



Administrative Conference Recommendation 2022-5

Regulatory Enforcement Manuals

Adopted December 15, 2022

Many agencies are responsible for detecting, investigating, and prosecuting potential violations of the laws they administer. Statutes and agency rules govern the exercise of agencies' enforcement authority and direct the activities of enforcement personnel. Agencies' policies: (a) explain and interpret relevant statutes and rules; (b) establish standards, priorities, and procedures for detecting and investigating suspected violations, issuing complaints against suspected violators, and prosecuting cases before an administrative body or a federal court; (c) describe how enforcement staff interact with other agency personnel and persons outside the agency; and (d) set forth processes for soliciting and receiving complaints about alleged violations from members of the public.

Many agencies have developed documents, often called “enforcement manuals,” that provide their personnel with a single, comprehensive resource regarding enforcement-related laws and policies. Enforcement manuals provide a way for agencies to effectively communicate such policies, which would otherwise be dispersed within a voluminous body of separate documents, and to ensure that agency enforcement is internally consistent, fair, efficient, effective, and legally sound.¹ Although enforcement manuals do not necessarily bind agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency management matter, to direct enforcement personnel to act in conformity with an enforcement manual.²

¹ See Jordan Perkins, Regulatory Enforcement Manuals 1, 9 (Dec. 9, 2022) (report to the Admin. Conf. of the United States).

² See Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 3, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).



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Enforcement manuals can also be a useful, practical resource for the public. The Freedom of Information Act (FOIA) requires agencies to post on their websites “administrative staff manuals and instructions to staff that affect a member of the public.”³ Although several courts of appeals have held that this provision does not apply to some portions of enforcement manuals,⁴ by providing public access to them, agencies can improve awareness of and compliance with relevant policies while promoting transparency more generally.

Enforcement manuals may contain information that agencies should not disclose. Disclosure of some portions of enforcement manuals might, for example, enable persons to circumvent the law by revealing forms of noncompliance that will not lead to investigation or enforcement. Accordingly, FOIA exempts from disclosure records or information that “would disclose techniques and procedures for law enforcement investigations or prosecutions” or “guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”⁵ FOIA also allows agencies to withhold records that fall within the attorney work-product privilege. This exemption may encompass information provided to enforcement personnel about litigation strategies and legal theories, the disclosure of which could adversely affect the integrity of adversarial proceedings.⁶ Agencies cannot rely on these exemptions reflexively, however. Since 2016, agencies may withhold information under FOIA only if they “reasonably foresee that disclosure would harm an interest protected by” an exemption or if disclosure is prohibited by law.⁷ In other circumstances, agencies should disclose their enforcement manuals, or at least the non-exempt portions of the manual.

This Recommendation offers agencies best practices for developing, managing, and disseminating enforcement manuals. It builds on several recommendations the Administrative

³ 5 U.S.C. § 552(a)(2)(C).

⁴ *See, e.g.,* Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973).

⁵ *Id.* § 552(b)(7)(E).

⁶ *See* ACLU of N. Cal. v. U.S. DOJ, 880 F.3d 473, 486–88 (9th Cir. 2018); Nat’l Ass’n of Crim. Def. Lawyers v. U.S. DOJ Exec. Off. for U.S. Attys., 844 F.3d 246, 254 (D.C. Cir. 2016).

⁷ 5 U.S.C. § 552(a)(8)(A).



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Conference has previously adopted regarding the development, management, and dissemination of agency procedural rules and guidance documents.⁸ In offering these recommendations, the Conference recognizes that enforcement manuals may not be appropriate for all agencies, given differences in the volume and complexity of documents that govern their enforcement activities, resources available to agencies, and the differing informational needs of persons affected by or interested in agency enforcement activities.

