



## **Administrative Conference Recommendation 2020-1**

### **Rules on Rulemakings**

**Adopted December 16, 2020**

Numerous agencies have promulgated rules setting forth the policies and procedures they will follow when conducting informal rulemakings under 5 U.S.C. § 553.<sup>1</sup> The rules can cover a variety of practices, including processes for initiating and seeking public input on new rules, coordinating with the Office of Management and Budget and other agencies as a rule is being formulated, and obtaining approval from agency leadership before a proposed rule is issued or finalized. Agencies refer to these rules by different names. This Recommendation calls them “rules on rulemakings.”

Rules on rulemakings vary—in terms of the particular matters they address, their scope and comprehensiveness, and other characteristics—but they share several common features. First, they authoritatively reflect the agency’s position as to what procedures it will observe when adopting new rules. By “authoritative,” this Recommendation means that a rule on rulemakings sets forth the procedures that agency officials responsible for drafting and finalizing new rules will follow in at least most cases within the rule on rulemakings’ scope, though it may contemplate the possibility that agency leadership could authorize an alternative set of procedures.<sup>2</sup>

Second, rules on rulemakings do more than simply summarize or explain rulemaking requirements of the Administrative Procedure Act and other statutes, although they often serve

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<sup>1</sup> This Recommendation does not address rulemakings subject to the formal hearing requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 556–57.

<sup>2</sup> *Cf.* Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017).



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an explanatory function at the same time that they set forth the procedures the agencies will follow in conducting rulemakings. Rules on rulemakings set forth additional commitments by an agency concerning how it will conduct rulemakings. And third, agencies disseminate rules on rulemakings publicly rather than only internally. They appear on agency websites and are often published not only in the *Federal Register* but also in the *Code of Federal Regulations* (CFR).

Rules on rulemakings can serve at least four important objectives. First, they promote efficiency by ensuring that both agency officials and those outside the agency know where to go to find the agency's rulemaking policies. Second, they promote predictability by informing the public that the agency will follow particular procedures, thereby allowing the public to plan their participation in the rulemaking process accordingly. Third, they promote accountability by ensuring that agency leadership has approved the policies and procedures the agency will follow. And they can also provide accountability in connection with individual rulemakings by creating an internal approval process by which agency leadership reviews proposed and final rules. Finally, they promote transparency by affording the public access to the agency's internal procedures pertaining to its rulemaking process.

In promulgating a rule on rulemakings, an agency may wish to solicit public input to inform the rule's development, even if such a rule is subject to 5 U.S.C. § 553's exemption from notice-and-comment procedures as a rule of procedure, general statement of policy, or otherwise. In soliciting public input, agencies may wish to use mechanisms that facilitate more robust participation, including by underrepresented communities.<sup>3</sup> As the Administrative Conference has acknowledged in past recommendations, public comment can both provide valuable input from the public and enhance public acceptance of an agency's rules.<sup>4</sup>

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<sup>3</sup> See, e.g., 2 U.S.C. § 1534 (Unfunded Mandates Reform Act); 5 U.S.C. § 609 (Regulatory Flexibility Act); Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 11, 2000).

<sup>4</sup> See Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992); see also Recommendation 2019-1, *supra* note 2; Recommendation 2017-5, *supra* note 2.



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An agency may also wish to publish its rule on rulemakings in the CFR. Doing so can enhance transparency and facilitate accountability. Importantly, publishing a rule on rulemakings in the CFR does not, by itself, make the rule on rulemakings judicially enforceable.<sup>5</sup>

This Recommendation does not seek to resolve whether, when, or on what legal bases a court might enforce a rule on rulemakings against an agency.<sup>6</sup>

### RECOMMENDATION

1. Agencies should consider promulgating rules on rulemakings setting forth the policies and procedures they will follow in informal rulemaking under 5 U.S.C. § 553.
2. In issuing rules on rulemakings, agencies should consider including provisions addressing the following topics (which reflect topics frequently covered in existing rules on rulemakings):
  - a. Procedures prior to the issuance of a notice of proposed rulemaking;
  - b. Procedures connected with the notice-and-comment process;
  - c. Procedures connected with the presidential review process, if applicable;
  - d. Procedures for handling post-comment period communications;
  - e. Internal approval procedures for issuing and finalizing rules; and
  - f. Procedures for reassessing existing rules.

The appendix gives examples of particular subtopics agencies may wish to consider under each of these topics.

3. Agencies should make rules on rulemakings available in a prominent, easy-to-find place on the portion of their websites dealing with rulemaking matters. Additionally, agencies

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<sup>5</sup> See, e.g., *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (stating that “publication in the Code of Federal Regulations, or its absence” is only “a snippet of evidence of agency intent” that the published pronouncement be given binding effect).

<sup>6</sup> Some rules on rulemakings include a statement that they do not create any substantive or procedural rights or benefits. This Recommendation does not address whether such disclaimers should be included or what legal effect they may have on judicial review. These questions cannot be answered in isolation from the broader question of when a rule on rulemakings is judicially enforceable.



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should consider publishing them in the *Federal Register* and the *Code of Federal Regulations*. When posting rules on rulemakings on their websites, agencies should use techniques like linked tabs, pull-down menus, indexing, tagging, and sorting tables to ensure that relevant documents are easily findable. Agencies should also design their search engines to allow people to easily identify relevant documents.

