



Rules on Rulemakings

Committee on Regulation

Proposed Recommendation for Committee | October 27, 2020

1 Many federal agencies issue judicially enforceable rules governing aspects of their
2 informal rulemaking processes. This Recommendation refers to such rules as “rules on
3 rulemakings.”

4 For purposes of this Recommendation, “rules on rulemakings” refers only to legislative
5 rules, a term this Recommendation uses to describe rules that are not only internally binding on
6 agency staff but also externally enforceable by private litigants on judicial review of agency
7 action.¹ For purposes of the Administrative Procedure Act’s (APA’s) informal rulemaking
8 provisions, rules on rulemakings can be substantive or procedural. Although the distinction
9 between substantive and procedural rules is notoriously murky,² it is important because
10 substantive rules must go through notice and comment, whereas procedural rules need not.³

11 Agencies also often issue publicly available documents that give background descriptions
12 of the rulemaking process. This Recommendation refers to such documents as “explainers.” For

Commented [TR1]: Note for the Committee: We flag for consideration whether a word other than “explainer” should be used.

¹ Although some courts and commenters confine “legislative rules” to substantive notice-and-comment rules, *see, e.g., American Tort Reform Ass’n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013), this Recommendation defines the term in a way that can apply to both substantive and procedural rules, *see, e.g., Admin. Conf. of the U.S., Recommendation 2019-6, Independent Research by Agency Adjudicators in the Internet Age*, 84 Fed. Reg. 71,350, 71,351 n.18 (Dec. 27, 2019) (“Legislative rules dealing with agency organization, procedure, or practice are exempt from notice-and-comment requirements.”).

² *See, e.g., JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (confessing that “we have struggled with the distinction between ‘substantive’ and ‘procedural’ rules”); *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (noting that the line dividing substantive and procedural rules is a “hazy” one).

³ *See* 5 U.S.C. § 553(b)(A) (exempting “rules of agency organization, procedure, or practice” from notice-and-comment requirements).



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13 purposes of this Recommendation, explainers include publicly available documents describing
14 an agency's rulemaking process that are not legislative rules (i.e., that lack the force of law and
15 thus are not enforceable against an agency in court). Explainers can include policy statements,
16 interpretive rules, and even some documents that may not qualify as rules under the APA.⁴

17 Agencies also sometimes issue documents that are not legislative rules but that set forth
18 rulemaking practices and may bind lower-level agency officials in the sense that such officials
19 can be disciplined for departing from the documents' terms. These documents may or may not be
20 publicly available. When made publicly available, they may qualify as explainers.

Prevalence of Rules on Rulemakings

21 There are at least twenty-five agencies that have adopted documents that appear to
22 qualify as rules on rulemakings.⁵ These documents often combine external-facing provisions,
23 which purport to bind the public, with internal-facing provisions, which purport to bind only the
24 agency. They also often combine substantive and procedural provisions.

25 The aspects of rulemaking most often addressed by these rules on rulemakings relate to:
26 internally initiating and approving rulemakings, performing ex ante and retrospective analyses of
27 rules, and soliciting and analyzing public comments. They also cover a wide array of other
28 procedures related to rulemaking.

Commented [TR2]: Note for the Committee: Should we add some language to follow up on Senior Fellow Gillian E. Metzger's point that these sorts of documents, though not legislative rules, might still be enforceable against the agency under an *Accardi* analysis?

Commented [TR3]: Note for the Committee: Lines 1-20 set forth one possible framing. The Committee may wish to consider an alternative framing in which rulemaking materials are divided into two categories: (a) rules on rulemakings, which are limited to legislative rules as defined here and (b) guidance documents pertaining to the rulemaking process.

Within the second category, there are a number of possible sub-categories, which are relevant to what types of documents the Committee will recommend that the agency make public:

- (a) Policy statements that are internally binding on agency staff that set forth policies on rulemaking that the agency intends to follow but that the agency does not intend to be enforceable by a private litigant on judicial review of agency action.
- (b) Guidance documents that explain the rulemaking process that the agency does not intend to be binding in any sense (i.e., neither internally binding on agency staff nor enforceable by a private litigant on judicial review) but that are useful to make publicly available to promote understanding of the rulemaking process.
- (c) Guidance documents relating to the rulemaking process that are internally binding but that are of no interest to the public (e.g., a requirement to double space internal drafts of rules) and therefore should not be made publicly available.

