

Declaratory Orders

Final Report to the Administrative Conference of the United States

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INTRODUCTION

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 that agencies address this problem is by providing guidance to regulated parties. This guidance takes a variety of forms. It may be oral or written. It may come from agency enforcement personnel, general counsel offices, or other staff or offices that interact on a regular basis with members of the regulated industry. There are innumerable forms of written guidance, including interpretative rules, policy statements, rulemaking preambles, memoranda, pamphlets, and letters.¹ Although these many forms of agency guidance do much to

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¹ The Administrative Conference has adopted a number of recommendations on agency guidance. See Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,988,

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 when 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), 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.”² The declaratory order is a creature 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 just the level of certainty required to overcome the deficiency of 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, and the agency remains free to change its position with adequate explanation in a subsequent proceeding.³ The declaratory order is a device that affords substantial administrative discretion—the agency may decline a request to institute a declaratory proceeding or issue a particular 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.

Despite the apparent usefulness of the declaratory order as a tool of administrative governance, agencies have demonstrated a persistent reluctance to use it. A variety of explanations have been offered to explain this reluctance, but two bear special mention. First, for many decades, the prevailing view was that the placement of the APA’s declaratory orders provision within Section 5, governing formal adjudication, limited the

35,992 (June 25, 2014); Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976); Admin. Conf. of the U.S., Recommendation 75-9, *Internal Revenue Service Procedures: Taxpayer Services and Complaints*, 41 Fed. Reg. 3986 ¶ c (Jan. 27, 1976); Admin. Conf. of the U.S., Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973).

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) [hereinafter AG’S REPORT] (urging Congress to include the declaratory orders provision in the APA).

³ Courts have occasionally misapprehended the nature of the declaratory order and characterized it as a form of informal guidance. See, e.g., *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 391-92 (5th Cir. 2014) (stating, without any citation to or acknowledgement of 5 U.S.C. § 554(e), that “[w]hile this FERC-issued document is rather impressively called a Declaratory Order, it is actually akin to an informal guidance letter”).

device to that context. Under this view, an agency could not issue a declaratory order through informal adjudication or use such an order to address a matter not subject by statute to adjudication under the APA. This considerably limited the availability of the device. Second, agencies have expressed a strong disinclination to legally bind themselves, preferring to offer advice through informal, non-binding guidance that was generally immune from judicial review. Over the years, scholars and other experts offered solutions to these and other sources of agency reticence and consistently urged that the use of declaratory orders should be expanded.⁴ Their efforts have been largely unsuccessful.

This Report evaluates the current status of declaratory practice in administrative agencies, urges that the practice should be expanded, and suggests procedures and best practices that agencies should follow in declaratory proceedings.⁵ Two fairly recent developments may improve the likelihood that this project can succeed where others have failed. First, over the last two decades, the courts have clearly held that a declaratory order may be properly issued through informal adjudication. This shift removes the most significant legal hurdle to expanded agency use of declaratory orders. Second, during the same timeframe, the courts also have shown a greater willingness to review agency guidance and to scrutinize an agency's characterization of a document as non-binding. This has been motivated in part by concern that agencies have been using guidance documents to evade the procedural requirements of the increasingly "ossified" informal rulemaking process. This judicial trend may reduce for agencies the comparative appeal of informal guidance. Beyond these developments, there may be new opportunities for agencies to use declaratory orders in creative ways to address modern needs. For example, agencies that adjudicate a large volume of similar claims and face substantial backlogs may be able to use declaratory orders to streamline their processes.⁶

⁴ See generally Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 ADMIN. L. REV. 1097 (2004).

⁵ Although the Administrative Conference studied declaratory orders in the early 1980s, it has not previously adopted any recommendation on the subject. The Conference's consultant on the previous project, Professor Burnele V. Powell (then of the University of North Carolina School of Law), published several articles based on his study. See Burnele V. Powell, *Regular Appellate Review, Direct Judicial Review, and the Role of Review of the Declaratory Order: Three Roads to Judicial Review*, 40 ADMIN. L. REV. 451 (1988) [hereinafter Powell, *Three Roads*]; Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L. REV. 277 (1986) [hereinafter Powell, *Administratively Declaring Order*]; Burnele V. Powell, *Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act*, 63 N.C. L. REV. 339 (1985) [hereinafter Powell, *Sinners*]. The Conference's most recent relevant work is Recommendation 2014-6, *Petitions for Rulemaking*. See 79 Fed. Reg. 75,114, 75,117 (Dec. 17, 2014) [hereinafter *Petitions for Rulemaking*]; see also Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Final Report to the Admin. Conf. of the U.S. (Nov. 5, 2014), available at <https://www.acus.gov/report/petitions-rulemaking-final-report>.

⁶ This possibility may be relevant to the Administrative Conference's current project on Aggregate Agency Adjudication. See <https://www.acus.gov/research-projects/aggregate-agency-adjudication>.

This report is based on a review and analysis of relevant statutes and legislative history, judicial opinions, administrative materials (e.g., agency regulations, orders, guidance), and scholarly literature. It also incorporates information obtained through interviews with personnel from the agencies that have adopted procedural regulations governing declaratory proceedings, have substantial experience with the use of declaratory orders, or issue decisions that appear to be analogous to declaratory orders. Interviews accordingly were conducted with personnel from the Federal Communications Commission (FCC),⁷ the Federal Energy Regulatory Commission (FERC), Federal Maritime Commission (FMC), the Internal Revenue Service (IRS), and the Surface Transportation Board (STB) (a successor to the Interstate Commerce Commission (ICC), which had perhaps the most robust declaratory order practice of any agency). The report proceeds in five parts. Part I provides essential background by describing the characteristics of the declaratory order, arguing that the device may be used in informal adjudication, and examining the history of agency use (and non-use) of declaratory orders. Part II explores legal issues that arise in connection with judicial review of declaratory orders. Part III catalogs the proper uses of declaratory orders, considers analogous forms of agency advice-giving, and argues that agencies should use declaratory orders more frequently. Part IV analyzes the minimum procedural requirements for declaratory proceedings, describes the procedures agencies currently use in such proceedings, and suggests best practices. Part V concludes.

I. THE FUNDAMENTALS OF ADMINISTRATIVE DECLARATORY ORDERS

This part begins by providing background on administrative declaratory orders. First, it discusses the statutory basis for declaratory orders under the APA and other statutes and explores the defining characteristics of declaratory orders. Next, it addresses the question of whether declaratory orders may be issued through informal adjudication. Finally, it examines the history of agency use (and non-use) of declaratory orders.

A. What is a Declaratory Order?

Section 5(d) of the APA, which is codified at 5 U.S.C. § 554(e), provides 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.”⁸ Enacted in 1946 and inspired by the then-recent development of state and federal courts’ being authorized to grant declaratory judgments,⁹ Section 5(d) was intended to extend to

⁷ Many if not most of the FCC’s declaratory rulings are issued on delegated authority at the bureau level. To ensure an adequate understanding of the full range of practices within the agency, I interviewed employees from the Consumer and Governmental Affairs, International, Media, Wireless Telecommunications, and Wireline Competition Bureaus, as well as the Office of the General Counsel.

⁸ 5 U.S.C. § 554(e).

⁹ See, e.g., AG’S REPORT, *supra* note 2, at 30 (discussing judicial declaratory judgments and stating that “[t]he time is ripe for introducing into administration itself an instrument similarly devised, to achieve similar

administrative agencies an analogous method for issuing binding rulings capable of providing clear and certain guidance to regulated parties without requiring those parties to first act on peril of sanction.¹⁰ As with many other aspects of administrative procedure, agency use of declaratory orders predated the APA.¹¹ But the practice was not widespread.¹² Congress had authorized only a few agencies to issue declaratory rulings, and the prevailing view was that, in the absence of specific statutory authorization, an agency was “powerless to render a binding declaratory ruling.”¹³ The inclusion of Section 5(d) addressed this difficulty by providing a blanket authorization for adjudicating agencies to issue declaratory orders. In addition to the APA’s cross-cutting authorization, Congress has occasionally granted to individual agencies more targeted statutory authority to issue declaratory orders, often to serve specified purposes.¹⁴ In addition, courts have found support for the issuance of declaratory orders in statutes that confer broader authorities, such as that to direct “other appropriate relief.”¹⁵

Declaratory orders (sometimes also called “declaratory rulings”)¹⁶ serve an important advice-giving function. This is evident in the APA’s text, which describes declaratory orders as agency decisions that “terminate a controversy or remove uncertainty.”¹⁷ Courts have found these twin statutory purposes essential to the

results in the administrative field.”); *cf.* John R. Reilly, *Declaratory Orders Under the APA – The Need for Legislation*, 52 IOWA L. REV. 657, 658 (1967) (describing the declaratory order as “the administrative counterpart of the declaratory judgment”).

¹⁰ *See, e.g.*, AG’S REPORT, *supra* note 2, at 6 (explaining that “in order to impart certainty to the administrative process, and to aid individual citizens seeking an authoritative statement of their rights and duties, the bill [that became the APA] proposes to authorize agencies to issue binding declaratory rulings”).

¹¹ *See, e.g.*, Bernard B. Goldner, *Declaratory Actions*, 2 CATHOLIC U.L. REV. 1, 1 (1952) (“Since 1938, the Bureau of Internal Revenue has been empowered to consummate ‘closing agreements,’ a form of declaratory order, and other federal agencies have operated under statutes granting them power to issue advisory opinions and declaratory rulings.”).

¹² *See, e.g.*, Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 228 (1949) (“Federal agencies rarely issued declaratory orders before the APA was enacted, and then only pursuant to special statutory provisions.”).

¹³ AG’S REPORT, *supra* note 2, at 31; *see also* Herman Oliphant, *Declaratory Rulings*, 24 A.B.A. J. 7, 8 (1938) (discussing the Treasury’s efforts to secure congressional approval to issue binding declarations to resolve uncertainty in taxation); *but see* Davis, *supra* note 12, at 228-29 (explaining a few qualifications necessary to the AG’s assertion that agencies are generally powerless to issue declaratory orders).

¹⁴ *See, e.g.*, *Ashland Oil & Ref. Co. v. Fed. Power Comm’n*, 421 F.2d 17, 20 (6th Cir. 1970) (noting that the Federal Power “Commission has statutory authority to issue declaratory orders,” citing both 5 U.S.C. § 554(e) and 15 U.S.C. § 717(o)); *see generally* Roger W. Kapp & Robert N. Hart, *A Case Against Restraint: Declaratory Status Orders Under the Investment Company Act of 1940*, 61 CORNELL L. REV. 231 (1976) (examining the SEC’s authority and responsibility to issue declaratory status orders under the Investment Company Act of 1940).

¹⁵ *See Climax Molybdenum*, 703 F.2d at 452 (quoting 30 U.S.C. § 815(d)).

¹⁶ *See* 47 C.F.R. § 1.2; *see also* Powell, *Sinners*, *supra* note 5, at 365 n. 112 (“The ‘ruling’ designation . . . is longstanding with the FCC.”).

¹⁷ 5 U.S.C. § 554(e); *see, e.g.*, *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 993 n.23 (1978) (“A declaratory order is any order issued by an agency or staff member at a sufficiently high level,

definition of a valid declaratory order and have held (albeit in relatively rare instances) that an agency’s decision is not properly characterized as a “declaratory order” if it does not serve at least one of these purposes.¹⁸ An agency decision serves the first statutory purpose if it resolves “an actual controversy between” two parties.¹⁹ More commonly, and as will be discussed in greater detail in Part III, agencies use declaratory orders to resolve various kinds of uncertainty regarding the application of existing statutes or regulations to new or different factual circumstances.²⁰ This is in accord with the expectations of the APA’s supporters, as the Attorney General’s final report to Congress explains:

The perils of unanticipated sanctions and liabilities . . . should be reduced or eliminated. A major step in that direction would be the establishment of procedures by which an individual who proposed to pursue a course which might involve him in dispute with an administrative agency, might obtain from that agency, in the latter’s discretion, a binding declaration concerning the consequences of the proposed action.²¹

In keeping with these intentions, agencies have used declaratory orders to clarify the regulatory status of proposed projects so as to facilitate the necessary (and often significant) financial investment to launch them,²² to put regulated parties on notice that certain conduct will henceforth trigger sanctions or other enforcement action,²³ or to clarify the boundary between state and federal regulation.²⁴ As these varied purposes perhaps suggest, it is often difficult to draw a clear distinction between declaratory orders

that has sufficient formality, that does not coerce, and that has sufficient binding effect to be judicially reviewable.”); Goldner, *supra* note 11, at 1 (“The declaratory ruling or order is the device whereby administrative agencies make decisions in advance of affirmative action so that rights and duties are declared, and affected persons can regulate their conduct and actions accordingly.”).

¹⁸ See *Hollister Ranch Owners’ Ass’n v. FERC*, 759 F.2d 898 (D.C. Cir. 1985).

¹⁹ See *W. Coast Truck Lines v. Am. Indus., Inc.*, 893 F.2d 229, 233 (9th Cir. 1990). Where the parties have come before the agency with a question that is at issue in state or federal litigation, the agency’s decision may “resolve controversy” within the meaning of Section 554(e) even if it is not outcome-determinative before the courts. See *City of Chicago v. FCC*, 199 F.3d 424, 428-29 (7th Cir. 1999).

²⁰ See *infra* at Part. III.A; see, e.g., *British Caledonian Airways*, 584 F.2d at 989 (“That some tariffs did not contain information on cancellation charges while others did, points to exactly that sort of ‘uncertainty’ in the interpretation of the law, by those subject to it, which declaratory orders are explicitly authorized to remove under the terms of 5 U.S.C. § 554(e).”).

²¹ AG’S REPORT, *supra* note 2, at 30-31.

²² See *FERC, Primary Power, LLC, Order on Petition for Declaratory Order and Related Determinations*, 131 F.E.R.C. ¶ 61,015, P23 (April 13, 2010).

²³ See *FCC v. Pacifica Found.*, 438 U.S. 726, 732-35 (1978).

²⁴ See *State Corp. Comm’n v. FCC*, 787 F.2d 1421, 1428 (10th Cir. 1986).

that remove uncertainty and those that terminate controversy. In many instances, the act of removing uncertainty necessarily terminates or prevents controversy.

The declaratory order is therefore best understood as the adjudicatory complement to the more familiar, legislative or informal approaches to agency advice giving (e.g., interpretative rules, policy statements, advisory opinions, and other forms of non-binding agency guidance).²⁵ The advisory opinion – an informal, non-binding form of agency guidance typically offered to help regulated parties understand how regulations will apply to them before they act – traditionally has been viewed as the immediate alternative to the declaratory order.²⁶ Advisory opinions are typically provided by agency staff, often orally (e.g., by phone), with little formality or delay.²⁷ More often than not, these opinions meet the immediate needs of both agencies and regulated parties, furnishing reliable guidance with little burden imposed upon the agency. The disadvantage of advisory opinions is that they do not bind the agency.²⁸ As a result, although advisory opinions can do much to resolve regulatory uncertainty, they cannot wholly or reliably eliminate it.²⁹

In contrast to advisory opinions, the advantage and key characteristic of the declaratory order is that it has binding legal effect. This is grounded in APA’s text, which provides that an agency may issue a declaratory order “with like effect as in the case of

²⁵ See, e.g., FERC, Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance, 123 F.E.R.C. ¶ 61,157, P19 & P20 (May 15, 2008), available at <http://www.ferc.gov/whats-new/comm-meet/2008/051508/M-2.pdf> [hereinafter FERC Interpretative Order on Guidance] (explaining how declaratory orders fit among the various mechanisms available for obtaining guidance from the Commission and its staff).

²⁶ See AG’S REPORT, *supra* note 2, at 31.

²⁷ See, e.g., FERC Interpretative Order on Guidance, *supra* note 25, at P23, P25, P27, P28-P29, P34 (describing various, informal mechanisms available for obtaining non-binding guidance).

