



## Regulatory Enforcement Manuals

### Committee on Rulemaking

#### Proposed Recommendation from Committee | November 1, 2022

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

10 Many agencies have developed documents, often called “enforcement manuals,” that  
11 provide their personnel with a single, comprehensive resource regarding enforcement-related  
12 laws and policies. Enforcement manuals provide a way for agencies to effectively communicate  
13 such policies, which would otherwise be dispersed within a voluminous body of separate  
14 documents, and to ensure that agency enforcement is internally consistent, fair, efficient,  
15 effective, and legally sound.<sup>1</sup> Although enforcement manuals should not necessarily bind  
16 agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency  
17 management matter, to direct enforcement personnel to act in conformity with an enforcement

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<sup>1</sup> 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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18 manual.<sup>2</sup> Because enforcement manuals are a form of agency guidance, the public should not  
19 necessarily rely upon them.

20 The Freedom of Information Act (FOIA) requires agencies to post on their websites  
21 “administrative staff manuals and instructions to staff that affect a member of the public.”<sup>3</sup> To be  
22 sure, several courts of appeals have held that this provision does not apply to some portions of  
23 enforcement manuals. But whatever the exact scope of this provision, the policies underlying it  
24 are relevant. Like other internal manuals, enforcement manuals can also be a useful, practical  
25 resource for the public. By providing public access to enforcement manuals, agencies can  
26 improve awareness of and compliance with relevant policies and promote transparency more  
27 generally. However, disclosure of some portions of enforcement manuals might also enable  
28 persons to circumvent the law by revealing forms of noncompliance that will not lead to  
29 investigation or enforcement. Avoiding such disclosures is both legitimate and important.  
30 Accordingly, FOIA exempts from disclosure records or information that “would disclose  
31 techniques and procedures for law enforcement investigations or prosecutions” or “guidelines for  
32 law enforcement investigations or prosecutions if such disclosure could reasonably be expected  
33 to risk circumvention of the law.”<sup>4</sup> FOIA also allows agencies to withhold records that fall within  
34 the attorney work-product privilege. This exemption may encompass information provided to  
35 enforcement personnel about litigation strategies and legal theories, the disclosure of which  
36 would adversely affect the integrity of adversarial proceedings.<sup>5</sup> Agencies cannot rely on these  
37 exemptions reflexively, however. All or part of a manual can be withheld only if “the agency  
38 reasonably foresees that disclosure would harm an interest protected by” an exemption; absent

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<sup>2</sup> 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).

<sup>3</sup> 5 U.S.C. § 552(a)(2)(C).

<sup>4</sup> *Id.* § 552(b)(7)(E).

<sup>5</sup> 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).



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39 such foreseeable harm, the manual should or must be disclosed.<sup>6</sup>

40 This Recommendation offers agencies best practices for developing, managing, and  
41 disseminating enforcement manuals. It builds on several recommendations the Administrative  
42 Conference has previously adopted regarding the development, management, and dissemination  
43 of agency procedural rules and guidance documents.<sup>7</sup> In offering these recommendations, the  
44 Conference recognizes that enforcement manuals may not be appropriate for all agencies, given  
45 differences in the volume and complexity of documents that govern their enforcement activities,  
46 resources available to agencies, and the differing informational needs of persons affected by or  
47 interested in agency enforcement activities.

### RECOMMENDATION

#### Developing Enforcement Manuals

- 48 1. Subject to available resources, agencies responsible for investigating and prosecuting  
49 potential violations of the laws that they administer should develop an enforcement  
50 manual—that is, a document that provides personnel a single, comprehensive resource  
51 for enforcement-related statutes, rules, and policies—if doing so would improve the  
52 communication of enforcement-related policies to agency personnel and promote the fair  
53 and efficient performance of enforcement functions consistent with established policies.
- 54 2. In developing enforcement manuals, agencies should consider, among other things:
- 55 a. Identifying the office or individual within the agency under whose name and  
56 authority the manual is being issued;
- 57 b. Identifying which offices within the agency are directed to act in conformity with  
58 the manual;

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<sup>6</sup> 5 U.S.C. § 552(a)(8)(A).

<sup>7</sup> 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); Recommendation 2017-5, *supra* note 2.