⁴ See *id.* § 551(4) (defining "rule").

⁵ See Todd Rubin, Memorandum to Members of the Committee on Regulation and Interested Persons 3 (Oct. 13, 2020), <https://www.acus.gov/memorandum/memorandum-committee-regulation-rules-rulemakings-10-15-2020>.



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Policy Considerations

29 There are a number of policy considerations that bear on an agency’s decision to issue
30 rules on rulemakings. The key benefits are efficiency, predictability, accountability, and
31 transparency. The potential risks are agencies’ tying their hands or layering on excessive
32 procedure.

33 *Efficiency.* Both agency officials and members of the public benefit from having a
34 consistent set of rules governing an agency’s rulemaking practices that is set forth in an easy-to-
35 locate place. This saves time by ensuring all parties know where to go to find the relevant
36 policies.

37 *Predictability.* Having a consistent set of rules as described above also reduces
38 uncertainty, as the public knows that the agency will follow a particular set of procedures and
39 can plan accordingly. For example, if an agency commits to a sixty-day comment period in a rule
40 on rulemakings, regulated parties that wish to opine on a rulemaking can plan their workload
41 accordingly. And it allows the agency to announce policies that bind the public (e.g., announce
42 in advance that late comments will not be accepted), which will likely curtail claims of undue
43 surprise or challenges to the regularity of the agency’s procedures.

44 *Accountability.* Adopting rules on rulemakings promotes external accountability by
45 ensuring that the public has advance notice of the policies that the agency will follow in any
46 given rulemaking. Rules on rulemakings also can promote internal accountability by providing a
47 consistent set of procedures by which high-ranking officials, including political leadership, sign
48 off on a rule.

49 *Transparency.* Publicly posted rules on rulemakings and explainers bring greater
50 transparency to the rulemaking process. Public posting of these documents avoids the need for
51 members of the public to expend considerable resources to find an agency’s policies.



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52 *Costs and Inflexibility.* Notwithstanding the many benefits of rules on rulemakings,
53 agencies should be mindful of the potential risks of tying their hands or layering on excessive
54 procedure. This should not be an issue if the agency reserves an appropriate level of discretion in
55 its rule on rulemakings. By preserving an appropriate level of discretion, either by not pre-
56 committing if the agency cannot consistently follow a policy or by writing the rule on
57 rulemakings in a way that ensures that it can depart if necessary, an agency can achieve all of the
58 goals outlined above while avoiding any undue constraints on its ability to operate.

RECOMMENDATION

- 59 1. Agencies should adopt rules on rulemakings to pre-commit to those policies that they
60 deem important to follow in all rulemakings for purposes of promoting predictability,
61 efficiency, accountability, and transparency. Agencies should preserve an appropriate
62 amount of discretion to depart from these rules in appropriate circumstances. This may
63 entail not committing to a particular procedure, or it may entail drafting the rule in a way
64 that leaves adequate discretion.
- 65 2. Bearing in mind that each agency's rulemaking process is unique and that agencies
66 should carefully consider the set of practices to which they pre-commit, agencies should
67 consider including within their rules on rulemakings policies with respect to the
68 following topics. Agencies should note that this menu of options draws from existing
69 rules on rulemakings, many of which include these procedures to implement statutes,
70 executive orders, or previous recommendations of the Administrative Conference.
- 71 (a) Internally initiating and approving rulemakings;
 - 72 (b) Accepting, reviewing, and deciding on petitions for rulemaking;
 - 73 (c) Considering options besides rulemaking;
 - 74 (d) Developing entries for the *Unified Agenda of Regulatory and Deregulatory*
75 *Actions*;
 - 76 (e) Using plain language in regulatory drafting;



