DISCLOSURE OF AGENCY LEGAL MATERIALS
TENTATIVE RECOMMENDATIONS AND RATIONALES

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At the request of the Administrative Conference of the United States (ACUS), we are preparing a report to address "whether the main statutes governing disclosure of agencies' legislative rules, guidance documents, adjudicative decisions, and other important legal materials should be amended to consolidate and harmonize their overlapping requirements, account for technological developments, correct certain statutory ambiguities and drafting errors, and address other potential problems that may be identified." As per this charge from ACUS, we are recommending "statutory reforms to provide clear standards as to what legal materials agencies must publish and where they must publish them" so as to better "ensure that agencies provide ready public access to important legal materials in the most efficient way possible." Below is a preliminary summary of our tentative recommendations prepared for the purpose of soliciting input from the team's consultative group.

I. SCOPE OF THE REPORT

A. Definition of Agency Legal Materials

"Agency legal materials" are documents that create rights or impose obligations on those subject to the agency's authority, documents that constrain agency action, and documents that explain legal obligations imposed or enforced by the agency for the guidance of stakeholders or the general public. In other words, agency legal materials are documents produced by an agency that establish, interpret, apply, explain, or address enforcement of legal rights and obligations, along with constraints imposed, implemented, or enforced by or upon an agency.[1]

We adopt a broad view of "agency legal materials." The above definition encompasses not only sources addressed to the public (such as rules or adjudicatory decisions), but sources addressed to those within the agency itself to direct them in their contacts and interactions with the public, such as through adjudication, guidance, and enforcement. These latter materials often take the form of staff manuals or other forms of internally oriented documents. The definition of agency legal material used here thus also includes documents that constrain agency action. The constraint can be internal, as where the agency ties its own hands. Or the constraint can be external, imposed by

[1] For purposes of our report, we treat as an "agency" any governmental entity or office that is defined as an agency under federal law. This includes "each authority of the Government of the United States" except Congress, the courts, and other entities exempted from the definition of an agency in the Administrative Procedure Act. 5 U.S.C. §551. It also includes any entity defined as an agency in the Federal Register Act, which includes "the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government." 44 U.S.C. §1501.

a superior source of obligation, *i.e.,* the Constitution, treaties, statutes, presidential directives, and caselaw. These superior obligations may be interpreted by lawyers either within the agency or within the broader executive branch (such as DOJ's Office of Legal Counsel) in a manner that restricts agency policy discretion.

Our conception of what counts as an agency legal material is broadly consistent with the Freedom of Information Act, 5 U.S.C. §552, which contains affirmative disclosure requirements that are not limited to materials addressed only to the public.[2] Our definition also aligns with broader legal and moral reasons for rejecting the concept of secret law.

B. Special Status of Agency Legal Materials

As reflected by the Freedom of Information Act, many agency records are appropriately disclosed to the public upon request. Agency legal materials, though, have a special status and agencies have had an affirmative obligation to disclose them that is not only embodied in but long predates FOIA. Most obviously, the Due Process Clause, and basic fairness, require that those charged with complying with the law be able to ascertain what the law is. They must have fair warning. Even if the law is not enforced against an unwitting violator, uncertainty about the existence or substance of the law has real costs for regulated entities.

Publicity also serves important interests beyond those of regulated entities. Regulatory beneficiaries are entitled to know the content of the law. Such knowledge may affect their own conduct, including enabling them to enforce or seek public enforcement in the case of violations. Finally, democratic self-governance and accountability require public awareness and understanding of the law. Anyone who seeks to change or improve the law—regulated entities, regulatory beneficiaries, interested citizens, or legislators—needs first to know what the law is.

C. Existing Legal Limitations on Disclosure

Full disclosure of agency legal materials is a fundamental and essential principle. We recognize, however, the numerous countervailing considerations that cut against disclosure of certain types of government information. Many of these countervailing considerations are captured by the exemptions under FOIA, including privacy, national security, law enforcement efficacy, business secrecy, and protecting privileges. The appropriate scope and weight to be given to these countervailing considerations can be complex, context-specific, and vigorously contested.