²⁸ E.g., 18 C.F.R. § 388.104 (governing informal advice from Commission staff); *id.* § 385.1901(f)(6) (providing that FERC’s General Counsel may provide written interpretations of the National Gas Policy Act or rules issued by the Commission thereunder, “[t]he interpretation of the General Counsel is not the interpretation of the Commission” and “is given without prejudice to the Commission’s authority to consider the same or like question and to issue a declaratory order to take other action which has the effect of rescinding, revoking, or modifying the interpretation of the General Counsel”); see also AG’S REPORT, *supra* note 2, at 31 (“Advisory rulings are not an entirely satisfactory device, however, because they invariably carry an explicit or implicit warning that the agency is not bound by the opinion it has rendered.”); Oliphant, *supra* note 13, at 8 (discussing the unfortunate fallout of an IRS decision not to adhere to the advisory opinion provided to a taxpayer in advance of a financial transaction).

²⁹ See, e.g., AG’S REPORT, *supra* note 2, at 31 (explaining that, because they are not binding, “advisory rulings do not entirely eliminate, though they materially reduce, the element of uncertainty”).

other orders.”³⁰ The binding effect of a declaratory order is what allows it to offer the full measure of regulatory certainty that other forms of agency guidance cannot provide.³¹

The binding effect of a declaratory order is naturally limited by the nature of the device. First, because declaratory orders “are only as effective as other adjudicatory orders, they are not binding upon nonparties.”³² Only the agency and the named party (or parties) are bound by the action.³³ While the named party is often an individual regulated person or entity who petitioned for the declaration, an agency may also issue an order that applies to all similarly situated regulated parties, provided that such breadth is reasonable within the context of the agency’s statutory authority and the nature of the controversy or other issue the order is designed to address.³⁴ Second, whether directed towards one or more regulated parties, a declaratory order’s binding effect is non-coercive.³⁵ That is, it provides a declaration that is legally binding without itself imposing a penalty, sanction, or other liability. The non-coercive character of the declaratory order is essential—without it, the device would not operate effectively as

³⁰ 5 U.S.C. § 554(e); see Bernard Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U. L. REV. 1173, 1213 (1954). The APA defines “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” 5 U.S.C. § 551(6). The APA’s definition of an “adjudication” as an “agency process for the formulation of an order” is therefore a catchall category for non-rulemaking actions, including declaratory orders. *Id.* § 551(7). Finally, the APA describes “final opinions, including concurring and dissenting opinions,” along with “orders,” as products of adjudication. *Id.* § 552(a)(2)(A).

³¹ See, e.g., AG’S REPORT, *supra* note 2, at 31 (“Greater certainty [beyond that provided by advisory rulings] can be achieved only by attaching to the ruling the same binding effect upon the agency that is attributed to other adjudications.”); but see *Exelon Wind 1*, 766 F. 3d at 391 (mischaracterizing a declaratory order as merely informal guidance).

³² *New England Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 565 F. Supp. 949, 959 n.15 (D. Me. 1983) (internal citation omitted).

³³ But see Frederick F. Blachly & Miriam E. Oatman, 34 GEO. L.J. 407, 418 (1946) (“The determination made for one individual would in reality be a general determination, since the declaratory order is to have ‘like effect as in the case of other orders,’ that is, the force of law.”).

³⁴ See, e.g., *Merchs. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 916 (5th Cir. 1993) (upholding an ICC declaratory order that “applies to all shippers who can demonstrate that their shipping patterns match the general patterns assumed in the order”). If an agency is contemplating the issuance of a broadly applicable declaratory order, it may need to take steps to ensure that all interested parties have an opportunity to comment or otherwise participate in the proceedings. This can be accomplished through basic notice-and-comment procedures. See *City of Arlington v. FCC*, 668 F.3d 229, 242-43 (5th Cir. 2012), *aff’d* 133 S. Ct. 1863 (2013).

³⁵ See, e.g., Robert John Hickey, *Declaratory Orders and the National Labor Relations Board*, 45 NOTRE DAME LAW. 89, 89 (1969) (defining a declaratory order as “a noncoercive, definite, binding, and reviewable adjudication declaring actual, present, substantive rights of adverse parties on a question of law”); Note, *Administrative Declaratory Orders*, 13 STAN. L. REV. 307, 307 (1961) (explaining that declaratory orders “are noncoercive declarations of rights rather than orders imposing penalties or liabilities” (citing 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 at 268 (1958))); see generally 5 U.S.C. § 551(10) (defining “sanction”). As Professor Davis explained: “The only difference between declaratory orders or judgments and other orders and judgments is presence or absence of the element of coercion.” 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 at 268 (1958).

voluntary mechanism through which regulated parties may seek and obtain a binding declaration of the law without first acting *in peril of sanction*.³⁶ A third important limitation is that a declaratory order is binding only in the factual circumstances on which it is based.³⁷ A regulated party that has requested and received a declaratory order based on certain facts will not be able to use the order to shield itself in a subsequent state or federal enforcement proceeding based on different facts.³⁸ Finally, like judicial opinions, agency declaratory orders may have precedential value that exceeds their binding effect.³⁹ Agency personnel and regulated parties not subject to an order may nonetheless refer to it for reliable guidance. In some cases, courts may even rely upon an administrative declaratory order to resolve a dispute between private parties who were not party to the agency's adjudication.⁴⁰

It bears emphasizing that the binding effect of a declaratory order does not prevent an agency from adopting a different interpretation or pursuing a different policy in a subsequent proceeding, including through another declaratory order or in an enforcement proceeding or other adjudication.⁴¹ This is so even if the agency has

³⁶ See Walter Gellhorn, *Declaratory Rulings by Federal Agencies*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 155 (1942). An agency may, of course, issue a coercive order in a later proceeding on the authority of the previously issued declaratory order. This may occur if the party to the declaratory order is later found in noncompliance without having successfully challenged the declaration on appeal. Or the agency may rely on the declaratory order as precedent in a proceeding against a third party found in noncompliance. Another advantage of a declaratory order, in contrast to a coercive action such as a cease-and-desist order, is that it "may be either affirmative or negative, whereas the cease-and-desist order is necessarily negative." Davis, *supra* note 12, at 203. The advantage of a negative use of a declaratory order is that an agency may use it to disapprove of a party's proposed action before imposing a sanction or requiring the party to act in peril of sanction.

³⁷ See *Texas v. United States*, 866 F.2d 1546, 1551 (5th Cir. 1989); see also *Central Freight Lines v. ICC*, 899 F.2d 413, 417 (5th Cir. 1990) ("[T]he order in this case settles rights and removes uncertainty in that it allows [the named freight carrier] to rely on its interstate certificate as authorization for its actions so long as its operations conform to the facts it presented to the ICC and which the ICC assumed in the declaratory order.").

³⁸ See, e.g., *Merchs. East Motor Lines, Inc.*, 5 F.3d at 918 ("The [declaratory] order would not insulate the [regulated parties] from a state regulatory proceeding if facts are presented which are different from those assumed in the declaratory order."); *Central Freight Lines*, 899 F.2d at 418 ("[T]he ICC's order in this case would not insulate the carrier from a state law regulatory proceeding if facts were proved that were different from those supposed by the order.").

³⁹ See, e.g., *Radiofone, Inc. v. FCC*, 759 F.2d 936, 938 (D.C. Cir. 1985) (discussing the precedential value of a declaratory order).

⁴⁰ See, e.g., *Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc.*, 87 F. Supp. 2d 820, 828-31 (S.D. Ohio 2000) (giving *Chevron* deference to an ICC declaratory order and relying on the precedential value of that order to resolve the case before it).

⁴¹ See *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1076 (D.C. Cir. 1987) (en banc); see also *Central Freight Lines*, 899 F.2d at 417 (affirming an ICC declaratory order in which "[t]o reach [its] conclusion, the ICC found it necessary to overrule an earlier decision").

successfully defended its first interpretation in the federal courts.⁴² After all, as the D.C. Circuit has observed, “an ambiguous or broadly worded statute may admit of more than one interpretation that is reasonable and consistent with Congressional intent.”⁴³ As in rulemaking, an agency is permitted to change its position on an issue so long as it explains the decision and the new interpretation is reasonable and permissible in light of the relevant statutory language.⁴⁴

Finally, in the absence of any manifest injustice, a declaratory order may have retroactive effect. “The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply the new interpretation in the proceeding before it.”⁴⁵ This general principle applies so long as the retrospective application of the agency’s new interpretation will work no manifest injustice. The D.C. Circuit has articulated “a non-exhaustive list of five factors” used to evaluate a claim of manifest injustice. These factors include:

- (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.⁴⁶

Although the courts “have generally shown little or no deference to agencies’ rejection of claims that retroactivity produced manifest injustice,” they “have been quite deferential to decisions regarding the retroactive effect of agency action where retroactivity would

⁴² See, e.g., *Clark-Cowlitz*, 826 F.2d at 1080-81 (“[A]s to claim preclusion, FERC’s successfully defending its position (at that time) in [an appeal from its previous declaratory order] does not bar it from asserting a different position in the current proceedings.”).

⁴³ *Clark-Cowlitz*, 826 F.2d at 1081.

⁴⁴ See, e.g., *Central Freight Lines*, 899 F.2d at 423-26 (upholding an agency declaratory order that adequately explained its decision to overrule prior agency precedent to establish a new interpretation of the agency’s statute); *Clark-Cowlitz*, 826 F.2d at 1079-80 (affirming agency reversal of position that was reasonable and properly explained); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (holding that an agency’s decision to reverse its position must be adequately explained, but is subject to no more searching review than was its initial decision); *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (holding that *Chevron* applies to an agency’s interpretation of an ambiguous statutory term, even if a court has previously interpreted that term).

⁴⁵ *Clark-Cowlitz*, 826 F.2d at 1081 (citing *NLRB v. Wyman-Gordon*, 394 U.S. 759, 765-66 (1969)); but see *Clark-Cowlitz*, 826 F.2d at 1093 (Mikva, J., dissenting) (“There is no such general principle under the law.”).

⁴⁶ *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); see also *Clark-Cowlitz*, 826 F.2d at 1081-86 (using the *Retail, Wholesale* factors to evaluate (and ultimately reject) a claim that FERC’s retrospective application of a new interpretation worked a manifest injustice).

not work a manifest injustice.”⁴⁷ Moreover, the fact that an agency’s decision resolves some uncertainty in the law (as declaratory orders often do) does not ordinarily suggest any manifest injustice in that decision’s retroactive application.⁴⁸

In sum, an administrative declaratory order may be defined as an agency (1) order, produced through adjudication, (2) that resolves uncertainty or terminates controversy (3) without imposing sanctions by (4) binding the agency and the named party or parties (5) on the facts stated (6) and with optional retroactive effect, in the absence of any manifest injustice, (7) providing guidance to agency personnel, other regulated parties, courts, and the public through its precedential effect.

B. Formal vs. Informal Adjudication

The text of the APA suggests another possible characteristic of the declaratory order: it is necessarily a creature of formal adjudication.⁴⁹ If so, two significant consequences might follow. First, agencies might only be able to issue declaratory orders to address matters that are required by statute to be conducted in accordance with the APA’s formal adjudication provisions.⁵⁰ Second, an agency might be required to conduct a hearing on the record before it could issue a declaratory order.⁵¹

Historically, the dominant view held that the APA’s declaratory orders provision applied only in the context of formal adjudications. The legislative history strongly suggests that the drafters intended to so limit the availability of the device.⁵² Consistent with this suggestion, the AG’s Manual, which was produced immediately after the APA’s

⁴⁷ *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

⁴⁸ *Id.* at 540.

⁴⁹ “Formal adjudication” is routinely used as a term of art to refer to adjudications conducted in accord with the APA’s adjudication provisions, 5 U.S.C. §§ 554, 556, and 557. See, e.g., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES OFFICE OF THE CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 5 (Mar. 31, 2014) [hereinafter EEOC REPORT], available at <https://www.acus.gov/research-projects/status-and-placement-agency-adjudicators>. In contrast, “informal adjudications” are those not required by statute to be conducted in accord with these provisions of the APA. The terminology leaves something to be desired, because many so-called “informal” adjudications are voluntarily conducted using judicialized procedures that look much like those mandated by the APA. Some, including Professor Michael Asimow in his work for the Administrative Conference, accordingly eschew the usual terminology. See Admin. Conf. of the U.S., Federal Administrative Adjudication, <https://www.acus.gov/research-projects/federal-administrative-adjudication>. For the sake of simplicity, however, this report will use the terms “formal” and “informal” in their traditional senses.

⁵⁰ See 5 U.S.C. § 554(a)(1) (providing that Section 554 applies to “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,” with six enumerated exceptions).

⁵¹ See *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (1996).

⁵² See, e.g., S. DOC. NO. 248, 79th Cong., 2d Sess. 204 (1946) (stating that declaratory orders under § 5(d) “may be issued only where the agency is empowered by statute to hold hearings and the subject is not expressly exempted by the introductory clauses of this section”).

adoption, explained that the APA’s “grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined ‘on the record after opportunity for an agency hearing.’”⁵³ On this view, if no statute requires formal adjudication, or the matter is one exempted from the APA’s formal adjudication provisions, Section 5(d)’s grant of authority to issue declaratory orders is unavailable to the agency.⁵⁴ As an example, the AG’s Manual explained that the new provision did not authorize the SEC to issue declaratory orders in lieu of informal advisory opinions “as to whether particular securities must be registered under the Securities Act” because there was “no statutory agency hearing procedure in which this question can be determined.”⁵⁵ For decades following the APA’s adoption, scholars and experts generally also interpreted the statute to limit the issuance of declaratory orders to formal adjudications.⁵⁶

This historical view has since been abandoned. Courts have held that agencies may issue declaratory orders in informal adjudicatory proceedings, to address matters not subject to formal adjudication under the APA and without first conducting a hearing on the record.⁵⁷ The Supreme Court’s decision in *Weinberger v. Hynson, Westcott & Dunning*⁵⁸ paved the way for this approach. In *Weinberger*, the Court rejected an argument that the Food and Drug Administration could not issue a declaratory order to address a matter that the parties argued was susceptible of resolution “only in a court proceeding where there is an adjudication ‘on the record of [a] hearing.’”⁵⁹ Concluding that the APA “does not place administrative proceedings in that straitjacket,” the Court reasoned that “paralysis would result if case-by-case battles in the courts were the only

⁵³ Tom C. Clark, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 59 (1947), available at <http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf> [hereinafter AG’S MANUAL].

⁵⁴ See *id.*; see also 5 U.S.C. §§ 554(a)(1)-(6) (enumerating exceptions to the APA’s formal adjudication requirements).

⁵⁵ AG’S MANUAL, *supra* note 53, at 59.

⁵⁶ See Powell, *Administratively Declaring Order*, *supra* note 5, at 279; Hickey, *supra* note 35, at 90; *Administrative Declaratory Orders*, *supra* note 35, at 311-12; TASK FORCE ON LEGAL SERVICES AND PROCEDURE OF THE HOOVER COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 189 (1955) [hereinafter HOOVER COMMISSION REPORT]; Goldner, *supra* note 11, at 8; but see Davis, *supra* note 12, at 230-32 (arguing that the apparent textual limitations on the use of declaratory orders “have little rational foundation and are probably the product of inadvertence” and concluding that an agency’s authority to issue a declaratory order in informal adjudication “in spite of the introductory clause of § 5 is consistent with statutory language, is supported by legislative history, and is impelled by practical needs”).

⁵⁷ Another way that agencies may lawfully streamline adjudication is by using summary decision procedures. See Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

⁵⁸ 412 U.S. 609 (1973).

