ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation | June 13, 2019

The Administrative Procedure Act (APA) exempts policy statements and interpretive[1] rules from its requirements for the issuance of legislative rules, including notice and comment.[2] The *Attorney General's Manual on the Administrative Procedure Act* defines "statements of policy" as agency statements of general applicability "issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[3] The *Manual* similarly defines "interpretive rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[4] Because of the commonalities between policy statements and interpretive rules, including their advisory function, many scholars and government agencies have more recently adopted the umbrella term "guidance" to refer to both interpretive rules and policy statements.[5]

The Administrative Conference has issued several recommendations on policy statements.[6] The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*

[1] In accordance with standard parlance, this Recommendation uses the term "interpretive" in place of the APA's word "interpretative."

[2] 5 U.S.C. § 553(b)(A).

[3] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

[4] *Id.*

[5] *See, e.g.*, Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/agency-guidance-final-report.

[6] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 1992-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 1976-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

Statements, offers best practices to agencies regarding policy statements. The Recommendation advises agencies not to treat policy statements as binding on the public and to take steps to make clear to the public that policy statements are nonbinding. It also suggests measures agencies could take to allow the public to propose alternative approaches to those contained in a policy statement and offers suggestions on how agencies can involve the public in adopting and modifying policy statements.

During the discussion of Recommendation 2017-5, the Assembly considered whether to extend the recommendations therein to interpretive rules. The Assembly decided against doing so, but it expressed its views that a follow-on study addressing interpretive rules would be valuable.

This project takes up that charge. Policy statements and interpretive rules are similar in that they lack the force of law[7] and are often issued without notice-and-comment proceedings, as the APA permits. This similarity suggests that, as a matter of best practice, when interested persons disagree with the views expressed in an interpretive rule, the agency should allow them a fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the practice that Recommendation 2017-5 already prescribes in the case of policy statements.[8] The benefits to the public of according such treatment, as well as the potential costs to agencies of according it, are largely the same regardless of whether a given guidance document is concerned with law, policy, or a combination of both.[9]

Recommendation 2017-5 provided that "[a]n agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any

[7] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) (citing the ATTORNEY GENERAL'S MANUAL, *supra* note 3, at 30 n.3)).

[8] Recommendation 2017-5, *supra* note 6, ¶ 2; *see also* Recommendation 1992-2, *supra* note 6, ¶ II.B.

[9] *See* Blake Emerson and Ronald M. Levin, Agency Guidance Through Interpretive Rules: Research and Analysis 33–34 (May 28, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/agency-guidance-through-interpretive-rules-final-report.

member of the public."[10] Although the same basic idea should apply to interpretive rules, the concept of "binding" effect can give rise to misunderstanding in the context of those rules, for several reasons.

First, interpretive rules often use mandatory language when the agency is using that language to describe an existing statutory or regulatory requirement. Recommendation 2017-5 itself recognized the legitimacy of such phrasing.[11] For this reason, administrative lawyers sometimes describe such rules as "binding." That common usage of words, however, can lead to confusion: it can impede efforts to make clear that interpretive rules should remain nonbinding in a different sense, i.e., that members of the public should be accorded a fair opportunity to request that such rules be modified, rescinded, or waived.

Second, discussions of the circumstances in which interpretive rules may or may not be "binding" bring to mind assumptions that stem from the case law construing the rulemaking exemption in the APA. Courts and commentators have disagreed about whether, under that case law, interpretive rules may be binding on the agency that issues them.[12] Despite this diversity of views, officials interviewed for this project did not express the view that they would categorically deny private parties the opportunity to seek modification, rescission, or waiver of an interpretive rule. In this Recommendation, the Administrative Conference addresses only best practices and expresses no opinions about how the APA rulemaking exemption should be construed. Nevertheless, assumptions derived from the APA background can divert attention from issues of what sound principles of administration require, which this Recommendation does address.

Third, administrative lawyers currently differ on the question of whether interpretive rules are effectively rendered "binding" when they are reviewed in court under the *Auer v.*

[10] Recommendation 2017-5, *supra* note 6, ¶ 1.

[11] *Id.* ¶ 5; *accord* Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,440 (Jan. 25, 2007).

[12] Emerson & Levin, *supra* note 9, at 20–23; Parrillo, *supra* note 5, at 23–25; *see also* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).

Robbins[13] standard of review, which provides that an agency's interpretation of its own regulation becomes of "controlling weight" if it is not "plainly erroneous or inconsistent with the regulation."[14] The question of whether interested persons should be able to ask an agency to modify, rescind, or waive an interpretive rule does not intrinsically have to turn on what level of deference the courts would later accord to the agency's interpretation in the event of judicial review. Indeed, the possibility of judicial deference at the appellate level (under *Auer* or any other standard of review) may augment the challenger's interest in raising this interpretive issue at the agency level.[15] Even so, the doctrinal debate over whether an interpretive rule is or is not "binding" under *Auer* can have the effect of directing the focus of attention away from these practical considerations.

For the foregoing reasons, the Administrative Conference has worded the initial operative provisions of the Recommendation so that it avoids using the phrase "binding on the public." Instead it urges that agencies not treat interpretive rules as setting independent standards for action and that interested persons should have a fair opportunity to seek modification, rescission, or waiver of an interpretive rule. In substance, this formulation expresses positions that largely correspond with prescriptions that Recommendation 2017-5 made regarding policy statements, but it does so without implicating unintended associations that the word "binding" might otherwise evoke.

What constitutes a fair opportunity to contest an interpretive rule will depend on the circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of factors can deter affected persons from contesting guidance documents with which they disagree;

[13] 519 U.S. 452 (1997).

[14] *Id*. at 461; *compare Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (stating that because of "judge-made doctrines of deference . . . [a]gencies may now use [interpretive] rules not just to advise the public, but also to bind them"), *with id.* at 1208 n.4 (opinion of the Court) ("Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says."). The Supreme Court is currently considering whether to overrule *Auer* in *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari). For reasons explained in the text, the present recommendations do not depend on which view of *Auer* one favors, or on what the Court may decide in *Kisor*.

[15] *See* Emerson & Levin, *supra* note 9, at 25.

these factors operate in approximately the same manner regardless of whether a policy statement or interpretive rule is involved.[16] Agencies that design procedures for requesting reconsideration or modification of both types of guidance should be attentive to circumstances that affect the practical ability of members of the public to avail themselves of the opportunity to be heard. The mere existence of an opportunity to contest an interpretive rule through an internal appeal may not be enough to afford a "fair opportunity" because of the very high process costs that pursuing such an appeal could entail.

At the same time, agencies should also consider governmental interests such as the agency's resource constraints and need for centralization.[17] For example, an agency should be able to deal summarily with requests that it finds to be obstructive, dilatory, or otherwise tendered in apparent bad faith. It should not be expected to entertain and respond in detail to repetitive or frivolous challenges to the agency's position. Additionally, Paragraph 3 recognizes that the need for coordination of multiple decision makers in a given program may justify requiring lower-level employees to adhere to the agency's interpretive rules.

The recommendations below pertaining to public participation in the formulation of interpretive rules closely track the public participation provisions of Recommendation 2017-5. The recommendations here have been modified to reflect differences between interpretive rules and statements of policy.

Paragraphs 12 through 15 set forth principles that agencies should consider in determining whether and how to invite members of the public to suggest alternative approaches to those spelled out in interpretive rules. These paragraphs are largely drawn from corresponding provisions in Recommendation 2017-5. Interpretive rules that lend themselves to alternative approaches include those that lay out several lawful options for the public but do not purport to be exhaustive, and those that speak at a general level, leaving space for informal adjustments and negotiation between the agency and its stakeholders about how the rule should be applied. On the

[16] Parrillo, *supra* note 5, at 25.

[17] *See* Emerson & Levin, *supra* note 9, at 38–41.

other hand, certain kinds of interpretive rules do not lend themselves to such flexible treatment. This category may include rules in which an agency has determined that a statutory term has only one construction, such as where the rule takes the view that certain conduct is categorically required or forbidden.[18]

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

1. An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.
2. An agency should afford members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule. In determining whether to modify, rescind, or waive an interpretive rule, an agency should give due regard to any reasonable reliance interests.
3. It is sometimes appropriate for an agency, as an internal agency management matter, to direct some of its employees to act in conformity with an interpretive rule. But the agency should ensure that this does not interfere with the fair opportunity called for in Paragraph 2. For example, an interpretive rule could require officials at one level of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a higher level can authorize a modification, rescission, or waiver of that rule. Agency review should be available in cases in which frontline officials fail to follow interpretive rules in conformity with which they are properly directed to act.
4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that the rule expresses the agency's current interpretation of the law but that a member of the

[18] *Id.* at 42–44.

public will, upon proper request, be accorded a fair opportunity to seek modification, rescission, or waiver of the rule.

5. An interpretive rule should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement, or the language is addressed to agency employees and will not interfere with the fair opportunity called for in Paragraph 2.
6. An agency should make clear to members of the public which agency officials are required to follow an interpretive rule and where to go within the agency to seek modification, rescission, or waiver from the agency.
7. An agency should instruct all employees engaged in an activity to which an interpretive rule pertains that, although the interpretive rule may contain mandatory language, they should refrain from making any statements suggesting that an interpretive rule may not be contested within the agency. Insofar as any employee is directed, as an internal agency management matter, to act in conformity with an interpretive rule, that employee should be instructed as to the expectations set forth in Paragraphs 2 and 3.
8. When an agency is contemplating adopting or modifying an interpretive rule, it should consider whether to solicit public participation, and, if so, what kind, before adopting or modifying the rule. Options for public participation include stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response. In deciding how to proceed, the agency should consider:
    a. The agency's own procedures for the adoption of interpretive rules.
    b. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated persons (regulatory beneficiaries and other interested persons) may offer different information than regulated persons and that non-regulated persons will often have no meaningful opportunity to provide input regarding interpretive rules other than at the time of adoption.
    c. The likely increase in rule acceptance from broadening participation, keeping in mind that non-regulated persons will often have no opportunity to provide input

regarding interpretive rules other than at the time of adoption, and that rule acceptance may be less likely if the agency is not responsive to stakeholder input.

d. Whether the agency is likely to learn more useful information by having a specific agency proposal as a focal point for discussion, or instead having a more free-ranging and less formal discussion.

e. The practicability of broader forms of participation, including invitation for written input from the public, keeping in mind that broader participation may slow the adoption of interpretive rules and may diminish resources for other agency tasks, including the provision of interpretive rules on other matters.

9. If an agency does not provide for public participation before adopting or modifying an interpretive rule, it should consider offering an opportunity for public participation after adoption or modification. As with Paragraph 8, options for public participation include stakeholder meetings or webinars, advisory committee proceedings, and invitation for written input from the public with or without a response.

10. An agency may make decisions about the appropriate level of public participation interpretive rule-by-interpretive rule or by assigning certain procedures for public participation to general categories of interpretive rules. If an agency opts for the latter, it should consider whether resource limitations may cause some interpretive rules, if subject to pre-adoption procedures for public participation, to remain in draft for substantial periods of time. If that is the case, agencies should either (a) make clear to stakeholders which draft interpretive rules, if any, should be understood to reflect current agency thinking; or (b) provide in each draft interpretive rule that, at a certain time after publication, the rule will automatically either be adopted or withdrawn.

11. All written interpretive rules affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found. Interpretive rules should also indicate the nature of the reliance that may be placed on them and the opportunities for modification, rescission, or waiver of them.