In formulating our recommendations, we have taken FOIA's existing exemptions from disclosure as a given. We do not weigh in on the ongoing debates about the contours of particular exemptions. Doing so is beyond both our available time and our mandate. It also risks diverting us, and ACUS more broadly, from this project's primary goal—enhancing the meaningful affirmative disclosure

[2] Although others have occasionally distinguished between the two, we use "affirmative disclosure" and "proactive disclosure" interchangeably to refer to statutory requirements mandating the publication of categories of records without the need for a FOIA request.

of agency legal materials through new legislation. In our full report, we will nonetheless discuss the unique implications these various exemptions and limitations to disclosure have on the availability of agency legal materials as defined above, in the hopes that flagging issues proves useful to others who may wish to consider reforms in the future.

Insofar as the definition of legal materials encompasses directives or guidance to government officials rather than to the public, there can, at times, exist an almost inverse relationship between the goals served by transparency of agency legal materials and some countervailing considerations, such as those related to preventing the circumvention of the law, protecting deliberative intra-governmental deliberative processes, and respecting the separation of powers. Our decision to treat the FOIA exemptions as they stand now is made for the practical reason that otherwise the scope of our project would be intractable. Some of these exemptions are currently contested in court, sometimes with conflicting judicial outcomes. If the exemptions were to remain unchanged, we recognize that this would leave the law with regard to agency legal materials in a state that would be unsatisfactory to many and deeply disturbing to some. As much as we recognize the important concerns implicated by the current state of the law, and at the center of ongoing litigation, this report takes no position on the merits of or possible amendments to the current exemptions. Should Congress adopt legislation based on this report that leaves the existing exemptions intact, we recommend that it avoid inadvertently endorsing any particular interpretation of those exemptions—just as we hope readers of our report understand that we are similarly not endorsing any particular interpretation either.

We likewise have not waded into the vibrant debate concerning the incorporation by reference (IBR) into agency regulations of standards produced by private standard-setting bodies. IBR is a particularly striking exception to the universally accepted norm of free, online publication of the content of proposed and final substantive rules. A longstanding debate as to whether this exception is justified continues. ACUS has already devoted substantial resources to a direct study of IBR and a formal recommendation adopted by the Conference.[3] Accordingly, while our report devotes some attention to IBR, we do not present any specific recommendations here. It may well be that ACUS should revisit the IBR issue; if so, it deserves more complete and dedicated consideration than we can provide here.

Our affirmative recommendations concern three topics: 1) clarifying and supplementing the categories of agency legal materials that must be affirmatively disclosed; 2) how and where agency legal materials should be disclosed; and 3) strengthening enforcement of and creating incentives to comply with affirmative disclosure requirements. In making these recommendations, we have aimed to articulate the key objectives of new legislation, not to draft statutory language. Furthermore, we recognize that Congress would need to address a number of important issues beyond the ambit of our charge in crafting any implementing legislation. For example, to the extent that our recommendations would significantly increase the scope of existing affirmative disclosure obligations or practices, any such additional requirements would be virtually pointless without additional appropriations to fund new technologies and personnel to ensure the initiatives could be carried out. In addition, Congress would want to set a deadline for agencies to comply with new

[3] ACUS, *Incorporation By Reference*, https://www.acus.gov/research-projects/incorporation-reference

obligations and consider whether some obligations should apply only to newly generated legal materials. As these issues fall outside of our core mandate from ACUS, we simply note the importance of these issues in any resulting legislation and do not recommend a particular course of action.

II. TENTATIVE LEGISLATIVE RECOMMENDATIONS

A. Types of Agency Legal Materials

The consultant team has tentatively formulated nine recommendations pertaining to the scope of agency legal materials that should be subject to affirmative disclosure requirements.