⁵⁹ *Id.* at 625-26.

way [for an agency] to protect the public.”⁶⁰ Subsequent courts have read *Weinberger* more expansively to mean that agencies may issue declaratory orders under 5 U.S.C. § 554(e) through informal adjudication.⁶¹ Scholars who have addressed the issue in more recent times have similarly interpreted the APA.⁶²

This approach is in accord with background principles of administrative law that recognize substantial agency discretion over procedural matters. One such principle holds that “[a]gencies have discretion to choose between adjudication and rulemaking as a means of setting policy.”⁶³ At a more granular level, agencies also have substantial discretion to define the procedures they will use to conduct specific kinds of proceedings.⁶⁴ This discretion is limited only by the requirement that agencies observe the minimum (and minimal) requirements imposed by the APA and the Constitution’s guarantee of due process. The broad scope of agency procedural discretion is especially impactful in informal adjudication, perhaps in part because the APA does not establish minimum procedural requirements for informal adjudication, as it does for informal rulemaking.⁶⁵ Here, the consequence of agency discretion is extraordinary diversity among the procedures employed in the many informal adjudication programs that exist throughout the federal government.⁶⁶ More importantly, the APA’s express grant to agencies of authority to issue declaratory orders in *formal* adjudications need not be

⁶⁰ *Id.* at 626. The Court further observed that “great inequities might well result” if the FDA was required to proceed individually as “competitors selling drugs in the same category would go scot-free until the tedious and laborious procedures of litigation reached them.” *Id.*

⁶¹ See *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson*, 87 F.3d at 397; *Texas*, 866 F.2d at 1555. Some opinions, however, seem to still to imply (typically without analysis) that the APA’s grant of authority to issue declaratory orders is limited to matters required by statute to be adjudicated in accord with the APA’s formal adjudication provisions. See, e.g., *Arctic Express*, 87 F. Supp. 2d at 828 n.11 (quoting 5 U.S.C. § 554(e) in conjunction with 5 U.S.C. § 554(a)).

⁶² See Lubbers & Morant, *supra* note 4, at 1112-14.

⁶³ *Am. Airlines*, 202 F.2d at 797 (citing *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974)); see also *Cent. Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205, (D.C. Cir. 2005) (applying this principle to FCC’s use of declaratory ruling); *British Caledonian Airways*, 584 F.2d at 987 (explaining that “[w]hile rulemaking might well be advisable, or even required, when mandating the filing of information not plainly within the comprehension of extant statutes and regulations, the Board was well within the bounds of procedural propriety in using a declaratory order” to clarify filing requirements (citing *Yale Broad. Co. v. FCC*, 478 F.2d 594, 599-601 (1973))).

⁶⁴ E.g., *Climax Molbdenum Co. v. Sec’y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (“[A]dministrative agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules.” (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970))).

⁶⁵ Compare 5 U.S.C. § 553 (establishing minimum procedures for informal rulemaking without requiring observance of the hearing requirements of §§ 556 and 557), with *id.* § 554 (establishing minimum procedures for adjudications formally conducted in accord with §§ 556 and 557; see also, e.g., *Occidental Petroleum Corp. v. Sec. & Exch. Comm’n*, 873 F.2d 325, 337 (D.C. Cir. 1989) (explaining that “no provision of the APA contains specific procedures to govern an informal agency adjudication”).

⁶⁶ See Federal Administrative Adjudication, available at <https://www.acus.gov/research-projects/federal-administrative-adjudication> (cataloging the diverse array of informal adjudicator procedures created and employed by agencies).

read—and has not been read—to prevent agencies from using their otherwise broad procedural discretion to use declaratory orders in *informal* adjudications.⁶⁷ The D.C. Circuit has thus implied that an agency’s authority to issue a declaratory order in informal adjudication may be grounded in its own regulations, even if there is some doubt regarding the applicability of Section 5(d) to the proceeding at issue.⁶⁸

C. History of Agency Use of Declaratory Orders

Although the APA’s declaratory orders provision was intended to have a substantial effect on administrative practice, agencies historically have made little use of it.⁶⁹ Studies conducted in the 1950s revealed minimal use of the then-recent grant of authority.⁷⁰ In 1955, the Hoover Commission’s Task Force on Legal Services and Procedure described agency use of declaratory orders as “negligible.”⁷¹ A contemporaneous study by the House Committee on Government Operations found that “[o]ut of 38 agencies engaged in adjudicative activities, only 7 acknowledged that they had issued declaratory orders under the APA.”⁷² By the early 1960s, only two agencies had adopted procedural regulations governing the issuance of declaratory orders.⁷³ As of the end of that same decade, one additional agency had followed suit.⁷⁴

Limited agency use of declaratory orders persisted well beyond the APA’s infancy. In 1968, an American Bar Association subcommittee reported that only two surveyed agencies (the Federal Power Commission (FPC) and the FMC) had adopted procedural rules for issuing “declaratory orders,”⁷⁵ while a third agency (the FCC) had adopted procedural rules for issuing “declaratory rulings.”⁷⁶ The subcommittee concluded that,

⁶⁷ Cf. EEOC REPORT, *supra* note 49, at 23-32 (arguing that the mandatory use of administrative law judges (ALJs) in formal adjudication implies no restriction on agency discretion to voluntarily appoint ALJs to preside in informal adjudications).

⁶⁸ See *Cent. Texas Tel. Coop.*, 402 F.3d at 210.

⁶⁹ See Schwartz, *supra* note 30, at 1212-13.

⁷⁰ See Goldner, *supra* note 11, at 10-15; see also Reilly, *supra* note 9, at 659 (“The history of the past twenty years demonstrates that the declaratory order has been largely ignored by our administrative agencies.”).

⁷¹ HOOVER COMMISSION REPORT, *supra* note 56, at 188-89 (1955).

⁷² Reilly, *supra* note 9, at 659 (citing WALTER GELLHORN & CLARK BYSE, *CASES ON ADMINISTRATIVE LAW* 701-02 (4th ed. 1960)).

⁷³ Reilly, *supra* note 9, at 659 (citing DELMAS H. NELSON, *ADMINISTRATIVE AGENCIES OF THE USA: THEIR DECISIONS AND AUTHORITY* 76-77 (1964)).

⁷⁴ See Reilly, *supra* note 9, at 659-60

⁷⁵ See Comment, *Declaratory Orders – Uncertain Tools to Remove Uncertainty*, 21 ADMIN. L. REV. 257, 257, 258 (1969) [hereinafter *Uncertain Tools*]. The report, which was prepared by the Subcommittee on Declaratory Orders of the Administrative Process Committee of the American Bar Association’s Administrative Law Section, surveyed the use of declaratory orders by the ICC, FPC, Federal Trade Commission, Securities and Exchange Commission, FCC, FMC, and Food and Drug Administration. See *id.* at 257.

⁷⁶ The report expressed skepticism about the accuracy of the FCC’s position that “declaratory rulings” and “declaratory orders” are synonymous. See *id.* at 258 (noting that “a recent Court of Appeals decision has cast considerable doubt upon [the FCC’s] attempted analogy”). It is interesting that this terminological

despite the apparent usefulness of declaratory orders, “neither the agencies nor the practicing bar are availing themselves of the declaratory order procedures presently available to the degree expected when the project was undertaken.”⁷⁷ Only 43 petitions for declaratory order were filed with the FPC between 1946 and 1966, and “11 of these were filed in 1966.”⁷⁸ The practice before the FMC was even more limited, with only four petitions for declaratory order docketed between 1961 and 1966.⁷⁹ The FCC’s use of “declaratory rulings” was also limited to “only a dozen or so instances” in the 1950s and “a mere ‘handful’ in the early 1960s.”⁸⁰ More recent studies conducted since that time suggest ongoing and pervasive administrative indifference to declaratory orders.⁸¹

At least two of the explanations that have been offered to explain this indifference were grounded in interpretations of the APA that no longer prevail.⁸² First, and as discussed in the previous section, the inclusion of the declaratory orders provision in the APA’s formal adjudication provision was long viewed as a significant limitation on the availability of the device.⁸³ Although the courts began to move away from this interpretation in the 1970s, it appears to have continued to hold sway within the bar until at least the 1980s. More recently, however, the courts’ position has become clearer, and expert opinion appears to have evolved accordingly.⁸⁴ As discussed in greater detail in Part III.A., below, the few agencies that have a robust declaratory orders practice often use these orders to address matters not subject to mandatory formal adjudication under the APA. Second, some have placed blame on the statute’s language authorizing an agency “in its sound discretion” to issue a declaratory order,⁸⁵ which suggests the possibility of an agency exercising its discretion *not* to issue a declaratory order.⁸⁶ Initially, the courts held that such a negative exercise of discretion was unreviewable, a remedy that may have emboldened agencies in their disinclination to use declaratory

issue created such controversy given that the FCC was not the first to refer to the “declaratory ruling.” See AG’S REPORT, *supra* note 2, at 30. The FCC has continued to use the “declaratory ruling” terminology to the present day, and the courts have concluded that, despite the differing terminology, such rulings qualify as adjudicatory orders. See *City of Arlington*, 668 F.3d at 241.

⁷⁷ *Uncertain Tools*, *supra* note 75, at 263.

⁷⁸ *Id.* at 259.

⁷⁹ *Id.* at 260.

⁸⁰ *Id.* at 260-61. The survey of the FCC was published separately and provides greater detail. See Arthur Stambler, *the Declaratory Order at the Federal Communications Commission*, 21 FED. COMM. B.J. 123 (1967).

⁸¹ See Powell, *Sinners*, *supra* note 5, at 344, 372.

⁸² E.g., Reilly, *supra* note 9, at 660 (“Blame for the ineffectiveness of section 5(d) has, at times, been primarily assigned to the agencies intended to utilize its provisions. It is more accurate, however, to state that fault lies as heavily with the authors of the provision as it does with the agencies.” (internal footnotes omitted)).

⁸³ See *supra* at Part. I.B.

⁸⁴ See *City of Arlington*, 668 F.3d at 241; Lubbers & Morant, *supra* note 4, at 1112.

⁸⁵ 5 U.S.C. § 554(e).

⁸⁶ See, e.g., Schwartz, *supra* note 30, at 1213 (“arguing that the minimal use of declaratory orders ‘has been due primarily to the fact that under Section 5(d) the question of whether a declaratory order should be issued in a particular case is left to the discretion of the agency concerned.’”).

orders. As discussed below, however, this interpretation was short-lived and is no longer good law.⁸⁷

Other explanations for the modest effect of Section 5(d) have been grounded not in law but in practical considerations. Although enthusiasm for declaratory orders appears to have been widespread over the years,⁸⁸ a minority of experts has been deeply skeptical of the usefulness of declaratory orders in the administrative context.⁸⁹ For example, two scholars at the Brookings Institution, writing just before the APA's enactment, argued that the declaratory order "seems inapplicable to all controversies settled by administrative action" and "would be fraught with many dangers."⁹⁰ A more commonly expressed concern has been that a more receptive attitude towards declaratory orders (and petitions therefor) might result in a flood of requests that would impose a significant burden on agencies and undermine their ability to establish their own priorities and determine how best to use limited available resources.⁹¹ Perhaps out of a desire to discourage petitions for declaratory order, most agencies have not adopted procedures governing declaratory proceedings.⁹² The private sector also apparently has been reluctant to request declaratory relief from administrative agencies.⁹³ Finally, it has been persuasively argued that the ability to provide regulatory guidance through non-

⁸⁷ See *infra* at Part II.A.

⁸⁸ See, e.g., Gellhorn, *supra* note 36, at 155 ("There is a clear need for a [declaratory] device within the administrative process, which in many of its branches is even more dynamic and more comprehensive, and therefore a source of even more uncertainty, than the law of the judicial process."); see also *infra* at note 95 and accompanying text (discussing the substantial support over the years for expanded agency use of declaratory orders).

⁸⁹ See Blachly & Oatman, *supra* note 33, at 417-21; see also Powell, *Sinners*, *supra* note 5, at 345 (noting that some have objected to declaratory orders in administrative adjudication because of "the alleged lack of concreteness that would attend agency attempts to resolve disputes prior to the point at which the application of agency compliance sanctions would be appropriate").

⁹⁰ Blachly & Oatman, *supra* note 33, at 418.

⁹¹ See, e.g., *id.* at 419 (arguing that "administrative authorities might well be so beset with requests for declarations as to seriously interfere with their work"). This same concern arises in connection with petitions for rulemaking. See Schwartz & Revesz, *supra* note 5, at 61.

⁹² See, e.g., Powell, *Sinners*, *supra* note 5, at 372 ("The procedure is under-utilized as a result of the continuing failure of most federal agencies to adopt explicit implementing regulations.").

⁹³ See, e.g., Goldner, *supra* note 11, at 10 (noting that "the businessmen and other individuals who should request the[] issuance" of declaratory orders "are slow to adopt this form of procedure"). It is hard to say why the private sector has historically given declaratory orders such a cold reception. One explanation may be reluctance to try a new, untested procedure in lieu of the established methods of conducting business with the agency. The agencies' general failure to adopt procedural regulations governing declaratory proceedings may have rendered the device obscure (and thus unnoticed by the private bar) or may have given regulated parties the impression that petitions for declaratory order would be unwelcome or ineffective and thus a waste of time and resources.

binding documents not subject to judicial review has simply offered a comparatively more attractive alternative to the declaratory order.⁹⁴

Scholars, government officials, and other experts have consistently argued that agencies should expand the use of declaratory orders, and some of the more formidable obstacles to achieving that goal have been removed over the years.⁹⁵ The courts have moved away from interpreting the APA to limit declaratory orders to formal adjudication and no longer deem absolute the agencies' discretion to refuse requests for declaratory relief.⁹⁶ In addition, in recent decades, courts have demonstrated a greater willingness to review other forms of non-binding regulatory guidance.⁹⁷ Concerned about agency avoidance of the increasingly ossified rulemaking process, courts are more likely now to scrutinize an agency's characterization of a document as guidance or an interpretative rule exempt from the APA's notice-and-comment requirements.⁹⁸ The question of how to distinguish between legislative rules and non-legislative rules or other non-binding guidance is exceptionally difficult and a matter subject to much debate.⁹⁹ The Supreme Court recently declined an opportunity to provide some clarity on this matter.¹⁰⁰

Despite all this, modern administrative practice has changed little: declaratory orders remain underused. As Part III details, there are still relatively few agencies that issue declaratory orders or have regulations establishing procedures for conducting declaratory proceedings.¹⁰¹ Before turning to that discussion, however, some consideration of the issues that arise in connection with judicial review of administrative declaratory orders is in order.

⁹⁴ See Powell, *Sinners*, *supra* note 5, at 353-56; cf Goldner, *supra* note 11, at 15 ("The underlying, recurrent theme of the letters received by the author [from federal agencies] is that the agencies who determine private rights are loath to issue a ruling which binds them conclusively.").

⁹⁵ See, e.g., Lubbers & Morant, *supra* note 4, at 1100 (urging increased agency use of declaratory orders); HOOVER COMMISSION REPORT, *supra* note 56, at 187 ("Agencies should make greater use of declaratory orders, advisory opinions, and other shortened procedures."); Gellhorn, *supra* note 36, at 159 (arguing that inclusion of the declaratory orders provision in the APA "should prove extremely valuable").

⁹⁶ See *supra* at Part I.B.

⁹⁷ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that an EPA guidance document was final agency action subject to judicial review).

⁹⁸ See, e.g., *id.* at 1020 (expressing concern that agencies are increasingly shifting to the use of guidance documents as a way of avoiding the rulemaking process and evading judicial review); see generally Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

⁹⁹ See generally John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004); Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000).

¹⁰⁰ See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).

¹⁰¹ See *infra* at Part III.