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches

12. Interpretive rules that lend themselves to alternative approaches include those that lay out several lawful options for the public but do not purport to be exhaustive, and those that speak at a general level, leaving space for informal adjustments and negotiation between the agency and its stakeholders about how the rule should be applied. Paragraphs 1-11 above apply with equal force to such rules. However, with respect to such rules, agencies should take additional steps to promote flexibility, as discussed below.
13. Agencies should afford members of the public a fair opportunity to argue for lawful approaches other than those put forward by an interpretive rule, subject to any binding requirements imposed upon agency employees as an internal management manner. The agency should explain that a member of the public may take a lawful approach different from the one set forth in the interpretive rule or request that the agency take such a lawful approach. The interpretive rule should also include the identity and contact information of officials to whom such a request should be made. Additionally, with respect to such rules, agencies should take further measures to promote such flexibility as provided in Paragraph 14.
14. In order to provide a fair opportunity for members of the public to argue for other lawful approaches, an agency should, subject to considerations of practicability and resource limitations and the priorities described in Paragraph 15, consider additional measures, including the following:
    a. Promoting the flexible use of interpretive rules in a manner that still takes due account of needs for consistency and predictability. In particular, when the agency accepts a proposal for a lawful approach other than that put forward in an interpretive rule and the approach seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected stakeholders, to officials likely to

hear the argument, and to members of the public, subject to existing protections for confidential business or personal information.

b. Assigning the task of considering arguments for approaches other than those in an interpretive rule to a component of the agency that is likely to engage in open and productive dialogue with persons who make such arguments, such as a program office that is accustomed to dealing cooperatively with regulated parties and regulatory beneficiaries.

c. In cases where frontline officials are authorized to take an approach different from that in an interpretive rule but decline to do so, directing appeals of such a refusal to a higher-level official who is not the direct superior of those frontline officials.

d. Investing in training and monitoring of frontline personnel to ensure that they: (i) treat parties' ideas for lawful approaches different from those in an interpretive rule in an open and welcoming manner; and (ii) understand that approaches other than those in an interpretive rule, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them.

e. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support approaches different from those in an interpretive rule and to provide feedback to the agency on whether its officials are giving reasonable consideration to such proposals.

15. Because measures to promote flexibility (including those listed in Paragraph 14) may take up agency resources, it will be necessary to set priorities for which interpretive rules are most in need of such measures. In deciding when to take such measures, the agency should consider the following, bearing in mind that these considerations will not always point in the same direction:

a. An agency should assign a higher priority to an interpretive rule the greater the rule's impact is likely to be on the interests of regulated parties, regulatory beneficiaries, and other interested parties, either because regulated parties have

strong incentives to comply with the rule or because the rule practically reduces the stringency of the regulatory scheme compared to the status quo.

b. An agency should assign a lower priority to promoting flexibility in the use of a rule insofar as the rule's value to the agency and to stakeholders lies primarily in the fact that it is helpful to have consistency independent of the rule's substantive content.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Guidance Through Interpretive Rules

Committee on Judicial Review

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager's amendments (with no marginal notes), an amendment from the Council (with source shown in the margin), and additional amendments from a Conference Member (with source shown in the margin).

The Administrative Procedure Act (APA) exempts policy statements and interpretive[1] rules from its requirements for the issuance of legislative rules, including notice and comment.[2] The *Attorney General's Manual on the Administrative Procedure Act* defines "statements of policy" as agency statements of general applicability "issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[3] The *Manual* similarly defines "interpretive rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[4] Because of the commonalities between policy statements and interpretive rules, including their advisory function, many scholars and government agencies have more recently adopted the umbrella term "guidance" to refer to both interpretive rules and policy statements.[5]

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The Administrative Conference has issued several recommendations on policy statements.[6] The latest one, Recommendation 2017-5, *Agency Guidance Through Policy Statements*, offers best practices to agencies regarding policy statements. The Recommendation advises agencies not to treat policy statements as binding on the public and to take steps to make clear to the public that policy statements are nonbinding. It also suggests measures agencies could take to allow the public to propose alternative approaches to those contained in a policy statement and offers suggestions on how agencies can involve the public in adopting and modifying policy statements.[7]

During the discussion of Recommendation 2017-5, the Assembly considered whether to extend the recommendations therein to interpretive rules. The Assembly decided against doing so, but it expressed its views that a follow-on study addressing interpretive rules would be valuable.

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according it, are largely the same regardless of whether a given guidance document is concerned with law, policy, or a combination of both.[10]

Recommendation 2017-5 provided that "[a]n agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public."[11] Although the same basic idea should apply to interpretive rules, the concept of "binding" effect can give rise to misunderstanding in the context of those rules, for several reasons.

First, interpretive rules often use mandatory language when the agency is ~~using that language to~~ describinge an existing statutory or regulatory requirement. Recommendation 2017-5 itself recognized the legitimacy of such phrasing.[12] For this reason, administrative lawyers sometimes describe such rules as "binding." That common usage of words, however, can lead to confusion: it can impede efforts to make clear that interpretive rules should remain nonbinding in a different sense, i.e., that members of the public should be accorded a fair opportunity to request that such rules be modified, rescinded, or waived.

Second, discussions of the circumstances in which interpretive rules may or may not be "binding" bring to mind assumptions that stem from the case law construing the rulemaking exemption in the APA.[13] Courts and commentators have disagreed about whether, under that case law, interpretive rules may be binding on the agency that issues them.[14] Despite this diversity of views, officials interviewed for this project did not express the view that they would

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categorically deny private parties the opportunity to seek modification, rescission, or waiver of an interpretive rule. In this Recommendation, the Administrative Conference addresses only best practices and expresses no opinions about how the APA rulemaking exemption should be construed. Nevertheless, assumptions derived from the APA background can divert attention from ~~issues~~consideration of what sound principles of administration require, which this Recommendation does address.

Third, administrative lawyers currently differ on the question of whether interpretive rules are effectively rendered "binding" when they are reviewed in court under the *Auer v. Robbins*[15] standard of review, which provides that an agency's interpretation of its own regulation becomes of "controlling weight" if it is not "plainly erroneous or inconsistent with the regulation."[16] The question of whether interested persons should be able to ask an agency to modify, rescind, or waive an interpretive rule does not intrinsically have to turn on what level of deference the courts would later accord to the agency's interpretation~~, in the event of judicial review~~ Indeed, the possibility of judicial deference at the appellate level (under *Auer* or any other standard of review) may augment the challenger's interest in raising this interpretive issue at the agency level.[17] Even so, the doctrinal debate over whether an interpretive rule is or is not "binding" under *Auer* can ~~have the effect of~~ direct~~ing the focus of~~ attention away from these practical considerations.

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for action and that interested persons should have a fair opportunity to seek modification, rescission, or waiver of an interpretive rule. In substance, this formulation expresses positions that largely correspond with prescriptions that Recommendation 2017-5 made regarding policy statements, but it does so without implicating unintended associations that the word "binding" might otherwise evoke.

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The recommendations here have been modified to reflect differences between interpretive rules and statements of policy.

Paragraphs 12 through 15 set forth principles that agencies should consider in determining whether and how to invite members of the public to suggest alternative approaches or analyses to those spelled out in interpretive rules. These paragraphs are largely drawn from corresponding provisions in Recommendation 2017-5. Interpretive rules that lend themselves to alternative approaches include those that lay out several lawful options for the public but do not purport to be exhaustive. They may also include rules that, in spelling out decisional factors that are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules~~,~~ ~~and those that~~ speak at a general level, leaving space for informal adjustments and negotiation between the agency and ~~its~~ ~~stakeholders~~interested persons[20] about how the rule should be applied. On the other hand, certain kinds of interpretive rules, such as those in which an agency has determined that a statutory term has only one construction (e.g., rules that take the view that certain conduct is categorically required or forbidden), do not lend themselves to such flexible treatment. ~~This category may include rules in which an agency has determined that a statutory term has only one construction, such as where the rule takes the view that certain conduct is categorically required or forbidden~~.[21]

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan B. Morrison #1

Commented [CMA2]: Proposed Amendment from Senior Fellow Alan B. Morrison #2

Commented [CA3]: Proposed Amendment from Council. This Amendment also includes the addition of a new FN 20. Note: If adopted, staff will ensure, as a Committee on Style matter, proper internal cross-references in all footnotes.

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

1. An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule

[20] This Recommendation uses "interested person" rather than "stakeholder," which Recommendation 2017-5, *supra* note 6, uses. The Conference believes that "interested person" is more precise than "stakeholder" and that "stakeholder," as used in Recommendation 2017-5, should be understood to mean "interested person."

[21] *Id.* at 42–44.

should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.

2. An agency should afford members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule. In determining whether to modify, rescind, or waive an interpretive rule, an agency should give due regard to any reasonable reliance interests.
3. It is sometimes appropriate for an agency, as an internal agency management matter, to direct some of its employees to act in conformity with an interpretive rule. But the agency should ensure that this does not interfere with the fair opportunity called for in Paragraph 2. For example, an interpretive rule could require officials at one level of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a higher level can authorize a modification, rescission, or waiver of that rule. Agency review should be available ~~in cases in which~~ when frontline officials fail to follow interpretive rules ~~in conformity with which~~ they are properly directed to ~~act~~follow.
4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that the rule expresses the agency's current interpretation of the law but that a member of the public will, upon proper request, be accorded a fair opportunity to seek modification, rescission, or waiver of the rule.
5. An interpretive rule should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement, or the language is addressed to agency employees and will not interfere with the fair opportunity called for in Paragraph 2.
6. An agency should make clear to members of the public which agency officials are required to follow an interpretive rule and where to go within the agency to seek modification, rescission, or waiver from the agency.
7. An agency should instruct all employees engaged in an activity to which an interpretive rule pertains that, although the interpretive rule may contain mandatory language, they should refrain from making any statements suggesting that an interpretive rule may not be contested within the agency. Insofar as any employee is directed, as an internal agency

management matter, to act in conformity with an interpretive rule, that employee should be instructed as to the expectations set forth in Paragraphs 2 and 3.

8. When an agency is contemplating adopting or modifying an interpretive rule, it should consider whether to solicit public participation, and, if so, what kind, before adopting or modifying the rule. Options for public participation include ~~stakeholder~~ meetings or webinars with interested persons, advisory committee proceedings, and invitation for written input from the public with or without a response. In deciding how to proceed, the agency should consider:
    a. The agency's own procedures for ~~the adoption of~~ adopting interpretive rules.
    b. The likely increase in useful information available to the agency from broadening participation, keeping in mind that non-regulated persons (regulatory beneficiaries and other interested persons) may offer different information than regulated persons and that non-regulated persons will often have no meaningful opportunity to provide input regarding interpretive rules other than at the time of adoption.
    c. The likely increase in rule acceptance from broadening participation, keeping in mind that non-regulated persons will often have no opportunity to provide input regarding interpretive rules other than at the time of adoption, and that rule acceptance may be less likely if the agency is not responsive to ~~stakeholder~~ input from interested persons.
    d. Whether the agency is likely to learn more useful information by having a specific agency proposal as a focal point for discussion, or instead having a more free-ranging and less formal discussion.
    e. The practicability of broader forms of participation, including invitation for written input from the public, keeping in mind that broader participation may slow the adoption of interpretive rules and may diminish resources for other agency tasks, including ~~the provision of~~ issuing interpretive rules on other matters.
9. If an agency does not provide for public participation before adopting or modifying an interpretive rule, it should consider offering an opportunity for public participation after

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adoption or modification. As with Paragraph 8, options for public participation include ~~stakeholder~~ meetings or webinars with interested persons, advisory committee proceedings, and invitation for written input from the public with or without a response.