1. **FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2)(A), should be amended to clarify that "final opinions" and "orders" include all decisions made in relation to an adjudication regardless of agency designation, such as precedential/non-precedential or published/unpublished.**

The law as it now stands has been interpreted inconsistently with respect to whether agencies must publish non-precedential opinions. This ambiguity deserves clarification. All agency decisions made in relation to an adjudicatory hearing have significant public import. ACUS has previously recognized that open adjudication processes increase legitimacy, public confidence, and public understanding of important agency functions. Moreover, even decisions designated as "unpublished" or "non-precedential" may have persuasive value or be relied upon by future litigants. Furthermore, patterns of agency decision-making may reveal issues of public interest that could be addressed through advocacy or law reform. Finally, many agencies already publish or have promised to publish the full corpus of their adjudicatory decisions, indicating the feasibility of other agencies doing so. Concerns about privacy and confidential business interests can be addressed through targeted redactions or withholding materials under existing exemptions. For the rare cases where agencies with mass adjudication systems have repetitive, formulaic, or otherwise low-value decisional records, our subsequent recommendation concerning alternative disclosure (listed below at Recommendation #9) should be adequate to provide flexibility in meeting disclosure obligations.

2. **FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2)(A), should be amended to clarify that "orders" include all written enforcement actions, including decisions *not* to enforce (such as waivers and variances), that have either a legal or a practical effect on a private party.**

Records that represent the agency's finding of a violation of law, compliance with the law, or release from a legal obligation take many forms, including fines, penalties, stipulated settlements of an administrative complaint, warning letters, agencies' records of their inspections, waivers, and dispensations from requirements. These documents very often have legal or practical consequence such as elevating future penalties for subsequent violations, on the one hand, or providing a safe harbor from consequences, on the other. The public interest in seeing information about agency enforcement actions is plain. These actions represent the agency's determination of legal compliance. Individual decisions as well as patterns of enforcement reveal how the agency

Commented [BK1]: The FTC strongly disagrees with this recommendation. Under the FTC's organic statute and regulations, *see, e.g.,* 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10, FTC law enforcement investigations are nonpublic until they are disclosed by the agency in the course of litigation or settlement. The FTC relies on the nonpublic nature of its investigations to obtain information and assistance from investigational targets and third parties – the confidential nature of these investigations provides assurances to these entities, enabling the FTC to receive the most sensitive of corporate and personal information. Many of these investigations, however, are closed without seeking further action. If the FTC had an affirmative obligation to disclose decisions that litigation or settlement were not warranted, it would reveal these investigational decisions and the involved entities and chill their cooperation and assistance to the FTC, thus impeding the FTC's law enforcement mission.

Affirmative disclosure of decisions not to initiate enforcement proceedings also permits two misleading inferences: (1) a wrongdoer who the FTC decided not to pursue for logistical or resource-related reasons could claim that the decision not to enforce is exoneration; or (2) a company that the FTC decided not to pursue after finding the conduct lawful could be nonetheless inappropriately and publicly tarred by its involvement in a federal investigation.

More generally, treating a decision not to engage in law enforcement proceedings as an "order" stretches the definition of the term. "Order" means "1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a government official, esp. a court or judge." ORDER, Black's Law Dictionary (11th ed. 2019). This definition conveys the imposition of an affirmative legal obligation, not the decision to refrain from action. Indeed, APA case recognizes this distinction by making decisions not to enforce unreviewable. *See e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

classifies certain actions as violations (or not). Many agencies do publish whole categories of enforcement records, suggesting that such publication is feasible for other agencies too. Moreover, for any sets of such records that are repetitive, formulaic, or otherwise low-value records, our subsequent recommendation concerning alternative disclosure (listed below at Recommendation #9) should be adequate to provide flexibility in meeting disclosure obligations.