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- 59 c. Describing the manual’s purpose, scope, organization, and legal effect, including  
60 a disclaimer, if applicable, that the manual should not bind the agency as a whole  
61 and that the public should not necessarily rely upon the manual;
- 62 d. Identifying the office or individual within the agency that is empowered to  
63 receive, and potentially to act on, any complaint that the agency personnel who  
64 are conducting an investigation or other enforcement action are engaging in  
65 unlawful or inappropriate conduct;
- 66 e. Identifying the statutes and rules that govern the agency’s enforcement activities;
- 67 f. Explaining how and by whom the manual is developed, periodically reviewed for  
68 accuracy, and updated;
- 69 g. Describing procedures for soliciting and receiving information about alleged  
70 violations from persons outside the agency;
- 71 h. Identifying criteria used to classify the severity of alleged violations, recommend  
72 or assess penalties or other remedies, or prioritize investigations or prosecutions;
- 73 i. Describing procedures for conducting investigations, inspections, audits, or  
74 similar processes;
- 75 j. Describing policies governing communications between enforcement personnel  
76 and other agency personnel, the subjects of enforcement actions, and other  
77 persons outside the agency;
- 78 k. Explaining procedures for determining if records or information are legally  
79 protected, and procedures for handling such records or information;
- 80 l. Addressing when and how agency personnel may publicly disclose information  
81 about an enforcement proceeding, such as by issuing a press release;
- 82 m. Identifying guidelines for informally adjudicating or negotiating settlements with  
83 the subjects of enforcement actions; and
- 84 n. Describing criteria for the selection among enforcement alternatives, procedures  
85 for formally initiating agency adjudicative or judicial proceedings, and making  
86 criminal referrals.
- 87 3. Agencies should ensure that the contents of enforcement manuals are presented in a clear,



88 logical, and comprehensive fashion, and include a table of contents and an index.

### **Managing Enforcement Manuals**

- 89 4. Agencies should periodically review their enforcement manuals and update them as  
90 needed to ensure they accurately reflect current law and policies. When agencies update  
91 their enforcement manuals, they should prominently display the date of the update and  
92 identify what changes were made.
- 93 5. Agencies with enforcement manuals should develop procedures for managing them and  
94 keeping them up to date. These procedures should address:
- 95 a. How often the enforcement manual, in whole or in part, is reviewed for accuracy  
96 and updated if necessary;
  - 97 b. Which office or individual within the agency is responsible for periodically  
98 reviewing the enforcement manual, in whole or in part; and
  - 99 c. How and by whom changes to the enforcement manual are drafted, reviewed,  
100 approved, and implemented.
- 101 6. To ensure that enforcement personnel can easily access current versions of enforcement  
102 manuals, agencies should make enforcement manuals available in a searchable, electronic  
103 format in an appropriate location on an internal network.
- 104 7. Agencies should solicit feedback on their enforcement manuals from their personnel and  
105 consider that feedback in managing their manuals.

### **Disseminating Enforcement Manuals to the Public**

- 106 8. Agencies should make enforcement manuals, or portions thereof, publicly available on  
107 their websites when doing so would improve public awareness of relevant policies and  
108 compliance with legal requirements or promote transparency more generally, and if they  
109 have adequate resources available to ensure publicly available enforcement manuals  
110 remain up to date. Agencies should not include information in publicly available versions  
111 of enforcement manuals that would enable persons to circumvent the law or reflect  
112 litigation strategies or legal theories, the disclosure of which would adversely affect the



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- 113 integrity of adversarial proceedings.
- 114 9. When agencies post publicly available versions of enforcement manuals, they should post  
115 the manuals in an easily identified location on their websites, in a user-friendly format,  
116 and with an introduction sufficient to ensure that potentially interested persons, including  
117 members of historically underserved communities, can easily find and use them.
- 118 10. Agencies should provide notice to the public when they issue or revise a publicly  
119 available enforcement manual, for example by placing a notice on the agency's website,  
120 issuing a press release, making an announcement on social media, or publishing a notice  
121 of availability in the *Federal Register*.
- 122 11. Agencies that make enforcement manuals publicly available should solicit feedback on  
123 them in a public forum from a wide range of persons interested in or affected by agency  
124 enforcement proceedings.