10. An agency may make decisions about the appropriate level of public participation interpretive rule-by-interpretive rule or by assigning certain procedures for public participation to general categories of interpretive rules. If an agency opts for the latter, it should consider whether resource limitations may cause some interpretive rules, if subject to pre-adoption procedures for public participation, to remain in draft for substantial periods of time. If that is the case, agencies should either (a) make clear to ~~stakeholders~~interested persons which draft interpretive rules, if any, should be understood to reflect current agency thinking; or (b) provide in each draft interpretive rule that, at a certain time after publication, the rule will automatically either be adopted or withdrawn.
11. All written interpretive rules affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found. Interpretive rules should also indicate the nature of the reliance that may be placed on them and the opportunities for modification, rescission, or waiver of them.

Recommendations Applicable Only to Those Interpretive Rules Amenable to Alternative Approaches or Analyses

12. Interpretive rules that lend themselves to alternative approaches or analyses include those that lay out several lawful options for the public but do not purport to be exhaustive. They may also include rules that, in spelling out decisional factors that are relevant to the meaning of a statute or regulation, leave open the possibility that other decisional factors might also be relevant. Typically, such rules~~, and those that~~ speak at a general level, leaving space for informal adjustments and negotiation between the agency and ~~its~~ ~~stakeholders~~interested persons about how the rule should be applied. Paragraphs 1-11 above apply with equal force to such rules. However, with respect to such rules, agencies should take additional steps to promote flexibility, as discussed below.

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13. Agencies should afford members of the public a fair opportunity to argue for lawful approaches or analyses other than those ~~put forward by~~spelled out in an interpretive rule, subject to any binding requirements imposed upon agency employees as an internal management manner. The agency should explain that a member of the public may take a lawful approach different from the one set forth in the interpretive rule, ~~or~~ request that the agency take such a lawful approach, or request that the agency endorse an alternative or additional analysis of the rule. The interpretive rule should also include the identity and contact information of officials to whom such a request should be made. Additionally, with respect to such rules, agencies should take further measures to promote such flexibility as provided in Paragraph 14.

14. In order to provide a fair opportunity for members of the public to argue for other lawful approaches or analyses, an agency should, subject to considerations of practicability and resource limitations and the priorities described in Paragraph 15, consider additional measures, including the following:

    a. Promoting the flexible use of interpretive rules in a manner that still takes due account of needs for consistency and predictability. In particular, when the agency accepts a proposal for a lawful approach or analysis other than that put forward in an interpretive rule and the approach or analysis seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected ~~stakeholders~~interested persons, to officials likely to hear the argument, and to members of the public, subject to existing protections for confidential business or personal information.

    b. Assigning the task of considering arguments for approaches or analyses other than those in an interpretive rule to a component of the agency that is likely to engage in open and productive dialogue with persons who make such arguments, such as a program office that is accustomed to dealing cooperatively with regulated parties and regulatory beneficiaries.

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c. ~~In cases where~~When frontline officials are authorized to take an approach or endorse an analysis different from that in an interpretive rule but decline to do so, directing appeals of such a refusal to a higher-level official who is not the direct superior of those frontline officials.

d. Investing in training and monitoring of frontline personnel to ensure that they: (i) treat parties' ideas for lawful approaches or analyses that are different from those in an interpretive rule in an open and welcoming manner; and (ii) understand that approaches or analyses other than those in an interpretive rule, if undertaken according to the proper internal agency procedures for approval and justification, are appropriate and will not have adverse employment consequences for them.

e. Facilitating opportunities for members of the public, including through intermediaries such as ombudspersons or associations, to propose or support approaches or analyses different from those in an interpretive rule and to provide feedback to the agency on whether its officials are giving reasonable consideration to such proposals.

15. Because measures to promote flexibility (including those listed in Paragraph 14) may take up agency resources, it will be necessary to set priorities for which interpretive rules are most in need of such measures. In deciding when to take such measures, the agency should consider the following, bearing in mind that these considerations will not always point in the same direction:

a. An agency should assign a higher priority to an interpretive rule the greater the rule's impact is likely to be on the interests of regulated parties, regulatory beneficiaries, and other interested parties, either because regulated parties have strong incentives to comply with the rule or because the rule practically reduces the stringency of the regulatory scheme compared to the status quo.

b. An agency should assign a lower priority to promoting flexibility in the use of a rule insofar as the rule's value to the agency and ~~to stakeholders~~interested persons ~~lies~~ is primarily ~~in the fact that it is helpful to have~~ consistency ~~independent of the rule's~~rather than substantive content.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Selection of Administrative Law Judges

Commented [ATW1]: The Committee on Adjudication and the Committee on Administration and Management voted to change the title of this Recommendation to "Agency Recruitment and Selection of Administrative Law Judges."

Joint Ad Hoc Committee of the Committee on Adjudication and Committee on Administration and Management

Proposed Recommendation | June 13, 2019

The Administrative Procedure Act (APA) requires that hearings conducted under its main adjudication provisions[1] (sometimes known as "formal" hearings) be presided over by the agency itself, by "one or more members of the body which comprises the agency," or by "one or more administrative law judges [(ALJs)] appointed under" 5 U.S.C. § 3105.[2] Section 3105, in turn, authorizes "[e]ach agency" to "appoint as many [ALJs] as are necessary for proceedings required to be conducted in accordance" with those provisions.[3]

The process for appointing ALJs recently changed as a result of Executive Order (EO) 13,843.[4] Until that order was issued, agencies could a hire a new ALJ only from a certificate of qualified applicants (that is, a list of applicants eligible for hire) prepared by the Office of Personnel Management (OPM).[5] Each certificate generally had three applicants selected from a much larger register of applicants OPM deemed "qualified." The "list of three," as it was known, consisted of the three highest-scoring applicants based upon, among other things, an OPM-

[1] 5 U.S.C. §§ 554, 556–57.

[2] *Id*.

[3] *Id.* § 3105.

[4] Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018); *see also* Memorandum from Jeff T.H. Pon, Dir., Office of Pers. Mgmt., to Heads of Exec. Dep'ts and Agencies, Executive Order – Excepting Administrative Law Judges from the Competitive Service (July 10, 2018), https://chcoc.gov/print/9282 (noting that "OPM's regulations continue to govern some aspects of ALJ employment").

[5] This was the process for hiring new ALJs. Many agencies hired incumbent ALJs from other agencies under a process known as "interagency transfer." This process no longer exists, but agencies are still free to hire ALJs from other agencies using their own process.

administered and -developed examination and panel interview process, as well as veterans' status.[6]

Under EO 13,843, newly appointed ALJs are no longer in the "competitive service," but instead are in what is known as the "excepted service."[7] As a result, agencies now hire new ALJs directly—that is, without OPM's involvement—generally using whatever selection criteria and procedures they deem appropriate. EO 13,843 was premised on two primary bases. The first was the need to "mitigate" the concern that, after the Supreme Court's 2018 decision in *Lucia v. Securities and Exchange Commission*,[8] the OPM-administered process might unduly circumscribe an agency head's discretionary hiring authority under the Constitution's Appointments Clause.[9] *Lucia* held that the Securities and Exchange Commission's (SEC) ALJs were officers under the Appointments Clause, with the result being that—assuming that the SEC's ALJs are inferior rather than principal officers[10]—they must be appointed directly by the Commission itself as the head of a department rather than, as was being done, by SEC staff.[11] The second basis was the need to give "agencies greater ability and discretion to assess critical qualities in ALJ candidates . . . and [such candidates'] ability to meet the particular needs of the agency."[12]

EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and

[6] *See* Admin. Conf. of the U.S., Recommendation 1992-7, *The Federal Administrative Judiciary* 5, 57 Fed. Reg. 61,759, 61761 (Dec. 29, 1992). Qualified veterans received extra points that "had an extremely large impact, given the small range in unadjusted scores." *Id.* As the Administrative Conference noted in 1992, "application of the veterans' preference has almost always been determinative in the ALJ selection system." *Id.*

[7] "[T]he 'excepted service' consists of those civil service positions which are not in the competitive service or the Senior Executive Service." 5 U.S.C. § 2103.

[8] 138 S. Ct. 2044 (2018).

[9] *See* Exec. Order No. 13,843, § 1, 83 Fed. Reg. at 32,755.

[10] The *Lucia* majority expressly refrained from deciding whether the SEC's ALJs are principal or inferior officers, but did note that "[b]oth the Government and Lucia view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them." *Lucia*, 138 S. Ct. at 2051 n.3.

[11] *See id.* This Recommendation takes no position on constitutional questions.

[12] Exec. Order No. 13,843, § 1, 83 Fed. Reg. at 32,755.

the ability to communicate their decisions, explicitly leaving it, however, to each agency to determine its own selection criteria. This Recommendation does not address the substantive hiring criteria that agencies should employ in selecting among ALJ candidates, though it does recommend that agencies publish the minimum qualifications and selection criteria for their ALJ positions. The selection criteria that an agency adopts might include, for example, litigation experience, experience as an adjudicator, experience in dispute resolution, experience with the subject-matter that comprises the agency's caseload, specialized technical skills, experience with case management systems, demonstrated legal research and legal writing skills, a dedicated work ethic, and strong leadership and communications skills.[13]

Each agency must decide not only which selection criteria will apply, but also which will be mandatory and which are only desirable or preferred. Of course, agencies must also ensure compliance with generally applicable legal requirements, including those relating to equal employment opportunity and veterans' preference.[14]

Because the EO allows each agency to design its own selection procedures, each agency must now decide which of its officials will be involved in the selection process, how the process will be structured, how vacancies will be announced and otherwise communicated to potential applicants, and whether the agency will require writing samples or some other evaluation.

This Recommendation is built upon the view that there is no "one-size-fits-all" procedure for appointing ALJs and is designed to assist agencies that are in the initial stages of thinking through new procedures for appointing ALJs under the EO.[15] Each agency will have to construct a

[13] *See generally* Jack M. Beermann and Jennifer L. Mascott, Federal Agency ALJ Hiring After *Lucia* and Executive Order 13843 (May 29, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-research-report-federal-agency-alj-hiring-after-lucia-and-eo-13843. This report is based in part upon interviews with officials at a number of agencies, including those employing the vast majority of ALJs.

[14] The Executive Order provides that "each agency shall follow the principle of veteran preference as far as administratively feasible." Exec. Order No. 13,843, § 3, 83 Fed. Reg. at 32,755.

[15] Some agencies have already publicly disseminated guidance. *See, e.g.*, Secretary's Order 07-2018, Procedures for Appointments of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018); U.S. DEP'T OF HEALTH & HUMAN SERV.'S, ADMINISTRATIVE LAW JUDGE APPOINTMENT PROCESS UNDER THE EXCEPTED SERVICE (Nov. 29, 2018), https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf.

system that is best suited to its particular needs. Doing so will require consideration of, among other things, the nature of its proceedings, the size of the agency's caseload, and the substance of the relevant statutes and the procedural rules involved in an agency's proceedings.