3. **FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include all settlement agreements resolving litigation to which an agency is a party.**

When agencies settle litigation to which they are parties, those settlement agreements represent the agency's official position on its obligations with respect to the end of a particular dispute. Many times, these settlements bind agencies to a future course of conduct. As such, these agreements constitute part of the agency's working law. Unless they are judicially approved as consent decrees, those agreements may not make it into the judicial record. ACUS has previously recommended that agencies provide access to these agreements (along with other litigation documents we do not take up here), and Congress has considered legislation to require a centralized settlement agreement database.[4] Some agencies already publish comprehensive websites with their settlement agreements, indicating that such publication is feasible for other agencies, too, and the existing exemptions to disclosure under §552(b) are adequate to protect competing interests such as privacy or trade secrecy.

4. **Congress should clarify that FOIA's affirmative disclosure, 5 U.S.C. §552(a)(2), includes legal opinions that are written by agency lawyers and directed to the public or to other members of the government, including those opinions produced by the Department of Justice's Office of Legal Counsel and agency general counsel offices.**

FOIA's affirmative disclosure provisions are not clear as to whether they encompass legal opinions issued by government counsel. Yet, these documents can constitute agency legal materials that are important to the public. Some opinions operate as directives, constraining agency officials' policy discretion in dealing with the public. Such legal opinions are not only critical translations of constitutional, statutory, and other binding law, the opinions themselves, in important practical senses, bind agency officials. The most prominent, but by no means the only, corpus of legal opinions consists of those produced by the Office of Legal Counsel in the Department of Justice ("OLC"). OLC opinions can be enormously consequential in terms of (a) the momentous issues they address (often with no prospect of judicial review), (b) the government-wide scope of their applicability, (c) their finality, and (d) the nature of their constraint on agency action and, albeit indirectly, their impact on the public. These and similar corpuses of opinions are an archetypal example of "law" in the executive branch which, if undisclosed, would constitute the type of "secret law" section 552 was intended to preclude.

Commented [BK2]: The FTC strongly disagrees with this recommendation for two reasons: (1) This new interpretation is not tethered to any existing language in 5 U.S.C. § 552(a)(2) and thus represents a new disclosure obligation that Congress did not require; and (2) as written, the current recommendation does not sufficiently protect attorney-client, work product, deliberative process or other privileges from disclosure. Indeed, FOIA and discovery case law provide protections for privileged information that cut strongly against interpreting 552(a)(2) in the way proposed here and that are not overcome by the limited references to isolated precedents in Second or D.C. Circuit law. There are circumstances in which agency legal opinions written by agency lawyers and directed to other members of the government could retain privilege, particularly with respect to litigation involving multiple agencies. This general recommendation does not address or account for those circumstances.

[4] A concurrent ACUS project concerns agency settlement of administrative proceedings, not settlement of lawsuits filed in Article III courts. *See* ACUS, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, https://www.acus.gov/recommendation/public-availability-agency-settlement-agreements-draft-recommendation-committee

The D.C. and Second Circuits have held that OLC opinions can be withheld pursuant to the deliberative process and attorney-client privileges (incorporated into FOIA's Exemption 5) until the opinions are adopted by agencies. That approach, however, is subject to criticism, including arguments that it misapplies applicable Supreme Court and D.C. Circuit precedents and is circular and unworkable. We are particularly concerned that in adopting the above recommendation, Congress not unwittingly ratify any judicial decisions regarding the application of Exemption 5 privileges in this context.

5. **Congress should amend the Federal Register Act provision requiring publication in the Federal Register of certain presidential proclamations and executive orders, 44 U.S.C. §1505(a), to provide that written presidential directives, including amendments and revocations, regardless of designation, should be published in the Federal Register if they (A) directly impose obligations on or alter rights of private persons or entities or (B) direct agencies to consider or implement actions that impose obligations or alter rights of private persons or entities. Congress should clarify the President's authority to withhold from publication directives that relate solely to the internal personnel rules and practices of the Executive Branch or an agency. Congress should also specify that such revised §1505(a) disclosure requirements are subject to the exemptions set out in FOIA, including those found in §552(b)(1).**

Presidential directives in various forms and carrying various designations often compel action by an agency or agencies in coordinated fashion. In doing so, they constrain agency action in a manner that brings them within our definition of legal materials. The Federal Register Act, 44 U.S.C. §1505, requires the President and his staff to submit two types of presidential directives—those designated as proclamations or executive orders—to the Office of the Federal Register for publication. Moreover, §1505 exempts from publication all such documents that either: (1) are "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof," or (2) lack "general applicability and legal effect."