4. In addition to issuing rules on rulemakings, agencies should consider explaining in accessible language how the rulemaking process works in order to educate the public. Such explanations might be integrated within a rule on rulemakings or might be contained in separate explanatory documents (e.g., documents identifying frequently asked questions). When providing such explanations, an agency should, to the extent practicable, distinguish between procedures it intends to follow and material provided purely by way of background.
5. Agencies should consider a broad range of means of seeking public input on rules on rulemakings, even if the Administrative Procedure Act does not require it.
6. Agencies should consider the extent to which procedures required by a rule on rulemakings should be made internally waivable and, if so, by whom. For example, they might consider drafting a rule on rulemakings in a way that allows high-level agency officials to permit other officials to use alternative procedures.



## APPENDIX

### Non-Exhaustive List of Topics for Agencies to Consider Including Within Their Rules on Rulemakings

#### (a) Procedures prior to the issuance of a notice of proposed rulemaking

*Subtopic Examples:*

- (1) Regulatory planning;<sup>7</sup>
- (2) Issuing advance notices of proposed rulemaking and obtaining feedback from members of the public using means other than the notice-and-comment process, such as requests for information and focus groups;<sup>8</sup>
- (3) Accepting, reviewing, and responding to petitions for rulemaking;<sup>9</sup>
- (4) Considering options besides rulemaking;
- (5) Performing ex ante regulatory analyses (e.g., benefit-cost analysis and regulatory flexibility analysis);<sup>10</sup>
- (6) Using plain language in regulatory drafting;<sup>11</sup>
- (7) Preparing for potential judicial review of rulemakings, including deciding whether to make any of the provisions of a rule severable;<sup>12</sup>

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<sup>7</sup> See Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757 (June 26, 2015).

<sup>8</sup> See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

<sup>9</sup> See Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014).

<sup>10</sup> See Admin. Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

<sup>11</sup> See Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

<sup>12</sup> See Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 Fed. Reg. 30,685 (June 29, 2018).



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- (8) Conducting negotiated rulemaking;<sup>13</sup> and
- (9) Establishing an effective date for rules.

### **(b) Procedures connected with the notice-and-comment process**

#### *Subtopic Examples:*

- (1) Materials to be published on Regulations.gov with the notice;<sup>14</sup>
- (2) Minimum comment periods to be allowed;<sup>15</sup>
- (3) Policies on ex parte contacts;<sup>16</sup>
- (4) Handling external merits communications not filed as comments;
- (5) Incorporating standards by reference;<sup>17</sup>
- (6) Using social media to engage the public in rulemaking;<sup>18</sup>
- (7) Obtaining feedback from American Indian tribes, other historically underrepresented or under-resourced groups, and state and local governments;<sup>19</sup>
- (8) Posting, analyzing, and responding to public comments, including comments that may contain confidential commercial information, protected personal information, or other kinds of sensitive submissions;<sup>20</sup>

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<sup>13</sup> See Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,040 (July 5, 2017).

<sup>14</sup> See Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019).

<sup>15</sup> See Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

<sup>16</sup> See Admin. Conf. of the U.S., Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

<sup>17</sup> See Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

<sup>18</sup> See Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

<sup>19</sup> See Recommendation 2018-7, *supra* note 8.

<sup>20</sup> See Admin. Conf. of the U.S., Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, 86 Fed. Reg. \_\_\_\_ (approved Dec. 16, 2020); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011).



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- (9) Waiving or invoking of Administrative Procedure Act exemptions to notice and comment;<sup>21</sup> and
- (10) Using interim final rules or direct final rules.<sup>22</sup>

### **(c) Procedures connected with the presidential review process, if applicable**

#### *Subtopic Examples:*

- (1) Interacting with the Office of Information and Regulatory Affairs, the Office of the Federal Register, the Regulatory Information Service Center, the Small Business Administration's Office of Advocacy, and other offices with government-wide rulemaking responsibilities;
- (2) Participating in the interagency review process; and
- (3) Procedures related to international regulatory cooperation.<sup>23</sup>

### **(d) Procedures for handling post-comment period communications**

#### *Subtopic Examples:*

- (1) Provisions pertaining to reply comments<sup>24</sup> and
- (2) Handling late-filed comments.<sup>25</sup>

### **(e) Internal approval procedures for issuing and finalizing rules**

#### *Subtopic Examples:*

- (1) Procedures for submitting rules to offices with legal, economic, and other responsibilities within the agency for review<sup>26</sup> and
- (2) Procedures for submitting rules to the relevant agency official for final approval.

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<sup>21</sup> See Recommendation 92-1, *supra* note 4.

<sup>22</sup> See Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemakings*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

<sup>23</sup> See Admin. Conf. of the U.S., Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2259 (Jan. 17, 2012).

<sup>24</sup> See Recommendation 2011-2, *supra* note 15.

<sup>25</sup> See *id.*

<sup>26</sup> See Admin. Conf. of the U.S., Recommendation 2019-5, *Agency Economists*, 84 Fed. Reg. 71,349 (Dec. 27, 2019).



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### **(f) Procedures for reassessing existing rules**

#### *Subtopic Examples:*

- (1) Issuing regulatory waivers and exemptions;<sup>27</sup>
- (2) Engaging in retrospective review of rules;<sup>28</sup>
- (3) Maintaining and preserving rulemaking records, including transparency of such records and the handling of confidential commercial information, protected personal information, or other kinds of sensitive information contained therein;<sup>29</sup> and
- (4) Handling rules that have been vacated or remanded without vacatur.<sup>30</sup>

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<sup>27</sup> See Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61,742 (Dec. 29, 2017).

<sup>28</sup> See Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

<sup>29</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>30</sup> See Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,272 (Dec. 17, 2013).