



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

1 Every year, federal agencies conduct hundreds of thousands of adjudications.¹ In order to
2 participate meaningfully in the process, persons appearing before federal agencies must have
3 ready online access both to the key materials associated with these adjudications (including prior
4 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.² This Recommendation deals with
7 the latter set of materials, appearing before agencies and the public.³

8 A number of different sources create procedural rules that govern agency adjudication. At
9 the very least, these sources include: (a) the Fifth Amendment Due Process Clause; (b) the
10 adjudication provisions of the Administrative Procedure Act (APA);⁴ (c) agency or program-
11 specific statutes that set forth rules for particular types of adjudications; (d) agency-promulgated
12 rules of procedure with legal effect; (e) agency precedents as set forth in decisions by agency

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

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

³ 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.

⁴ 5 U.S.C. §§ 554–58.



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13 officials authorized to engage in final agency action;⁵ (f) adjudicator-specific practice procedures
14 applicable across multiple cases, such as standing orders; and (g) agency-specific forms that
15 persons appearing before an agency are required to use.

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

24 Under existing law, agencies, with some limited exceptions, are required to publish rules
25 of procedure with general applicability and legal effect in the *Federal Register* and to codify
26 such rules in the *Code of Federal Regulations*,⁸ and those rules in turn are required to be
27 published on the agency websites.⁹ Generally, agencies have some discretion over how to
28 organize these materials on their websites. How the agency characterizes guidance documents or
29 explanatory materials it makes publicly available is important, as a court may enforce a guidance

⁵ *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.

⁶ To facilitate ease of understanding, explanatory materials should adhere to Administrative Conference Recommendation 2017-3. An agency should tailor these 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).

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

⁸ 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.

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



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30 document that a member of the public reasonably interprets to create legally enforceable rights
31 against the agency.

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

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

RECOMMENDATION

- 48 1. Agencies should provide updated access on their websites to all sources of procedural
49 rules and related guidance documents and explanatory materials that apply to agency
50 adjudications, including as relevant: (a) the provisions of the Administrative Procedure
51 Act relating to adjudication (5 U.S.C. §§ 554–58); (b) statutory provisions providing
52 procedural rules for adjudication; (c) agency-promulgated rules of procedure with legal

¹⁰ 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)).



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- 53 effect; (d) guidance documents and explanatory materials relating to adjudicative
54 procedures, including guides designed for persons appearing before an agency and
55 agency adjudicators (e.g., manuals, bench books), excepting those covered by a Freedom
56 of Information Act exemption that the agency intends to invoke; and (e) agency-specific
57 forms that individuals must use. Agencies should also consider, as appropriate, providing
58 access to adjudicator-specific practice procedures applicable across multiple cases, such
59 as standing orders.
- 60 2. In providing access to the materials pursuant to Paragraph 1, agencies should present the
61 materials in a clear, logical, and comprehensive fashion. One way to do so is to display
62 the materials published under Paragraph 1 in an easy-to-read table. An example appears
63 in the Appendix. When possible, agencies should prominently delineate between binding
64 and nonbinding materials.
- 65 3. Agency-promulgated rules of procedure with legal effect should be accessible on agency
66 websites in one easily searchable file. The rules should include a table of contents listing
67 the rule titles. The rule titles should be hyperlinked to the rule text. The numbering
68 system in the searchable file should mirror the *Code of Federal Regulations'* (CFR)
69 numbering system and provide a link to the official version of the CFR.
- 70 4. When an agency's mission consists exclusively or almost exclusively of conducting
71 adjudications, the agency should link to its materials published under Paragraph 1 on the
72 agency's homepage. When conducting adjudications is merely one of an agency's many
73 functions, the agency should link to its rules and guidance from a location on the website
74 that is both dedicated to adjudicatory materials and logical in terms of a person's
75 likelihood of finding the documents in the selected location, such as an enforcement or
76 adjudications page. Examples appear in the Appendix.
- 77 5. Agencies should consider providing access on their websites to explanatory materials
78 aimed at providing an overview of relevant agency precedents that apply the rules of
79 procedure. Explanatory materials should link to applicable statutes, rules of procedure,
80 and adjudicative precedents relating to adjudication procedures.