Section 1505(a) has not been updated in almost 90 years, and thus it does not reflect the evolution of the designations of presidential directives, most notably the increased use of the "presidential memorandum" designation. Indeed, reliance on document designations does not offer the best approach for identifying presidential records that should be published affirmatively. Presidents have voluntarily submitted particular documents designated by other titles for publication in the *Federal Register*. This recommendation is designed to create a content-based publication requirement, rather than a designation-based one.

In addition, this recommendation addresses obvious problems with one of the two major existing exceptions, primarily that executive orders are by definition "effective against" only federal officials. Each order includes boilerplate language asserting that it does not *"create any right or benefit, substantive or procedural, enforceable at law or in equity by any party."* To the extent the exception is designed to carve out a sphere of internal administrative directives that have no effect on the public (presumably a quite small portion of presidential directives), the same goal can be achieved, as we suggest above, by incorporating into the statutory provision the language of FOIA Exemption 2, which covers records that relate solely to internal personnel matters.

Finally, in light of the unique national security concerns regarding presidential directives, particularly national security and homeland security directives, this recommendation makes clear that FOIA's Exemption 1, which concerns classified materials, applies to the affirmative disclosure requirement. But such an exemption is not intended to express any position on FOIA requests directed to *agencies covered by FOIA* for classified directives, leaving the question to be determined by the courts under existing law.

6. Congress should repeal §206(b) of the E-Government Act, codified at 55 U.S.C. §3501, as the provision consists of duplicative and inoperative language and non-sensical scrivener's errors.

As currently drafted, section 206(b) of the E-Government Act provides: "To the extent practicable as determined by the agency in consultation with the Director [of OMB], each agency . . . shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code." This provision has several problems. First, section 206(b)'s reference to materials that must be published in the Federal Register pursuant to section 552(a)(2) is nonsensical; the latter does not require Federal Register publication, only electronic publication. Second, section 206 only applies "to the extent practicable as determined by the agency," which suggests that agencies possess unreviewable, boundless discretion on this score and implies the existence of barriers to compliance that no longer exist (if they ever did). Third, the limitation to "information about the agency" is both confusing and unnecessary. To the extent any intended meaning can be divined, it would be to require all records already published in the Federal Register to be also published on agency websites, an objective achieved by our subsequent recommendation #10 concerning a different provision of the E-Government Act.

Perhaps most fundamentally, the provision does no work. The "information about the agency required to be published in the Federal Register under paragraph (1) . . . of section 552(a)," like everything published in the Federal Register, *is* published on "a publicly accessible Federal Government website." Two, in fact. The contents of the Federal Register are published on the Federal Register's own website and by the Government Publishing Office. And with regard to (a)(2) material, (a)(2) itself requires agencies to make that available in electronic format. Section 206(b) simply reiterates that existing obligation. As explained below regarding recommendation #10, agencies should list and post, or list and link to, all (a)(1) material. But that is not what 206(b) requires; it is what section 207(f) requires (or at least should require).

7. To maintain the originally intended congruence between the Presidential Records Act and FOIA exemptions, Congress should amend Section 2204 of the PRA to eliminate language that tracks—or once tracked—FOIA exemptions, and instead incorporate those exemptions by reference, specifically subsections 552(b)(1), (b)(3), (b)(4), and (b)(6).

