



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Regulatory Enforcement Manuals

Committee on Rulemaking

Draft Recommendation for Committee | November 1, 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 agency policies govern the exercise of agencies' enforcement
4 authority and direct the activities of enforcement personnel. These laws and policies might, for
5 example, explain and interpret relevant statutes and rules; establish standards, priorities, and
6 procedures for detecting and investigating suspected violations, issuing complaints against
7 suspected violators, and prosecuting cases before an administrative body or a federal court;
8 describe how enforcement staff interact with other agency personnel and persons outside the
9 agency; and set forth processes for soliciting and receiving complaints about alleged violations
10 from members of 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 laws and policies. Enforcement manuals provide a way for agencies to effectively communicate
14 such policies, which would otherwise be dispersed within a voluminous body of separate
15 documents, and to ensure that personnel fairly and efficiently perform enforcement functions
16 consistent with established policies and priorities.¹ [Although enforcement manuals should not
17 bind agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency
18 management matter, to direct enforcement personnel to act in conformity with an enforcement](#)

¹ See Jordan Perkins, Regulatory Enforcement Manuals 1, 9 (Sept. 28, 2022) (draft report to the Admin. Conf. of the United States).

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19 [manual](#)²

20 Enforcement manuals can also be a useful, practical resource for the public. By providing
21 public access to enforcement manuals, agencies can improve awareness of and compliance with
22 relevant policies and promote transparency more generally. In disclosing enforcement manuals,
23 however, agencies must be careful not to reveal information that might enable persons to
24 circumvent the law. The Freedom of Information Act (FOIA) recognizes agencies' right to do so
25 by exempting from disclosure records or information that "would disclose techniques and
26 procedures for law enforcement investigations or prosecutions" or "guidelines for law
27 enforcement investigations or prosecutions."³ FOIA also allows agencies to withhold records that
28 fall within the attorney work-product privilege. This exemption may encompass information
29 provided to enforcement personnel about litigation strategies and legal theories, the disclosure of
30 which would adversely affect the integrity of adversarial proceedings.⁴ However, agencies may
31 choose to proactively disclose exempted materials, so long as any legally protected information
32 is removed.

33 This Recommendation offers agencies best practices for developing, managing, and
34 disseminating enforcement manuals. It builds on several recommendations the Administrative
35 Conference has previously adopted regarding the development, management, and dissemination
36 of agency procedural rules and guidance documents.⁵ In offering these recommendations, the
37 Conference recognizes that enforcement manuals may not be appropriate for all agencies, given

Commented [A1]: For Committee discussion based on discussion at previous meeting (see paragraphs 2(a) and (b) below): Should this point be made explicit in the preamble, in addition to the recommendation paragraphs? Note, this language is drawn from Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 3, which reads: "Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement."

² See Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 3, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).

³ 5 U.S.C. § 552(b)(7)(E).

⁴ 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).

⁵ 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, *supra note 2 Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017).



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38 differences in the volume and complexity of documents that govern their enforcement activities,
39 resources available to agencies, and the differing informational needs of persons affected by or
40 interested in agency enforcement activities.

RECOMMENDATION

Developing Enforcement Manuals

- 41 1. Subject to available resources, agencies responsible for investigating and prosecuting
42 potential violations of the laws they administer should develop an enforcement manual—
43 that is, a document that provides personnel a single, comprehensive resource for
44 enforcement-related statutes, rules, and policies—if doing so would improve the
45 communication of enforcement-related policies to agency personnel and promote the fair
46 and efficient performance of enforcement functions consistent with established policies.
- 47 2. In developing enforcement manuals, agencies should consider, among other things:
- 48 a. Identifying the office or individual within the agency under whose name and
49 authority the manual is being issued;
 - 50 b. [Identifying agency employees who are directed to act in conformity with the](#)
51 [manual](#);
 - 52 c. Describing the manual’s purpose, scope, organization, [and legal effect, including](#)
53 [a disclaimer, if applicable, that the manual does not necessarily reflect the views](#)
54 [of other agency officials and does not bind the agency as a whole](#);
 - 55 d. Identifying the person or office in the agency that is empowered to receive, and
56 potentially to act on, any complaint that the agency personnel who are conducting
57 the investigation or other enforcement action are engaging in unlawful or
58 inappropriate conduct;
 - 59 e. Identifying the statutes and rules that govern the agency’s enforcement activities;
 - 60 f. Explaining how and by whom the manual is developed, periodically reviewed for
61 accuracy, and updated;
 - 62 g. Describing procedures for soliciting and receiving information about alleged
63 violations from persons outside the agency;