RECOMMENDATION

1. To ensure the widest possible awareness of their Administrative Law Judge (ALJ) vacancies and a broad pool of applicants, agencies should announce their ALJ vacancies on the Office of Personnel Management's website USAJOBS, their own websites, and/or other websites that might reach potential ALJ applicants. Agencies that desire or require subject-matter, adjudicative, or litigation experience should also reach out to lawyers who practice in the field or those with prior experience as an adjudicator. Each agency should keep the application period open for a reasonable period of time to achieve an optimal pool of applicants.
2. Agencies should formulate and publish minimum qualifications and selection criteria for ALJ hiring. Those qualifications and criteria should include the factors specified in Executive Order 13,843 and the qualifications the agency deems important for service as an ALJ in the particular agency. The notice should distinguish between mandatory and desirable criteria. When constructing guidelines and processes for the hiring of ALJs, agencies should be mindful of the importance of the appearance of impartiality and the independence and neutrality of ALJs.
3. Agencies should develop policies to review and assess ALJ applications. These policies might include the development of screening panels to select which applicants to interview, interview panels to select which applicants to recommend for appointment, or both kinds of panels. Such panels could include internal reviewers only or both internal and external reviewers, and could include overlapping members among the two types of panels or could include entirely different members. These policies might include procedures to evaluate applicants' writing samples. Such writing samples could be submitted with the applicants' initial applications, as part of a second round of

77 submissions for applicants who meet the agencies' qualifications expectations, or as part
78 of a proctored writing assignment in connection with an interview.
79

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Selection of Administrative Law Judges

Commented [CMA1]: The Committee on Adjudication and the Committee on Administration and Management voted to change the title of this Recommendation to "Agency Recruitment and Selection of Administrative Law Judges."

Joint Ad Hoc Committee of the Committee on Adjudication and Committee on Administration and Management

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

The Administrative Procedure Act (APA) requires that hearings conducted under its main adjudication provisions[1] (sometimes known as "formal" hearings) be presided over by the agency itself, by "one or more members of the body which comprises the agency," or by "one or more administrative law judges [(ALJs)] appointed under" 5 U.S.C. § 3105.[2] Section 3105, in turn, authorizes "[e]ach agency" to "appoint as many [ALJs] as are necessary for proceedings required to be conducted in accordance" with those provisions.[3]

The process for appointing ALJs recently changed as a result of Executive Order (EO) 13,843.[4] Until that order was issued, agencies could a hire a new ALJ only from a certificate of qualified applicants (that is, a list of applicants eligible for hire) prepared by the Office of Personnel Management (OPM).[5] Each certificate generally had, for each opening, three

[1] 5 U.S.C. §§ 554, 556–57.

[2] *Id*.

[3] *Id.* § 3105.

[4] Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018); *see also* Memorandum from Jeff T.H. Pon, Dir., Office of Pers. Mgmt., to Heads of Exec. Dep'ts and Agencies, Executive Order – Excepting Administrative Law Judges from the Competitive Service (July 10, 2018), https://chcoc.gov/print/9282 (noting that "OPM's regulations continue to govern some aspects of ALJ employment").

[5] This was the process for hiring new ALJs. Many agencies hired incumbent ALJs from other agencies under a process known as "interagency transfer." This process no longer exists, but agencies are still free to hire ALJs from other agencies using their own process.

applicants selected from a much larger register of applicants OPM deemed "qualified." The "list of three," as it was known, consisted of the three highest-scoring applicants based upon, among other things, an OPM-administered and -developed examination and panel interview process, as well as veterans' status.[6]

Under EO 13,843, newly appointed ALJs were removed from the~~are no longer in the~~ "competitive service," and were instead placed~~but instead are~~ in what is known as the "excepted service."[7] As a result, agencies now hire new ALJs directly—that is, without OPM's involvement—generally using whatever selection criteria and procedures they deem appropriate. EO 13,843 was premised on two primary bases. The first was the need to "mitigate" the concern that, after the Supreme Court's 2018 decision in *Lucia v. Securities and Exchange Commission*,[8] the OPM-administered process might unduly circumscribe an agency head's discretionary hiring authority under the Constitution's Appointments Clause.[9] *Lucia* held that the Securities and Exchange Commission's (SEC) ALJs were officers under the Appointments Clause, with the result being that—assuming that the SEC's ALJs are inferior rather than principal officers[10]—they must be appointed directly by the Commission itself as the head of a department rather than, as was being done, by SEC staff.[11] The second basis was the need to give "agencies greater ability and discretion to assess critical qualities in ALJ candidates . . . and [such candidates'] ability to meet the particular needs of the agency."[12]

[6] *See* Admin. Conf. of the U.S., Recommendation 1992-7, *The Federal Administrative Judiciary* 5, 57 Fed. Reg. 61,759, 61761 (Dec. 29, 1992). Qualified veterans received extra points that "had an extremely large impact, given the small range in unadjusted scores." *Id.* As the Administrative Conference noted in 1992, "application of the veterans' preference has almost always been determinative in the ALJ selection system." *Id.*

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[8] 138 S. Ct. 2044 (2018).

[9] *See* Exec. Order No. 13,843, § 1, 83 Fed. Reg. at 32,755.

[10] The *Lucia* majority expressly refrained from deciding whether the SEC's ALJs are principal or inferior officers, but did note that "[b]oth the Government and Lucia view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them." *Lucia*, 138 S. Ct. at 2051 n.3.

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EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and the ability to communicate their decisions, explicitly leaving it, however, to each agency to determine its own selection criteria. This Recommendation does not address the substantive hiring criteria that agencies should employ in selecting among ALJ candidates, though it does recommend that agencies publish the minimum qualifications and selection criteria for their ALJ positions. The selection criteria that an agency adopts might include, for example, litigation experience, experience as an adjudicator, experience in dispute resolution, experience with the subject-matter that comprises the agency's caseload, specialized technical skills, experience with case management systems, demonstrated legal research and legal writing skills, a dedicated work ethic, and strong leadership and communications skills.[13]

Each agency must decide not only which selection criteria will apply, but also which are~~will be~~ mandatory and which are only desirable or preferred. Of course, agencies must also ensure compliance with generally applicable legal requirements, including those relating to equal employment opportunity such as are embodied in Executive Order 13,583 regarding government-wide initiatives to promote diversity and inclusion in the federal workforce[14] and veterans' preference.[15]

Commented [CMA2]: Proposed Amendment from Public Member Renee M. Landers

Because the EO allows each agency to design its own selection procedures, each agency must now decide which of its officials will be involved in the selection process, how the process will be structured, how vacancies will be announced and otherwise communicated to potential applicants, and whether the agency will ~~require~~review writing samples or use some other evaluation method.

[13] *See generally* Jack M. Beermann and Jennifer L. Mascott, Federal Agency ALJ Hiring After *Lucia* and Executive Order 13843 (May 29, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-research-report-federal-agency-alj-hiring-after-lucia-and-eo-13843. This report is based in part upon interviews with officials at a number of agencies, including those employing the vast majority of ALJs.

[14] Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011).

[15] The Executive Order provides that "each agency shall follow the principle of veteran preference as far as administratively feasible." Exec. Order No. 13,843, § 3, 83 Fed. Reg. at 32,755.

This Recommendation is built upon the view that there is no "one-size-fits-all" procedure for appointing ALJs and is designed to assist agencies that are in the initial stages of thinking through new procedures for appointing ALJs under the EO.[16] Each agency will have to construct a system that is best suited to its particular needs. Doing so will require consideration of, among other things, the nature of its proceedings, the size of the agency's caseload, and the substance of the relevant statutes and the procedural rules involved in an agency's proceedings.

RECOMMENDATION

1. To ensure the widest possible awareness of their Administrative Law Judge (ALJ) vacancies and an optimal and broad pool of applicants, agencies should announce their ~~ALJ~~ vacancies on the ~~Office of Personnel Management's~~ website USAJOBS (currently operated by the Office of Personnel Management), their own websites, and/or other websites that might reach a diverse range of potential ALJ applicants. Agencies that desire or require subject-matter, adjudicative, or litigation experience should also reach out to lawyers who practice in the field or those with prior experience as an adjudicator, as well as the relevant bar associations. Each agency should keep the application period open for ~~a~~ sufficient ~~reasonable period of~~ time to achieve an optimal and broad pool of applicants.
2. Agencies should formulate and publish minimum qualifications and selection criteria for ALJ hiring. Those qualifications and criteria should include the factors specified in Executive Order 13,843 and the qualifications the agency deems important for service as an ALJ in the particular agency. The notice should distinguish between mandatory and desirable criteria. ~~When constructing guidelines and processes for the hiring of ALJs, agencies should be mindful of the importance of the appearance of impartiality and the independence and neutrality of ALJs.~~

Commented [CA3]: Proposed Council Amendment #1

Commented [CMA4]: Proposed Amendment from Senior Fellow Alan B. Morrison #1

Commented [CMA5]: Proposed Amendment from Public Member Renee M. Landers

Commented [CMA6]: Proposed Amendment from Senior Fellow Alan B. Morrison #2

Commented [CA7]: Proposed Council Amendment #1

Commented [CA8]: Proposed Council Amendment #2

[16] Some agencies have already publicly disseminated guidance. *See, e.g.*, Secretary's Order 07-2018, Procedures for Appointments of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018); U.S. DEP'T OF HEALTH & HUMAN SERV.'S, ADMINISTRATIVE LAW JUDGE APPOINTMENT PROCESS UNDER THE EXCEPTED SERVICE (Nov. 29, 2018), https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf.

3. Agencies should develop policies to review and assess ALJ applications. These policies might include the development of screening panels to select which applicants to interview, interview panels to select which applicants to recommend for appointment, or both kinds of panels. If used, ~~S~~such panels could include internal reviewers only or both internal and external reviewers, and could include overlapping members among the two types of panels or could include entirely different members. These policies might include procedures to evaluate applicants' writing samples. If used, ~~S~~such writing samples could be submitted with the applicants' initial applications, as part of a second round of submissions for applicants who meet the agencies' qualifications expectations, or as part of a proctored writing assignment in connection with an interview.

~~3.~~4. The guidelines and procedures for the hiring of ALJs should be designed and administered to ensure the hiring of ALJs who will carry out the functions of the office with impartiality and maintain the appearance of impartiality.

Commented [CA9]: Proposed Council Amendment #2

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Agency Guidance

Commented [TP1]: The Committee on Regulation voted to change the title of this Recommendation to "Public Availability of Agency Guidance Documents"

Committee on Regulation

Proposed Recommendation | June 13, 2019

Among their many activities, government agencies issue guidance documents that help explain their programs and policies or communicate other important information to regulated entities and the public. Members of the public should have ready access to these guidance documents so that they can understand how their government works and how their government relates to them. Agencies should manage their guidance documents consistent with legal requirements and the principles of governmental transparency and accountability.

Guidance documents can take many forms.[1] They include what the Administrative Procedure Act (APA) calls "interpretative rules" and "general statements of policy," which are two types of rules that are not required to undergo the notice-and-comment procedures applicable to legislative rules.[2] They may also include other materials considered to be guidance under other, separate definitions adopted by government agencies.[3] When managing the public

[1] To allow agencies flexibility to manage their varied and unique types of guidance documents, this Recommendation does not seek to provide an all-encompassing definition of guidance documents. This Recommendation is addressed, at a minimum, to those guidance documents required by law to be published in the *Federal Register* and any other guidance document required by law to be made publicly available. *See infra* notes 4–7 and accompanying text.

[2] Interpretative rules and general statements of policy are "rules" under the APA. *See* 5 U.S.C. §§ 551(4), 553. Although the APA does not define these two terms, the *Attorney General's Manual on the Administrative Procedure Act* defines "interpretative rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," and "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

[3] *See* Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents.

availability of agency information in implementing this Recommendation, agencies should be clear about what constitutes guidance and what does not.

