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

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

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it provided that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”

The declaratory order is a type of adjudication that serves an important advice-giving function. It may be issued in response to a petition filed with the agency or on the agency’s own motion. It is well tailored to provide a level of certainty that may not be achievable using more informal kinds of guidance. This is because it is non-coercive and yet legally binds the agency and the named party, but only on the facts assumed in the order. The agency remains free to change its position with adequate explanation in a subsequent proceeding. It is a device that affords substantial administrative discretion—the agency may decline a request to institute a declaratory proceeding or to issue a declaratory order. An agency’s decision, be it a denial of a petition or the issuance of a declaratory order, is judicially reviewable. But the scope of review is limited, and the position an agency takes in a declaratory order is typically afforded deference, both on judicial review and when relevant to matters at issue in subsequent or parallel litigation.

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

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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. 1982); 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).

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

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

**RECOMMENDATION**

**Defining the Scope of Declaratory Practice**

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

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

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

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

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

**Initiating the Proceeding**

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

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

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

**Determining Minimal Procedural Requirements for Declaratory Orders**

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

(a) For adjudication on matters subject to the formal adjudication provisions of the APA, the minimal requirements of the APA must be met, such as observing separation of functions requirements, providing adequate notice of the proceeding, and observing prohibitions on ex parte communications.
(b) For adjudication on matters not required by statute to be conducted under the APA’s formal adjudication provisions, an agency has substantial discretion but should use at minimum a basic form of notice and opportunity for comment.

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

**Giving Notice and Collecting Information**

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

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

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

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

**Issuing Declaratory Orders**

12. Agencies that receive a petition for declaratory order should respond to that petition within a reasonable period of time. If an agency denies the petition, it should give prompt notice of its decision, accompanied by a brief explanation of its reasons.
13. Agencies should make their declaratory decisions, including orders and other dispositions on petitions, available to the public in a centralized and easy-to-find location on their websites.