



Declaratory Orders

Committee on Adjudication

Proposed Recommendation | December 4, 2015

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

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



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12 misplaced reliance rise, even a small chance that an agency will not adhere to a position offered
13 in guidance can become intolerable.

14 When it enacted the Administrative Procedure Act (APA) in 1946, Congress included a
15 provision designed to address this difficult problem. In 5 U.S.C. § 554(e), it provided that an
16 “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a
17 declaratory order to terminate a controversy or remove uncertainty.”² The declaratory order is
18 a type of adjudication that serves an important advice-giving function. It may be issued in
19 response to a petition filed with the agency³ or on the agency’s own motion. It is well tailored to
20 provide a level of certainty that may not be achievable using more informal kinds of guidance.
21 This is because it is non-coercive and yet legally binds the agency and the named party, but only
22 on the facts assumed in the order. The agency remains free to change its position with adequate
23 explanation in a subsequent proceeding. It is a device that affords substantial administrative
24 discretion—the agency may decline a request to institute a declaratory proceeding or to issue a
25 declaratory order. An agency’s decision, be it a denial of a petition or the issuance of a
26 declaratory order, is judicially reviewable. But the scope of review is limited, and the position an
27 agency takes in a declaratory order is typically afforded deference,⁴ both on judicial review and

² 5 U.S.C. § 554(e) (2012); *see generally* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 30-34 (1941) (urging Congress to include the declaratory orders provision in the APA).

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

⁴ The level of deference may depend on the formality of the procedure used, *see United States v. Mead Corp.*, 553 U.S. 218 (2001), though “[c]ourts have afforded *Chevron* deference to declaratory orders issued through both formal and informal adjudication.” Emily S. Bremer, *Declaratory Orders* 25 (Oct. 30, 2015) *available at* <https://www.acus.gov/report/declaratory-orders-final-report> [hereinafter Bremer], citing *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (giving *Chevron* deference to a declaratory ruling issued by the FCC through informal adjudication).



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28 when relevant to matters at issue in subsequent or parallel litigation. In the latter instance, it
29 could even have issue preclusive effect.⁵

30 An agency may properly use a declaratory order for a wide variety of purposes, including
31 to: (1) interpret the agency's governing statute or own regulations; (2) define terms of art; (3)
32 clarify whether a matter falls within federal regulatory authority; or (4) address questions of
33 preemption.⁶ One occasion for doing so is in response to a court's request for a ruling when the
34 court has found that the agency has primary jurisdiction over a matter being litigated. By
35 providing definitive guidance through a document of easily ascertainable legal effect, declaratory
36 orders may reduce or eliminate litigation.⁷ By using declaratory orders to address narrow
37 questions raised by specific and uncontested facts, an agency can precisely define the legal issues
38 it addresses and reserve related issues for future resolution, thereby facilitating an incremental
39 approach to the provision of regulatory guidance. The resulting body of agency precedent will
40 not only be useful to regulated and other interested parties, but may also prove invaluable to the
41 agency when it later decides to conduct a rulemaking or other proceeding for formulating policy
42 on a broader scale. Other uses may be possible as well. For example, an agency that conducts
43 mass adjudication could use the declaratory order to promote uniformity by choosing to give
44 practical and detailed guidance or make binding, decisional law regarding the proper application
45 of the law to commonly encountered factual circumstances.

46 There are several benefits to an agency when it uses declaratory orders. First, declaratory
47 orders promote voluntary compliance, which saves agency resources that would otherwise be

⁵ See generally *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015) (holding that the decisions of administrative tribunals can, and often do, have issue preclusive effect).

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

⁷ Cf. Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 331.



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48 spent on enforcement. Second, declaratory orders promote uniformity and fairness in treatment
49 among the agency's regulated parties. Third, they facilitate communication between the agency
50 and its regulated parties, which can help highlight issues before they become problems. Finally,
51 declaratory orders help the agency stay current by allowing regulated parties to communicate
52 how they are doing business so that agency officials can understand and address emerging issues.

53 Despite the apparent usefulness of the declaratory order as a tool of administrative
54 governance, agencies have demonstrated a persistent reluctance to use it. Several developments
55 may encourage agencies to overcome this traditional reluctance to use declaratory orders. First,
56 it is now reasonably clear that agencies may issue declaratory orders in informal adjudication.⁸
57 This development expands the availability of the device and also reduces the cost and procedural
58 burden of using declaratory orders.⁹ Second, courts today are more willing to review guidance
59 documents and to question an agency's characterization of its action as non-binding. Agencies
60 may be able to avoid some of the attendant litigation risk by using declaratory orders—a binding,
61 but targeted form of instruction—in lieu of other forms of non-binding, legislative guidance.
62 Agencies may also be able to use declaratory orders to provide requisite notice to regulated
63 parties of the agency's intention to enforce in the future a rule or principle that has previously
64 been communicated only via non-binding guidance. Finally, new programs and new challenges

⁸ See *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996); *Texas v. United States*, 866 F.2d 1546, 1555-56 (5th Cir. 1989); *Bremer*, *supra* note 4 at 12-13, 32-33, 36-37. For example, courts have affirmed the sufficiency of basic notice-and-comment procedures when agencies issue a declaratory order in informal adjudication. See *City of Arlington v. FCC*, 668 F.3d 229, 243-45 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013).

⁹ Even if the matter is one subject by statute to formal adjudication under the APA, an agency may be able to streamline the process of issuing a declaratory order. *Cf.* Administrative Conference of the United States, Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973). See generally *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 625 (1973).



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65 facing old programs may create opportunities to beneficially expand the use of declaratory
66 orders.

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

RECOMMENDATION

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

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

77 **Potential Uses of Declaratory Orders**

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

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

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

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



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- 86 (d) Clarifying whether a matter falls within federal regulatory authority;
- 87 (e) Clarifying a division of jurisdiction between or among federal agencies that
- 88 operate in a shared regulatory space; and
- 89 (f) Addressing questions of preemption.

90 4. Agencies should look for opportunities to experiment with innovative uses of

91 declaratory orders to improve regulatory programs by providing binding and reliable guidance.

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

93 5. Each agency that uses declaratory orders should have written and publicly available

94 procedures explaining how the agency initiates, conducts, and terminates declaratory

95 proceedings. An agency should also communicate in a written and publicly available way its

96 preferred uses of declaratory orders.

97 6. When designing the procedures for its declaratory proceedings, an agency should begin

98 by determining whether or not the matter is one that must be adjudicated according to the

99 formal adjudication provisions of the APA. If the matter is not required by statute to be

100 conducted under the APA's formal adjudication provisions, an agency has substantial procedural

101 discretion, but at a minimum should provide a basic form of notice and opportunity for comment.

102 7. Agency procedures should provide guidance regarding the information that petitioners

103 should include in a petition for declaratory order.

104 **Giving Notice and Collecting Information**

105 8. Each agency should provide a way for petitioners and other interested parties to learn

106 when the agency has received a petition for declaratory order or intends to issue a declaratory

107 order on its own motion. The agency should tailor this communication according to the nature

108 of the proceeding and the needs of potential commenters.



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

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

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

116 **Timeliness and Availability of Declaratory Orders**

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

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