



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Public Availability of Adjudication Rules

Ad hoc Committee of the Committee on Administration  
and Management and the Committee on Adjudication

Proposed Recommendation | December 13, 2018

### Proposed Amendments

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

1 Every year, federal agencies conduct hundreds of thousands of adjudications.<sup>1</sup> In order to  
2 participate meaningfully in ~~adjudication~~the process, persons appearing before federal agencies  
3 must have ready online access both to the key materials associated with these adjudications  
4 (including prior decisions) and the procedural rules governing them. Administrative Conference  
5 Recommendation 2017-1 addresses the former set of materials, urging agencies to provide online  
6 access to the key documents associated with adjudications.<sup>2</sup> This Recommendation deals with  
7 the latter set of materials. ~~s.~~It sets forth best practices to assist agencies in making their  
8 procedural rules available online and in organizing those materials in a way that is accessible to  
9 and comprehensible for the public and persons appearing before agencies ~~and the public.~~<sup>3</sup>

10 A number of different sources create procedural rules that govern agency adjudication. At  
11 the very least, these sources include: (a) the ~~Fifth Amendment~~Due Process Clause of the

**Commented [CA1]:** Proposed amendment from the Council.

This amendment also includes amendments on lines 51-53.

<sup>1</sup> See Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

<sup>2</sup> See Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

<sup>3</sup> Another ongoing Administrative Conference project addresses the online availability of agency guidance documents. Admin. Conf. of the U.S., *Public Availability of Agency Guidance*, <https://www.acus.gov/research-projects/public-availability-agency-guidance>. This recommendation deals only with the limited class of those documents relating to adjudication procedure.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

12 **Constitution's Fifth Amendment**; (b) the adjudication provisions of the Administrative Procedure  
13 Act (APA);<sup>4</sup> (c) agency or program-specific statutes that set forth rules for particular types of  
14 adjudications; (d) agency-promulgated rules of procedure with legal effect; (e) agency  
15 precedents as set forth in decisions by agency officials authorized to engage in final agency  
16 action;<sup>5</sup> (f) adjudicator-specific practice procedures applicable across multiple cases, such as  
17 standing orders; and (g) agency-specific forms that persons appearing before an agency are  
18 required to use.

19 In addition, many agencies have issued guidance documents and explanatory materials  
20 that help persons appearing before agencies navigate the adjudicative process and guide agency  
21 adjudicators and other agency officials.<sup>6</sup> These documents and materials usually take the form of  
22 policy statements and, like other forms of agency guidance, are not legally enforceable against  
23 persons appearing before the agency. However, a member of the public might reasonably  
24 interpret certain guidance documents and explanatory materials to create enforceable rights (i.e.  
25 to be binding), with the potential that a court would find them to be enforceable against the  
26 agency.<sup>7</sup>

27 Under existing law, agencies, with some limited exceptions, are required to publish rules  
28 of procedure with general applicability and legal effect in the *Federal Register* and to codify  
29 such rules in the *Code of Federal Regulations*,<sup>8</sup> and those rules in turn are required to be

---

<sup>4</sup> 5 U.S.C. §§ 554–58.

<sup>5</sup> *Id.* § 704. Decisions of the Supreme Court may also be considered a binding source of law. Whether lower-court decisions are binding is not addressed by the Administrative Conference.

<sup>6</sup> To facilitate ease of understanding, explanatory materials should adhere to Administrative Conference Recommendation 2017-3. A an agency should tailor these explanatory materials to meet the needs of the members of the public who typically appear before it. Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

<sup>7</sup> See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1974) (concluding that those “privileges and benefits” that an “internal-operations” manual required the publication of that served “solely [as] an internal-operations brochure” and provided “that all directives that “inform the public of privileges and benefits available”” was were binding on the agency).

<sup>8</sup> 5 U.S.C. § 552(a)(1); 44 U.S.C. §§ 1505(a)(2), 1510(a); 1 C.F.R. §§ 5.2(c), 5.5, 5.9.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

30 published on the agency websites.<sup>9</sup> Generally, agencies have some discretion over how to  
31 organize these materials on their websites. How the agency characterizes guidance documents or  
32 explanatory materials it makes publicly available is important, as a court may enforce a guidance  
33 document that a member of the public reasonably interprets to create legally enforceable rights  
34 against the agency.

