



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Rules on Rulemakings

Committee on Regulation

Proposed Recommendation | December 16, 2020

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Numerous agencies have promulgated rules setting forth the policies and procedures they
2 will follow when conducting informal rulemakings **under 5 U.S.C. § 553**.¹ The rules can cover a
3 variety of practices, including processes for initiating and seeking public input on new rules,
4 coordinating with the Office of Management and Budget and other agencies as a rule is being
5 formulated, and obtaining approval from agency leadership before a proposed rule is issued or
6 finalized. Agencies refer to these rules by different names. This Recommendation calls them
7 “rules on rulemakings.”

8 Rules on rulemakings vary—in terms of the particular matters they address, their scope
9 and comprehensiveness, and other characteristics—but they share several common features.
10 First, they authoritatively reflect the agency’s position as to what procedures it will observe
11 when adopting new rules. By “authoritative,” **this** Recommendation means that a rule on
12 rulemakings sets forth the procedures that agency officials responsible for drafting and finalizing
13 new rules will follow in at least most cases within the rule on rulemakings’ scope, though it may

¹ This Recommendation does not address rulemakings subject to the formal hearing requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 556–57.



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14 contemplate the possibility that agency leadership could authorize an alternative set of
15 procedures.²

16 Second, rules on rulemakings do **not more than** simply summarize or explain rulemaking
17 requirements of the Administrative Procedure Act and other statutes, although they often serve
18 an explanatory function at the same time that they set forth the procedures the agencies will
19 follow in conducting rulemakings. Rules on rulemakings set forth additional commitments by an
20 agency concerning how it will conduct rulemakings. And third, agencies disseminate rules on
21 rulemakings publicly rather than **just only** internally. They appear on agency websites and are
22 often published not only in the **daily** *Federal Register* but also in the **Code of Federal**
23 **Regulations** *Code of Federal Regulations* (CFR).

24 Rules on rulemakings can serve at least four important objectives. First, they promote
25 efficiency by ensuring that both agency officials and those outside the agency know where to go
26 to find the agency's rulemaking policies. Second, they promote predictability by informing the
27 public that the agency will follow particular procedures, thereby allowing the public to plan their
28 participation in the rulemaking process accordingly. Third, they promote accountability by
29 ensuring that agency leadership has approved the policies and procedures the agency will follow.
30 And they can also provide accountability in connection with individual rulemakings by creating
31 an internal approval process by which agency leadership reviews proposed and final rules.
32 Finally, they promote transparency by affording the public access to the agency's internal
33 procedures pertaining to its rulemaking process.

34 In promulgating a rule on rulemakings, an agency may wish to solicit public input to
35 inform the rule's development, even if such a rule is subject to 5 U.S.C. § 553's exemption from
36 notice-and-comment procedures as a rule of procedure, general statement of policy, or otherwise.
37 In soliciting public input, agencies may wish to use mechanisms that facilitate more robust

² Cf. 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).



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38 participation, including by underrepresented communities.³ As the Administrative Conference
39 has acknowledged in past recommendations, public comment can both provide valuable input
40 from the public and enhance public acceptance of **thean** agency’s rules.⁴

41 An agency may also wish to publish its rule on rulemakings in the CFR. Doing so can
42 enhance transparency and facilitate accountability. Importantly, publishing a rule on rulemakings
43 in the CFR does not, by itself, make the rule on rulemakings judicially enforceable.⁵

44 This Recommendation does not **addressseek to resolve** whether, when, or on what legal
45 bases a court might enforce a rule on rulemakings against an agency.⁶ ~~As Paragraph 7 below~~
46 ~~provides, however, an agency that does not wish to be bound by its rule on rulemakings may~~
47 ~~wish to include a provision in its rule on rulemakings stating that such rules do not create any~~
48 ~~substantive or procedural rights or benefits.⁷ However, some or all provisions in a rule on~~
49 ~~rulemakings may be comparable to executive orders that are “intended only to improve the~~
50 ~~internal management of the Federal Government.”⁸ Courts have given effect to language in such~~

Commented [CA1]: Proposed Council Amendment (see parallel amendment at lines 94-96 below and corresponding explanation)

³ See, e.g., 2 U.S.C. § 1534 (Unfunded Mandates Reform Act); 5 U.S.C. § 609 (Regulatory Flexibility Act); Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 11, 2000).