Several laws require agencies to make at least certain guidance documents available to the public. The Federal Records Act requires agencies to identify "records of general interest or use to the public that are appropriate for public disclosure, and . . . post[] such records in a publicly accessible electronic format."[4] The Freedom of Information Act (FOIA) requires that agencies publish "statements of general policy or interpretations of general applicability formulated and adopted by the agency" in the *Federal Register*.[5] FOIA also requires that agencies "make available for public inspection in an electronic format . . . statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*," as well as "administrative staff manuals and instructions to staff that affect a member of the public."[6] Finally, Congress has occasionally enacted agency-specific requirements for posting guidance documents online. For example, the Food and Drug Administration is required to "maintain electronically and update and publish periodically in the *Federal Register* a list of guidance documents," and to ensure that "[a]ll such documents [are] made available to the public."[7]

The Administrative Conference has recommended that various types of guidance documents be made available online. Recommendation 2017-5, *Agency Guidance Through Policy Statements*, provided that "[a]ll written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made

[4] 44 U.S.C. § 3102.

[5] 5 U.S.C. § 552(a)(1)(D). To the extent that the documents an agency considers guidance would fall within any of the nine FOIA exceptions, such as "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), agencies would not be required to disclose them.

[6] 5 U.S.C. § 552(a)(2); *see also* E-Government Act, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 44 U.S.C. 3501 note) (requiring agencies, to the extent practicable, to publish online documents that FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies to produce a "small entity compliance guide" for some legislative rules and post those guides "in an easily identified location on the website of the agency").

[7] 21 U.S.C. § 371(h)(3).

available electronically and indexed, in a manner in which they may readily be found."[8] Recommendation 2019-__ includes identical language directing agencies to do the same for interpretive rules.[9] Similarly, Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to "provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications."[10]

While many agencies do post guidance documents online, in recent years, concerns have emerged about how well organized, up to date, and easily accessible these documents are to the public. At various times, the Office of Management and Budget (OMB) has instructed agencies on their management of guidance documents.[11] The United States Government Accountability Office has conducted an audit that highlights the management challenges associated with agency dissemination of guidance documents online.[12] Several legislative proposals have been introduced (but not enacted) to create standards for public disclosure of guidance documents.[13]

[8] Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 12, 82 Fed. Reg. 61,728, 61,737 (Dec. 29, 2017).

[9] Admin. Conf. of the U.S., Proposed Recommendation, *Agency Guidance Through Interpretive Rules* (Apr. 30, 2019).

[10] Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

[11] For example, OMB Bulletin 07-02 directs Executive Branch departments and agencies to provide a current list of significant guidance documents in effect on their websites. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); Office of Mgmt. & Budget, Memorandum No. M-07-07, *Issuance of OMB's "Final Bulletin for Agency Good Guidance Practices"* (Jan. 18, 2007), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf; *see also* Office of Mgmt. & Budget, Memorandum No. M-19-14, *Guidance on Compliance with the Congressional Review Act* (Apr. 11, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf (calling upon both executive and independent regulatory agencies to send certain pre-publication guidance materials to the Office of Information and Regulatory Affairs).

[12] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015).

[13] The most notable of the pending legislation would require agencies to publish guidance documents on their websites and a centralized website selected by OMB. *See* Guidance Out of Darkness Act, S. 380, 116th Cong. (2019); S. REP. NO. 116-12 (2019); Guidance Out of Darkness Act, H.R. 4809, 115th Cong. (2018); H.R. REP. NO. 115-972 (2018); *see also* H.R. 2142, 116th Cong. (2019) (requiring the creation of a centralized website for small business compliance guides). For other legislation, see Coglianese, *supra* note 3, at 6–7.

Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance documents are available), (b) currency (whether guidance documents are up to date), (c) accessibility (whether guidance documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).

With these principles in mind, this Recommendation calls on agencies to consider opportunities for improving the public availability of their guidance documents. Each agency must decide which guidance documents to post online and how to present them in a manner that will ensure their availability and usefulness for regulated parties and the public. The Recommendation provides best practices to guide agencies to make their guidance documents more publicly available. These best practices are intended to be adaptable to fit agency-specific circumstances.[14] The Administrative Conference notes that each agency is different, and the practices outlined in this Recommendation may be employed with flexibility as necessary (perhaps based on an agency's internal structures, the parties it regulates, and its end users) so that guidance documents are made available to the public in a logical and suitably comprehensive manner.

RECOMMENDATION

Procedures for Managing Guidance Documents

1. Agencies should develop written procedures pertaining to their internal management of guidance documents.

[14] For example, even the term "agency" as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 11 (2d ed. 2018), *available at* https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition.

a. The procedures should include:
    i. a description of relevant categories or types of guidance documents subject to the procedures; and
    ii. examples of specific materials not subject to the procedures, as appropriate.
b. The procedures should address steps to be taken for the:
    i. development of guidance documents, including any opportunity for public comment;
    ii. publication and dissemination of draft or final guidance documents; and
    iii. periodic review of existing guidance documents.
c. Agency procedures should indicate the extent to which any of the steps created or identified in response to Paragraph 1(b) should vary depending on the type of guidance document or its category, as defined by any provisions in agency procedures responsive to Paragraph 1(a).

2. All relevant agency staff should receive training in agencies' guidance document management procedures.
3. Agencies should develop and apply appropriate internal controls to ensure adherence to guidance document management procedures.
4. To facilitate internal tracking of guidance documents, as well as to help members of the public more easily identify relevant guidance documents, agencies should consider assigning unique identification numbers to guidance documents covered by their written guidance procedures. Once a guidance identification number has been assigned to a guidance document, it should appear on that document and be used to refer to the document whenever it is listed or referenced on the agency's website, in public announcements, or in the *Federal Register* or the *Code of Federal Regulations*.
5. Using appropriate metrics, agencies should periodically review their guidance document management procedures and their implementation in order to assess their performance in making guidance documents available as well as to identify opportunities for improvement.

6. Agencies should provide opportunities for public feedback on their efforts to promote the public availability of their guidance documents.

Guidance on Agency Websites

7. Agencies should maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating access to those documents. Such guidance document webpages should include:
    a. Agencies' written guidance document management procedures pursuant to Paragraph 1, if developed;
    b. Plain language explanations (sometimes known as "explainers") that define guidance documents, explain their legal effects, or give examples of different types of guidance documents;
    c. A method for users to find relevant guidance documents, which might include:
        i. Comprehensively listing agency guidance documents;
        ii. Displaying links to pages where guidance documents are located, which could be organized by topic, type of guidance document, agency sub-division, or some other rubric; or
        iii. A search engine; and
    d. Contact information or a comment form to facilitate public feedback related to potentially broken links, missing documents, or other errors or issues related to the agency's procedures for the development, publication, or disclosure of its guidance documents.
8. Agencies should provide the public with access to a comprehensive set of its guidance documents—either on the dedicated guidance document webpage or other webpages—in accordance with its written procedures.
    a. Agency websites should include, at minimum, (1) all guidance documents required by law to be published in the *Federal Register* and (2) all other guidance documents required by law to otherwise be made publicly available.
    b. Guidance documents should generally be made available in downloadable form.

c. Links to downloadable copies of agencies' Small Entity Compliance Guides—issued in accordance with the Small Business Regulatory Enforcement Fairness Act[15]—should be provided.

d. Agency websites should include relevant information for each guidance document, such as its title, any corresponding regulatory or statutory provision that the guidance relates to or interprets (if applicable), the date of issuance, and any assigned identifying number.

e. Agencies should keep guidance documents on their websites current. To the extent a website contains obsolete or modified guidance, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance.

9. Although not every agency website will have the same population of users, agency websites should be designed to ensure that they are as helpful to the end user as possible. In particular, agencies should ensure:

a. Simple words, such as "guidance," are used in describing webpages that discuss or list guidance documents;

b. Agency guidance document webpages are easy to find from their website's home page, through such techniques as a linked tab or entry in a pull-down menu;

c. The search engine on agency websites works effectively for finding relevant guidance information;

d. Guidance documents, when listed on webpages, are displayed in a manner that helps the public find a particular document, by using such techniques as indexing, tagging, or sortable tables; and

[15] Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).

e. Websites displaying guidance documents are kept up to date, with any broken links fixed and any amended or withdrawn documents clearly labeled as such.

10. To make guidance documents accessible to users who are searching for information elsewhere on agency websites, agencies should strive to ensure that clearly labeled links to all guidance documents related to specific rules, issues, or programs are easily found in the corresponding section of the website where users are likely to find that information especially helpful.

Public Notice of Guidance Documents

11. Agencies should undertake affirmative steps to alert interested members of the public to new and revised guidance documents. Such steps could include, among other things, establishing public email distribution lists to disseminate alerts about new or revised guidance; using social media to disseminate guidance documents and related information; having agency staff speak about guidance documents at relevant conferences or meetings; or preparing printed pamphlets or other hard-copy documents. Even when not required to do so by law, agencies should consider publishing information about new or revised guidance documents in the *Federal Register*.
12. Agencies should consider providing descriptive references (such as links, if possible) to relevant guidance documents in appropriate sections of the *Code of Federal Regulations*, stating where the public can access the documents.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Agency Guidance

Commented [CMA1]: Proposed Amendment by Government Member Connor N. Raso #1. The Committee on Regulation voted to change the title of this Recommendation to "Public Availability of Agency Guidance Documents"

Committee on Regulation

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with sources shown in the margin).

Among their many activities, government agencies issue guidance documents that help explain their programs and policies or communicate other important information to regulated entities and the public. Members of the public should have ready access to these guidance documents so that they can understand how their government works and how their government relates to them. Agencies should manage their guidance documents consistent with legal requirements and the principles of governmental transparency and accountability.

Guidance documents can take many forms.[1] They include what the Administrative Procedure Act (APA) calls "interpretative rules" and "general statements of policy," which are two types of rules that are not required to undergo the notice-and-comment procedures applicable to legislative rules.[2] They may also include other materials considered to be guidance

[1] To allow agencies flexibility to manage their varied and unique types of guidance documents, this Recommendation does not seek to provide an all-encompassing definition of guidance documents. This Recommendation is addressed, at a minimum, to those guidance documents required by law to be published in the *Federal Register* and any other guidance document required by law to be made publicly available. *See infra* notes 4–7 and accompanying text.

[2] Interpretative rules and general statements of policy are "rules" under the APA. *See* 5 U.S.C. §§ 551(4), 553. Although the APA does not define these two terms, the *Attorney General's Manual on the Administrative Procedure Act* defines "interpretative rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," and "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). In

under other, separate definitions adopted by government agencies.[3] When managing the public availability of agency information in implementing this Recommendation, agencies should be clear about what constitutes guidance and what does not.

Several laws require agencies to make at least certain guidance documents available to the public. The Federal Records Act requires agencies to identify "records of general interest or use to the public that are appropriate for public disclosure, and . . . post[] such records in a publicly accessible electronic format."[4] The Freedom of Information Act (FOIA) requires that agencies publish "statements of *general* policy or interpretations of general applicability formulated and adopted by the agency" in the *Federal Register*.[5] FOIA also requires that agencies "make available for public inspection in an electronic format . . . [specific] statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*," as well as "administrative staff manuals and instructions to staff that affect a member of the public."[6] Finally, Congress has occasionally enacted agency-specific requirements for posting guidance documents online. For example, the Food and Drug Administration is required to "maintain electronically and update and publish periodically in the

Commented [CMA2]: Proposed Amendment by Government Member Connor N. Raso #2. Proposed amendment italicizes the word "general" in the first sentence, adds the word "specific" in the second sentence, and adds text to footnote 5.

Commented [CMA3]: Proposed Amendment by Government Member Connor N. Raso #3. Proposed amendment adds language to footnote 6.

accordance with standard parlance, this Recommendation uses the term "interpretive" in place of the APA's word "interpretative."

[3] *See* Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents.

[4] 44 U.S.C. § 3102.

[5] 5 U.S.C. § 552(a)(1)(D) (emphasis added). To the extent that the documents an agency considers guidance would fall within any of the nine FOIA exceptions, such as "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), agencies would not be required to disclose them.