35 A review of existing agency websites reveals that agency practices vary widely. Some  
36 provide access on their websites to all relevant statutes, rules of practice, precedents, standing  
37 orders, forms, and guidance documents and explanatory materials, whereas others publish few or  
38 none of these things. Of those that do publish such documents and materials, some identify the  
39 sources of law from which the rules derive and clearly delineate between agency-promulgated  
40 rules of procedure with legal effect and (non-binding) guidance documents, whereas others do  
41 not. Finally, some websites are much more effective than others in organizing these materials  
42 and placing them in a logical location on the agency website such that they are easily accessible.

43 This Recommendation offers best practices to optimize agencies' online presentation of  
44 procedural rules for agency adjudications. Implementation of these best practices will benefit not  
45 only individuals appearing before agencies, who need ready access to procedural rules in order to  
46 proceed effectively, but also agencies, which, among other things, have an interest in ensuring  
47 that non-binding explanatory materials are clearly labeled as such. They will also advance the  
48 purpose of the E-Government Act and recent amendments to the Freedom of Information Act,  
49 which expand affirmative disclosure by federal agencies and ensure that key agency documents  
50 are made available.<sup>10</sup>

---

<sup>9</sup> See, e.g., E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).

<sup>10</sup> E-Government Act of 2002, § 206, (amending 44 U.S.C. § 3501); FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (amending 5 U.S.C. § 552(a)(2)).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### RECOMMENDATION

51 [The following recommendations offer best practices for agencies to consider as they seek to](#)  
52 [make procedural rules publicly available and to present those rules and related materials in a way](#)  
53 [that is accessible to and comprehensible for the public and persons appearing before agencies;](#)

**Commented [CA2]:** Proposed amendment from the Council.

- 54 1. Agencies should provide updated access on their websites to all sources of procedural  
55 rules and related guidance documents and explanatory materials that apply to agency  
56 adjudications, including as relevant: (a) the provisions of the Administrative Procedure  
57 Act relating to adjudication (5 U.S.C. §§ 554–58); (b) statutory provisions providing  
58 procedural rules for adjudication; (c) agency-promulgated rules of procedure with legal  
59 effect; (d) guidance documents and explanatory materials relating to adjudicative  
60 procedures, including guides designed for persons appearing before an agency and  
61 agency adjudicators (e.g., manuals, bench books), excepting those covered by a Freedom  
62 of Information Act exemption that the agency intends to invoke; and (e) agency-specific  
63 forms that individuals must use. Agencies should also consider, as appropriate, providing  
64 access to adjudicator-specific practice procedures applicable across multiple cases, such  
65 as standing orders.
- 66 2. In providing access to the materials pursuant to Paragraph 1, agencies should present the  
67 materials in a clear, logical, and comprehensive fashion. One way to do so is to display  
68 the materials published under Paragraph 1 in an easy-to-read table. An example appears  
69 in the Appendix. When possible, agencies should prominently delineate between binding  
70 and nonbinding materials.
- 71 3. Agency-promulgated rules of procedure with legal effect should be accessible on agency  
72 websites in one easily searchable file. The rules should include a table of contents listing  
73 the rule titles. The rule titles should be hyperlinked to the rule text. The numbering  
74 system in the searchable file should mirror the *Code of Federal Regulations*' (CFR)  
75 numbering system and provide a link to the official version of the CFR.
- 76 4. When an agency's mission consists exclusively or almost exclusively of conducting  
77 adjudications, the agency should link to its materials published under Paragraph 1 on the



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

78 agency's homepage. When conducting adjudications is merely one of an agency's many  
79 functions, the agency should link to its rules and guidance from a location on the website  
80 that is both dedicated to adjudicatory materials and logical in terms of a person's  
81 likelihood of finding the documents in the selected location, such as an enforcement or  
82 adjudications page. Examples appear in the Appendix.