The Presidential Records Act, 44 U.S.C. Chapter 22, lists certain exceptions to public access of presidential records. As it currently stands, section 2204 contains six such exceptions, four of which were apparently intended to directly track the language in existing FOIA exemptions listed for agency records under 5 U.S.C. §552(b). When FOIA exemptions are occasionally amended, though, the corresponding PRA exception may be overlooked. This occurred recently when a

provision in the OPEN FOIA Act of 2009, Pub. L. No. 111-83, §564, 123 Stat. 2142, 2184 (2009), was crafted to address the considerable controversy over which statutes qualify for Exemption 3, the FOIA exemption that applies when other statutes call for nondisclosure. The OPEN FOIA Act added to FOIA's exemption the requirement that any future statute that Congress intended to operate as a nondisclosure statute must specifically reference the FOIA exemption in its text. Yet the PRA has not been amended in parallel fashion. A similar incongruence will arise anytime one of the FOIA exemptions with parallel PRA provisions is amended in the future. Incorporating the four duplicated FOIA exemptions by reference, rather than reproducing their text separately in the two statutes, resolves the inconsistency today and protects against inconsistencies going forward.

8. **FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include memoranda of understanding (MOUs), memoranda of agreement (MOAs), and other similar inter-agency or inter-governmental agreements.**

Commented [BK3]: The FTC does not support this recommendation, for two reasons: (1) This new interpretation is not tethered to any existing language in 5 U.S.C. § 552(a)(2) and thus represents a new disclosure obligation that Congress did not require; and (2) as written, the current recommendation assumes that all MOUs are suitable for public disclosure. There may be occasions when agencies enter into MOUs for law enforcement or investigational purposes where public disclosure would thwart or impede the purpose of the MOU. This recommendation should account for those circumstances.

FOIA's affirmative disclosure provisions are designed to ensure that the public is informed of the agency's organization and procedures, inter alia. But often issues may be addressed in coordinated fashion by multiple federal agencies, or by federal, state, and local authorities. Memoranda of understanding ("MOUs") and memoranda of agreement ("MOAs") often memorialize these cooperative arrangements and thus may provide valuable information necessary for navigating "agency" procedure in such circumstances. For example, such agreements may demarcate jurisdictional boundaries or allocate responsibilities between federal agencies or between federal and state agencies. MOU/MOAs may also provide information regarding the extent of information-sharing among agencies with respect to personally identifiable information and confidential business information.

At least four agencies publish MOUs and MOAs, apparently without problems. Indeed, gathering all current MOUs and MOAs in one place on a website might be helpful to officials within the agency itself. For any sets of MOUs/MOAs that are repetitive, formulaic, or otherwise low-value records, our subsequent recommendation concerning alternative disclosure, listed below at Recommendation #9, should provide agencies adequate flexibility in meeting this disclosure obligation.

9. **FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to provide that an agency may forgo affirmative disclosure of the materials encompassed in recommendations #1 through #8 in limited circumstances. This option should apply if an agency finds publication of the full set or any subset of records otherwise required to be affirmatively disclosed would be both (A) impracticable to the agency because of the volume or cost and (B) of de minimis value to the public due to records' repetitive nature. In such an event, an agency can avoid its obligation to publish the full range of material if it undertakes a notice-and-comment rulemaking to determine and explain what records will not be published; what aggregate data, representative samples, or other information about the records, if any, will be published in lieu of the primary documents that will adequately inform the public about agency activities; and justifications for those choices. Any legislation to implement this recommendation should ensure**

that this alternative is not available to allow an agency to reduce their current disclosure practices.

Commented [BK4]: The FTC does not support this recommendation because the reasons an agency may forgo affirmative disclosure are too limited. Agencies engaging in law enforcement investigations and litigation may have reasons for withholding information that include investigational necessities, the need to protect confidential or sensitive information, work product, or privilege. To the extent this recommendation is intended to allow for exemptions from the tentative recommendations above, it needs to address these other circumstances.

