, and adjudicative precedents. For example, the Department of Veterans Affairs' Adjudication Procedures Manual covers agency rules and precedents when discussion the agency's rules of practice.*

**** Recommendation 8.*** *When an agency's mission consists exclusively or almost exclusively of conducting adjudications, the agency should link to its rules and guidance on the agency's homepage. One model is that of the Occupational Safety and Health Review Commission. When conducting adjudications is merely one of an agency's many responsibilities, the agency should link to its rules and guidance from a location on the website that is both dedicated to adjudicatory materials and logical in terms of a litigant's likelihood of finding the documents in the selected location. One model is that of the Federal Trade Commission.*

APPENDIX 1

1. 5 U.S.C. § 551 provides:

Definitions

****

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

***

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

2. 5 U.S.C. § 552 provides:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public-

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format-

***

(C) administrative staff manuals and instructions to staff that affect a member of the public;

***

3. 5 U.S.C. § 553 provides:

Rule making

***

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

4. 44 U.S.C. § 1510 provides:

Code of Federal Regulations

(a) The Administrative Committee of the Federal Register, with the approval of the President, may require, from time to time as it considers necessary, the preparation and publication in special or supplemental editions of the Federal Register of complete codifications of the documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the Federal Register or by filing with the Administrative Committee, and are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions, and are in effect as to facts arising on or after dates specified by the Administrative Committee.

(b) A codification published under subsection (a) of this section shall be printed and bound in permanent form and shall be designated as the "Code of Federal Regulations." The Administrative Committee shall regulate the binding of the printed codifications into separate books with a view to practical usefulness and economical manufacture. Each book shall contain an explanation of its coverage and other aids to users that the Administrative Committee may require. A general index to the entire Code of Federal Regulations shall be separately printed and bound.

***

5. 44 U.S.C. § 3501 note provides:

Regulatory Agencies

***

(b) Information Provided by Agencies Online—To the extent practicable as determined by the agency in consultation with the Director, each agency (as defined under section 551 of title 5, United States Code) shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.

***

6. 44 U.S.C. § 3502 provides:

Definitions

As used in this subchapter—

***

(4) the term "Director" means the Director of the Office of Management and Budget;

***

APPENDIX 2

Screenshot for Recommendation 2

The Appeals Process −

- Level 1 Appeals
- Level 2 Appeals
- Level 3 Appeals (OMHA)
- Level 4 Appeals
- Level 5 Appeals
- Legal Authorities
- Case Processing Manual