[6] 5 U.S.C. § 552(a)(2). "Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a 'FOIA Library.'" U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 6 (2019 ed.), *available at* https://www.justice.gov/oip/foia-guide/proactive_disclosures/download; *see also* E-Government Act, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 44 U.S.C. 3501 note) (requiring agencies, to the extent practicable, to publish online documents that FOIA requires be published in the *Federal Register*); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note) (requiring agencies to produce a "small entity compliance guide" for some legislative rules and post those guides "in an easily identified location on the website of the agency").

Federal Register a list of guidance documents," and to ensure that "[a]ll such documents [are] made available to the public."[7]

The Administrative Conference has recommended that various types of guidance documents be made available online. Recommendation 2017-5, *Agency Guidance Through Policy Statements*, provided that "[a]ll written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found."[8] Recommendation 2019-__ includes identical language directing agencies to do the same for interpretive rules.[9] Similarly, Recommendation 2018-5, *Public Availability of Adjudication Rules*, urged agencies to "provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications."[10]

While many agencies do post guidance documents online, in recent years, concerns have emerged about how well organized, up to date, and easily accessible these documents are to the public. At various times, the Office of Management and Budget (OMB) has instructed agencies on their management of guidance documents.[11] The United States Government Accountability Office has conducted an audit that highlights the management challenges associated with agency

[7] 21 U.S.C. § 371(h)(3).

[8] Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 12, 82 Fed. Reg. 61,728, 61,737 (Dec. 29, 2017).

[9] Admin. Conf. of the U.S., Proposed Recommendation, *Agency Guidance Through Interpretive Rules* (Apr. 30, 2019).

[10] Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019).

[11] For example, OMB Bulletin 07-02 directs Executive Branch departments and agencies to provide a current list of significant guidance documents in effect on their websites. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); Office of Mgmt. & Budget, Memorandum No. M-07-07, *Issuance of OMB's "Final Bulletin for Agency Good Guidance Practices"* (Jan. 18, 2007), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf; *see also* Office of Mgmt. & Budget, Memorandum No. M-19-14, *Guidance on Compliance with the Congressional Review Act* (Apr. 11, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf (calling upon both executive and independent regulatory agencies to send certain pre-publication guidance materials to the Office of Information and Regulatory Affairs).

dissemination of guidance documents online.[12] Several legislative proposals have been introduced (but not enacted) to create standards for public disclosure of guidance documents.[13]

Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance documents are available), (b) currency (whether guidance documents are up to date), (c) accessibility (whether guidance documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).

With these principles in mind, this Recommendation calls on agencies to consider opportunities for improving the public availability of their guidance documents. Each agency must decide which guidance documents to post online and how to present them in a manner that will ensure their availability and usefulness for regulated parties and the public. The Recommendation provides best practices to guide agencies to make their guidance documents more publicly available. These best practices are intended to be adaptable to fit agency-specific circumstances.[14] The Administrative Conference notes that each agency is different, and the practices outlined in this Recommendation may be employed with flexibility as necessary (perhaps based on factors such as an agency's internal structures, available resources, types and

[12] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015).

[13] The most notable of the pending legislation would require agencies to publish guidance documents on their websites and a centralized website selected by OMB. *See* Guidance Out of Darkness Act, S. 380, 116th Cong. (2019); S. REP. NO. 116-12 (2019); Guidance Out of Darkness Act, H.R. 4809, 115th Cong. (2018); H.R. REP. NO. 115-972 (2018); *see also* H.R. 2142, 116th Cong. (2019) (requiring the creation of a centralized website for small business compliance guides). For other legislation, see Coglianese, *supra* note 3, at 6–7.

[14] For example, even the term "agency" as used in the Recommendation can be construed to address either agencies or sub-agencies within larger departments. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 11 (2d ed. 2018), *available at* https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition.

volume of documents, the parties it regulates, and its end users) so that guidance documents are made available to the public in a logical and suitably comprehensive manner.

Commented [CMA4]: Proposed Amendment from Public Member Sidney A. Shapiro

RECOMMENDATION

Procedures for Managing Guidance Documents

1. Agencies should develop written procedures pertaining to their internal management of guidance documents generated by agency leadership, including relevant bureaus, in the expectation of shaping staff behaviors and/or public expectations.

Commented [CMA5]: Proposed Amendment from Senior Fellow Peter L. Strauss

    a. The procedures should include:
        i. a description of relevant categories or types of guidance documents subject to the procedures; and
        ii. examples of specific materials not subject to the procedures, as appropriate.
    b. The procedures should address ~~steps~~ measures to be taken for the:
        i. development of guidance documents, including any opportunity for public comment;
        ii. publication and dissemination of draft or final guidance documents; and
        iii. periodic review of existing guidance documents.
    c. Agency procedures should indicate the extent to which any of the ~~steps~~ measures created or identified in response to Paragraph 1(b) should vary depending on the type of guidance document or its category, as defined by any provisions in agency procedures responsive to Paragraph 1(a).
2. All relevant agency staff should receive training in agencies' guidance document management procedures.
3. Agencies should develop and apply appropriate internal controls to ensure adherence to guidance document management procedures.
4. To facilitate internal tracking of guidance documents, as well as to help members of the public more easily identify relevant guidance documents, agencies should consider

assigning unique identification numbers to guidance documents covered by their written guidance procedures. Once a guidance identification number has been assigned to a guidance document, it should appear on that document and be used to refer to the document whenever it is listed or referenced on the agency's website, in public announcements, or in the *Federal Register* or the *Code of Federal Regulations*.

5. Using appropriate metrics, agencies should periodically review their guidance document management procedures and their implementation in order to assess their performance in making guidance documents available as well as to identify opportunities for improvement.
6. Agencies should provide opportunities for public feedback on their efforts to promote the public availability of their guidance documents.

Guidance on Agency Websites

7. Agencies should maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating access to those documents. Such guidance document webpages should include:
    a. Agencies' written guidance document management procedures pursuant to Paragraph 1, if developed;
    b. Plain language explanations (sometimes known as "explainers") that define guidance documents, explain their legal effects, or give examples of different types of guidance documents;
    c. A method for users to find relevant guidance documents, which might include:
        i. Comprehensively listing agency guidance documents;
        ii. Displaying links to pages where guidance documents are located, which could be organized by topic, type of guidance document, agency sub-division, or some other rubric; or
        iii. A search engine; and
    d. Contact information or a comment form to facilitate public feedback related to potentially broken links, missing documents, or other errors or issues related to

Commented [CMA6]: Comment by Senior Fellow Judge Stephen F. Williams: "It seemed to me that the suggestions in 7.c. could bear expansion. It seems amazing that a website used for access to guidance would not always and automatically have a search engine, so for that to be just one possible avenue for users seems inadequate. (Maybe I've got the technology wrong.) Nor does 7.c. include the possibility of a detailed index."

the agency's procedures for the development, publication, or disclosure of its guidance documents.

8. Agencies should provide the public with access to a comprehensive set of its guidance documents—either on the dedicated guidance document webpage or other webpages—in accordance with its written procedures.
    a. Agency websites should include, at minimum, (1) all guidance documents required by law to be published in the *Federal Register* and (2) all other guidance documents required by law to otherwise be made publicly available.
    b. Guidance documents should generally be made available in downloadable form.
    c. Links to downloadable copies of agencies' Small Entity Compliance Guides—issued in accordance with the Small Business Regulatory Enforcement Fairness Act[15]—should be provided.
    d. Agency websites should include relevant information for each guidance document, such as its title, any corresponding regulatory or statutory provision that the guidance relates to or interprets (if applicable), the date of issuance, and any assigned identifying number.
    e. Agencies should keep guidance documents on their websites current. To the extent a website contains obsolete or modified guidance, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance.
9. Although not every agency website will have the same population of users, agency websites should be designed to ensure that they are as helpful to the end user as possible. In particular, agencies should ensure:

[15] Pub. L. No. 104-121, § 212, 110 Stat. 847, 858 (Mar. 29, 1996) (codified at 5 U.S.C. § 601 note).

a. Simple words, such as "guidance," are used in describing webpages that discuss or list guidance documents;
b. Agency guidance document webpages are easy to find from their website's home page, through such techniques as a linked tab or entry in a pull-down menu;
c. The search engine on agency websites works effectively for finding relevant guidance information;
d. Guidance documents, when listed on webpages, are displayed in a manner that helps the public find a particular document, by using such techniques as indexing, tagging, or sortable tables; and
e. Websites displaying guidance documents are kept up to date, with any broken links fixed and any amended or withdrawn documents clearly labeled as such.

10. To make guidance documents accessible to users who are searching for information elsewhere on agency websites, agencies should strive to ensure that clearly labeled links to all guidance documents related to specific rules, issues, or programs are easily found in the corresponding section of the website where users are likely to find that information especially helpful.

Public Notice of Guidance Documents

11. Agencies should undertake affirmative ~~steps~~ measures to alert interested members of the public to new and revised guidance documents. Such ~~steps~~ measures could include, among other things, establishing public email distribution lists to disseminate alerts about new or revised guidance; using social media to disseminate guidance documents and related information; having agency staff speak about guidance documents at relevant conferences or meetings; or preparing printed pamphlets or other hard-copy documents. Even when not required to do so by law, agencies should consider publishing information about new or revised guidance documents in the *Federal Register*.
12. Agencies should consider providing descriptive references (such as links, if possible) to relevant guidance documents in appropriate sections of the *Code of Federal Regulations*, stating where the public can access the documents.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Revised Model Rules for Implementation of the Equal Access to Justice Act

Ad Hoc Committee

Proposed Recommendation | June 13, 2019

The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of attorney fees and other expenses to certain individuals, small businesses, and other entities who prevail against the federal government in judicial proceedings and certain adversarial agency adjudicative proceedings, when the position of the government is not substantially justified.[1] The stated purpose of EAJA is to, among other things, "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing" the award of certain costs and fees against the United States.[2]

In the case of agency adjudications, agencies must establish "uniform procedures for the submission and consideration of applications for an award of fees and other expenses" "[a]fter consultation with the Chairman of the Administrative Conference of the United States."[3] To carry out this statutory charge, the Conference's Chairman issued model rules in 1981 to help agencies establish uniform procedures for the submission and consideration of EAJA applications.[4] Adoption of these model rules was intended to satisfy an agency's obligation under section 504 of Title V of the United States Code to consult with the Chairman.[5] In 1986, the

[1] 5 U.S.C. § 504.

[2] Equal Access to Justice Act, Pub. L. No. 96-481, § 202(b)(1), 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504 and 28 U.S.C. § 2412).

[3] 5 U.S.C. § 504(c)(1).

[4] Admin Conf. of U.S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

[5] *Cf.* Admin Conf. of U.S., Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. 16,659 (May 6, 1986).

Chairman revised the 1981 model rules following the amendment and reauthorization of EAJA.[6] Numerous agencies adopted the 1981 and 1986 model rules, including the Federal Trade Commission, the Consumer Financial Protection Bureau, the Securities and Exchange Commission, and the National Labor Relations Board.[7]

In light of the amendments to EAJA made since 1986,[8] as well evolving adjudicative practices since that time, the Conference's Chairman decided to review and, as necessary, revise the 1986 model rules, just as it recently did in the case of the *Model Adjudication Rules*, which govern agency adjudication procedures generally.[9] Rather than simply revise the rules itself the Chairman decided to put the rules before the membership of the Conference—first through an ad hoc committee of all interested members—for review so as to assure consideration of as broad a range of views as possible. The Conference considered, among other things, EAJA rules that agencies have issued since the promulgation of the 1986 model rules. Where appropriate, the Conference updated the model rules to reflect evolving practice and the latest EAJA amendments and made additional revisions to promote greater consistency and clarity. The Conference's revised model rules appear in the appendix to this Recommendation.