In our first eight recommendations, we are clarifying categories of records subject to affirmative disclosure, but we recognize that some of these categories may be voluminous and may expand the responsibilities of agencies beyond current practices. One challenge in legislation in the area of affirmative disclosure is that the types of records agencies use and hold vary widely between agencies. Each agency has different sets and systems of records with different volumes, designations, and uses. Trans-substantive disclosure rules can, of course, be made and should be strengthened as described above. However, to account for agency variability, and the concern that special circumstances of an agency's practices would make the publication of the full range of the newly listed materials impracticable and without public value, we recommend including in any new legislative package a provision that would allow agencies, with the benefit of public input through a notice and comment process, to determine what to publish in lieu of the full set of a particular kind of record that would provide adequate public oversight benefits. If no data, sample, or other information about the unpublished records is to be provided, an agency would have to justify that choice. Moreover, such rules would be subject to review under 5 U.S.C. §706, including review under the arbitrary and capricious standard, ensuring that agencies adopt reasonable disclosure alternatives when invoking this option.

B. Methods of Disclosure of Agency Legal Materials

The consultant team has tentatively formulated five recommendations pertaining to the manner in which agencies disclose their legal materials that are or should be subject to affirmative disclosure requirements.

10. **Congress should amend §207 of the E-Government Act to clarify each agency's obligation to make its legal materials not merely available but also easily accessible to and usable by the public, including by (A) amending §207(f)(1)(A)(ii) of the E-Government Act to eliminate its cross-reference to FOIA §552(b), and (B) amending §207 to specify that, with respect to agency rules listed on their websites, links to or online entries for each rule should be accompanied by links to other related agency legal materials, such as any guidance documents explaining the regulation or major adjudicatory opinions applying it.**

Section 207(f)(1)(A)(ii) of the E-Government Act, concerning agency websites, provides that OMB must issue guidance that requires, among other things, that agency websites include "direct links to . . . information made available to the public under subsections (a)(1) and (b) of section 552 of title 5, United States Code."[5] This is nonsensical, as subsection (b) requires no information to be made available to the public; to the contrary, it is a list of *exemptions* to disclosure requirements. Presumably the intent was, as in §206(b), to refer to subsections (a)(1) and *(a)(2)*,

[5] We note that while most or all agencies do provide links to their regulations, OMB's Policies do not actually require them to do so, in violation of this provision.

not *(b)*. The cross-reference should be amended accordingly or simply deleted as duplicative with FOIA itself.

More broadly, this recommendation aims to improve the public's practical ability to find regulatory information they seek. Merely posting regulations on a website—or linking to them from a website (as we read the statute, the "direct link" could be to a document on the agency's own website or on another website)—does not mean that those regulations can be easily found or accessed by members of the public. The existing statute shows awareness of this concern in requiring OMB to establish "minimum agency goals to assist public users to navigate agency websites." The statute should go further, however, specifying (or requiring OMB to specify) that each agency's regulations should be discoverable through a search of the agency's website, such as by clicking on a "regulations" tab on the homepage in addition to clicking links found elsewhere on portions of the website covering topics related to the regulation.

Along with a link to the current text of the regulation, each agency's website should also include links to other related material, such as the following: the *Federal Register* notice for the final rule and any amendments to it; the *Federal Register* notice for the initial proposed rule and any subsequent notices or proposals; the online rulemaking docket on either the agency's website or at regulations.gov; posted summaries of the regulation or guidance documents related to the regulation; posted agency adjudicatory decisions applying or interpreting the regulation, including advisory opinions or declaratory orders; press releases about the regulation; and posted enforcement manuals pertaining to the regulation. Legislation should make clear that affirmative disclosure means much more than the mere possibility that documents can be found somewhere on an agency's website. Given the substantive importance of agency legal materials, agencies must do more to make it realistically feasible for the general public to find these materials online and see how they connect with other related agency materials.

11. Congress should update §207 of the E-Government Act to eliminate references to the no-longer-extant Interagency Committee on Government Information. Instead, it should require OMB to update its agency website guidance (A) after consultation with the Federal Web Managers Council, (B) no less often than once every two years, and (C) with explicit attention to ensuring that agency legal materials are, as an amended §207 should require, easily accessible, usable, and searchable.