Filing an Appeal +

About OMHA +

Contact OMHA

Legal Authorities

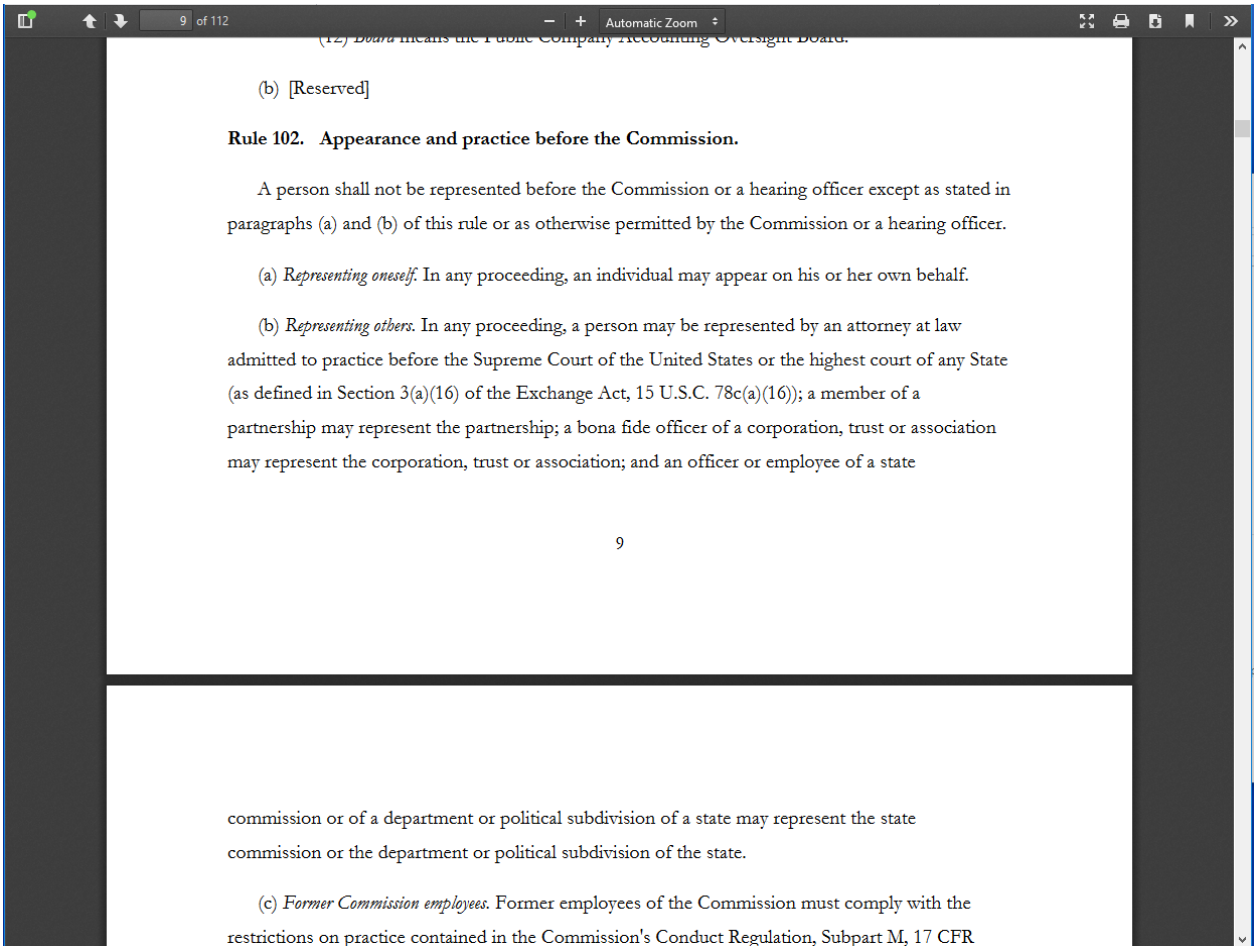
The current Medicare appeals process was established by various statutes and implementing regulations. The table below lists some of the statutes and regulations that govern the appeals process for Medicare claims and entitlement, Medicare Advantage organization determination, and Medicare prescription drug coverage determination appeals, as well as select OMHA and Centers for Medicare & Medicaid (CMS) program guidance.

Medicare Part	Statute*	Implementing Regulations	Select Program Guidance
Medicare Part A and Part B fee-for-service claim, entitlement, and certain premium initial determinations	Social Security Act § 1869 (42 U.S.C. 1395ff) QIO Appeals Only Social Security Act § 1155 (42 U.S.C. 1320c-4)	42 C.F.R. part 405, subpart I (§§ 405.1000–405.1063 for ALJ appeals) QIO Appeals Only 42 C.F.R. part 478, subpart B (§ 478.40 for ALJ appeals) IRMAA Appeals Only 20 C.F.R. §§ 418.1301–418.1355 (§ 418.1350 for ALJ appeals)	OMHA Case Processing Manual (Division II for Part A/B appeals, Division V for entitlement and certain premium appeals) Medicare Claims Processing Manual, CMS Publ'n 100-04, Ch. 29 - PDF (§§ 330–330.6 for ALJ appeals)
Medicare Part C Medicare Advantage and competitive health plan organization determinations	Social Security Act § 1852(g) (42 U.S.C. 1395w-22(g)) Social Security Act § 1876(c)(5)(B) (42 U.S.C. 1395mm(c)(5)(B))	42 C.F.R. part 422, subpart M (§§ 422.600–405.612 for ALJ appeals) 42 C.F.R. part 417, subpart Q	OMHA Case Processing Manual (Division III for Part C appeals) Medicare Managed Care Manual, CMS Publ'n 100-16, Ch. 13 - PDF (§§ 100–100.2 for ALJ appeals)
Medicare Part D plan sponsor coverage determinations and certain premium determinations	Social Security Act § 1860D-4 (42 U.S.C. 1395w-104)	42 C.F.R. part 423, subparts M and U (§§ 423.1968–423.2063 for ALJ appeals) IRMAA Appeals Only 20 C.F.R. §§ 418.2301–418.2355 (§ 418.2350 for ALJ appeals)	OMHA Case Processing Manual (Division IV for Part D appeals) Prescription Drug Benefit Manual, CMS Publ'n 100-18, Ch. 18 (§§ 90–90.4 for ALJ appeals)