Substantial changes have been made to the 1986 model rules. They include, most notably, the elimination of most of what was Subpart A. Subpart A of the 1986 model rules consisted of general provisions addressing, among other things, when EAJA applies, eligibility of applicants,

[6] *Id.*

[7] Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Consumer Fin. Prot. Bureau Feb. 10, 2014) (codified as amended at 12 C.F.R. pt. 1071); Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Sec. Exch. Comm'n Dec. 27, 1989) (codified as amended at 17 C.F.R. pt. 200-01); Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Nat'l Labor Relations Bd. Oct. 9, 1986) (codified as amended at 29 C.F.R. pt. 102); Procedural Rules Amendments, 51 Fed. Reg. 17,732 (Nat'l Labor Relations Bd. May 15, 1986); Procedural Rules; Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Fed. Trade Comm'n Dec. 31, 1985) (codified as amended at 16 C.F.R. pt. 0-5); Equal Access to Justice Rules, 47 Fed. Reg. 609 (Sec. Exch. Comm'n Jan. 6, 1982); Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. 48,910 (Fed. Trade Comm'n Oct. 5, 1981).

[8] Act of Jan. 4, 2011, Pub. L. No. 111-350, § 5, 124 Stat. 3677, 3841; Small Business Regulatory Enforcement Fairness Act of 1996, 104 Pub. L. No. 121, § 231, 110 Stat. 847, 862; Religious Freedom Restoration Act of 1993, 103 Pub. L. No. 141, § 4, 107 Stat. 1488, 1489; Education and Savings Act of 1988, Pub. L. No. 100-647, § 6239, 102 Stat. 3342, 3746.

[9] Admin. Conf. of the U.S., Model Adjudication Rules, 83 Fed. Reg. 49,530 (Oct. 2, 2018).

proceedings covered, standards for awards, allowable fees and expenses, rulemaking on maximum rates for attorney fees, awards against other agencies, and delegations of authority. The Conference recommends the elimination of these provisions because they address the substantive standard for EAJA awards and other such matters beyond the Conference's statutory charge identified above. Other changes to the rules, including the addition of a definitions section, have also been made to improve their clarity and comprehensibility.

RECOMMENDATION

The 1986 model rules should be replaced with the revised model rules for the implementation of EAJA that follow.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Revised Model Rules for Implementation of the Equal Access to Justice Act

Ad Hoc Committee

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager's amendments (with no marginal notes).

The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of attorney fees and other expenses to certain individuals, small businesses, and other entities who prevail against the federal government in judicial proceedings and certain adversarial agency adjudicative proceedings, when the position of the government is not substantially justified.[1] The stated purpose of EAJA is to, among other things, "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing" the award of certain costs and fees against the United States.[2]

In the case of agency adjudications, agencies must establish "uniform procedures for the submission and consideration of applications for an award of fees and other expenses" "[a]fter consultation with the Chairman of the Administrative Conference of the United States."[3] To carry out this statutory charge, the Conference's Chairman issued model rules in 1981 to help agencies establish uniform procedures for the submission and consideration of EAJA applications.[4] Adoption of these model rules was intended to ~~satisfy an agency's obligation under~~

[1] 5 U.S.C. § 504.

[2] Equal Access to Justice Act, Pub. L. No. 96-481, § 202(b)(1), 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504 and 28 U.S.C. § 2412).

[3] 5 U.S.C. § 504(c)(1).

[4] Admin Conf. of U.S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

facilitate consultation between agencies and the Chairman of the Conference as required by 5 U.S.C. § 504~~section 504 of Title V of the United States Code to consult with the Chairman~~.[5] In 1986, the Chairman revised the 1981 model rules following the amendment and reauthorization of EAJA.[6] Numerous agencies adopted the 1981 and 1986 model rules, including the Federal Trade Commission, the Consumer Financial Protection Bureau, the Securities and Exchange Commission, and the National Labor Relations Board.[7]

In light of the amendments to EAJA made since 1986,[8] as well evolving adjudicative practices since that time, the Conference's Chairman decided to review and, as necessary, revise the 1986 model rules, just as he~~it~~ recently did in the case of the *Model Adjudication Rules*, which govern agency adjudication procedures generally.[9] Rather than simply revise the rules himself,~~itself~~ the Chairman decided to put the rules before the membership of the Conference—first through an ad hoc committee of all interested members—for review so as to assure consideration of as broad a range of views as possible. The Conference considered, among other things, EAJA rules that agencies have issued since the promulgation of the 1986 model rules. Where appropriate, the Conference updated the model rules to reflect evolving practice and the

[5] ~~*Cf.*~~ Admin Conf. of U.S., ~~Model Rules for~~ Implementation of the Equal Access to Justice Act: Request for Comments on Draft Model Rules, 46~~51~~ Fed. Reg. 15,895~~6,659~~ (Mar.~~y~~ 10~~6~~, 1981~~6~~).

[6] *Id.*

[7] Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Consumer Fin. Prot. Bureau Feb. 10, 2014) (codified as amended at 12 C.F.R. pt. 1071); Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Sec. Exch. Comm'n Dec. 27, 1989) (codified as amended at 17 C.F.R. pt. 200-01); Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Nat'l Labor Relations Bd. Oct. 9, 1986) (codified as amended at 29 C.F.R. pt. 102); Procedural Rules Amendments, 51 Fed. Reg. 17,732 (Nat'l Labor Relations Bd. May 15, 1986); Procedural Rules; Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Fed. Trade Comm'n Dec. 31, 1985) (codified as amended at 16 C.F.R. pt. 0-5); Equal Access to Justice Rules, 47 Fed. Reg. 609 (Sec. Exch. Comm'n Jan. 6, 1982); Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. 48,910 (Fed. Trade Comm'n Oct. 5, 1981).

[8] Act of Jan. 4, 2011, Pub. L. No. 111-350, § 5, 124 Stat. 3677, 3841; Small Business Regulatory Enforcement Fairness Act of 1996, 104 Pub. L. No. 121, § 231, 110 Stat. 847, 862; Religious Freedom Restoration Act of 1993, 103 Pub. L. No. 141, § 4, 107 Stat. 1488, 1489; Education and Savings Act of 1988, Pub. L. No. 100-647, § 6239, 102 Stat. 3342, 3746.

[9] Admin. Conf. of the U.S., Model Adjudication Rules, 83 Fed. Reg. 49,530 (Oct. 2, 2018).

latest EAJA amendments and made additional revisions to promote greater consistency and clarity. The Conference's revised model rules appear in the appendix to this Recommendation.

Substantial changes have been made to the 1986 model rules. They include, most notably, the elimination of most of what was Subpart A. Subpart A of the 1986 model rules consisted of general provisions addressing, among other things, when EAJA applies, eligibility of applicants, proceedings covered, standards for awards, allowable fees and expenses, rulemaking on maximum rates for attorney fees, awards against other agencies, and delegations of authority. The Conference recommends the elimination of these provisions because they address the substantive standard for EAJA awards and other such matters beyond the Conference's statutory charge identified above. Other changes to the rules, including the addition of a definitions section, have also been made to improve their clarity and comprehensibility.

RECOMMENDATION

The 1986 model rules should be replaced with the revised model rules for the implementation of EAJA that follow.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Revised Model Rules for Implementation of the Equal Access to Justice Act

Ad Hoc Committee

Proposed Model Rules | June 13, 2019

The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of attorneys' fees and other expenses to eligible parties who prevail against the federal government in judicial proceedings and certain adversarial agency adjudicative proceedings, where the position of the government is not substantially justified.[1] *In the case of agency adjudications, agencies must establish "uniform procedures for the submission and consideration of applications for an award of fees and other expenses" "[a]fter consultation with the Chairman of the Administrative Conference of the United States."*[2] *In furtherance of this statutory obligation, the Conference Chairman in 1981 issued a set of model rules for agencies to use when adopting rules for the consideration of applications for EAJA awards in agency adjudications.*[3] *The Conference Chairman issued a revised set of rules in 1986.*[4] *Many agencies have since promulgated EAJA rules that are substantially based upon these model rules.*[5]

[1] 5 U.S.C. § 504; 28 U.S.C. § 2412.

[2] 5 U.S.C. § 504(c)(1).

[3] Admin Conf. of U.S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

[4] Admin. Conf. of U.S., Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. 16,659 (May 6, 1986) (previously codified at 1 C.F.R pt. 315).

[5] Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Consumer Fin. Prot. Bureau Feb. 10, 2014) (codified as amended at 12 C.F.R. pt. 1071); Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Sec. Exch. Comm'n Dec. 27, 1989) (codified as amended at 17 C.F.R. pt. 200-01); Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Nat'l Labor Relations Bd. Oct. 9, 1986) (codified as amended at 29

The Conference Chairman is issuing these rules to replace the 1981 and 1986 rules. They include revisions made to reflect changes in practice in the intervening thirty years and to promote greater accuracy and clarity. These rules are substantially the same as the rules accompanying Conference Recommendation 2019-__, adopted by the Assembly of the Conference. Agencies are encouraged to use these model rules when drafting or revising their EAJA rules pertaining to adjudications to promote the uniformity of procedure contemplated by EAJA.

REVISED MODEL RULES FOR IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT

Subpart A — Scope of These Rules

Subpart B — Definitions

Subpart C — EAJA Applications

C.F.R. pt. 102); Procedural Rules; Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Fed. Trade Comm'n Dec. 31, 1985) (codified as amended at 16 C.F.R. pt. 0-5).

Subpart A — Scope of These Rules

§ 315.101 Scope of these rules.

The Equal Access to Justice Act, section 504 of Title V of the United States Code (called "the Act" or "EAJA" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. Alternatively, an eligible party may receive an award under

section 504(a)(4) of Title V of the United States Code when it defends against an excessive demand made by an agency.

Subpart B — Definitions

§ 315.201 Definitions.

For the purposes of these rules:

(a) *Adjudicative officer* means the official, whether the official is designated as an administrative law judge or otherwise, who presided over the hearing at the adversary adjudication or the official who presides over an EAJA proceeding.

(b) *Adversary adjudication* means (i) an adjudication under section 554 of Title V of the United States Code in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of Title 41 of the United States Code before an agency board of contract appeals as provided in section 7105 of Title 41 of the United States Code, (iii) any hearing conducted under chapter 38 of Title 31 of the United States Code, and (iv) the Religious Freedom Restoration Act of 1993.

(c) *Demand* means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(c) *Excessive demand* means a demand by an agency, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory requirement, that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case.

(d) *Final disposition* means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the agency and to the courts.

(e) *Party* means a party, as defined in section 551(3) of Title V of the United States Code, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association. For purposes of section 504(a)(4) of Title V of the United States Code, "party" also includes a small entity as defined in section 601 of Title V of the United States Code.

(f) *Position of the agency* means, in addition to the position taken by the agency in the

adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

Subpart C — EAJA Applications

§ 315.301 Application requirements.

(a) A party seeking an award under EAJA shall file an application with the agency that conducted the adversarial adjudication within 30 days after the agency's final disposition of the adversary adjudication.

(b) The application shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency or agencies that the applicant alleges was not substantially justified; or, if the applicant has not prevailed, shall show that the agency's demand was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision under the facts and circumstances of that case. The application shall also identify the agency position(s) in the proceeding that the applicant alleges was (were) not substantially justified or the agency's demand that is alleged to be excessive and unreasonable. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(c) The application shall also show that the applicant meets the definition of "party" in section 504(b)(1)(B) of Title V of the United States Code, including adequate documentation of its net worth, as set forth in section 315.302.