83 5. Agencies should consider providing access on their websites to explanatory materials  
84 aimed at providing an overview of relevant agency precedents that apply the rules of  
85 procedure. Explanatory materials should link to applicable statutes, rules of procedure,  
86 and adjudicative precedents relating to adjudication procedures.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

APPENDIX

87 Paragraph 2

88 Paragraph 2 reads in part, “[i]n providing access to the materials pursuant to Paragraph 1,  
89 agencies should present the materials in a clear, logical, and comprehensive fashion. One way to  
90 do so is to display the materials published under Paragraph 1 in an easy-to-read table.” The  
91 “Legal Authorities” page of the Office of Medicare Hearings and Appeals’ website, an office  
92 within the Department of Health and Human Services, demonstrates such a table.<sup>11</sup>

**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	<a href="#">Social Security Act § 1869</a> (42 U.S.C. 1395f)	42 C.F.R. part 405, subpart J (\$§ 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. §§ 418.1301–418.1365 (\$ 418.1350 for ALJ appeals)	OMHA Case Processing Manual (Division II for Part A/B appeals, Division V for entitlement and certain premium appeals)  <a href="#">Medicare Claims Processing Manual, CMS Publ'n 100-04, Ch. 23 - PDF</a> (\$§ 330–330.6 for ALJ appeals)
Medicare Part C Medicare Advantage and competitive health plan organization determinations	<a href="#">Social Security Act § 1852(g)</a> (42 U.S.C. 1395w-22(g))  <a href="#">Social Security Act § 1876(c)(5)(B)</a> (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 G	OMHA Case Processing Manual (Division III for Part C appeals)  <a href="#">Medicare Managed Care Manual, CMS Publ'n 100-16, Ch. 13 - PDF</a> (\$§ 100–100.2 for ALJ appeals)
Medicare Part D plan sponsor coverage determinations and certain premium determinations	<a href="#">Social Security Act § 1860D-4</a> (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. §§ 418.2301–418.2365 (\$ 418.2350 for ALJ appeals)	OMHA Case Processing Manual (Division IV for Part D appeals)  <a href="#">Prescription Drug Benefit Manual, CMS Publ'n 100-18, Ch. 18</a> (\$§ 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](#)

93

94

<sup>11</sup> DEP’T. OF HEALTH & HUM. SERVS., LEGAL AUTHORITIES, <https://www.hhs.gov/about/agencies/omha/the-appeals-process/legal-authorities/index.html?language=es> (last visited Oct. 22, 2018).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

95 **Paragraph 4**

96 Paragraph 4 reads in part, “[w]hen an agency’s mission consists exclusively or almost  
97 exclusively of conducting adjudications, the agency should link to its materials published under  
98 Recommendation 1 on the agency’s homepage.” The Occupational Safety and Health Review  
99 Commission’s (OSHRC) website demonstrates how an agency can link to the procedural  
100 materials published from an agency’s home page.<sup>12</sup>



101  
102 Paragraph 4 also reads in part, “[w]hen conducting adjudications is merely one of an  
103 agency’s many functions, the agency should link to its rules and guidance from a location on the  
104 website that is both dedicated to adjudicatory materials and logical in terms of a person’s  
105 likelihood of finding the documents in the selected location, such as an enforcement or

<sup>12</sup> OCCUPATIONAL SAFETY & HEALTH REV. COMM’N, HOME, <https://www.oshrc.gov> (last visited Oct. 22, 2018).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

106 adjudications page.” The Federal Trade Commission’s (FTC) website demonstrates how an  
107 agency can link to the published materials from an enforcement page.<sup>13</sup>

The screenshot shows the FTC website's Enforcement page. At the top, there is a search bar and navigation links for Contact, Stay Connected, Privacy Policy, and FTC en español. The main navigation menu includes ABOUT THE FTC, NEWS & EVENTS, ENFORCEMENT (highlighted), POLICY, TIPS & ADVICE, and I WOULD LIKE TO... The page content is divided into a sidebar and a main text area. The sidebar lists various enforcement categories. The main text area features a title 'Enforcement', an image of a courtroom, and three paragraphs of text explaining the FTC's enforcement mission and the laws it administers. The footer contains a comprehensive navigation menu and contact details for the FTC headquarters.

108

<sup>13</sup> FED. TRADE COMM’N, ENFORCEMENT, <https://www.ftc.gov/enforcement> (last visited Oct. 22, 2018).