*Statutory citations are given to the Social Security Act, as amended, with United States Code (U.S.C.) equivalents as parentheticals. However, please note that the online version of the U.S.C. may be more current

top

Screenshot for Recommendation 3



(12) *Board* means the Public Company Accounting Oversight Board.

(b) [Reserved]

Rule 102. Appearance and practice before the Commission.

A person shall not be represented before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule or as otherwise permitted by the Commission or a hearing officer.

(a) *Representing oneself.* In any proceeding, an individual may appear on his or her own behalf.

(b) *Representing others.* In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state

9

commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(c) *Former Commission employees.* Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, Subpart M, 17 CFR

Screenshot for Recommendation 5

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

En Español

About FMSHRC | Guides | Decisions | Review Commission Arguments & Meetings | The Mine Act & Procedural Rules | FOIA | Reports & Budget Submissions | Cases on Review | Contact Us

Home » Guides » Guide to Commission Proceedings

Guide to Commission Proceedings

The following summary of Commission procedure is provided for informational purposes only and is not binding legal authority. A more comprehensive explanation of procedural matters is provided in the Commission's Procedural Rules (29 C.F.R. Part 2700). In the event of discrepancies between the summary provided here and either the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq.) ("Mine Act") or published regulations, the Act and regulations are controlling. The Commission's rules and other information about its procedures are available on the Commission's website, which is located at www.fmshrc.gov. A booklet, entitled "How a Case Proceeds Before the Commission" is also available in hard copy or on the Commission's website.

TABLE OF CONTENTS

I. The Commission's Function

II. Types of Commission Proceedings

- A. Contest Proceedings
- B. Civil Penalty Proceedings
- C. Discrimination Proceedings
- D. Temporary Reinstatement Proceedings
- E. Emergency Response Plan Dispute Proceedings
- F. Compensation Proceedings
- G. Simplified Proceedings

III. Appeals of Judges' Decisions or Orders to the Review Commission

- A. Contest, Civil Penalty Discrimination and Compensation Proceedings

Screenshot for Recommendation 7

- processing inextricably intertwined issues raised on a substantive appeal, **M21-1, Part I, 5.E.3.c and d**, and
- certifying inextricably intertwined appeals, see **M21-1, Part I, 5.F.3.h**.

I.5.A.1.h. Definition: Full Grant

If the issue under appeal is initial SC, a ***full grant*** occurs when SC for the disability is granted.

If the issue under appeal is the *evaluation* of an already service-connected (SC) disability, a ***full grant*** of an issue on appeal occurs when the maximum benefit allowed by law and regulation for the specific issue(s) under appeal is granted for the entire period under appeal.

Exception: When a Veteran submits an appeal for a specific disability evaluation other than the schedular maximum, an award of the specifically requested evaluation for the entire period under appeal is considered a full grant.

Examples:

- A Veteran files an NOD seeking SC for a left knee condition. A DRO subsequently grants SC for the left knee condition. This is a full grant of the benefit sought and the appeal has been satisfied.
- A Veteran files an NOD as to the evaluation of her SC left knee. A DRO grants an increased evaluation, but not the maximum schedular evaluation allowed for the left knee condition. This is *not* a full grant of the benefit sought and the original appeal remains active.

