



## Declaratory Orders

### Committee on Adjudication

#### Draft Recommendation | October 20, 2015

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

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<sup>1</sup> 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>.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14           When it enacted the Administrative Procedure Act (APA) in 1946, Congress included a  
15 provision designed to address this difficult problem. In 5 U.S.C. § 554(e), it provided that an  
16 “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a  
17 declaratory order to terminate a controversy or remove uncertainty.”<sup>2</sup> The declaratory order is  
18 a type of adjudication that serves an important advice-giving function. It may be issued in  
19 response to a petition filed with the agency<sup>3</sup> or on the agency’s own motion. It is well tailored to  
20 provide a level of certainty that may not be achievable using more informal kinds of guidance.  
21 This is because it is non-coercive and yet legally binds the agency and the named party, but only  
22 on the facts assumed in the order. The agency remains free to change its position with adequate  
23 explanation in a subsequent proceeding. It is a device that affords substantial administrative  
24 discretion—the agency may decline a request to institute a declaratory proceeding or to issue a  
25 declaratory order. An agency’s decision, be it a denial of a petition or the issuance of a  
26 declaratory order, is judicially reviewable. But the scope of review is limited, and the position an  
27 agency takes in a declaratory order is typically afforded deference, both on judicial review and  
28 when relevant to matters at issue in subsequent or parallel litigation. In the latter instance, it  
29 could even have preclusive effect.<sup>4</sup>

30           An agency may properly use a declaratory order for a wide variety of purposes, including  
31 to: (1) interpret the agency’s governing statute or own regulations; (2) define terms of art; (3)  
32 clarify whether a matter falls within federal regulatory authority; or (4) address questions of

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<sup>2</sup> 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).

<sup>3</sup> An agency so authorized may assess a filing fee to help defray the cost of issuing declaratory orders in response to petitions.

<sup>4</sup> *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015) (holding that the decisions of administrative tribunals can, and often do, have preclusive effect).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

33 preemption.<sup>5</sup> One occasion for doing so is in response to a court's request for a ruling when the  
34 court has found that the agency has primary jurisdiction over a matter being litigated. By  
35 providing definitive guidance through a document of easily ascertainable legal effect, declaratory  
36 orders may reduce or eliminate litigation.<sup>6</sup> By using declaratory orders to address narrow  
37 questions raised by specific and uncontested facts, an agency can precisely define the legal issues  
38 it addresses and reserve related issues for future resolution, thereby facilitating an incremental  
39 approach to the provision of regulatory guidance. The resulting body of agency precedent will  
40 not only be useful to regulated and other interested parties, but may also prove invaluable to the  
41 agency when it later decides to conduct a rulemaking or other proceeding for formulating policy  
42 on a broader scale. Other uses may be possible as well. For example, an agency that conducts  
43 mass adjudication could use the declaratory order to promote uniformity by choosing to give  
44 practical and detailed guidance or make binding, decisional law regarding the proper application  
45 of the law to commonly encountered factual circumstances.

46 Despite the apparent usefulness of the declaratory order as a tool of administrative  
47 governance, agencies have demonstrated a persistent reluctance to use it. Several developments  
48 may encourage agencies to overcome this traditional reluctance to use declaratory orders. First,  
49 it is now reasonably clear that agencies may issue declaratory orders in informal adjudication.<sup>7</sup>  
50 This development expands the availability of the device and also reduces the cost and procedural

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<sup>5</sup> 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).

<sup>6</sup> 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.

<sup>7</sup> See *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996); *Texas v. United States*, 866 F.2d 1546, 1555-56 (5th Cir. 1989); Emily S. Bremer, *Declaratory Orders 12-13, 32-33, 36-37* (Sept. 18, 2015), available at <https://www.acus.gov/report/declaratory-orders-draft-report>. For example, courts have affirmed the sufficiency of basic notice-and-comment procedures when agencies issue a declaratory order in informal adjudication. See *City of Arlington v. FCC*, 668 F.3d 229, 243-45 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013).