(d) The application shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in section 504(b)(1)(A) of Title V of the United States Code, with adequate documentation as set forth in section 315.303.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under penalty of perjury that the information provided in the application is true and correct.

§ 315.302 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization, cooperative association, or, in the case of an application for an award related to an allegedly excessive demand by the agency, a small entity as that term is defined by section 601 of Title V of the United States Code, shall provide with its application a detailed exhibit showing the net worth of the applicant is as represented in the statement required by section 315.301(b) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards provided in section 315.201(e). An adjudicative officer presiding over an EAJA proceeding may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may request that the documents be filed under seal or otherwise be treated as confidential, pursuant to [insert cross-reference to appropriate agency rules governing such requests].

§ 315.303 Documentation of fees and expenses.

The application shall be accompanied by adequate documentation of the fees and other expenses incurred after initiation of the adversary adjudication, including, but not limited to, the reasonable cost of any study, analysis, engineering report, test, or project. With respect to a claim for fees and expenses involving an excessive demand by the agency, the application shall be accompanied by adequate documentation of such fees and expenses incurred after initiation of the adversary adjudication for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. An adjudicative officer presiding over an EAJA proceeding may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

Subpart D — Procedures for Considering Applications

§ 315.401 Filing and service of documents.

Any application for an award, or any accompanying documentation related to an application, shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except, as provided in section 315.302(b), for confidential financial information.

§ 315.402 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer presiding over an EAJA proceeding upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied upon in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under section 315.405.

§ 315.403 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under section 315.405.

§ 315.404 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying adversary adjudication, or after the adversary adjudication has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

§ 315.405 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer presiding over an EAJA proceeding may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold oral argument; or allow for discovery or hold an evidentiary hearing, but only as to issues other than

whether the agency's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees and expenses). Any written submissions shall be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request for further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 315.406 Decision.

The adjudicative officer presiding over an EAJA proceeding shall issue an [initial or recommended][6] decision on the application within [60 days] after the time for filing a reply, or when further proceedings are held, within [60 days] after completion of such proceedings.

(a) *For an application involving a prevailing party*. The decision on the application shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if applicable, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

[6] Brackets such as these indicate that an agency is to use its discretion to determine what language or time frame is most appropriate.

(b) *For an application involving an allegedly excessive agency demand*. The decision on the application shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the underlying decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That determination shall be based upon all the facts and circumstances of the case. The decision on the application shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(c) *Awards.* An adjudicative officer presiding over an EAJA proceeding may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

§ 315.407 Agency review.

Either the applicant or agency counsel may seek review of the decision of the adjudicative officer on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [insert cross-reference to agency's regular review procedures].

§ 315.408 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in section 504(c)(2) of Title V of the United States Code.

§ 315.409 Stay of decision concerning award.

Any proceedings on an application for fees under these rules shall be automatically stayed until the agency's final disposition of the decision on which the application is based and either the time period for seeking judicial review expires, or if review has been sought, until final disposition is made by a court and no further judicial review is available.

§ 315.410 Payment of award.

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within [60 days].

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Revised Model Rules for Implementation of the Equal Access to Justice Act

Ad Hoc Committee

Proposed Model Rules | June 13, 2019

This document displays manager's amendments (with no marginal notes) and an additional amendment from a Conference member (with the source shown in the margin).

The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of attorneys' fees and other expenses to eligible parties who prevail against the federal government in judicial proceedings and certain adversarial agency adjudicative proceedings, where the position of the government is not substantially justified.[1] *In the case of agency adjudications, agencies must establish "uniform procedures for the submission and consideration of applications for an award of fees and other expenses" "[a]fter consultation with the Chairman of the Administrative Conference of the United States."*[2] *In furtherance of this statutory obligation, the Conference Chairman in 1981 issued a set of model rules for agencies to use when adopting rules for the consideration of applications for EAJA awards in agency*

[1] 5 U.S.C. § 504; 28 U.S.C. § 2412.

[2] 5 U.S.C. § 504(c)(1).

adjudications.[3] *The Conference Chairman issued a revised set of rules in 1986.*[4] *Many agencies have since promulgated EAJA rules that are substantially based upon these model rules.*[5]

The Conference Chairman is issuing these rules to replace the 1981 and 1986 rules. They include revisions made to reflect changes in practice in the intervening thirty years and to promote greater accuracy and clarity. These rules are substantially the same as the rules accompanying Conference Recommendation 2019-__, adopted by the Assembly of the Conference. Agencies are encouraged to use these model rules when drafting or revising their EAJA rules pertaining to adjudications to promote the uniformity of procedure contemplated by EAJA.

REVISED MODEL RULES FOR IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT

Subpart A — Scope of These Rules

§ 315.101 Scope of these rules.

Subpart B — Definitions

[3] Admin Conf. of U.S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

[4] Admin. Conf. of U.S., Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. 16,659 (May 6, 1986) (previously codified at 1 C.F.R pt. 315).

[5] Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Consumer Fin. Prot. Bureau Feb. 10, 2014) (codified as amended at 12 C.F.R. pt. 1071); Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Sec. Exch. Comm'n Dec. 27, 1989) (codified as amended at 17 C.F.R. pt. 200-01); Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Nat'l Labor Relations Bd. Oct. 9, 1986) (codified as amended at 29 C.F.R. pt. 102); Procedural Rules; Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Fed. Trade Comm'n Dec. 31, 1985) (codified as amended at 16 C.F.R. pt. 0-5).

Subpart A — Scope of These Rules

§ 315.101 Scope of these rules.

The Equal Access to Justice Act, 5 U.S.C. § 504~~section 504 of Title V of the United States Code~~ (called "the Act" or "EAJA" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. Alternatively, an eligible party, even if not a prevailing party, may receive an award under ~~section~~5 U.S.C. § 504(a)(4) ~~of Title V of the United States Code~~ when it successfully defends against an excessive demand made by an agency.

Subpart B — Definitions

§ 315.201 Definitions.

For the purposes of these rules:

(a) *Adjudicative officer* means the official, whether the official is designated as an administrative law judge or otherwise, who presided over the hearing at the adversary adjudication or the official who presides over an EAJA proceeding.

(b) *Adversary adjudication* means (i) an adjudication under ~~section 554 of Title V of the United States Code~~ 5 U.S.C. § 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant

to ~~section 7103 of Title 41 of the United States Code~~41 U.S.C. § 7103 before an agency board of contract appeals as provided in 41 U.S.C. § 7105~~section 7105 of Title 41 of the United States Code~~, (iii) any hearing conducted under ~~chapter 38 of Title 31 of the United States Code~~31 U.S.C. § 3801 *et seq.*, and (iv) the Religious Freedom Restoration Act of 1993.

Commented [CMA1]: Comment by Senior Fellow Judge Stephen F. Williams: "It looks as if (iv) is missing a word parallel to the opening words of (i) through (iii), i.e., 'adjudication,' 'appeal,' and 'hearing.'"

(c) *Demand* means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(c) *Excessive demand* means a demand by an agency, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory requirement, that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case.

(d) *Final disposition* means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the agency and to the courts.

(e) *Party* means a party, as defined in section ~~551(3) of Title V of the United States Code~~5 U.S.C. § 551(3), who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was

initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association. For purposes of ~~section 504(a)(4) of Title V of the United States Code~~5 U.S.C. § 504(a)(4), "party" also includes a small entity as defined in ~~section 601 of Title V of the United States Code~~5 U.S.C. § 601.

(f) *Position of the agency* means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

Subpart C — EAJA Applications

§ 315.301 Application requirements.

(a) A party seeking an award under EAJA shall file an application with the agency that conducted the adversarial adjudication within 30 days after the agency's final disposition of the adversary adjudication.

(b) The application shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency or agencies that the applicant alleges was not substantially justified; or, if the applicant has not prevailed, shall show that the agency's demand was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision

under the facts and circumstances of that case. The application shall also identify the agency position(s) in the proceeding that the applicant alleges was (were) not substantially justified or the agency's demand that is alleged to be excessive and unreasonable. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(c) The application shall also show that the applicant meets the definition of "party" in ~~section 504(b)(1)(B) of Title V of the United States Code~~5 U.S.C. § 504(b)(1)(B), including adequate documentation of its net worth, as set forth in section 315.302.

(d) The application shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in ~~section 504(b)(1)(A) of Title V of the United States Code~~5 U.S.C. § 504(b)(1)(A), with adequate documentation as set forth in section 315.303.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under penalty of perjury that the information provided in the application is true and correct.

§ 315.302 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization, cooperative association, or, in the case of an application for an award related to an allegedly excessive demand by the agency, a small entity as that term is defined by ~~section 601 of Title V of the United States Code~~5 U.S.C. § 601, shall provide with its application a detailed exhibit showing the net worth of the applicant is as represented in the statement required by section 315.301(~~c~~b) when the

proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards provided in section 315.201(e). An adjudicative officer presiding over an EAJA proceeding may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may request that the documents be filed under seal or otherwise be treated as confidential, pursuant to [insert cross-reference to appropriate agency rules governing such requests].

§ 315.303 Documentation of fees and expenses.

The application shall be accompanied by adequate documentation of the fees and other expenses incurred after initiation of the adversary adjudication, including, but not limited to, the reasonable cost of any study, analysis, engineering report, test, or project. With respect to a claim for fees and expenses involving an excessive demand by the agency, the application shall be accompanied by adequate documentation of such fees and expenses incurred after initiation of the adversary adjudication for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which

reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. An adjudicative officer presiding over an EAJA proceeding may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

Subpart D — Procedures for Considering Applications

§ 315.401 Filing and service of documents.

Any application for an award, or any accompanying documentation related to an application, shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except, as provided in section 315.302(b), for confidential financial information.

§ 315.402 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further

extensions may be granted by the adjudicative officer presiding over an EAJA proceeding upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied upon in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under section 315.405.

§ 315.403 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under section 315.405.

§ 315.404 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying adversary adjudication, or after the adversary adjudication has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

§ 315.405 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer presiding over an EAJA proceeding may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold oral argument; or allow for discovery or hold an evidentiary hearing, but only as to issues other than whether the agency's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees and expenses). Any written submissions shall be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request for further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 315.406 Decision.

The adjudicative officer presiding over an EAJA proceeding shall issue an [initial or recommended][6] decision on the application within [60 days] after the time for filing a reply, or when further proceedings are held, within [60 days] after completion of such proceedings.

[6] Brackets such as these indicate that an agency is to use its discretion to determine what language or time frame is most appropriate.

(a) *For an application involving a prevailing party*. The decision on the application shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if applicable, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(b) *For an application involving an allegedly excessive agency demand.* The decision on the application shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the underlying decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That determination shall be based upon all the facts and circumstances of the case. The decision on the application shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(c) *Awards.* An adjudicative officer presiding over an EAJA proceeding may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

§ 315.407 Agency review.

Either the applicant or agency counsel may seek review of the decision of the adjudicative officer on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [insert cross-reference to agency's regular review procedures].

§ 315.408 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in ~~section 504(c)(2) of Title V of the United States Code~~5 U.S.C. § 504(c)(2).

§ 315.409 Stay of decision concerning award.

Any proceedings on an application for fees under these rules shall be automatically stayed until the agency's final disposition of the decision on which the application is based and either the time period for seeking judicial review expires, or if review has been sought, until final disposition is made by a court and no further judicial review is available.

§ 315.410 Payment of award.

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within [60 days].