APPENDIX

81 Paragraph 2

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

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.

Table with 4 columns: Medicare Part, Statute*, Implementing Regulations, and Select Program Guidance. It lists legal authorities for Medicare Part A and Part B, Part C, and Part D.

*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



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¹¹ 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).



89 **Paragraph 4**

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



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

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



100 adjudications page.” The Federal Trade Commission’s (FTC) website demonstrates how an
101 agency can link to the published materials from an enforcement page.¹³

The screenshot shows the Federal Trade Commission (FTC) website's Enforcement page. At the top, there is a navigation bar with links for 'Contact', 'Stay Connected', 'Privacy Policy', and 'FTC en español'. Below this is a search bar. The main navigation menu includes 'ABOUT THE FTC', 'NEWS & EVENTS', 'ENFORCEMENT', 'POLICY', 'TIPS & ADVICE', and 'I WOULD LIKE TO...'. The 'ENFORCEMENT' link is highlighted in yellow.

The page content is divided into a sidebar and a main area. The sidebar on the left lists various enforcement categories: 'Enforcement', 'CASES AND PROCEEDINGS', 'DATA AND VISUALIZATIONS', 'PREMERGER NOTIFICATION PROGRAM', 'MERGER REVIEW', 'ANTICOMPETITIVE PRACTICES', 'RULES', 'STATUTES', 'CONSUMER SENTINEL NETWORK', and 'CRIMINAL LIAISON UNIT'. The main area features a large heading 'Enforcement' above a photograph of a bookshelf. Below the image, there are two paragraphs of text. The first paragraph states: 'The FTC enforces federal consumer protection laws that prevent fraud, deception and unfair business practices. The Commission also enforces federal antitrust laws that prohibit anticompetitive mergers and other business practices that could lead to higher prices, fewer choices, or less innovation.' The second paragraph explains the FTC's mission: 'Whether combatting telemarketing fraud, Internet scams or price-fixing schemes, the FTC's mission is to protect consumers and promote competition.' A third paragraph lists the laws administered: 'The FTC administers a wide variety of laws and regulations, including the Federal Trade Commission Act, Telemarketing Sale Rule, Identity Theft Act, Fair Credit Reporting Act, and Clayton Act. In total, the Commission has enforcement or administrative responsibilities under more than 70 laws.'

The footer of the page is organized into four columns of links. The first column, 'ABOUT THE FTC', includes links for 'What We Do', 'Our History', 'Commissioners', 'Bureaus & Offices', 'Biographies', 'Budgets', 'Performance', and 'Office of Inspector General'. The second column, 'NEWS & EVENTS', includes 'Press Releases', 'Commission Actions', 'Media Resources', 'Events Calendar', 'Speeches', 'Audio/Video', 'Social Media', and 'Blogs'. The third column, 'ENFORCEMENT', includes 'Cases and Proceedings', 'Data and Visualizations', 'Premerger Notification Program', 'Merger Review', 'Anticompetitive Practices', 'Rules', and 'Statutes'. The fourth column, 'POLICY', includes 'Advocacy', 'Advisory Opinions', 'Cooperation Agreements', 'Federal Register Notices', 'Reports', 'Studies', and 'Testimony'. To the right of these columns is the 'FEDERAL TRADE COMMISSION' contact information: 'Headquarters: 600 Pennsylvania Avenue, NW, Washington, DC 20580, Contact Us'. Below this is a row of social media icons for Facebook, Twitter, YouTube, LinkedIn, and RSS. At the bottom right is a blue button that says 'Stay Connected with the FTC'.

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