51 burden of using declaratory orders.<sup>8</sup> Second, courts today are more willing to review guidance  
52 documents and to question an agency's characterization of its action as non-binding. Agencies  
53 may be able to avoid some of the attendant litigation risk by using declaratory orders—a binding,  
54 but targeted form of instruction—in lieu of other forms of non-binding, legislative guidance.  
55 Agencies may also be able to use declaratory orders to provide requisite notice to regulated  
56 parties of the agency's intention to enforce in the future a rule or principle that has previously  
57 been communicated only via non-binding guidance. Finally, new programs and new challenges  
58 facing old programs may create opportunities to beneficially expand the use of declaratory  
59 orders.

60 The Administrative Conference recognizes the declaratory order as a useful device to be  
61 used in appropriate circumstances. To that end, this recommendation provides guidance and  
62 best practices to agencies as they consider implementing or improving their use of declaratory  
63 orders.

## RECOMMENDATION

64 1. Agencies should consider issuing declaratory orders as authorized by 5 U.S.C. § 554(e),  
65 either sua sponte or by petition, to provide binding, non-coercive guidance to regulated parties  
66 in order to terminate an actual or emerging controversy or to resolve uncertainty in the  
67 application of existing legal requirements.

68 2. Any filing fees for issuing declaratory orders should be reasonable within the fee  
69 structure of the agency and contain appropriate exemptions and waivers.

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<sup>8</sup> Even if the matter is one subject by statute to formal adjudication under the APA, an agency may be able to streamline the process of issuing a declaratory order. *Cf.* Administrative Conference of the United States, Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973). See *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 625 (1973).



70 **Potential Uses of Declaratory Orders**

71 3. An agency should consider issuing declaratory orders in several ways, including, but  
72 not limited, to:

73 (a) Communicating the agency's considered views regarding the meaning of its  
74 governing statute, regulations, or other legal documents (such as permits,  
75 licenses, certificates, or other authorizations the agency has issued);

76 (b) Explaining how existing legal requirements apply to proposed or contemplated  
77 transactions or other activities;

78 (c) Defining terms of art that are used within the agency's regulatory scheme;

79 (d) Clarifying whether a matter falls within federal regulatory authority;

80 (e) Clarifying a division of jurisdiction between or among federal agencies that  
81 operate in a shared regulatory space; and

82 (f) Addressing questions of preemption.

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

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

86 5. Each agency that uses declaratory orders should have written and publically available  
87 procedures explaining how the agency initiates, conducts, and terminates declaratory  
88 proceedings. An agency should also communicate in a written and publicly available way its  
89 preferred uses of declaratory orders.



90           6. When designing the procedures for its declaratory proceedings, an agency should begin  
91 by determining whether or not the matter is one that must be adjudicated according to the  
92 formal adjudication provisions of the APA. If the matter is not required by statute to be  
93 conducted under the APA's formal adjudication provisions, an agency has substantial procedural  
94 discretion, but at a minimum should provide a basic form of notice and opportunity for comment.

95           7. Agency procedures should provide guidance regarding the information that petitioners  
96 should include in a petition for declaratory order.

97           **Giving Notice and Collecting Information**

98           8. Each agency should provide a way for petitioners and other interested parties to learn  
99 when the agency has received a petition for declaratory order or intends to issue a declaratory  
100 order on its own motion. The agency should tailor this communication according to the nature  
101 of the proceeding and the needs of potential commenters.

102           9. Each agency should provide a way for interested parties to participate in proceedings  
103 involving petitions for declaratory order.

104           (a) If the matter is one of broad interest or general policy, the agency should allow  
105 broader public participation.

106           (b) If the declaratory proceeding involves a narrow question of how existing  
107 regulations would apply to an individual party's proposed actions, the agency may  
108 choose to manage the submission of comments via an intervention process.



109 **Timeliness and Availability of Declaratory Orders**

110           10. Agencies that receive a petition for declaratory order should respond to that petition  
111 within a reasonable period of time. If an agency declines to act on the petition, it should give  
112 prompt notice of its decision, accompanied by a brief explanation of its reasons.

113           11. Agencies should make their declaratory orders and other dispositions on petitions  
114 available to the public in a centralized and easy-to-find location on their websites.

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