



Declaratory Orders

Committee on Adjudication

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1 Providing clarity and certainty is an enduring challenge of administrative governance,
2 particularly in the regulatory context. Faced with uncertainty about how an agency will regulate
3 a project or transaction, businesses and individuals may be unable or unwilling to act. The
4 consequences for the economy, society, and technological progress can be significant and
5 harmful. The predominant way agencies address this problem is by providing guidance to
6 regulated parties.¹ Although the many forms of agency guidance—such as interpretive rules,
7 policy statements, and memoranda—do much to dispel regulatory uncertainty, they cannot
8 eliminate it entirely. This is because they are generally informal and not legally binding on the
9 agency that issues them. Regulated parties may usually be able to rely upon them, but if an
10 agency changes its position after a transaction is completed, the consequences for the affected
11 party can be severe. As the potential costs of misplaced reliance rise, even a small chance that
12 an agency will not adhere to a position offered in guidance can become intolerable.

13 When it enacted the Administrative Procedure Act (APA) in 1946, Congress included a
14 provision designed to address this difficult problem. In Section 5(d), codified at 5 U.S.C. § 554(e),

¹ The Administrative Conference has adopted a number of recommendations on agency guidance. See Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014), available at <https://www.acus.gov/recommendation/guidance-rulemaking-process>; Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992), available at <https://www.acus.gov/recommendation/agency-policy-statements>; Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976), available at <https://www.acus.gov/recommendation/interpretive-rules-general-applicability-and-statements-general-policy>; Recommendation 75-9, *Internal Revenue Service Procedures: Taxpayer Services and Complaints*, 41 Fed. Reg. 3986 (Jan. 27, 1976), available at <https://www.acus.gov/recommendation/internal-revenue-service-procedures-taxpayer-services-and-complaints>; Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973), available at <https://www.acus.gov/recommendation/articulation-agency-policies>.



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15 it provided that an “agency, with like effect as in the case of other orders, and in its sound
16 discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”²
17 The declaratory order is a type of adjudication that serves an important advice-giving function.
18 It may be issued in response to a petition filed with the agency or on the agency’s own motion.
19 It is well tailored to provide a level of certainty that may not be achievable using more informal
20 kinds of guidance. This is because it is non-coercive and yet legally binds the agency and the
21 named party, but only on the facts assumed in the order. The agency remains free to change its
22 position with adequate explanation in a subsequent proceeding. It is a device that affords
23 substantial administrative discretion—the agency may decline a request to institute a declaratory
24 proceeding or to issue a declaratory order. An agency’s decision, be it a denial of a petition or
25 the issuance of a declaratory order, is judicially reviewable. But the scope of review is limited,
26 and the position an agency takes in a declaratory order is typically afforded deference, both on
27 judicial review and when relevant to matters at issue in subsequent or parallel litigation.

28 There is a wide variety of purposes for which an agency may properly use a declaratory
29 order, including to: (1) interpret the agency’s governing statute or own regulations; (2) define
30 terms of art; (3) clarify whether a matter falls within federal regulatory authority; or (4) address
31 questions of preemption.³ One occasion for doing so is a response to a court’s request for a
32 ruling when the court has found that the agency has primary jurisdiction over a matter being
33 litigated. By providing definitive guidance through a document of easily ascertainable legal
34 effect, declaratory orders may reduce or eliminate litigation.⁴ By using declaratory orders to

² 5 U.S.C. § 554(e); *see generally* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 30-34 (1941) (urging Congress to include the declaratory orders provision in the APA).

³ *See Illinois Terminal R.R. v. ICC*, 671 F.2d 1214 (8th Cir. 1992); *N. Y. State Comm’n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *North Carolina Utils. Comm’n*, 537 F.2d 787 (4th Cir. 1976); *Ashland Oil & Refining Co. v. FPC*, 421 F.2d 17 (6th Cir. 1970).

⁴ *Cf. Mitchell Rogovin & Donald L. Korb, The Four R’s Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 331.