⁴ See Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992); see also Recommendation 2019-1, *supra* note 2; Recommendation 2017-5, *supra* note 2.

⁵ See, e.g., *Health Ins. Ass’n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (stating that “publication in the Code of Federal Regulations, or its absence” is only “a snippet of evidence of agency intent” that the published pronouncement **hasbe given** binding effect).

⁶ ~~Some rules on rulemakings include a statement that they do not create any substantive or procedural rights or benefits. This Recommendation does not address whether such disclaimers should be included or what legal effect they may have on judicial review. These questions cannot be answered in isolation from the broader question of when a rule on rulemakings is judicially enforceable.~~

⁷ See, e.g., 49 C.F.R. § 5.23. Agencies could be discouraged from promulgating rules on rulemakings if courts were to not defer to agencies’ characterizations that they are not judicially enforceable. Cf. *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 228 (D.C. Cir. 2007) (“[W]e have previously relied on similar disclaimers as relevant to the conclusion that a guidance document is non-binding.”).

⁸ See, e.g., Exec. Order 12,866, 58 Fed. Reg. 51,735, § 10 (Oct. 4, 1993).



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51 orders declaring that they do “not create any right or benefit, substantive or procedural.”⁹ Insofar
52 as an agency considers some or all provisions in a rule on rulemakings to have been adopted for
53 internal management reasons, making them inappropriate for private enforcement, it should
54 consider including in the rule on rulemakings a statement that such rules or provisions do not
55 create any substantive or procedural rights or benefits. The option to include such language may
56 encourage agencies to make more extensive use of rules on rulemakings, thereby serving the
57 purposes of this recommendation.

Commented [CMA2]: Proposed Amendment from Senior Fellow Ronald M. Levin (see parallel amendment at lines 97-100 below)

RECOMMENDATION

- 58 1. Agencies should consider promulgating rules on rulemakings setting forth the policies
59 and procedures they will follow when conducting their informal rulemaking process
60 (rules on rulemakings) under 5 U.S.C. § 553.
- 61 2. In issuing rules on rulemakings, agencies should consider including provisions
62 addressing the following topics (which reflect topics frequently covered in existing
63 agency rules on rulemakings):
- 64 (a) procedures prior to the issuance of a notice of proposed rulemaking;
 - 65 (b) procedures connected with the notice-and-comment process;
 - 66 (c) procedures connected with the presidential review process, if applicable;
 - 67 (d) procedures for handling post-comment period communications;
 - 68 (e) internal approval procedures for issuing and finalizing rules; and
 - 69 (f) procedures for reassessing existing rules.
- 70 The appendix gives examples of particular subtopics agencies may wish to consider
71 under each of these topics.

⁹ *Id.*; see, e.g., *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986); *Alliance for Natural Health US v. Sebelius*, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011). See also *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970) (declining to enforce a rule that was “adopted for the orderly transaction of business before” the agency and was “not intended primarily to confer important procedural benefits upon individuals”).



