



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 on-line access both to the key materials associated with these adjudications (including
4 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.² This recommendation deals with the
7 latter set of materials, urging agencies to make procedural rules readily available online and
8 providing best practices as to how to present those materials in a manner that is most helpful to
9 persons appearing before agencies and ensures accessibility to the public.³

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; (b) the
12 adjudication provisions of the APA;⁴ (c) agency or program-specific statutes that set forth rules
13 for particular types of adjudications; (d) agency-promulgated rules of procedure with legal effect;
14 (e) agency precedents as set forth in decisions by agency officials authorized to engage in final

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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15 agency action;⁵ (f) adjudicator-specific practice procedures applicable across multiple cases,
16 such as standing orders; and (g) agency-specific forms that persons appearing before an agency
17 are required to use.

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

26 Under existing law, agencies, with some limited exceptions, are required to publish rules
27 of procedure with general applicability and legal effect in the *Federal Register* and to codify
28 such rules in the *Code of Federal Regulations*,⁸ and those rules in turn are required to be
29 published on the agency websites.⁹ Generally, agencies have some discretion over how to
30 organize these materials on their websites. How the agency characterizes guidance documents or
31 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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32 document that a member of the public reasonably interprets to create legally enforceable rights
33 against the agency.

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

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

RECOMMENDATION

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

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



APPENDIX

82 Recommendation 2

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

Navigation menu for 'The Appeals Process' with links for Level 1-5 Appeals, Legal Authorities, Case Processing Manual, Filing an Appeal, About OMHA, and 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 details the legal basis for appeals in Medicare Part A/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 AND HUM. SERV., LEGAL AUTHORITIES, <https://www.hhs.gov/about/agencies/omha/the-appeals-process/legal-authorities/index.html?language=es> (last visited Oct. 22, 2018).



90 **Recommendation 4**

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



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

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



101 adjudications page.” The Federal Trade Commission’s (FTC) website demonstrates how an
102 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 'ABOUT THE FTC', 'NEWS & EVENTS', 'ENFORCEMENT', 'POLICY', 'TIPS & ADVICE', and 'I WOULD LIKE TO...'. The 'ENFORCEMENT' link is highlighted. Below the navigation bar, the page title is 'Enforcement'. On the left, there is a sidebar with a list of links: 'CASES AND PROCEEDINGS', 'DATA AND VISUALIZATIONS', 'PREMERGER NOTIFICATION PROGRAM', 'MERGER REVIEW', 'ANTICOMPETITIVE PRACTICES', 'RULES', 'STATUTES', 'CONSUMER SENTINEL NETWORK', and 'CRIMINAL LIAISON UNIT'. The main content area features a large image of a bookshelf filled with books. Below the image, there is a paragraph of text: '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.' Below this, there is another paragraph: 'Whether combatting telemarketing fraud, Internet scams or price-fixing schemes, the FTC's mission is to protect consumers and promote competition.' Below that, there is a third paragraph: '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.' At the bottom of the page, there is a footer with a grid of links for 'ABOUT THE FTC', 'NEWS & EVENTS', 'ENFORCEMENT', and 'POLICY'. To the right of the footer, there is a section for 'FEDERAL TRADE COMMISSION' with contact information: 'Headquarters: 600 Pennsylvania Avenue, NW, Washington, DC 20580' and a 'Contact Us' link. Below the contact information, there are social media icons for Facebook, Twitter, YouTube, LinkedIn, and RSS. At the bottom right, there 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).