II. JUDICIAL REVIEW AND RELATED LEGAL CONSIDERATIONS

This part examines the legal issues that arise in connection with judicial review of declaratory orders. Rather than providing an exhaustive analysis of judicial precedent, it focuses on the issues that may be most relevant from the perspective of an agency that is considering whether, how, and in what circumstances to use declaratory orders. The first section begins by discussing the judicial reviewability of declaratory orders and agency refusals to institute declaratory order proceedings, including by addressing the limitations on collateral challenges to declaratory orders.¹⁰² The second section explains that, although the case and controversy requirement of Article III does not restrict an agency’s authority to issue a declaratory order, it may impede a court’s ability to judicially review the order.¹⁰³ This section also considers conceptually related issues that may affect (legally or prudentially) an agency’s issuance of a declaratory order. The third and final section concludes by surveying the substantially deferential standards that courts apply in judicial review of declaratory orders.¹⁰⁴

A. Direct Review and Collateral Challenge

Generally speaking, declaratory orders are final agency action subject to judicial review.¹⁰⁵ As the Supreme Court explained in *Bennett v. Spear*, two conditions must be met in order for agency action to qualify as “final” and subject to judicial review.¹⁰⁶ First, the action “must not be of a merely tentative or interlocutory nature,”¹⁰⁷ but rather “must mark the ‘consummation’ of the agency’s decisionmaking process.”¹⁰⁸ Second, the agency’s “action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”¹⁰⁹ As the case law demonstrates, this test is usually satisfied by an agency’s issuance of a declaratory order.¹¹⁰ That result is

¹⁰² See *infra* at Part II.A.

¹⁰³ See *infra* at Part II.B.

¹⁰⁴ See *infra* at Part II.C.

¹⁰⁵ See 5 U.S.C. § 704; see, e.g., *Weinberger*, 412 U.S. at 627 (holding that a declaratory order is judicially reviewable under the APA (citing *Frozen Foods Express v. United States*, 351 U.S. 40 (1956))).

¹⁰⁶ 520 U.S. 154 (1997).

¹⁰⁷ *Bennett*, 520 U.S. at 178; see also *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984) (holding that an ICC declaratory order was final agency action subject to judicial review).

¹⁰⁸ *Bennett*, 520 U.S. at 177-78 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948)).

¹⁰⁹ *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

¹¹⁰ See, e.g., *Central Freight Lines*, 899 F.2d at 418 (“[B]ecause the ICC’s order both settles rights and touches vital interests of carriers, this court has jurisdiction to review the order.”); *W. Coast Truck Lines*, 893 F.2d at 233-234 (holding that an ICC declaratory order was final agency action subject to judicial review). There have been rare instances in which courts have held declaratory orders unreviewable. See *infra* at Part II.B.

consistent with the intentions of the APA’s supporters, who viewed the availability of judicial review as a necessary corollary of the binding legal effect of a declaratory order.¹¹¹

An agency’s denial of a petition for a declaratory order or other refusal to institute a declaratory proceeding also typically qualifies as final agency action subject to judicial review.¹¹² This principle, now well established, was initially questioned because 5 U.S.C. § 554(e) authorizes agencies to issue declaratory orders in their “sound discretion.”¹¹³ When first presented with the question, courts interpreted this language to mean that the decision whether to issue a declaratory order was committed to agency discretion by law and was therefore unreviewable.¹¹⁴ That approach, however, was much criticized and did not survive.¹¹⁵ Today, courts read the statute’s reference to “*sound discretion*” as an indication that an agency’s refusal to issue a declaratory order is, at least to some extent, reviewable.¹¹⁶

Declaratory orders may also come before the courts collaterally, when a court is called upon to interpret or apply an agency’s statute or regulation to resolve a dispute between two private parties or review a state or local regulator’s enforcement action.¹¹⁷ In some cases, a declaratory order may become relevant to matters at issue in later litigation between private parties, in which case the order may have preclusive effect.¹¹⁸ In other instances, a declaratory order may offer a useful procedural vehicle for an agency to answer a question that first arises in litigation and is then referred to the agency by the court. Such referrals are typically made under the doctrine of primary jurisdiction, a prudential doctrine that allows a court to stay litigation and order the parties to seek resolution of an issue from an administrative agency that has been vested with “special competence” to address it.¹¹⁹ If a party is aggrieved by a declaratory order issued in

¹¹¹ See AG’S REPORT, *supra* note 2, at 33.

¹¹² See *Intercity*, 737 F.2d at 106-107.

¹¹³ 5 U.S.C. § 554(e).

¹¹⁴ See *United Gas Pipeline Co. v. Fed. Power Comm’n*, 203 F.2d 78 (5th Cir. 1953); see also 5 U.S.C. § 701(a)(2) (exempting from judicial review “agency action [that] is committed to agency discretion by law”).

¹¹⁵ See *Intercity*, 737 F.2d at 106-07; see, e.g., Schwartz, *supra* note 30, at 1248-49 (describing the holding of *United Gas Pipeline* as “doubtful” and arguing that the phrase “sound discretion” “affects the question of the scope, not that of the availability, of review”); *Administrative Declaratory Orders*, *supra* note 35, at 318-19 (expressing skepticism that “Congress intended ‘sound discretion’ to mean absolute discretion” and arguing that “[a]gency refusal to issue a declaratory order should be reviewable to determine whether it transgresses the realm of ‘sound discretion’”).

¹¹⁶ 5 U.S.C. § 554(e) (emphasis added); see *Intercity*, 737 F.2d at 106-08; see also *id.* at 106 n.4 (discussing the legislative history). The scope of review is discussed below. See Part II.C.

¹¹⁷ See, e.g., *Arctic Express*, 87 F. Supp. 2d at 828; see also *infra* at Part III.A.

¹¹⁸ See *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015).

¹¹⁹ *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)); see generally Note, Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707 (2007) (discussing the development, contours, and application of the primary jurisdiction doctrine). As Mr. Lockwood explains, “[b]ecause it is applied infrequently, the shape of this doctrine is not fully defined. The circuit

response to such a judicial referral, that party must file for direct judicial review within the applicable deadline for appeal. If it fails to so challenge the order, the referring court will ordinarily refuse to entertain a collateral challenge to the agency's decision.¹²⁰ To put it another way, the parties to a declaratory order, as well as a court called upon to adjudicate related claims, is bound by an agency's declaratory order once the time for direct appeal of that order has expired.¹²¹

B. Barriers to Judicial Review of Declaratory Orders

Although it is well established that the case and controversy requirement of Article III does not apply to administrative agencies, this constitutional limitation on the judicial power occasionally prevents judicial review of declaratory orders or agency refusals to grant requests for declaratory relief.¹²² Most of these barriers arise because the scope of agency authority under 5 U.S.C. § 554(e) is broader than the scope of the courts' authority under Article III. The difficulty is grounded in the APA's grant of authority to agencies to issue declaratory orders to "resolve uncertainty" in the absence of an actual

courts employ differing conceptions of primary jurisdiction, utilize different factors in their analysis, and apply different standards of review." Lockwood, 64 WASH. & LEE L. REV. at 708. In the caselaw related to declaratory orders, the courts loosely refer to an agency's "primary jurisdiction" without making any referral, often as a way of explaining why it was appropriate for an agency to address a particular issue through a previously issued declaratory order. See, e.g., *Ill. Terminal R.R. Co. v. ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982) (explaining that "[t]he ICC acted properly" in issuing the declaratory order appealed from because "courts have long recognized that interpretation of terms of art is within the special province or primary jurisdiction of the ICC and therefore should, in the first instance, be decided by the ICC"). This appears particularly common in cases involving the ICC, perhaps because the primary jurisdiction "doctrine arises from a series of Supreme Court cases addressing the [ICC]." Lockwood, 64 WASH. & LEE L. REV. at 710.

¹²⁰ See *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257, 261-62 (D. Mass. 2002), *reversed on other grounds*, *Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12 (1st Cir. 2003); *but see* *Frozen Food Express v. United States*, 351 U.S. 40 (1956) (holding that an ICC declaratory order was judicially reviewable in district court action filed by a plaintiff "who was not party to the administrative proceeding").

¹²¹ See, e.g., *W. Coast Truck Lines*, 893 F.2d at 234 (holding that until a declaratory order "was reviewed by an appellate court, the parties were bound by the [agency's] determination" and since the parties "did not file a notice of appeal from the [agency's] order . . . this court is barred from reviewing [its] merits"); *Boston & Maine*, 191 F. Supp. 2d at 261-62 ("If the aggrieved party fails to challenge the [agency] decision within the statutory period, the [agency] decision becomes final and binding upon the referring court." (quoting *Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334, 341 (1st Cir. 1970))).

¹²² E.g., *Central Freight Lines*, 899 F.2d at 420-21 ("It is . . . well established that the case or controversy requirement of Article III 'does not restrict an agency's authority to issue declaratory rulings.'" (quoting *Texas*, 866 F.2d at 1551)); *see also* *Tennessee Gas Pipeline Co. v. Fed. Power Comm'n*, 606 F.2d 1373, 1380 (D.C. Cir. 1979) ("The subject matter of agencies' jurisdiction naturally is not confined to cases or controversies inasmuch as agencies are creatures of article I."). The sponsors of section 5(d) of the APA noted that agencies would "be as free to act irrespective of the technical rules of case or controversy as courts are." McCarran, *Administrative Procedure Act – Legislative History*, S. DOC. NO. 248, 79th Cong., 2d Sess. 204 (1946).

controversy between adverse parties.¹²³ Indeed, the core purpose of the administrative declaratory order—to provide binding guidance to regulated parties *before* they have acted in peril of regulatory sanction—may be in some circumstances at odds with the Constitution’s prohibition on the courts’ issuing advisory opinions.¹²⁴ In other words, as the cases discussed below reveal, administrative agencies have greater flexibility to issue declaratory orders in circumstances in which the Article III requirements of justiciability would not be satisfied.

Miller v. FCC provides a good example of how the disconnect between administrative and judicial power may thwart judicial review of an administrative declaratory order. In *Miller*, the Eleventh Circuit was called upon to review an FCC declaratory ruling addressing the preemptive effect of Section 315(b) of the Communications Act of 1934. Section 315(b) establishes the “lowest unit charge,” a limitation on the amount that a political candidate may be charged for the broadcast of campaign advertisements.¹²⁵ In 1991, the FCC issued a declaratory ruling stating that “any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act . . . is preempted by federal law,” and that “[t]he sole forum for adjudicating such matters shall be this Commission.”¹²⁶ The FCC issued this declaratory ruling on its own motion and not in response to any petition or other request for resolution of a specific controversy.¹²⁷ On a petition for review, the court held the case nonjusticiable because “[b]y asking this court to decide what another court should do in a future case, petitioners are posing a hypothetical question, the answer to which would be an advisory opinion” prohibited by Article III.¹²⁸ The court characterized the agency’s decision as an unreviewable “agency opinion,” thereby suggesting that the justiciability problem was created by the agency’s mischaracterization

¹²³ 5 U.S.C. § 554(e); *see also* *Coal. for a Healthy California v. FCC*, 87 F.3d 383, 386 (9th Cir. 1996) (“[W]hile the FCC might properly issue such a general declaration which does not settle an actual controversy between adverse parties, this court cannot.”); *Hickey*, *supra* note 35, at 91 n.7 (noting that “the constitutional limitation to ‘case and controversy’ . . . is not strictly imposed upon an administrative agency” and “[a]s a matter of statutory interpretation, the only possible meaning that can be given to the words ‘remove uncertainty’ is that Congress intended to expand the availability of declaratory relief beyond its application to orthodox controversies”).

¹²⁴ *Compare* AG’S REPORT, *supra* note 2, at 30 (discussing advisory function of declaratory orders); *Pacifica Found.*, 438 U.S. at 734-35 (“However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions.”). In the Declaratory Judgment Act, Congress appears to have recognized this potential disconnect, by expressly limiting a federal court to granting declaratory relief “[i]n a case of actual controversy within its jurisdiction.” *See* 28 U.S.C. § 2201(a); *see also* *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 325 (1936) (upholding the constitutionality of the Declaratory Judgment Act because, by its terms, “it does not attempt to change the essential requisites for the exercise of judicial power.”).

¹²⁵ *Miller v. FCC*, 66 F.3d 1140, 1141 (11th Cir. 1995).

¹²⁶ *Id.* at 1143 (quoting 6 F.C.C.R. 7511 (1991)).

¹²⁷ *Id.* at 1143, 1144.

¹²⁸ *Id.* at 1145; *see also id.* at 1146 (“Consequently, we are prohibited from determining the propriety of the FCC’s declaratory ruling given the abstract circumstances in which this issue is presented.”).

of its own action.¹²⁹ The true source of the difficulty, however, was that the scope of the FCC's authority to issue the declaratory order was broader than the scope of the court's authority to review that action. This became evident when, in parallel litigation in which the FCC's declaratory ruling was relevant but not subject to direct review, the Ninth Circuit rejected the *Miller* court's characterization and held that the agency's decision was a properly issued declaratory order with binding legal effect.¹³⁰ Perhaps the most interesting point is that both courts were right – this particular agency decision was *both* an unreviewable advisory opinion (from the perspective of the reviewing court) *and* a binding declaratory order (from the perspective of the court called upon to apply agency precedent in parallel litigation).

In other cases, the courts have perceived the problem as a lack of finality that undermines the agency's classification of its action as a declaratory order. For example, in *Miami v. Interstate Commerce Commission*, the Fifth Circuit declined to review an ICC order that was, in the court's view, merely "styled" as a declaratory order.¹³¹ The underlying dispute involved the City of Miami's extended effort to acquire for use as a public park a thirty-three acre facility owned by the Florida East Coast Railway.¹³² In condemnation proceedings in state court, the railroad argued that the property was a "line of railroad" that could be neither condemned nor abandoned "without ICC approval issued in the form of a certificate of public convenience and necessity."¹³³ The state court rejected this argument, characterizing the property as a "spur" not subject to the ICC's jurisdiction, and approved the taking.¹³⁴ The railroad responded by petitioning the ICC for a declaration that the terminal and tracks at issue were a "line of railroad."¹³⁵ After seeking input from the city, the ICC issued the requested declaration and "ordered its [administrative] proceedings 'discontinued.'"¹³⁶ On a petition for review filed by the city, the Fifth Circuit held that the ICC's declaratory order was nonfinal and unreviewable because it neither determined rights or obligations nor produced any legal consequences.¹³⁷ The ICC's order, explained the court, "neither permit[ted] nor prohibit[ed] the abandonment of the [railroad's] terminal."¹³⁸ The court therefore

¹²⁹ *Id.* at 1144.

¹³⁰ *See Wilson*, 87 F.3d at 397-98.

¹³¹ 669 F.2d 219, 221 (5th Cir. 1982).

¹³² *See id.* at 220.

¹³³ *Id.* at 220.

¹³⁴ *See id.*

¹³⁵ *See id.* The railroad did not, however, seek a certificate of public convenience and necessity from the ICC, perhaps to avoid issuance of the approval it had argued was a necessary pre-condition to condemnation. *See id.*

¹³⁶ *Id.* at 221.

¹³⁷ *Id.* (quoting *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)) (first alteration added).

¹³⁸ *Miami*, 669 F.2d at 221

concluded that the order was “nothing more than an advisory ruling” not subject to judicial review.¹³⁹

The problem may also present itself as one of mootness pending appellate review.¹⁴⁰ An example of one such case is *Radiofone, Inc. v. FCC*, which involved a petition for review of an FCC declaratory ruling that Auto Page, a company that provided radio paging services, was not a common carrier.¹⁴¹ The Louisiana Public Service Commission (LPSC) had determined that Auto Page was a radio common carrier operating unlawfully without a certificate from the LPSC.¹⁴² Auto Page sought an injunction against the LPSC’s cease and desist order in federal district court, and the court referred the matter to the FCC on the grounds of primary jurisdiction.¹⁴³ The FCC issued notice and requested comments from interested parties before issuing a declaratory ruling in Auto Page’s favor.¹⁴⁴ Although Auto Page (perhaps unsurprisingly) did not file for review of the order, several other commenters in the proceeding did.¹⁴⁵ While the D.C. Circuit’s decision was pending, Auto Page went out of business.¹⁴⁶ The court held that the case was moot as a result of this development, and it accordingly vacated the FCC’s order.¹⁴⁷ Through vacatur, the court deprived the FCC’s order of its value as administrative precedent.¹⁴⁸

Finally, a more straightforward barrier to judicial review arises when a party that lacks standing under Article III petitions a court for review of a declaratory order. On this issue, *Radiofone* is again the primary judicial precedent. In that case, the judges were unanimous as to the proper result, and then-Judge Scalia authored the majority opinion. In a part of that opinion not joined by his two colleagues, Judge Scalia reasoned that Auto

¹³⁹ *Id.* at 222.