RECOMMENDATION

Developing Enforcement Manuals

1. Subject to available resources, agencies responsible for investigating and prosecuting potential violations of the laws that they administer should develop an enforcement manual—that is, a document that provides personnel a single, comprehensive resource for enforcement-related statutes, rules, and policies—if doing so would improve the communication of enforcement-related policies to agency personnel and promote the fair and efficient performance of enforcement functions consistent with established policies.
2. In developing enforcement manuals, agencies should consider, among other things:
 - a. Identifying the office or individual within the agency under whose name and authority the manual is being issued;
 - b. Identifying which offices within the agency are directed to act in conformity with the manual;
 - c. Describing the manual's purpose, scope, and organization;
 - d. Describing the manual's legal effect, including a disclaimer, if applicable, that the manual does not bind the agency as a whole;
 - e. Identifying the statutes and rules that govern the agency's enforcement activities;

⁸ See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Recommendation 2017-5, *supra* note 2.



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- f. Identifying any “safe harbors” (i.e., conduct that does not trigger agency enforcement actions);
 - g. Describing criteria for selecting among options available to the agency to compel remedial action, procedures for formally initiating agency adjudicative or judicial proceedings, and criteria for making criminal referrals;
 - h. Identifying the office or individual within the agency that is empowered to receive, and potentially to act on, any complaint that the agency personnel who are conducting an investigation or other enforcement action are engaging in unlawful or inappropriate conduct;
 - i. Describing procedures for soliciting and receiving information about alleged violations from persons outside the agency;
 - j. Identifying criteria used to classify the severity of alleged violations, recommend or assess penalties or other remedies, or prioritize investigations or prosecutions;
 - k. Describing procedures for conducting investigations, inspections, audits, or similar processes;
 - l. Describing policies governing communications between enforcement personnel and other agency personnel, the subjects of enforcement actions, and other persons outside the agency;
 - m. Explaining procedures for determining if records or information are legally protected from unauthorized disclosure, and procedures for handling such records or information;
 - n. Addressing when agency personnel may publicly disclose information about an enforcement proceeding, such as by issuing a press release, and the nature of information that may be disclosed;
 - o. Identifying guidelines for both informally adjudicating and negotiating settlements with the subjects of enforcement actions; and
 - p. Explaining how and by whom the manual is developed, periodically reviewed for accuracy, and updated.
3. Agencies should ensure that the contents of enforcement manuals are presented in a clear, logical, and comprehensive fashion, and include a table of contents and an index.



Managing Enforcement Manuals

4. Agencies should periodically review their enforcement manuals and update them as needed to ensure that they accurately reflect current law and policies. When agencies update their enforcement manuals, the manuals should prominently display the date of the update and identify what changes were made.
5. Agencies with enforcement manuals should develop procedures for reviewing and keeping them up to date. These procedures should address:
 - a. How often the enforcement manual, in whole or in part, is reviewed for accuracy and updated if necessary;
 - b. Which office or individual within the agency is responsible for periodically reviewing the enforcement manual, in whole or in part; and
 - c. How and by whom changes to the enforcement manual are drafted, reviewed, approved, and implemented.
6. To ensure that enforcement personnel can easily access current versions of enforcement manuals, agencies should make enforcement manuals available in a searchable, electronic format in an appropriate location on an internal network.
7. Agencies should solicit feedback on their enforcement manuals from their personnel and consider that feedback in reviewing and revising their manuals.

Disseminating Enforcement Manuals to the Public

8. Agencies should make their enforcement manuals, or portions of their manuals, publicly available on their websites when doing so would improve public awareness of relevant policies and compliance with legal requirements or promote transparency more generally, and if they have adequate resources available to ensure publicly available enforcement manuals remain up to date. Agencies should not include information in publicly available versions of enforcement manuals that would reflect litigation strategies or legal theories, the disclosure of which would adversely affect the integrity of adversarial proceedings, or enable persons to circumvent the law.
9. When agencies post publicly available versions of enforcement manuals, they should post



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the manuals in an easily identified location on their websites, in a user-friendly format, and with an introduction sufficient to ensure that potentially interested persons—including members of historically underserved communities, who may be unfamiliar with the existence, purpose, and legal effect of enforcement manuals—can easily find and use them.

10. When agencies issue or revise publicly available enforcement manuals, they should provide notice to the public of such actions, for example by placing a notice on the agency's website, issuing a press release, making an announcement on social media, or publishing a notice of availability in the *Federal Register*.
11. Agencies that make enforcement manuals publicly available should solicit feedback on them, from persons interested in or affected by agency enforcement proceedings, including possibly in a public forum and through direct outreach.