



Regulatory Enforcement Manuals

Committee on Rulemaking

Draft Recommendation for Committee | October 18, 2022

1 Many agencies are responsible for detecting, investigating, and prosecuting potential
2 violations of the laws they administer. Statutes, agency rules (whether adopted after notice and
3 comment or otherwise), and other policies govern the exercise of agencies' enforcement
4 authority and direct the activities of enforcement personnel. These policies might, for example,
5 explain and interpret relevant statutes and rules; establish standards, priorities, and procedures
6 for detecting and investigating suspected violations, issuing complaints against suspected
7 violators, and prosecuting cases before an administrative body or a federal court; describe how
8 enforcement staff interact with other agency personnel and persons outside the agency; and set
9 forth processes for soliciting and receiving complaints about alleged violations from members of
10 the public.

11 Many agencies have developed documents, often called “enforcement manuals,” that
12 provide their personnel with a single, comprehensive resource regarding enforcement-related
13 policies. Enforcement manuals provide a way for agencies to effectively communicate such
14 policies, which would otherwise be dispersed within a voluminous body of separate documents,
15 and to ensure that personnel fairly and efficiently perform enforcement functions consistent with
16 established policies and priorities.¹

17 Enforcement manuals can also be a useful, practical resource for the public. By providing
18 public access to enforcement manuals, agencies can improve awareness of and compliance with
19 relevant policies and promote transparency more generally. In disclosing enforcement manuals,

¹ See Jordan Perkins, Regulatory Enforcement Manuals XX (Sept. 28, 2022) (draft report to the Admin. Conf. of the United States).



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20 however, agencies must be careful not to reveal information that might enable persons to
21 circumvent the law. The Freedom of Information Act (FOIA) recognizes agencies' right to do so
22 by exempting from disclosure records or information that "would disclose techniques and
23 procedures for law enforcement investigations or prosecutions" or "guidelines for law
24 enforcement investigations or prosecutions."² FOIA also allows agencies to withhold records that
25 fall within the attorney work-product privilege. This exemption may encompass information
26 provided to enforcement personnel about litigation strategies and legal theories, the disclosure of
27 which would adversely affect the integrity of adversarial proceedings.³

28 This Recommendation offers agencies best practices for developing, managing, and
29 disseminating enforcement manuals. It builds on several recommendations the Administrative
30 Conference has previously adopted regarding the development, management, and dissemination
31 of agency procedural rules and guidance documents.⁴ In offering these recommendations, the
32 Conference recognizes that enforcement manuals may not be appropriate for all agencies given
33 differences in the volume and complexity of documents that govern their enforcement activities,
34 resources available to agencies, and the informational needs of persons affected by or interested
35 in agency enforcement activities differ among programs.

RECOMMENDATION

Developing Enforcement Manuals

- 36 1. Subject to available resources, agencies responsible for investigating and prosecuting
37 potential violations of the laws they administer should develop an enforcement manual—

² 5 U.S.C. § 552(b)(7)(E).

³ See *ACLU of N. Cal. v. U.S. DOJ*, 880 F.3d 473, 486–88 (9th Cir. 2018); *Nat'l Ass'n of Crim. Def. Lawyers v. U.S. DOJ Exec. Off. for U.S. Attys.*, 844 F.3d 246, 254 (D.C. Cir. 2016).

⁴ See Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); 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 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 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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- 38 that is, a document that provides personnel a single, comprehensive resource for
39 enforcement-related statutes, rules, and policies—if doing so would improve the
40 communication of enforcement-related policies to agency personnel and promote the fair
41 and efficient performance of enforcement functions consistent with established policies.
- 42 2. In developing enforcement manuals, agencies should consider, among other things:
- 43 a. Identifying the office or individual within the agency under whose name and
44 authority the manual is being issued and including a disclaimer, if applicable, that
45 the manual does not necessarily reflect the views of other agency officials;
 - 46 b. Describing the manual’s purpose, scope, organization, and legal effect;
 - 47 c. Identifying the statutes and rules that govern the agency’s enforcement activities;
 - 48 d. Explaining how and by whom the manual is developed, periodically reviewed for
49 accuracy, and updated;
 - 50 e. Describing any procedures for soliciting and receiving information about alleged
51 violations from persons outside the agency;
 - 52 f. Identifying any criteria used to classify the severity of alleged violations or
53 prioritize investigations or prosecutions;
 - 54 g. Describing procedures for conducting investigations, inspections, audits, or
55 similar processes;
 - 56 h. Describing policies governing communications between enforcement personnel
57 and other agency personnel, the subjects of enforcement actions, and other
58 persons outside the agency;
 - 59 i. Explaining procedures for handling legally protected records or information;
 - 60 j. Addressing when and how agency personnel may publicly disclose information
61 about an enforcement proceeding, such as by issuing a press release;
 - 62 k. Identifying guidelines for negotiating settlements with the subjects of
63 enforcement actions; and
 - 64 l. Describing criteria and procedures for formally initiating adjudicative or judicial
65 proceedings and prosecuting cases.
- 66 3. Agencies should ensure that the contents of enforcement manuals are presented in a clear,



67 logical, and comprehensive fashion, such as by providing a table of contents and an
68 index.

Managing Enforcement Manuals

- 69 4. Agencies should periodically review their enforcement manuals and update them as
70 needed to ensure they accurately reflect current policies. When agencies update their
71 enforcement manuals, they should prominently display the date of the update and identify
72 what changes were made.
- 73 5. Agencies with enforcement manuals should develop procedures for managing them and
74 keeping them up to date. These policies should address:
- 75 a. How often the enforcement manual as a whole, or individual sections, are
76 reviewed for accuracy and updated if necessary; and
 - 77 b. Which office or individual is responsible for periodically reviewing the
78 enforcement manual as a whole or reviewing individual sections;
 - 79 c. How and by whom changes to the enforcement manual are drafted, reviewed,
80 approved, and implemented.

Disseminating Enforcement Manuals

- 81 6. To ensure that enforcement personnel can easily access current versions of enforcement
82 manuals, agencies should make enforcement manuals available in a searchable, electronic
83 format in an appropriate location on an internal network or public website.
- 84 7. Agencies should make enforcement manuals publicly available on their websites if doing
85 so would improve public awareness of and compliance with relevant policies or promote
86 transparency more generally and if they have adequate resources available to ensure
87 publicly available enforcement manuals remain up to date.
- 88 8. Agencies should take steps to provide notice to the public when they issue or revise an
89 enforcement manual, for example by publishing a notice of availability in the *Federal*
90 *Register*, issuing a press releases, or making an announcement on social media.
- 91 9. Agencies should not include information in publicly available versions of enforcement



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92 manuals that would enable persons to circumvent the law or reflects litigation strategies
93 or legal theories, the disclosure of which would adversely affect the integrity of
94 adversarial proceedings.

Soliciting Input on Enforcement Manuals

- 95 10. Agencies should solicit feedback on their enforcement manuals from their personnel and
96 consider that feedback in managing their manuals.
- 97 11. Agencies that make enforcement manuals publicly available should solicit feedback on
98 them in a public forum from a wide range of persons interested in or affected by agency
99 enforcement proceedings.