¹⁴⁰ *E.g., Tennessee Gas*, 606 F.2d at 1379 (“Judicial review of administrative action, like all exercises of the federal judicial power, is circumscribed by the requirement that there be an actual controversy. Accordingly, we have no jurisdiction over suits challenging administrative orders which are moot.”); *see Hollister Ranch*, 759 F.2d at 902.

¹⁴¹ *See* 759 F.2d 936, 937 (D.C. Cir. 1985).

¹⁴² *See id.* at 937.

¹⁴³ *See id.* at 937.

¹⁴⁴ *See id.* 937-38.

¹⁴⁵ *See id.* at 938. It seems obvious that Auto Page would have had no reason to seek judicial review of the declaratory order that granted Auto Page the very relief it had requested. The identity of the litigants in this case is important because it reveals that, although a declaratory order may bind only the named party, other interested parties may still be able to seek judicial review of that order.

¹⁴⁶ *See id.* at 937.

¹⁴⁷ *See id.* at 938; *see also Oregon v. FERC*, 636 F.3d 1203 (9th Cir. 2011) (“In cases where intervening events moot a petition for review of an agency order, the proper course is to vacate the underlying order.” (citing *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 330-31 (1961))).

¹⁴⁸ The only circumstances in which courts have vacated a declaratory order because of justiciability problems appear to involve disputes that have become moot pending judicial review. Interestingly, when other barriers to judicial review have been encountered (such as when a petitioner has failed to exhaust administrative remedies), courts have left the agency’s declaratory order standing as precedent.

Page’s demise had deprived the petitioners of standing to challenge the FCC’s decision. To have standing, he explained, a petitioners’ injury must “arise from the particular activity which the agency adjudication has approved (here, the operation of Auto Page as a private land mobile radio system) and not from the mere precedential effect of the agency’s rationale.”¹⁴⁹ A related barrier may arise when a party that would otherwise have standing to challenge the agency’s action fails to exhaust its administrative remedies before seeking judicial review of a declaratory order.¹⁵⁰

C. Standards of Review

The scope of judicial review on appeal from a declaratory order is limited: courts will set aside an agency’s action only if it is arbitrary and capricious, an abuse of discretion, or is based upon factual findings that are not supported by substantial evidence.¹⁵¹

The narrow scope of review applies to most aspects of a declaratory order, including the decision of whether to initiate the proceeding.¹⁵² The courts may also enforce the APA’s modest requirement that agencies provide a brief statement of the grounds for denying a petition for declaratory order.¹⁵³ An agency’s considered and plainly stated “judgment that its limited resources are better allocated to other areas” has been held sufficient to meet the APA’s minimal requirements.¹⁵⁴ It may similarly be reasonable for an agency to “withhold declaratory relief in anticipation of a clearer exposition of government policy” that is expected or planned to be forthcoming, or on

¹⁴⁹ *Radiofone*, 759 F.2d at 939.

¹⁵⁰ *See, e.g., Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1303 (D.C. Cir. 1997) (dismissing a petition for review of a declaratory order issued on delegated authority by the FCC’s Common Carrier Bureau because the petitioner did not exhaust administrative remedies by filing an application for review by the full Commission).

¹⁵¹ *See* 5 U.S.C. § 706(2)(A); *Loveday v. FCC*, 707 F.2d 1443, 1447-48 (D.C. Cir. 1983); *see also Central Freight Lines*, 899 F.2d 413, 419 (“This court may set aside an agency’s adjudicatory ruling, such as a declaratory order, only if the agency’s findings and conclusions are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” (quoting 5 U.S.C. § 706(2)(A))).

¹⁵² 5 U.S.C. § 706(2)(a); *Intercity*, 737 F.2d at 108; *see also* *Aviators for Safe and Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 231 (1st Cir. 2000) (“While the agency has discretion to refuse [a request for a declaratory] ruling, that refusal is reviewable for abuse of discretion.”); *Central Freight Lines*, 899 F.2d at 418-19 (affirming an agency decision to institute declaratory order proceeding because that decision was neither arbitrary nor capricious). The D.C. Circuit has opined that “a policy of never instituting declaratory proceedings . . . could well constitute an abuse of discretion.” *Intercity*, 737 F.2d at 110 n.12.

¹⁵³ *See* 5 U.S.C. § 555(e). The Administrative Conference recently addressed this requirement in connection with petitions for rulemaking. *See generally* *Petitions for Rulemaking*, *supra* note 5; *see also* *Schwartz & Revesz*, *supra* note 5, at 17-20. The APA also requires agencies to respond to petitions in a “reasonable time,” *see* 5 U.S.C. § 555(b), and to give petitioners “prompt notice” when a petition is denied in whole or in part, *id.* 555(e).

¹⁵⁴ *Intercity*, 737 F.2d at 108-10 & n.12; *see also Climax Molybdenum*, 703 F.2d at 453 (“The Commission may reasonably choose to reserve its use of declaratory relief for special cases in order to conserve its administrative resources.”).

the basis of the agency’s judgment that the petitioner’s circumstances demonstrate no “special need” for a declaratory order.¹⁵⁵ When a court affirms an agency’s decision not to issue a declaratory order, it will not opine on what such an order should say if it were to be issued.¹⁵⁶

Courts generally give substantial deference to the legal interpretations that an agency provides in a declaratory order.¹⁵⁷ Such deference has been extended to an agency’s interpretation of any legal document within that agency’s special competence, including: the statute the agency is responsible for administering,¹⁵⁸ the agency’s own regulations,¹⁵⁹ the terms of art that are used within the agency’s regulatory regime,¹⁶⁰ and certificates or other authorizations that the agency has itself issued.¹⁶¹ In addition, courts generally defer to an agency’s jurisdictional determination.¹⁶² Courts have afforded *Chevron* deference to declaratory orders issued through both formal and informal adjudications.¹⁶³ With respect to orders issued through informal proceedings, a basic petitioning process that includes notice and the opportunity for comment has been sufficient to warrant *Chevron* deference.¹⁶⁴

¹⁵⁵ *Climax Molybdenum*, 703 F.2d at 452, 453.

¹⁵⁶ *E.g.*, *Coal. for a Healthy California*, 87 F.3d at 385-86 (declining litigant’s invitation to offer advisory opinion on appropriate content of declaratory order FCC declined to issue) ; *see also id.* at 385 n.3 (“Every reported case we have found which examined whether an agency improperly refused to issue a declaratory order only considered whether the order was improperly withheld, not what the order should have been.”).

¹⁵⁷ *See Clark-Cowlitz*, 826 F.2d at 1086-92l.

¹⁵⁸ *See, e.g., Central Freight Lines*, 899 F.2d at 423 (citing *Chevron* and noting that a court “must honor the [agency’s] interpretation of its statute so long as that interpretation is a reasonable one”).

¹⁵⁹ *See, e.g., Loveday*, 707 F.2d at 1459 (affirming FCC declaratory ruling and holding that “[t]he Commission’s interpretation of its own regulations as applied in this case is reasonable and consistent with section 317 of the Communications Act”). Some justices of the Supreme Court have recently expressed serious and increasing doubt about the propriety of judicial deference to an agency’s interpretation of its own regulations. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring) (“*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.”); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (explaining why he has “become increasingly doubtful” of *Auer* deference). If these were to become majority views, the resulting doctrinal sea change would presumably apply to the declaratory orders context.

¹⁶⁰ *See, e.g., Ill. Terminal R.R.*, 671 F.2d at 1217 (“We also note that courts should defer to ICC interpretation of technical terms.”).

¹⁶¹ *See, e.g., Midwest Motor Freight Bureau v. ICC*, 867 F.2d 458 (8th Cir. 1989) (“We hold the issue is clearly within the ICC’s jurisdiction in interpreting whether its certificate covers the transportation.”).

¹⁶² *See City of Arlington*, 133 S. Ct. at 1871 (2013); *see also, e.g., N. C. Utils. Comm’n v. FCC*, 537 F.2d 787, 794 (4th Cir. 1976) (holding that the FCC’s “declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the [Communications] Act”).

¹⁶³ *See, e.g., City of Arlington*, 133 S. Ct. at 1874-75 (giving *Chevron* deference to a declaratory ruling issued by the FCC through informal adjudication); *Arctic Express*, 87 F. Supp. 2d at 828 (“This Court finds that the ICC . . . opinion, a formal adjudication, is entitled to *Chevron* deference.”).

¹⁶⁴ *See City of Chicago*, 199 F.3d at 429. The court’s discussion does not make clear whether the basic notice-and-comment procedures used by the FCC were *necessary*, only that they were *sufficient*. *See id.* Part IV,

Judicial review of an agency’s application of controlling precedent, whether judicial or administrative, is similarly limited. A court’s “task on review is not to decide whether [it] would construe the precedents as the [agency] did, but whether the [agency’s] construction is reasonable and whether it has explained any departures from its past actions.”¹⁶⁵ Thus, in one case, the Fifth Circuit upheld an ICC declaratory order because the agency “followed its prior cases in reaching [its] determination, and it did not unreasonably construe federal precedents. It reasonably distinguished cases that might suggest a different result.”¹⁶⁶ An agency is generally not bound to give preclusive effect to an earlier federal or state court judgment if the issue arises out of a statute the agency is charged with administering.¹⁶⁷

Judicial review of an agency’s findings of fact is also limited. If the agency’s declaratory order emerges from a formal adjudication and includes factual findings grounded in the record, a court will review those findings for substantial evidence.¹⁶⁸ If the declaratory order is a product of an informal adjudication, the court will review the agency’s factual findings under the deferential arbitrary or capricious standard.¹⁶⁹ If the factual record is insufficient to support the agency’s action, a court may vacate the declaratory order.¹⁷⁰ This appears to be a fairly rare occurrence, perhaps because most declaratory orders are based on uncontested or assumed facts.

III. AGENCY USE OF DECLARATORY ORDERS

The historically minimal usage of declaratory orders by administrative agencies continues today.¹⁷¹ Only five agencies have adopted procedural regulations governing declaratory order proceedings: the FCC, the FERC, the FMC, the Maritime Administration, and the National Labor Relations Board (NLRB). Of these, the FERC and the FCC appear to have the most robust declaratory practices, while the FMC, the NLRB, and the Maritime Administration issue declaratory orders relatively rarely. The STB also regularly uses declaratory orders, although it has not adopted procedural regulations governing the practice. Finally, there are a handful of other agencies that have occasionally issued declaratory orders without having adopted procedural regulations

which explores in greater detail the procedures that agencies use in declaratory proceedings, suggests that most meet the minimum degree of formality needed to secure *Chevron* deference.

¹⁶⁵ *Central Freight*, 899 F.2d at 420-21 (citing *Texas*, 866 F.2d at 1556-57); see also *Merchs. Fast Motor Lines, Inc.*, 5 F.3d at 917 (same).

¹⁶⁶ *Central Freight*, 899 F.2d at 423; see *Pa. Pub. Util. Comm’n v. United States*, 812 F.2d 8 (D.C. Cir. 1987).

¹⁶⁷ See *Brand X*, 545 U.S. at 982-83; see also *Am. Airlines*, 202 F.2d at 799-801 (rejecting argument that the full faith and credit statute, 28 U.S.C. § 1738, or common law preclusion doctrines required a federal agency to give preclusive effect to a previously issued state court decision).

¹⁶⁸ See 5 U.S.C. § 706(2)(E); *Ill. Terminal R.R.*, 671 F.2d at 1216-17.

¹⁶⁹ See 5 U.S.C. § 706(2)(A).

¹⁷⁰ See *Hollister Ranch*, 759 F.2d at 92.

¹⁷¹ See *supra* at Part. I.C.

governing declaratory proceedings.¹⁷² Drawing on this experience, this Part considers how agencies can best use declaratory orders to improve their adjudicative and regulatory programs.

A. Defining the Scope of Declaratory Practice

How should agencies use declaratory orders—in what circumstances and to address what kinds of issues? The appropriate use of the declaratory order, as articulated in the text of the APA and fleshed out through judicial precedent, agency experience, and scholarly evaluation, provides a natural starting point. It provides the foundational principle that an agency should use a declaratory order 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. What this general principle will mean to an individual agency depends on that agency’s unique mission and context, including its statutory framework, the particular needs of its adjudicative or regulatory regime, and the culture of the industry it regulates or the community it serves. At the most basic level, the agency’s substantive statutory authority will necessarily define the range of issues that it may address through a declaratory order.¹⁷³ The case law demonstrates, however, that 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.¹⁷⁴ The device also offers a way for an agency to provide regulated parties with advance notice of how the agency will apply existing regulations to new or novel circumstances.¹⁷⁵ Even in the absence of novelty, an agency can provide targeted

¹⁷² See, e.g., Food and Drug Admin., Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34,650, 34,656 (June 17, 2015) (“This final determination is a 5 U.S.C. 554(e) declaratory order regarding the status of [Partially Hydrogenated Oils].”); Special Opportunities Fund, Inc.; Notice of Application, 78 Fed. Reg. 49,555, 49,555 (Aug. 14, 2013) (“Absent a request for a hearing that is granted by the [Securities and Exchange] Commission, the Commission intends to issue an order under Section 554(e) of the APA declaring that applicant’s proxy voting procedure does not satisfy Section 12(d)(1)(F) of the Act.”).

¹⁷³ See, e.g., *Ill. Terminal R.R.*, 671 F.2d at 1216 (“Of course, § 554(e) does not allow an agency to issue a declaratory order on any subject matter; there must be some underlying authority.”); accord 5 U.S.C. § 558(b) (“A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”).

¹⁷⁴ See *Ill. Terminal R.R.*, 671 F.2d at 1216; *New York State Comm’n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *N. C. Utils. Comm’n*, 537 F.2d at 794; *Ashland Oil*, 421 F.2d at 18. In Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*, the Administrative Conference urged agencies to consider procedural reforms designed to improve agency compliance with Executive Order 13132, which requires consultation with state and local governments in potentially preemptive rulemakings. See 76 Fed. Reg. 81 (Jan. 3, 2011). Subject to the limitations imposed by the ex parte rules that apply in administrative adjudications, see 5 U.S.C. § 554(d), this consultation may be easier in a declaratory order proceeding, because the narrow and known factual context makes clear the identity of any affected state or local authorities or interests.

¹⁷⁵ See *Aviators for Safe and Fairer Regulation*, 221 F.3d at 231.

guidance to regulated parties by declaring how existing regulatory requirements apply to a defined factual context.¹⁷⁶

Looking beyond the agencies' independent needs, the declaratory order is also an excellent device for agencies to use to assist state or federal courts by answering questions that are within an agency's special competence but arise in litigation in which the agency is not a party.¹⁷⁷ In some cases, parties may seek a declaratory order from an administrative agency at a court's express direction or referral.¹⁷⁸ In other cases, parties may ask an agency to issue a declaratory order in contemplation of or during the course of litigation, but without being so directed by a court.¹⁷⁹ Courts have perceived no legal impediment to such parallel administrative proceedings¹⁸⁰ and may even stay a proceeding pending the agency's decision.¹⁸¹ Regardless of how an issue is raised before the agency, its opinion may be very important to the litigation, even if it is not sufficient to determine the outcome before the courts.¹⁸² If an agency finds that the meaning of its governing statute, regulations, or other legal documents (such as permits or licenses) is commonly at issue in litigation to which it is not a party, the agency should consider creating a declaratory order procedure through which litigants can seek the agency's considered views. By doing so explicitly by regulation or through written guidance, the agency can make clear to its regulated industry the circumstances in which it will look favorably upon such petitions for declaratory order.