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- 77 (f) Preparing for potential judicial review of rulemakings, including deciding whether
78 to make any of the provisions of a rule severable;
- 79 (g) Incorporating standards by reference;
- 80 (h) Performing ex ante regulatory analyses (e.g., benefit-cost analysis and regulatory
81 flexibility analysis);
- 82 (i) Promoting international regulatory cooperation;
- 83 (j) Obtaining feedback from members of the public using the notice-and-comment
84 process, including whether to establish minimum comment periods;
- 85 (k) Obtaining feedback from members of the public using means other than the
86 notice-and-comment process, such as requests for information and focus groups;
- 87 (l) Issuing advanced notices of proposed rulemaking;
- 88 (m) Conducting negotiated rulemaking;
- 89 (n) Using social media to engage the public in rulemaking;
- 90 (o) Obtaining feedback from American Indian tribes, other traditionally
91 underrepresented or under-resourced groups, and from state and local
92 governments;
- 93 (p) Handling ex parte communications;
- 94 (q) Analyzing and responding to public comments, including comments that may
95 contain confidential commercial information, protected personal information, or
96 other kinds of sensitive submissions;
- 97 (r) Waiving or invoking of Administrative Procedure Act exemptions to notice and
98 comment;
- 99 (s) Using interim final rules or direct final rules;
- 100 (t) Establishing an effective date for rules;
- 101 (u) Issuing regulatory waivers and exemptions;
- 102 (v) Engaging in retrospective review of rules;



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- 103 (w) Maintaining and preserving rulemaking records, including transparency of such
104 records and the handling of confidential commercial information, protected
105 personal information, or other kinds of sensitive information contained therein;
106 (x) Handling rules that have been vacated or remanded without vacatur;
107 (y) Interacting with the Office of Information and Regulatory Affairs (OIRA), the
108 Office of the Federal Register, the Regulatory Information Service Center, and
109 other offices with government-wide rulemaking responsibilities; and
110 (z) Participating in the interagency review process.
- 111 3. Agencies should consider issuing documents that give background descriptions of
112 agencies' rulemaking processes (explaners) that provide a start-to-finish overview of
113 how the rulemaking process works. These explainers can describe the internal procedures
114 the agency follows; can indicate how and when the agency interacts with members of the
115 public; and can describe external inputs in the process, including the presidential review
116 process and how the agency interacts with OIRA, if applicable.
- 117 4. Agencies should consider issuing explainers even if they decide not to issue rules on
118 rulemakings or to exclude certain matters from their rules on rulemakings. For example,
119 an agency could describe how the commenting process works and give an average
120 number of days for comment periods, even if it decides against adopting a minimum
121 number of days for comment periods.
- 122 5. Agencies should make rules on rulemakings and explainers available in a prominent,
123 easy-to-find place on the portion of their websites dealing with rulemaking matters. In
124 doing so, agencies should draw from the principles of Recommendation 2019-3, *Public*
125 *Availability of Agency Guidance Documents*, which encourages agencies to, with respect
126 to guidance documents on their websites, use techniques like linked tabs or pull-down
127 menus; to design their search engines to allow one to easily identify relevant documents;
128 and to use techniques such as indexing, tagging, or sorting tables to ensure that relevant



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129 documents are easily findable.⁶ Agencies should very clearly delineate rules on
130 rulemakings, which include practices that the agency intends that a private litigant could
131 enforce in court, from explainers, which provide useful background but are not intended
132 to be enforceable against the agency in court.⁷

133 6. Agencies should cite their rules on rulemakings in any rule or proposed rule that draws
134 upon the procedures contained therein. Agencies should also consider, when relevant,
135 providing citations to explainers within their notices of proposed rulemakings to provide
136 useful background, though the agency should clearly specify that it does not consider
137 such documents enforceable against the agency in court.

138 7. Agencies should consider using the notice-and-comment process for rules on
139 rulemakings, even if they qualify as procedural rules that are exempt from that process. If
140 a rule on rulemaking mixes procedural and substantive elements, the agency should
141 subject the entire instrument to notice and comment.

Commented [TR4]: Note for the Committee: Committee Chair Connor N. Raso proposes deleting this.

⁶ Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

⁷ See Exec. Order No. 13,891, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55,235 (Oct. 15, 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 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017).