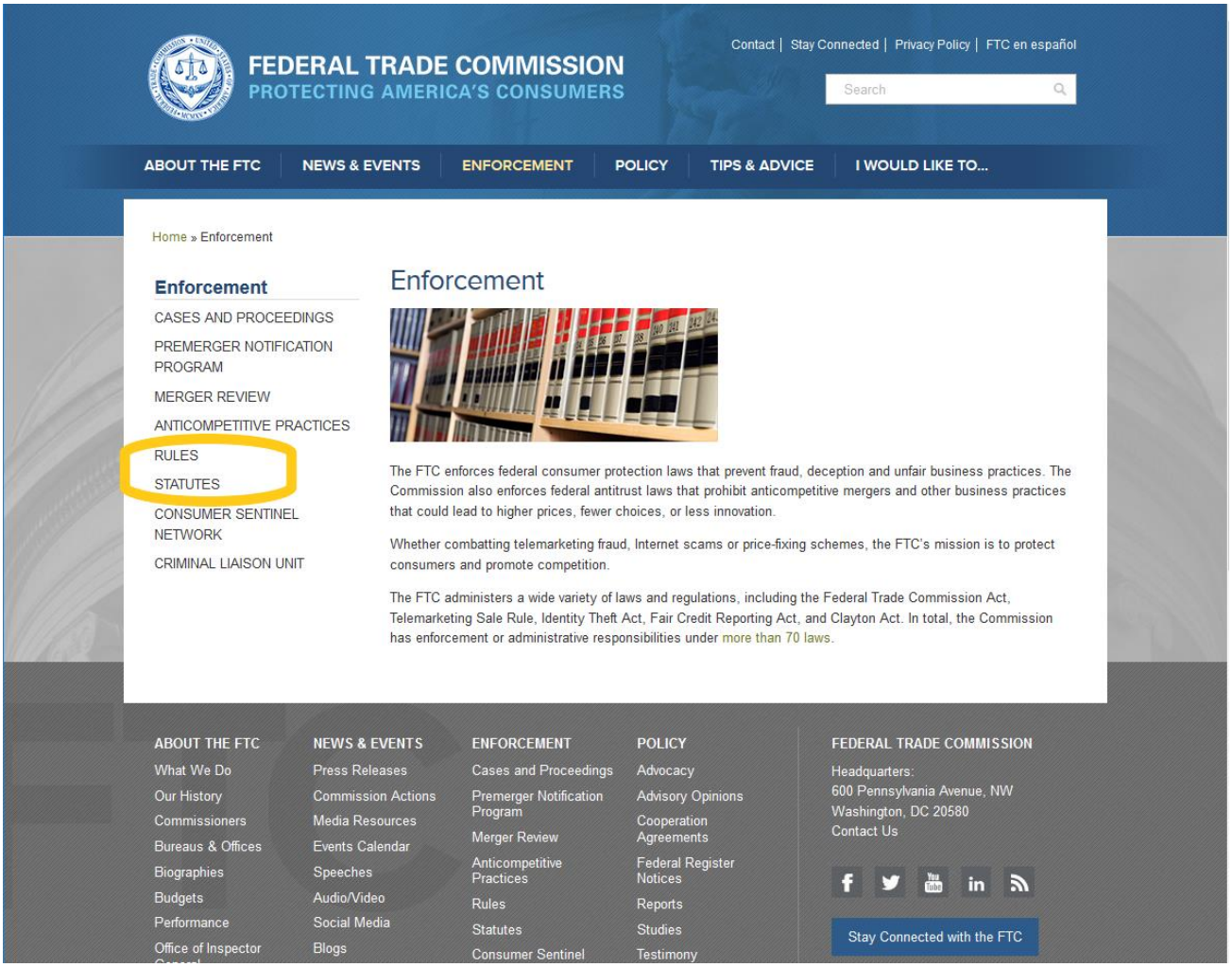
Reference: For more information on fully granting the benefit sought, see

- ***AB v. Brown***, 6 Vet.App. 35 (1993), and
- **M21-1, Part I, 5.D.2**.

I.5.A.1.i. Definition: Partial Grant

A ***partial grant*** of an issue on appeal occurs when the maximum schedular benefit allowed by law and regulation for the issue(s) under appeal is not granted for the entire period under appeal.

Important: If the issue under appeal is initial SC, a partial grant *cannot* occur; the decision rendered must either involve a full grant or denial of the issue under appeal.

First Screenshot for Recommendation 8

Second Screenshot for Recommendation 8