An agency can and should use its regulations to communicate and enforce its preferred uses of declaratory orders. This may be especially effective if the agency's declaratory practice is focused on a petition-initiated process.¹⁸³ In its regulations, the agency can allow or even require regulated parties to request a declaratory order as a

¹⁷⁶ See *Pacifica Found.*, 438 U.S. at 733-34.

¹⁷⁷ See *supra* notes 117-121 and accompanying text.

¹⁷⁸ See *Richman Bros. Records*, 124 F.3d at 1303; see also *Boston & Maine*, 330 F.2d at 14, 15-17. By statute, Congress has expressly allowed for the courts to refer questions or issues to certain agencies, see, e.g., 28 U.S.C. § 1336(b) (governing judicial referral to the STB), but because such referral may have "significant procedural consequences, a district court's stay of an action to allow a parallel [agency] action to proceed will not be treated as a referral . . . unless the district court clearly implies or explicitly states that it is referring the case to the" agency, *W. Coast Truck Lines*, 893 F.2d at 231.

¹⁷⁹ See, e.g., *Am. Airlines*, 202 F.3d at 795 ("At the urging of several of the parties, and while both the federal and state actions were pending, DOT initiated the interpretative proceeding that is the subject of this petition for review."); *Ashland Oil*, 421 F.2d at 19 ("On November 15, 1967, after the initiation of the action in the District Court, Phillips filed a petition with the Commission for a declaratory order.").

¹⁸⁰ See *Ashland Oil*, 421 F.2d at 21.

¹⁸¹ See, e.g., *E. W. Resort Transp., LLC v. Sopkin*, 371 F. Supp. 2d 1253 (D. Colo. 2005) (staying litigation pending STB's conclusion of declaratory proceeding on issue within agency's primary jurisdiction).

¹⁸² See *City of Chicago*, 199 F.3d at 428-29.

¹⁸³ As a purely descriptive matter, most of the agencies included in this study issue most if not all of their declaratory orders in response to petitions and not *sua sponte*. See *infra* at Part IV.B.

means of obtaining particular types of guidance from the agency.¹⁸⁴ This guidance need not be confined to the agency’s procedural regulation(s), but can rather be integrated into the appropriate provisions of the agency’s substantive regulations. This approach helps regulated parties understand how the agency prefers to use declaratory orders, and may thereby lend some order to the petitioning practice before the agency.¹⁸⁵

The FERC is a good example of an agency that has a robust declaratory practice that is well defined and controlled by regulation and written policy. In the FERC’s view, declaratory orders are generally not an appropriate vehicle for broad pronouncements on legal or policy issues, but are more typically used to address novel issues or provide needed regulatory certainty with respect to narrow legal questions on defined facts. From this perspective, a declaratory proceeding offers an early and more efficient route for regulated parties to either (1) obtain certainty before they invest significant resources in a project; and/or (2) pursue the potentially more expensive and involved route of a tariff filing or complaint before the agency.

The FERC clearly communicates these broad principles and agency preferences to its regulated industry in writing. For example, on the FERC’s website, the agency defines a “Petition For Declaratory Order” as:

[A] petition requesting the issuance of an order or ruling on jurisdictional issues where uncertainty, ambiguity, or controversy exists. The petition may seek an interpretation of a party’s rights or obligations under contracts, statutes, rules, regulations, or orders. Pleadings filed in the form of petitions for declaratory orders which seek more than a mere interpretive ruling (particularly those involving alleged rate schedule violations) are treated, instead, as formal complaints.¹⁸⁶

Building on this, the FERC’s regulations provide essential detail by specifically identifying the declaratory order as an appropriate procedural vehicle to:

¹⁸⁴ See, e.g., 18 C.F.R. § 284.502 (providing that certain FERC applicants “*must* file a request for declaratory order” (emphasis added)); 47 C.F.R. § 20.9(a)(14)(ii) (“Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider’s regulatory treatment as a private mobile radio service.”).

¹⁸⁵ This effort can be further supported if the agency provides guidance in its regulations regarding how a petition should be filed and what information it should contain in order to ensure that the agency has all the information it needs to efficiently process the petition. These matters are addressed in the discussion of agency procedures in Part IV.

¹⁸⁶ FERC, Application/Petition Definitions, https://elibrary.ferc.gov/idmws/help/Definitions/Sub_Definitions/Submittal/Applicaiton_Petition_Definitions.htm.

- Permit “[a] non-public utility [to] submit an open access transmission tariff and a request for declaratory order that its voluntary transmission tariff meets the requirements of Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.”¹⁸⁷
- Evaluate proposals to create or participate in Regional Transmission Organizations.¹⁸⁸
- Consider “[a] public utility’s request for one or more incentive-based rate treatments” before that utility files for such treatments under section 205 of the Federal Power Act.¹⁸⁹
- Resolve questions “concerning the Commission’s jurisdiction over a hydropower project under the Federal Power Act.”¹⁹⁰
- Consider requests for waiver of or exemption from certain regulatory requirements,¹⁹¹ or to evaluate the effect of a material change in facts on a previously granted waiver or exemption.¹⁹²
- Receive declarations of intent under section 23(b) of the Federal Power Act.¹⁹³

In addition, the FERC’s regulations in some cases facilitate the use of declaratory orders to streamline subsequent, related proceedings by calling for certain such orders to affect the applicable burden of proof.¹⁹⁴ By explicitly integrating the declaratory device into its

¹⁸⁷ 18 C.F.R. § 35.28(e). “Any submittal and request for declaratory order submitted by a non-public utility will be provided an NJ (non-jurisdictional) docket designation.” *Id.* § 35.28(e)(i).

¹⁸⁸ *See id.* § 35.34(d)(3).

¹⁸⁹ *Id.* § 35.35(d).

¹⁹⁰ *Id.* § 375.308(c)(5). More specifically, this provision delegates authority to the Director of the Office of Energy Projects (or the Director’s designee) to “[t]ake appropriate action” on such petitions. *Id.*

¹⁹¹ *See id.* §§ 292.203(d)(2), 366.3(d), 366.4(b)(3), 366.4(c)(2), 366.5(b), 366.5(c), 366.7(b). Other agencies, such as the FMC, do not use declaratory orders for this purpose, but instead have a separate process especially designed for considering requests for regulatory exemptions. *See* 46 C.F.R. § 502.74.

¹⁹² *See* 18 C.F.R. §§ 366.4(d)(1)(i), 366.4(d)(2)(ii), 366.7(c)(1).

¹⁹³ *See id.* § 385.207(b).

¹⁹⁴ The FERC’s rules provide when a non-public utility successfully secures a declaratory order finding its open access transmission tariff acceptable under the Commission’s rules, a “later applicant in a Federal Power Act (FPA) section 211 or 211A proceeding against the non-public utility shall have the burden of proof to show why service under the open access transmission tariff is not sufficient and why a section 211 or 211A order should be granted.” *Id.* § 35.28(e)(ii).

regulatory regime, the FERC has cultivated a well-defined, manageable declaratory practice that appears to benefit both the agency and the regulated industry.¹⁹⁵

The FCC is another agency that has defined by regulation the purposes for which it uses declaratory proceedings. For example, the FCC's regulations structure the International Bureau's use of declaratory rulings to approve foreign ownership in common carriers under Section 310 of the Communications Act of 1934.¹⁹⁶ The regulations also specify in detail the required contents of petitions filed for this purpose¹⁹⁷ and identify routine terms and conditions to which the resulting rulings are subject.¹⁹⁸ The International Bureau also uses declaratory rulings to respond to requests for authorization to provide service in the U.S. using non-U.S. licensed satellites,¹⁹⁹ while the Consumer and Governmental Affairs Bureau uses them to evaluate the validity of various restrictions on the reception of certain signals or services.²⁰⁰ The FCC's regulations thus help to shape the agency's declaratory practice by giving clear advice to the regulated industry regarding the circumstances in which the agency views a petition for declaratory ruling as the appropriate procedural vehicle.

An agency may also use its regulations or other written procedures and policies to make clear to its regulated industry the limits that it will impose on its declaratory practice. The FERC accomplishes this through its written guidance.²⁰¹ The FMC provides another good example. Its regulations establish declaratory order procedures, but state explicitly that those procedures "must be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view."²⁰² In its dispositions of petitions for declaratory order, the Commission has adhered to and

¹⁹⁵ A quick survey of industry newsletters suggests that the FERC's declaratory orders are effective in communicating the agency's policy positions and providing guidance to regulated parties. See, e.g., Troutman Sanders LLP, *2014 – A Big Year for FERC Orders Addressing LNG Jurisdiction*, <http://www.troutmansanders.com/files/Uploads/Documents/LNG%20FERC%20Rulings.pdf>; James F. Bowe, Jr., *FERC Decision Rejects Oil Pipeline's Petition for Declaratory Order Approving Contract Rates, Special Prorationing Methodologies and Priority Access for Excess Capacity*, King & Spalding Energy Newsletter (Apr. 2014), <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2014/April/article5.html>.

¹⁹⁶ See 47 C.F.R. §§ 1.990(a)(1) & (2).

¹⁹⁷ See *id.* § 1.991.

¹⁹⁸ See *id.* § 1.994.

¹⁹⁹ See *id.* § 25.137.

²⁰⁰ See *id.* § 1.4000(e). Other FCC regulations specify the declaratory ruling as the appropriate procedural vehicle for addressing other, specific kinds of issues. E.g., *id.* § 20.9(a)(14)(ii) ("Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service."); *id.* § 51.232(b) ("Any party seeking designation of a technology as a known disturber should file a petition for declaratory ruling with the Commission seeking such designation, pursuant to § 1.2 of this chapter.").

²⁰¹ See FERC Interpretative Order on Guidance, *supra* note 25.

²⁰² 46 C.F.R. § 502.75(b).

elaborated upon this statement of principle.²⁰³ The Commission has explained that, in its view, ““petitions for declaratory order, by their very nature concern potential violations of law. In fact . . . a potential legal peril must be demonstrated before the Commission will, under its rules, even entertain a petition for declaratory ruling.””²⁰⁴ Additionally, in practice, the FMC does not use declaratory orders to address matters that involve contested facts²⁰⁵ or will be more appropriately resolved through other kinds of proceedings.²⁰⁶ This latter limitation is evident in the FMC’s regulations, which provide that “[c]ontroversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease-and-desist orders are sought are not proper subjects of petitions” for declaratory order.²⁰⁷ Perhaps as a consequence of these clearly articulated policies, the FMC receives relatively few petitions for declaratory order, and it denies many of the petitions that it does receive.²⁰⁸

B. Agency Decisions Analogous to Declaratory Orders

Some consideration of agency decisions that appear to be analogous to declaratory orders or rulings may help to elucidate the circumstances in which agencies may be able

²⁰³ See, e.g., *Petition of Olympus Growth Fund III, L.P. for Declaratory Order, Rulemaking or Other Relief*, 31 S.R.R. 718, 723 (F.M.C. 2009) (explaining that a declaratory order ““is intended to provide guidance to persons who have not yet acted and who desire a legal ruling on a proposed future course of action”” (quoting *Petition of Evergreen Marine Corp. (Taiwan), Ltd. & Worldwide Logistics, Inc. for Declaratory Order*, 26 S.R.R. 605, 607 (F.M.C. 1991))).

²⁰⁴ *Olympus Growth Fund*, 31 S.R.R. at 723 (quoting *Indep. Action on Freight Forwarder Comp.*, 23 S.R.R. 390, 395 (F.M.C. 1985)).

²⁰⁵ See, e.g., *Comp. of Indep. Ocean Freight Forwarders*, 19 S.R.R. 1741, 1742 (F.M.C. 1980) (“For a declaratory judgment to issue, there must be a dispute which ‘calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present established facts.’” (quoting *Ashcroft v. Mattis*, 431 U.S. 171, 172 (F.M.C. 1977))). There is some tension between this aspect of the FMC’s practice and the provision of its procedural regulations suggesting the possibility of permitting “discovery or an evidentiary hearing” on a petition. See 46 C.F.R. §§ 502.75(c) & (e).

²⁰⁶ See, e.g., *Phillip R. Consolo v. Flota Mercante Granco-Combiana*, 7 F.M.C. 635, 640 (1963), available at <http://www.fmc.gov/assets/1/Page/vol07-Part4.pdf> (explaining that an agency need not issue a declaratory order where it appears the questions involved be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding that will be more appropriate or effective under the circumstances); see also AG’S MANUAL, *supra* note 53, at 60 (explaining that “an agency need not issue [declaratory] orders where it appears that the questions involved will be determined in a pending administrative or judicial proceeding or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances”).

²⁰⁷ 46 C.F.R. § 502.75(b).

²⁰⁸ In the petitioning context, a “denial” is an agency decision not to institute a declaratory proceeding or issue a declaratory order. In contrast, an agency “grants” (in whole or in part) a petition when it responds by issuing a declaratory order, even if the content or conclusion of the order is different from that which the petitioner requested.

to make more productive use of the declaratory device.²⁰⁹ The somewhat recent judicial approval of the issuance of declaratory orders through informal adjudicative processes also raises the possibility that some agencies may already be issuing decisions that are, in essence, declaratory orders, but which are called by some other name. One example is the “declaratory ruling” used by the FCC. For many years, there was substantial disagreement over whether these rulings were properly considered to be “declaratory orders.”²¹⁰ The courts’ acceptance of them as such has, however, terminated that controversy, allowing other agencies and scholars to draw from the FCC’s declaratory practice in understanding the possibilities and limitations of declaratory orders in administrative adjudication. The FCC’s experience also highlights the need for agencies to pay careful attention to determining and observing minimum procedural requirements when issuing declaratory orders through informal adjudication. In *City of Arlington*, the Fifth Circuit clearly signaled that it would have invalidated the FCC’s declaratory order if the agency had not used basic notice-and-comment procedures.²¹¹

A possibly analogous device may be found among the various forms of guidance that the IRS offers to taxpayers.²¹² The IRS has a sophisticated and somewhat complex system of guidance that uses a number of different, complementary vehicles to explain to taxpayers how the agency interprets and applies the U.S. tax code. A complete description and analysis of this system is well beyond the scope of this study, but it may be valuable to consider three of the primary guidance vehicles used by the agency: regulations, revenue rulings, and letter rulings. The most formal of these are regulations, which may be legislative or interpretative, but are in either event legally binding statements of agency policy and legal interpretation that taxpayers may rely upon.²¹³ At the other end of the spectrum is the private letter ruling, the purpose of which is “to provide taxpayers with definite and reliable determinations as to the tax treatment of future transactions.”²¹⁴ A “letter ruling” is defined as “a written statement issued to a taxpayer by an Associate Chief Counsel Office of the Office of Chief Counsel or by the Tax Exempt and Government Entities Division that interprets and applies the tax laws to

²⁰⁹ See *Uncertain Tools*, *supra* note 75, at 261. See Admin. Conf. of the U.S., Recommendation 70-2, *SEC No-Action Letters Under Section 4 of the Securities Act of 1933*, <https://www.acus.gov/sites/default/files/documents/70-2-ss.no-FR.pdf>.

²¹⁰ See *supra* at notes 16, 76.

²¹¹ See *City of Arlington*, 668 F.3d at 243-44.

²¹² See generally 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 (describing the various forms of guidance provided by the IRS to taxpayers).

²¹³ See *id.* at 326-30.