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- 72 3. Agencies should make rules on rulemakings available in a prominent, easy-to-find place
73 on the portion of their websites dealing with rulemaking matters. Additionally, agencies
74 should consider publishing them in the ~~daily~~ *Federal Register* ~~or~~ ~~and~~ the ~~Code of Federal~~
75 ~~Regulations~~ *Code of Federal Regulations*. When posting rules on rulemakings on their
76 websites, agencies should use techniques like linked tabs, pull-down menus, indexing,
77 tagging, and sorting tables to ensure that relevant documents are easily findable.
78 Agencies should also design their search engines to allow people to easily identify
79 relevant documents.
- 80 4. In addition to issuing rules on rulemakings, agencies should consider explaining in
81 accessible language how the rulemaking process works in order to educate the public.
82 Such explanations might be integrated within a rule on rulemakings or might be
83 contained in separate explanatory documents (e.g., documents identifying frequently
84 asked questions). When providing such explanations, an agency should, to the extent
85 practicable, distinguish between procedures it intends to follow and material provided
86 purely by way of background.
- 87 5. Agencies should consider a broad range of means for seeking public input on rules on
88 rulemakings, ~~whether or not even if the Administrative Procedure Act does not requires~~
89 it.
- 90 6. Agencies should consider the extent to which procedures required by a rule on
91 rulemakings ~~are~~ ~~should be made~~ internally waivable and, if so, by whom. For example,
92 they might consider drafting a rule on rulemakings in a way that allows high-level agency
93 officials to permit other officials to use alternative procedures.
- 94 ~~7. If agencies do not wish for their rules on rulemakings to be enforceable in court on~~
95 ~~judicial review, they should consider including a statement within their rules on~~
96 ~~rulemakings that such rules do not create any substantive or procedural rights or benefits.~~
- 97 ~~7. Insofar as an agency considers some or all provisions in a rule on rulemakings to have~~
98 ~~been adopted for internal management reasons, making them inappropriate for private~~

Commented [CA3]: Proposed Council Amendment (see parallel amendment at lines 45-48 above). Explanation: The Council appreciates the considerations that underly this Paragraph and encourages discussion of it at the plenary session. But the Council is concerned that, as currently drafted, the Paragraph takes a position on the legal effect of blanket disclaimers with which courts may disagree. The Council recommends that the Conference say no more on the issue than what appears in revised footnote 6. Individual Council members may wish to express additional views at the plenary session.



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enforcement, it should consider including in the rule on rulemakings a statement that such rules or provisions do not create any substantive or procedural rights or benefits.

Commented [CMA4]: Proposed Amendment from Senior Fellow Ronald M. Levin (see parallel amendment at lines 48-57 above)



APPENDIX

Non-exhaustive List of Topics for Agencies to Consider Including Within Their Rules on Rulemakings

- 101 **(a) procedures prior to the issuance of a notice of proposed rulemaking**
102 § Subtopic examples:
103 (1) regulatory planning;¹⁰
104 (2) issuing advance notices of proposed rulemaking and obtaining feedback from
105 members of the public using means other than the notice-and-comment
106 process, such as requests for information and focus groups;¹¹
107 (3) accepting, reviewing, and responding to petitions for rulemaking;¹²
108 (4) considering options besides rulemaking;
109 (5) performing ex ante regulatory analyses (e.g., benefit-cost analysis and
110 regulatory flexibility analysis);¹³
111 (6) using plain language in regulatory drafting;¹⁴
112 (7) preparing for potential judicial review of rulemakings, including deciding
113 whether to make any of the provisions of a rule severable;¹⁵

¹⁰ See Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757 (June 26, 2015).

¹¹ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

¹² See Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014).

¹³ See Admin. Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

¹⁴ See Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

¹⁵ See Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 Fed. Reg. 30,685 (June 29, 2018).



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- 114 (8) conducting negotiated rulemaking;¹⁶ and
115 (9) establishing an effective date for rules.

