Comments on Draft Recommendation
Recusal Rules for Administrative Adjudicators

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These comments reflect important input from EPA’s Ethics Law Office.

**Lines 44-45:** Delete “it is entirely possible and coherent to enforce both.”

Replace with “they may be enforced simultaneously and in a manner consistent with each other.”

Rationale: Clarity

**Lines 45-46:** Delete “This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two.”

Replace with: “Government ethics rules and recusal rules share a similar purpose, i.e., to ensure public confidence that actions taken by the government are in the public interest, but they differ in scope, form, and enforcement mechanisms available.”

Rationale: Clarity

**Line 46:** Insert “Federal” and “primarily” so that the sentence now begins: “Federal ethics rules focus primarily on preventing conflicts of interest…”

Rationale: Accuracy

**Line 47:** Insert after “employees”: “and to a lesser extent appearance issues that may arise in connection with certain close familial and other relationships that federal employees may have.”

Rationale: Accuracy. This edit accounts for the impartiality rules in the Standards of Conduct. Those rules require federal employees to recuse from specific party matters involving parties with whom they have a “covered relationship,” expressed here as “certain close familiar and other relationships.”

**Line 49:** Delete: “very precise” and replace with “more prescriptive”

Rationale: Accuracy.
Line 53: Delete “constitute a breach of any” and replace with “necessarily violate an,” so that the sentence fragment reads: “. . . by conduct that would not necessarily violate an ethics rule.

Line 54: Delete: “, such as advocating a particular policy in a speech before a professional association.”

Replace with: “. For example, an employee could potentially violate the ethics rules by advocating, in his/her personal capacity, a particular policy in a speech before a professional association and referring to his or her official title without a disclaimer that the views expressed in the speech were his or her own and did not necessarily reflect the views of the Agency.”

Rationale: Accuracy.

Lines 54-56: Edit: “The enforcement mechanism for each set of rules is also different. A potential ethics issue may be raised by a federal employee or an agency ethics official and will be reviewed privately by inside the agency the ethics official, whose determination constitutes official agency action. In contrast, the recusal process is public . . . “

Rationale: Ethics issues are not “reviewed privately.” There is no attorney-client privilege between an ethics official and a federal employee. In addition, many ethics determinations, such as written determinations regarding attendance at widely attended gatherings, are releasable under FOIA.

Lines 66-70: Edit: “The Agency recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but should not necessarily apply to agency heads. When adopting such recusal rules, agencies should consider both the actual and perceived integrity of agency adjudications and as well as the effectiveness and efficiency of adjudicative proceedings.”

Rationale: Clarity.

Lines 103-106: Edit: “4. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include: [NOTE new subheadings]

a. the right of petition for parties seeking recusal;

b. referral (for decision by an agency ethics official) of allegations of improper financial interest or impartiality arising under the Standards of Ethical Conduct for Employees of the Executive Branch;”
c. initial determination by the presiding adjudicator in appropriate cases; and

d. internal agency appeal.”

Rationale: Financial conflicts of interest and impartiality determinations must be made by an Agency ethics official. Silence might imply that someone other than an Agency ethics official would make those decisions.