²¹⁴ *Id.* at 346. Although it is not entirely clear, the letter ruling program may be what the General Counsel of the Treasury Department proposed to create in 1938. See generally Oliphant, *supra* note 13. Another device the IRS uses to provide certainty to taxpayers is the closing agreement, which is conceived as more in the nature of a settlement, which is generally reached after a transaction has been consummated and problems have been identified during examination. See Rogovin & Korb, *supra* note 212, at 349-50; see also 26 U.S.C. § 7121.

a specific set of facts” generally involving “transactions that have not been consummated.”²¹⁵ A letter ruling is not binding on the taxpayer, but it is generally reliable because the retroactive effect of any revocation is strictly limited.²¹⁶ By statute, letter rulings must be publicly available (with personally identifying information redacted), but generally have no precedential value.²¹⁷ Finally, revenue rulings are “official interpretations by the Service, prepared in the Associate Chief Counsel Offices and published in the Internal Revenue Bulletin” that “represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling.”²¹⁸ The facts used in revenue rulings are often drawn from letter rulings, but are stated in a generalized way. Although revenue rulings “do not have the force and effect of” regulations, those published “may be used as precedents.”²¹⁹ In this respect, “[t]he revenue ruling program is centered upon uniformity of interpretation, rather than on the problem of the individual taxpayer.”²²⁰

Although letter rulings and revenue rulings each share many of the characteristics of declaratory orders, neither is wholly analogous. For its part, the letter ruling is like a declaratory order in that it is typically issued in response to an individual request for guidance from a taxpayer, provides a generally reliable sense of how the agency will apply the law to proffered facts, serves the purpose of addressing the taxpayer’s uncertainty, and is made publicly available. But it is not legally binding, has no precedential effect, and is not subject to judicial review. The revenue ruling is more closely analogous to a declaratory order—it is more formal, may generate greater certainty, and has precedential effect. But it is based on facts that are generalized, it binds no individual taxpayer, and although “courts will often hold the Service to the position expressed in the revenue ruling,” they do not consistently defer to them.²²¹

This analysis is instructive primarily because it brings into further relief the advantages of declaratory orders over other mechanisms of agency advice-giving. The next section explores these advantages.

²¹⁵ Rogovin & Korb, *supra* note 212, at 343.

²¹⁶ *Id.* at 348.

²¹⁷ See 26 U.S.C. § 6110(k)(3); Rogovin & Korb, *supra* note 212, at 347-48. A letter ruling will have precedential effect only if the Secretary so provides by regulation, *id.*, but “[t]he only regulations that come close to allowing reliance are the penalty regulations under section 6662,” *id.* at 348. In 1976, out of concern that private letter rulings were creating a body of secret law not available to all taxpayers, Congress required the IRS to make the rulings available to the public. See *id.* at 347; 26 U.S.C. § 6110(h)(1). This history is fascinating in its own right.

²¹⁸ Rogovin & Korb, *supra* note 212, at 330.

²¹⁹ Internal Revenue Bulletin, Bulletin No. 2015-1, Introduction (Jan. 2, 2015), <http://www.irs.gov/pub/irs-irbs/irb15-01.pdf>.

²²⁰ Rogovin & Korb, *supra* note 212, at 331.

²²¹ *Id.* at 336.

C. Should Agencies Expand the Use of Declaratory Orders?

The declaratory order is a unique procedural device that offers valuable benefits to both agencies and regulated parties. Although agencies may be understandably reluctant to legally bind themselves, doing so may in some instances be the only way to achieve the level of clarity and certainty that is necessary for a program to run smoothly and effectively. The adjudicatory nature of the declaratory order offers a valuable compromise here: it allows the agency to bind itself and regulated parties, but that binding effect is limited by the facts stated in the order, and the agency is not prevented from changing its legal conclusion or policy in a subsequent order. By providing definitive guidance through a document of easily ascertainable legal effect, declaratory orders may reduce or eliminate litigation.²²² By using declaratory orders to 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.²²³

Three developments may encourage agencies to overcome their traditional reluctance to use declaratory orders. First, it is now reasonably clear that agencies may issue declaratory orders in informal adjudication. This development expands the availability of the device and also reduces the cost and procedural burden of using declaratory orders. Second, courts today are more willing to review guidance documents and to question an agency's characterization of its action as non-binding. The legal concepts underlying this development are difficult and contested, and the relevant judicial precedent is inconsistent and often unclear. Agencies may be able to avoid some of the attendant litigation risk by using declaratory orders – a binding, but targeted form of guidance – in lieu of other forms of non-binding, legislative guidance. Finally, new programs and new challenges facing old programs may create opportunities to beneficially expand the use of declaratory orders. For example, and as previously suggested, the device may be particularly well suited to streamlining overwhelmed

²²² Cf. *id.* at 331.

²²³ To the author's knowledge, no agency currently uses declaratory orders in this manner. But the method appears to be wholly consistent with the law governing the appropriate confines of administrative declarations.

adjudicatory programs by providing definitive guidance on the resolution of common issues.

In light of the unique advantages of declaratory orders and these recent developments, agencies should use declaratory orders more frequently. It may be particularly appropriate for an agency to use a declaratory order when regulated parties request or otherwise appear to require concrete guidance as to how the agency would apply existing regulatory requirements to proposed or contemplated activities or to emerging or concrete disputes among regulated parties or between a regulated party and state or local government. Ordinarily, the facts regarding these activities should be susceptible of accurate description, uncontested, and unlikely to change.²²⁴ Beyond these most basic considerations, however, agencies should experiment with innovative uses of declaratory orders to improve regulatory programs by providing binding and reliable guidance.

IV. AGENCY PROCEDURES IN DECLARATORY PROCEEDINGS

Once an agency has decided to use declaratory orders, it must design the procedures it will observe in declaratory proceedings. Drawing on the procedures used by those agencies that currently use declaratory orders, this Part suggests potential best practices.

A. Determining Minimum Procedural Requirements

Agencies can and do issue declaratory orders through both formal and informal adjudicatory proceedings.²²⁵ When designing the procedures that it will observe in a declaratory proceeding, an agency must begin by determining whether the matter is one that must be adjudicated formally or informally. This is necessary to determine the minimum procedures required by law.

If the agency anticipates issuing declaratory orders on matters that are required by statute to be adjudicated under the APA's formal adjudication provisions, those provisions determine the minimum procedural requirements. The Supreme Court has held, however, that even in this circumstance, an agency may generally issue a

²²⁴ See, e.g., CHARLES H. KOCH, 2 ADMINISTRATIVE LAW AND PRACTICE § 5:17, at 40 (3d ed.) (“Ordinarily declaratory orders should be issued only where critical facts are clear and cannot be altered by subsequent events.”); AG’S REPORT, *supra* note 2, at 32 (stating that declaratory orders should “be employed only in situations where the critical facts can be explicitly stated, without possibility that subsequent events will alter them”); Gellhorn, *supra* note 36, at 157 (arguing that “declaratory rulings should be reserved for cases which reflect a real need for administrative guidance” and “are appropriate only when the fact situations to which they relate can be described accurately and unequivocally”).

²²⁵ See *supra* at Part I.B.

declaratory order without completing a full hearing on the record.²²⁶ The agency's procedures must otherwise be in accord with the minimum requirements established by the APA.²²⁷ This means, for example, that the agency must provide parties with adequate notice of the proceeding²²⁸ and observe the APA's separation of functions requirements²²⁹ and prohibitions on ex parte communications.²³⁰ Nonetheless, the ability to issue a declaratory order prior to conducting a full hearing would appear to be a significant advantage – it provides an efficient way for an agency to give regulated parties guidance through a non-coercive, but legally binding order. This approach can provide the regulatory certainty that some regulated parties need in order to carry out their business.

If the agency anticipates issuing declaratory orders on matters that are not required by statute to be adjudicated under the APA (i.e., matters that may be adjudicated informally), then it has substantial discretion to design the procedures it will use.²³¹ With the exception of a few provisions in Sections 555 and 558, the APA does not establish procedures for informal adjudication.²³² On judicial review of declaratory orders issued through informal adjudication, however, the courts typically note, with apparent approval, an agency's use of basic notice-and-comment procedures.²³³ Indeed, some courts have suggested that agencies must provide at least a basic form of notice and an opportunity for comment.²³⁴ This minimal requirement should not be confused with the notice-and-comment requirements of informal rulemaking under the APA. Under the judicial gloss that has been applied to 5 U.S.C. § 553, agencies must meet a variety of detailed requirements in informal rulemaking that are not evident simply from the text of the statute. This includes, for example, the requirements of providing public access to data the agency intends to rely upon and of responding to comments filed on the proposed rule. Section 553 is not, however, applicable to adjudication.²³⁵ The minimum procedural requirements for declaratory orders issued in informal adjudication

²²⁶ See *Weinberger*, 412 U.S. at 625-26. Nevertheless, an evidentiary hearing may be required if the matter involves contested facts. See *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200 (D.C. Cir. 1976).

²²⁷ See 5 U.S.C. §§ 554, 556, 557.

²²⁸ See *id.* § 554(b).

²²⁹ See *id.* §§ 556(b), 557(b).

²³⁰ See *id.* § 557(d)(1); *Am. Airlines*, 202 F.2d at 798.

²³¹ See *Am. Airlines*, 202 F.2d at 797.

²³² See 5 U.S.C. §§ 555, 558; *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

²³³ See, e.g., *State Corp. Comm'n*, 787 F.2d at 1428.

²³⁴ See *Am. Airlines*, 202 F.2d at 797; *but see Radiofone*, 759 F.2d at 940 n.4 (explaining that in informal adjudication, the APA does not require an agency to give notice to other parties before issuing a declaratory order requested by a single entity); *cf. State Corp. Comm'n*, 787 F.2d at 1428 (“The FCC’s preemption order [issued as a declaratory ruling] enacted no new regime of rights and duties which would warrant the procedural safeguards of formal rulemaking.” (citing *Batterton v. Marshall*, 648 F.2d 694, 705 n.58 (D.C. Cir. 1980))).

²³⁵ See *Am. Airlines*, 202 F.2d at 797-98.

presumably should not include them and may therefore be best understood as “notice and comment lite.”²³⁶

Procedural regulations governing declaratory proceedings need not be extensive, and an agency’s adoption of them may offer significant benefits to both agencies and regulated parties. Adopting procedures specifically tailored to declaratory proceedings, even if those procedures are simple and concisely stated, communicates to the regulated industry the agency’s preferences and policies regarding the proper uses of petitions for declaratory order. This may help to prevent the filing of petitions that will not be well received and may improve the quality of the petitions that are filed. Adopting declaratory procedures need not be burdensome. Of the five agencies that currently have such procedures, most of them devote only one, relatively brief provision to the matter, relying upon other, more general provisions to fill in the details. For example, the FERC’s Rule 207 (governing “Petitions”) provides, in relevant part, that “[a] person must file a petition when seeking . . . [a] declaratory order or rule to terminate a controversy or remove uncertainty.”²³⁷ The FERC then uses other procedures, which apply in other kinds of proceedings as well, to process and decide on the petitions.²³⁸ Integrating declaratory orders into an agency’s broader procedural framework in this manner is an easy and efficient way of providing guidance to regulated parties regarding the procedures for requesting a declaratory order.

Each agency that uses declaratory orders in administrative adjudication 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.

B. Initiating the Proceeding

1. Petitions for Declaratory Order: Required Contents

Agencies most often issue declaratory orders in response to petitions, and there are techniques that an agency can use to improve the petitioning process for both the agency and regulated parties.²³⁹ An agency may by regulation specify the required contents of a petition for declaratory order, to ensure that the petition provides the agency

²³⁶ See *infra* at Parts III.B, C, & D; cf. Henry J. Friendly, “Some Kind of Hearing”, 123 U. Penn. L. Rev. 1267 (1975) (exploring the minimum requirements of a basic yet acceptable hearing).

²³⁷ 18 C.F.R. § 385.207(a)(2).

²³⁸ See, e.g., 18 C.F.R. § 2.1(a)(1)(xi)(D) (establishing the Commission’s policy of publishing notice of initiation of various proceedings, including petitions for declaratory order, in the *Federal Register*).

²³⁹ See, e.g., 18 C.F.R. § 385.207(a)(2) (establishing the general rule that “[a] person must file a petition when seeking . . . [a] declaratory order . . . to terminate a controversy or remove uncertainty”); 47 C.F.R. § 1.2 (providing that the FCC “may, in accordance with section 5(d) of the [APA], on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty”).

with the basic information required to make a decision.²⁴⁰ For example, the Maritime Administration’s regulations provide that declaratory order petitions “shall state clearly and concisely the nature of the controversy or uncertainty, shall cite the statutory authority involved, [and] shall include a complete statement of the facts and grounds supporting the petition, together with a full disclosure of the petitioner’s interest.”²⁴¹ The FCC and the FERC similarly specify by regulation the required contents of a petition for declaratory order.²⁴² These requirements, like those specified in the FMC’s regulations, may be applicable to all petitions for declaratory order, regardless of subject matter.²⁴³ The requirements may also be tailored to the subject matter of the petition, such as in the case of the FCC’s regulations specifying the contents of petitions for declaratory ruling on foreign ownership requirements.²⁴⁴ Either way, clearly specifying the necessary contents of a petition helps petitioners understand what is required of them and also ensures that the agency receives all the information it needs to act on petitions. This streamlines the process for prospective petitioners and the agency alike. For these reasons, agency procedures should specify the information that regulated parties should include in a petition for declaratory order.

2. *Petitions for Declaratory Order: Filing Fees*

As authorized by statute, an agency may charge a filing fee for petitions for declaratory order.²⁴⁵ For example, the FMC charges a \$241 filing fee for petitions for declaratory order.²⁴⁶ The FERC’s filing fee, which is updated annually,²⁴⁷ is currently \$24,730.00.²⁴⁸ This fee is not imposed if the petition:

solely concerns the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses and permits for the

²⁴⁰ See, e.g., 18 C.F.R. §§ 35.34(d)(3)(i)-(iv), 35.34(d)(4) (specifying the information that must be included in a petition for declaratory order approving a Regional Transmission Organization).

²⁴¹ 46 C.F.R. § 201.74.

²⁴² The FERC’s general pleading requirements apply to petitions for declaratory order. See 18 C.F.R. § 385.203.

²⁴³ For example, the FMC’s regulations provide that “[p]etitions for the issuance [of a declaratory order] must: state clearly and concisely the controversy or uncertainty; name the persons and cite the statutory authority involved; include a complete statement of the facts and grounds prompting the petitions, together with full disclosure of petitioner’s interest.” 46 C.F.R. § 502.75(a)(2).

²⁴⁴ See 47 C.F.R. §1.991.

²⁴⁵ See 18 C.F.R. § 385.207; see also 31 U.S.C. § 9701 (providing general authorization to the heads of agencies to establish user fees by regulation). Congress has statutorily directed the IRS to charge a user fee for letter rulings. Rogovin & Korb, *supra* note 212, at 347; see 26 U.S.C. § 7528. The Administrative Conference has previously addressed the issue of administrative user fees. See Admin. Conf. of the U.S., Recommendation 87-4, *User Fees*, 52 Fed. Reg. 23,634 (June 24, 1987).

²⁴⁶ See 46 C.F.R. § 502.75(a)(3)

²⁴⁷ See 18 C.F.R. § 381.104; see, e.g., Annual Update of Filing Fees, 79 Fed. Reg. 17,024 (Mar. 27, 2014) (providing an annual update of the FERC’s filing fees).

²⁴⁸ 18 C.F.R. § 381.302.

construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under Part I of the Federal Power Act.²⁴⁹

A person claiming this exemption must file a petition for exemption in lieu of the fee and must demonstrate that the exemption is applicable.²⁵⁰ The FERC has also established other kinds of waivers and exemptions that allow petitioners to avoid the filing fee in appropriate circumstances.²⁵¹ At a broader level, the FERC's filing fee for petitions for declaratory order is calculated within the context of its broader financing structure. As a zero-cost agency, the FERC is obligated to recoup the amount of its congressional appropriation through fees and charges and to return that amount to the U.S. Treasury.²⁵² Overall, the FERC's fees and charges reflect the agency's considered policy judgment as to the most "fair and equitable" way to recoup its overall appropriation and is also based on the cost of the staff time and other resources that each activity requires.²⁵³ In addition, the agency's regulated industry primarily consists of large energy companies that are able to pay the agency's fees and charges as an ordinary cost of business. The FERC's apparently substantial filing fee for petitions for declaratory order may thus be reasonable and appropriate when considered within its broader context.