116 **(b) procedures connected with the notice-and-comment process**

117 **Subtopic examples:**

- 118 (1) materials to be published on Regulations.gov with the notice;¹⁷
119 (2) minimum comment periods to be allowed;¹⁸
120 (3) policies on ex parte contacts;¹⁹
121 (4) handling external merits communications not filed as comments;
122 (2)(5) handling intra-agency, interagency, and other internal Executive Branch
123 merits communications not filed as comments;
124 (3)(6) incorporating standards by reference;²⁰
125 (4)(7) using social media to engage the public in rulemaking;²¹
126 (5)(8) obtaining feedback from American Indian tribes, other historically
127 underrepresented or under-resourced groups, and state and local
128 governments;²²

Commented [CMA5]: Proposed Amendment from Public Member Jack M. Beermann. Note: See parallel amendment at line 146 below.

¹⁶ See Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,040 (July 5, 2017).

¹⁷ See Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019).

¹⁸ See Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

¹⁹ See Admin. Conf. of the U.S., Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

²⁰ See Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

²¹ See Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

²² See Recommendation 2018-7, *supra* note 8.



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- 129 ~~(6)(9)~~ posting, analyzing, and responding to public comments, including
- 130 comments that may contain confidential commercial information, protected
- 131 personal information, or other kinds of sensitive submissions;²³
- 132 ~~(7)(10)~~ waiving or invoking of Administrative Procedure Act exemptions to
- 133 notice and comment;²⁴ and
- 134 ~~(8)(11)~~ using interim final rules or direct final rules.²⁵

(c) procedures connected with the presidential review process, if applicable

§ Subtopic examples:

- 136 (1) interacting with the Office of Information and Regulatory Affairs, the Office
- 137 of the Federal Register, the Regulatory Information Service Center, the Small
- 138 Business Administration’s Office of Advocacy, and other offices with
- 139 government-wide rulemaking responsibilities;
- 140 (2) participating in the interagency review process; and
- 141 (3) procedures related to international regulatory cooperation.²⁶

(d) procedures for handling post-comment period communications

§ Subtopic examples:

- 144 (1) provisions ~~respecting~~ **pertaining to** reply comments;²⁷
- 145 (2) ~~handling external merits communications not filed as comments;~~²⁸ and
- 146

Commented [CMA6]: Proposed Amendment from Public Member Jack M. Beermann. Note: See parallel edit at lines 120-23 above, where Mr. Beermann proposes moving this language.

²³ See **Admin. Conf. of the U.S., Recommendation 2020-2, Protected Materials in Public Rulemaking Dockets, Fed. Reg. _____**; Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011). ~~There is also an ongoing project of the Administrative Conference called Protected Materials in Public Rulemaking Dockets that deals with these subjects.~~

²⁴ See Recommendation 92-1, *supra* note 4.

²⁵ See Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemakings*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

²⁶ See Admin. Conf. of the U.S., Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2259 (Jan. 17, 2012).

²⁷ See Recommendation 2011-2, *supra* note 15.

²⁸ See ~~Admin. Conf. of the U.S., Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).~~



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147 (3) handling late-filed comments.²⁹

148 **(e) internal approval procedures for issuing and finalizing rules**

149 **§** *Subtopic examples:*

150 (1) procedures for submitting rules to offices with legal, economic, and other
151 responsibilities within the agency for review³⁰ and

152 (2) procedures for submitting rules to the relevant agency official for final
153 approval.

154 **(f) procedures for reassessing existing rules**

155 **§** *Subtopic examples:*

156 (1) issuing regulatory waivers and exemptions,³¹

157 (2) engaging in retrospective review of rules,³²

158 (3) maintaining and preserving rulemaking records, including transparency of
159 such records and the handling of confidential commercial information,
160 protected personal information, or other kinds of sensitive information
161 contained therein,³³ and

162 (4) handling rules that have been vacated or remanded without vacatur.³⁴

²⁹ See Recommendation 2011-2, *supra* note 15.

³⁰ See Admin. Conf. of the U.S., Recommendation 2019-5, *Agency Economists*, 84 Fed. Reg. 71,349 (Dec. 27, 2019).

³¹ See Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61,742 (Dec. 29, 2017).

³² See Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

³³ See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

³⁴ See Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,272 (Dec. 17, 2013).