

Comment on Proposed ACUS Recommendation: Internet Evidence in Agency Adjudication  
Jeffrey S. Lubbers, Special Counsel

Preamble:

At line 76–78, it says, “Some agencies apply the Federal Rules of Evidence; others have developed evidentiary rules to suit their specific need.” While this is not literally incorrect, I think it gives the false impression that there’s a 50-50 split between these two types of approaches among agencies. I believe that very few agencies have adopted the FRE, at least in whole cloth. So, I would prefer that the sentence read, “A few agencies apply the *Federal Rules of Evidence*, some use it as a guide, and others have developed evidentiary rules to suit their specific need.”

Following the substituted sentence, insert a footnote that reads: “Admin. Conf. of the U.S., Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 51 Fed. Reg. 25,642 (July 16, 1986). The APA provides only that ‘the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.’ 5 U.S.C. § 556(d).”