Agencies that charge filing fees for petitions for declaratory order should ensure that the fees are reasonable in the context of the agency's broader fee structure and should also provide appropriate waivers and exemptions. This approach may help to strike the right balance between competing considerations. On one hand, these user fees may help to defray the costs of a robust declaratory practice and may deter the filing of frivolous petitions. On the other hand, it is important not to set the fee so high that it deters meritorious or otherwise appropriate petitions or conveys an advantage to some parties at the expense of others. Carefully tailored exemptions can help to address these concerns.

²⁴⁹ *Id.* § 381.302(b).

²⁵⁰ *Id.* § 381.302(c).

²⁵¹ *See id.* §§ 381.106, 381.108.

²⁵² *See* Omnibus Reconciliation Act of 1986, Pub. L. 99-509, § 3401, 100 Stat. 1874, 1890-91 (1986), *codified at* 42 U.S.C. § 7178; *see also Report of the FERC Administration Committee*, 24 ENERGY L.J. 407, 407 (2003) (describing the FERC as a "self-funded federal agency that recovers its expenditures through charges to the entities it regulates"). For this reason, payment for the FERC's fees is made directly to the Treasurer of the United States. *See* 18 C.F.R. § 381.105.

²⁵³ *See* F.E.R.C. Order No. 641, *Revision of Annual Charges Assessed to Public Utilities*, 65 Fed. Reg. 65,757 (Nov. 2, 2000); *see also* 18 C.F.R. § 382.201

3. *Sua Sponte Declaratory Orders*

An agency may also issue a declaratory order on its own motion in order to terminate a controversy or remove uncertainty that has become apparent to it through its day-to-day interactions with its regulated industry. In contrast to a petition-based declaratory practice, this approach allows an agency to be more proactive and to assert better control over its own agenda. For example, the FCC has on occasion issued a declaratory ruling in conjunction with or shortly after it has published a final rule, in order to provide fact-bound guidance as to how the new rule will apply.²⁵⁴ The FDA has likewise issued declaratory orders on its own motion (after providing an opportunity for comment on a proposed order) in response to new or emerging scientific information that affects the application of existing regulatory requirements.²⁵⁵ Such uses of declaratory orders allow an agency to act on information that may be uniquely available to it, providing beneficial guidance to regulated parties without unexpected costs or interference with the agency's ability to set its own agenda. This more proactive use of declaratory orders may be useful in other circumstances as well. For example, an agency that adjudicates large numbers of claims may be able to streamline its process by using declaratory orders issued *sua sponte* to conclusively resolve issues that commonly arise in individual adjudications. Agencies should consider opportunities to improve regulatory and adjudicatory programs through more proactive, *sua sponte* issuance of declaratory orders.

C. Giving Notice and Collecting Information

All of the agencies included in this study give some form of generalized notice to the public and interested persons when a petition for declaratory order is filed, either through the *Federal Register* or on the agency's own website. For example, the FERC's policy, stated explicitly in its procedural regulations, is to inform the public and other interested parties of an application for a declaratory order via a notice published in the *Federal Register*.²⁵⁶ The FMC's regulations similarly provide that "[a] notice of filing of any petition which meets the requirements of this section must be published in the *Federal*

²⁵⁴ See Fed. Commc'ns Comm'n, Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Protecting and Promoting the Open Internet, FCC 15-24 (March 12, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

²⁵⁵ See Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34,650, 34,656 (June 17, 2015).

²⁵⁶ See 18 C.F.R. § 2.1(a)(1)(xi)(D); see, e.g., Navigator BSG Transportation & Storage, LLC; Notice of Petition for Declaratory Order, 80 Fed. Reg. 26,245 (May 7, 2015) (providing notice of an application for declaratory order); Primary Power, LLC; Notice of Filing, 74 Fed. Reg. 61,146 (Nov. 23, 2009) (same). In some instances, the FERC requires that petitioners "must include [with their petition for declaratory order] a form of notice suitable for publication in the *Federal Register*." 18 C.F.R. §§ 366.4(b)(3), 366.4(c)(2), 366.7(b). The FERC's rules see to allow for the possibility that the Secretary of the Commission may exercise his or her discretion to deviate from the general policy of providing notice of an application for declaratory order in the *Federal Register*. See *id.* § 2.1(a).

*Register.*²⁵⁷ Historically, the ICC was known to publish notice of petitions for declaratory order in the *Federal Register*.²⁵⁸ The ICC's modern successor, the STB, usually does not publish notice of petitions for declaratory order in the *Federal Register*, but it does provide such notice of all petitions via its own website.²⁵⁹ Although this is generally sufficient to ensure that interested parties learn of a petition (in part through informal communications among those in the STB's regulated industry), the STB has on occasion received complaints when interested parties did not timely learn about a proceeding. Like the STB, the FCC most often provides notice of the filing of a petition for declaratory ruling via its online docket system. The FCC's regulations provide that the bureau or office with which a petition is filed is responsible for providing notice, and notice practices do vary among them.²⁶⁰ The regulations provide that the appropriate bureau or office "should docket" a petition "within an existing proceeding" and "should seek comment on the petition via public notice."²⁶¹ In keeping with this permissive language, not all petitions for declaratory ruling are docketed or otherwise noticed. On the other end of the spectrum, the FCC's bureaus sometimes publish notice of a petition in the *Federal Register*.²⁶² An agency should give public notice, preferably via publication in the *Federal Register*, when it receives a petition for declaratory order or intends to issue a declaratory order on its own motion. To reduce costs, the notice can be brief, directing parties to obtain more information via the agency's website. Publication in the *Federal Register*, however, makes it more likely that interested parties will learn of the agency's proceedings in a timely manner. Notices published on an agency's website, in contrast, are likely to reach only those sophisticated parties who consistently keep a close eye on that targeted forum.

Most agencies also provide some opportunity for interested persons to submit comments or other information on a petition. In some cases, the process is more judicialized, reflecting the more individualized and adjudicatory nature of a declaratory order. The FMC's regulations, for example, provide that "[i]n the case of petitions

²⁵⁷ 46 C.F.R. § 502.75.

²⁵⁸ See *Arctic Express*, 87 F. Supp. 2d at 828 ("In response to Dart's petition [for declaratory order], the [ICC] issued a public notice of the proceedings and invited comments." (citing Dart Transit Co., Petition for Declaratory Order – Leasing Regs., 57 Fed. Reg. 3215 (1992))).

²⁵⁹ See Surface Transp. Bd., e-Library, Decisions & Notices, <http://www.stb.dot.gov/decisions/readingroom.nsf/WebServiceDate?openform>.

²⁶⁰ See 47 C.F.R. § 1.2(b).

²⁶¹ See *id.*

²⁶² See Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling by CTIA-The Wireless Association To Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, 73 Fed. Reg. 50,972 (Aug. 29, 2008). The *Federal Register* notice was important in *City of Arlington*, where the Wireless Bureau's decision to publish a notice and request for comments in the *Federal Register* permitted the Fifth Circuit to hold that, even if the resulting order might have been more properly characterized as a legislative rule, any procedural error was harmless. See *City of Arlington*, 668 F.3d at 242-43.

involving a matter limited to specifically named persons, participation by persons not named therein will be permitted only upon grant of intervention by the Commission.”²⁶³ The FERC, which ordinarily uses declaratory orders to give individual parties advice about how regulatory requirements will apply to their specific circumstances or investment plans, also uses a process of intervention to identify the parties that will be permitted to submit arguments and information in a declaratory proceeding.²⁶⁴ Thus, after the initial notice in the *Federal Register* is provided, the FERC’s regulations provide that “service of formal documents issued in a proceeding” is limited to “parties of record or their attorneys.”²⁶⁵ If a petition raises issues of broader interest or applicability, it may be appropriate for an agency to accept the submission of comments from a broader range of persons. The FMC’s regulations expressly embrace this idea, providing that “[i]f the controversy or uncertainty is one of general public interest, and not limited to specifically named persons, opportunity for response will be given to all interested persons.”²⁶⁶ The practice of other agencies is in accord.²⁶⁷ An agency should provide interested persons with an opportunity to comment when it receives a petition for declaratory order or intends to issue a declaratory order on its own motion. The agency should tailor this opportunity according to the nature of the proceeding and the needs of potential commenters. If the declaratory proceeding involves a narrow question of how existing regulations would apply to an individual party’s proposed actions, it may be appropriate to limit the submission of comments via an intervention process. On the other hand, if the matter is one of broader interest or general policy, then a process more akin to notice-and-comment rulemaking may be more appropriate.

Agency procedures for collecting information otherwise tend to be relatively informal, reflecting the discretionary, advisory nature of declaratory orders. As previously discussed, courts have held that a declaratory order may lawfully issue under the APA without the agency first conducting a hearing on the record.²⁶⁸ And, in keeping with the intentions of the APA’s supporters, most agencies refuse to issue declaratory

²⁶³ 46 C.F.R. § 502.75(f)(2); *see also id.* § 502.68 (establishing requirements for motions for leave to intervene).

²⁶⁴ *See* 18 C.F.R. § 385.214. The FERC’s standard is permissive and in practice imposes little limitation on participation in declaratory proceedings. *See, e.g., id.* § 385.214 (b)(2)(iii) (providing that “[a] motion to intervene must . . . address the movant’s interest in sufficient detail to demonstrate that . . . [t]he movant’s participation is in the public interest”).

²⁶⁵ 18 C.F.R. § 385.211(a). The rule further provides that “the mailing or e-mailing of information copies shall be confined to that which is required by the Commission’s rules and regulations, by courtesy in response to written requests for copies, or by other considerations deemed valid by the Secretary in specific instances.” *Id.* The FERC’s regulations also allow for the designation of corporate officials of regulated entities to receive service of documents, including of petitions for declaratory order. *See id.* §§ 385.2010(k)(1), 385.2010(k)(4).

²⁶⁶ 46 C.F.R. § 502.75(f)(1).

²⁶⁷ *See, e.g., City of Arlington*, 668 F.3d at 241. Although participation in a declaratory proceeding may be limited, the filings are often made publicly available through an agency’s online docketing system.

²⁶⁸ *See supra* at Part I.B.

orders on contested facts.²⁶⁹ Thus, for example, the STB typically does not engage in fact-finding in declaratory proceedings,²⁷⁰ and the FCC has adhered to a “long standing policy of refusing to issue interpretative rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them.”²⁷¹ Most agencies that use declaratory orders require petitioners and other interested parties to provide all necessary factual information in their petitions or responses thereto.²⁷² Although an agency may request additional information from a petitioner or other interested party, the submission of evidence or additional briefing is otherwise generally not permitted. This approach reinforces the seemingly appropriate expectation that the parties should provide all the information necessary for an agency to provide the requested, binding guidance.

D. Deciding and Processing Administrative Appeals

The decision of whether to initiate a declaratory proceeding or issue a requested declaratory order is within the agency’s “sound discretion.”²⁷³ Agencies also have the discretion to permit the voluntary dismissal of a declaratory proceeding after it has been initiated, but prior to issuance of a final declaratory order.²⁷⁴ When an agency receives a petition for declaratory order, the APA imposes two minimal procedural requirements. First, the agency must respond to the petition “within a reasonable time.”²⁷⁵ Second, if the agency denies the petition, it must give “[p]rompt notice” of the decision and, “[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.”²⁷⁶ These are the same procedural requirements that apply to agency decisions in response to other kinds of requests, including petitions for rulemaking.²⁷⁷ All but one of the agencies included in this study reported that they respond to all petitions for declaratory order and do so in timely fashion. This approach is in accord with the APA’s requirements and should be

²⁶⁹ See, e.g., AG’S REPORT, *supra* note 2, at 32, 33.

²⁷⁰ See, e.g., *Boston & Maine*, 330 F.3d at 17 (explaining how STB declaratory order issued in response to judicial referral “made clear that [the STB] had engaged in no factfinding . . . , but merely attempted to provide general guidance to the district court”).

²⁷¹ *Pacifica Found.*, 438 U.S. at 734 (internal quotation marks omitted).

²⁷² See, e.g., 46 C.F.R. § 502.75(c) (providing that petitions filed with the FMC “must be accompanied by the complete factual and legal presentation of petitioner as to the desired resolution of the controversy or uncertainty, or a detailed explanation why such can only be developed through discovery or evidentiary hearing”); *id.* § 502.75(d) (“Responses to the petition must contain the complete factual presentation of the responding party as to the desired resolution, or a detailed explanation why such can only be developed through discovery or evidentiary hearing.”).

²⁷³ 5 U.S.C. § 554(e).

²⁷⁴ See *Climax Molybdenum*, 703 F.2d at 451.

²⁷⁵ 5 U.S.C. § 555(b); see also *See FERC Interpretative Order on Guidance*, *supra* note 25, at P20 (“Although there is no statutory time frame to respond to a request for a declaratory order, the Commission attempts to respond to all such requests in a timely manner.”).

²⁷⁶ 5 U.S.C. § 555(e).

²⁷⁷ See *Petitions for Rulemaking*, *supra* note 5, at ¶¶ 10-13.

taken by all agencies. An agency that receives a petition for declaratory order should respond to that petition within a reasonable period of time. If the agency denies the petition, it should give prompt notice of its decision, accompanied by a brief explanation of its reasons.

A final, important issue involves the availability of an agency's declaratory decisions, including dispositions of petitions and declaratory orders. All of the agencies included in this study provide online access to declaratory decisions on their websites (typically through an online library or via an online docketing system). In some instances, agencies also publish declaratory decisions in the *Federal Register*. In addition, declaratory decisions may be available through professional publications (which may in turn be available through Westlaw or LexisNexis). Each of these methods meets minimal legal requirements. The D.C. Circuit has found that, even if an agency's "decisions are not widely available," their availability on the agency's website provides "sufficient notice for a well-represented entity" that is "intensely interested in the issue."²⁷⁸ In order to fulfill their guidance function and serve as useful agency precedent, it is important that declaratory decisions be readily available to regulated parties. To that end, an agency should make its declaratory decisions, including orders and other dispositions on petitions, available to the public in a centralized and easy-to-find location on its website.

V. CONCLUSION

The declaratory order is a unique and valuable tool that agencies historically have underused. A product of adjudication, this procedural device allows an agency to dispel uncertainty and to develop administrative policy incrementally through targeted, legally binding, non-coercive guidance to regulated parties. The historical underuse of the device may be attributed to a variety of factors, among which two are key. First, for many decades after the APA's passage, the prevailing view was that a declaratory order could be used to address only those relatively few matters that are subject by statute to formal adjudication. This view sharply limited the usefulness of the device – but the courts have more recently discarded it. Second, agencies have consistently exhibited a preference for informal, non-binding forms of guidance that are more shielded from judicial review than are declaratory orders. In recent decades, however, courts have demonstrated a greater willingness to scrutinize an agency's characterization of a document as non-binding and to review informal guidance. This development may have reduced the declaratory order's apparent comparative disadvantage.

In light of these developments, it appears that the time is ripe for agencies to integrate the declaratory order more fully into their procedural arsenal. The experiences of the relatively few agencies that have a robust declaratory practices suggests that, when used appropriately, the declaratory order can improve the administration of both

²⁷⁸ Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, 1131 n.9 (D.C. Cir. 2002).

regulatory and adjudicatory programs. It can allow an agency to save significant resources by staying abreast of emerging developments, addressing issues before they become problems, and preemptively adjudicating matters that might otherwise have to be resolved through more costly enforcement mechanisms. Building on previous experience, agencies should not hesitate to identify innovative new ways to use declaratory orders. An agency that has been charged with administering a new program, or which faces new challenges in an existing program, may be particularly well positioned to innovate. Finally, past practice suggests a number of procedures and best practices that may improve declaratory proceedings and reduce the costs of agency innovation.