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- 64 h. Identifying criteria used to classify the severity of alleged violations, recommend
65 or assess penalties or other remedies, or prioritize investigations or prosecutions;
66 i. Describing procedures for conducting investigations, inspections, audits, or
67 similar processes;
68 j. Describing policies governing communications between enforcement personnel
69 and other agency personnel, the subjects of enforcement actions, and other
70 persons outside the agency;
71 k. Explaining procedures for determining if records or information are legally
72 protected, and procedures for handling such records or information;
73 l. Addressing when and how agency personnel may publicly disclose information
74 about an enforcement proceeding, such as by issuing a press release;
75 m. [Explaining whistleblower protections available to agency personnel under statutes](#)
76 [and agency rules](#);
77 n. Identifying guidelines for informally adjudicating or negotiating settlements with
78 the subjects of enforcement actions; and
79 o. Describing criteria for the selection among enforcement alternatives, procedures
80 for formally initiating adjudicative or judicial proceedings, and making a criminal
81 referral.
- 82 3. Agencies should ensure that the contents of enforcement manuals are presented in a clear,
83 logical, and comprehensive fashion, such as by providing a table of contents and an
84 index.

Managing Enforcement Manuals

- 85 4. Agencies should periodically review their enforcement manuals and update them as
86 needed to ensure they accurately reflect current law and policies. When agencies update
87 their enforcement manuals, they should prominently display the date of the update and
88 identify what changes were made.
- 89 5. Agencies with enforcement manuals should develop procedures for managing them and
90 keeping them up to date. These procedures should address:



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- 91 a. How often the enforcement manual, in whole or in part, is reviewed for accuracy
92 and updated if necessary;
93 b. Which office or individual is responsible for periodically reviewing the
94 enforcement manual, in whole or in part; and
95 c. How and by whom changes to the enforcement manual are drafted, reviewed,
96 approved, and implemented.

Disseminating Enforcement Manuals

- 97 6. To ensure that enforcement personnel can easily access current versions of enforcement
98 manuals, agencies should at least make enforcement manuals available in a searchable,
99 electronic format in an appropriate location on an internal network.
- 100 7. Agencies should make enforcement manuals, or portions thereof, publicly available on
101 their websites when doing so would improve public awareness of relevant policies and
102 compliance with legal requirements or promote transparency more generally, and if they
103 have adequate resources available to ensure publicly available enforcement manuals
104 remain up to date.
- 105 8. [Agencies should post publicly available versions of enforcement manuals in an easily](#)
106 [identified location on their websites and present them in a clear and logical fashion, to](#)
107 [ensure that potentially interested persons, including members of historically underserved](#)
108 [communities, can easily find and use them.](#)
- 109 9. Agencies should provide notice to the public when they issue or revise a publicly
110 available enforcement manual, for example by publishing a notice of availability in the
111 *Federal Register*, issuing a press release, or making an announcement on social media.
- 112 10. Agencies should not include information in publicly available versions of enforcement
113 manuals that would enable persons to circumvent the law or reflect litigation strategies or
114 legal theories, the disclosure of which would adversely affect the integrity of adversarial
115 proceedings.



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Soliciting Input on Enforcement Manuals

- 116 11. Agencies should solicit feedback on their enforcement manuals from their personnel and
117 consider that feedback in managing their manuals.
- 118 12. Agencies that make enforcement manuals publicly available should solicit feedback on
119 them in a public forum from a wide range of persons interested in or affected by agency
120 enforcement proceedings.