35 address narrow questions raised by specific and uncontested facts, an agency can precisely
36 define the legal issues it addresses and reserve related issues for future resolution, thereby
37 facilitating an incremental approach to the provision of regulatory guidance. The resulting body
38 of agency precedent will not only be useful to regulated and other interested parties, but may
39 also prove invaluable to the agency when it later decides to conduct a rulemaking or other
40 proceeding for formulating policy on a broader scale. Other uses may be possible as well. For
41 example, an agency that conducts mass adjudication could use the declaratory order to promote
42 uniformity by giving its own adjudicators practical and detailed guidance regarding the proper
43 application of the law to commonly encountered factual circumstances.⁵

44 Despite the apparent usefulness of the declaratory order as a tool of administrative
45 governance, agencies have demonstrated a persistent reluctance to use it. The Administrative
46 Conference recognizes the declaratory order as a useful device to be used in appropriate
47 circumstances. To that end, this recommendation provides guidance and best practices to
48 agencies as they consider implementing or improving their use of declaratory orders.

RECOMMENDATION

49 **Defining the Scope of Declaratory Practice**

50 1. Agencies should use declaratory orders when it is necessary to provide binding, non-
51 coercive guidance to regulated parties in order to terminate an actual or emerging controversy
52 or to resolve uncertainty in the application of existing legal requirements.

53 2. Agencies should create a declaratory order procedure through which litigants can seek
54 the agency's considered views when it finds that the meaning of its governing statute,

⁵ See the Administrative Conference's project on Aggregate Agency Adjudication. AGGREGATE AGENCY ADJUDICATION, <https://www.acus.gov/research-projects/aggregate-agency-adjudication> (last visited Sept. 16, 2015).



55 regulations, or other legal documents (such as permits or licenses) is commonly at issue in
56 litigation to which the agency is not a party.

57 3. Agencies should issue regulations or guidance to communicate and enforce its
58 preferred uses of declaratory orders.

59 4. Agencies should experiment with innovative uses of declaratory orders to improve
60 regulatory programs by providing binding and reliable guidance.

61 **Initiating the Proceeding**

62 5. Agency procedures should specify the information that regulated parties should
63 include in a petition for declaratory order.

64 6. Agencies that are so authorized should consider assessing reasonable filing fees for
65 petitions for declaratory order, with appropriate exemptions.

66 7. Agencies should look for opportunities to improve regulatory and adjudicatory
67 programs through proactive, sua sponte issuance of declaratory orders.

68 **Determining Minimal Procedural Requirements for Declaratory Orders**

69 8. When designing the procedures that it will observe in a declaratory proceeding,
70 agencies must begin by determining whether or not the matter is one that must be adjudicated
71 according to the formal adjudication provisions of the APA.

72 (a) For adjudication on matters subject to the formal adjudication provisions of the
73 APA, the minimal requirements of the APA must be met, such as observing
74 separation of functions requirements, providing adequate notice of the
75 proceeding, and observing prohibitions on ex parte communications.



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76 (b) For adjudication on matters not required by statute to be conducted under the
77 APA's formal adjudication provisions, an agency has substantial discretion but
78 should use at minimum a basic form of notice and opportunity for comment.

79 9. Each agency that uses declaratory orders should have procedures, embodied in a
80 written and publicly available policy statement or procedural rule, explaining how the agency
81 initiates, conducts, and terminates declaratory proceedings.

82 **Giving Notice and Collecting Information**

83 10. Agencies should give public notice when they receive a petition for declaratory order
84 or intend to issue a declaratory order on their own motion.

85 (a) If the declaratory proceeding involves a narrow question of how existing
86 regulations would apply to an individual party's proposed actions, the agency may
87 limit the submission of comments via an intervention process.

88 (b) If the matter is one of broader interest or general policy, then the agency should
89 use a process more akin to notice-and-comment rulemaking.

90 11. Agencies should provide interested persons with an opportunity to comment when
91 they receive a petition for declaratory order or intend to issue a declaratory order on their own
92 motion. Agencies should tailor this opportunity according to the nature of the proceeding and
93 the needs of potential commenters.

94 **Issuing Declaratory Orders**

95 12. Agencies that receive a petition for declaratory order should respond to that petition
96 within a reasonable period of time. If an agency denies the petition, it should give prompt notice
97 of its decision, accompanied by a brief explanation of its reasons.



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98 13. Agencies should make their declaratory decisions, including orders and other
99 dispositions on petitions, available to the public in a centralized and easy-to-find location on their
100 websites.

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