Section 207 of the E-Government Act addresses, among other things, agency websites. Rather than directly imposing specific requirements for the electronic dissemination of information in general, or for the particulars of agency websites, Congress created an advisory committee. Section 207(c) requires the Director of OMB to establish an Interagency Committee on Government Information ("the ICGI"). While the Committee's work product was to be only advisory, the Act charges OMB with issuing policies "requiring that agencies use standards to enable organization and categorization of Government information" and, separately, promulgating "guidance for agency websites." Although referred to as "guidance," the Act also denominates them "standards for agency websites" and states that they are to set out "requirements that websites" have certain features. OMB established the ICGI in 2002; it issued recommendations in 2004; OMB's initial set of guidelines followed. OMB issued updated Policies in 2016, which remain in place. The E-

Government Act authorized OMB to terminate the ICGI once it had submitted its recommendations. OMB did not formally do so, but the ICGI no longer exists. It has evolved into the Federal Web Managers Council, often referred to as simply the Federal Web Council. The Council consists of two co-chairs, one from GSA and one from DHS, and about two-dozen federal web managers.

This recommendation proposes changes to §207 that would bring the E-Government Act up to date while maintaining its same basic, and sensible, structure: binding, though general, policies from OMB, informed by expert input from those in the government working on a daily basis on agency websites. It also would create a specific priority for ensuring that agencies make agency legal materials accessible on their websites in a meaningful way, in alignment with the amendments proposed in Recommendation 10. The Federal Web Council's recommendations should be incorporated by OMB into minimum guidelines to agencies about their websites and OMB should directed to update its guidelines periodically.

12. Congress should amend the Freedom of Information Act to require agencies to develop, publish online, and implement internal management plans and procedures for making legal materials available online. Such plans should include:

a. Definitions and descriptions of categories or types of legal materials covered by the agency's affirmative disclosure plan;
b. Definitions and descriptions of categories or types of legal materials that are not covered by the agency's affirmative disclosure plan or that are exempt from affirmative disclosure;
c. The criteria used for identifying material to be disclosed online pursuant to the affirmative disclosure plan, including specific criteria that clearly specify what material, if any, deemed exempt from affirmative disclosure;
d. A description of locations on the agency's website where material falling into different categories can be found;
e. A description of the agency's document labeling and numbering systems used to track agency legal materials that are made available online;
f. A description of how the agency will ensure the accuracy and currency of posted legal materials;
g. A description of how the agency will use online archiving or other means to maintain public access to amended, inoperative, superseded, or withdrawn agency legal materials, including:
    i. Any criteria for relocating to a portion of the agency's website dedicated to archiving materials that are inoperative or have been amended, superseded, or withdrawn; and
    ii. Labels affixed to amended, inoperative, superseded, or withdrawn to indicate their current legal status.
h. The name of and contact information for the agency official responsible for ensuring that the agency develops and implements the affirmative disclosure plan;

i. **Training practices used to ensure agency personnel will consistently carry out the agency's affirmative disclosure plan;**
j. **A stated commitment for periodic review of the affirmative disclosure plan and its implementation, including:**
    i. **Metrics and procedures that the agency will use to evaluate whether the agency is providing comprehensive and up-to-date public access to all legal material covered by the plan; and**
    ii. **Specific time intervals when the agency will periodically review its plan and its implementation; and**
k. **Opportunities for public feedback on the agency's affirmative disclosure plan and the agency's procedures for effective appeal of the plan and its implementation.**

Congress should also require each agency to designate an officer who has overall responsibility for ensuring the agency develop and implement faithfully the required affirmative disclosure plan and for overseeing the agency's compliance with all legal requirements for the affirmative disclosure of agency legal materials.

Commented [BK5]: The FTC does not support this recommendation because it seems unnecessarily prescriptive in directing specific forms of agency compliance with FOIA. More generally, the requirement to develop, publish online, and implement such affirmative disclosure plans would impose additional costs and expand current FOIA obligations in a way that effectively amounts to an unfunded mandate.

Given the large volume of material that agencies produce which must be affirmatively disclosed, agencies will need effective internal management systems and internal controls for tracking and disclosing such materials if agencies are to provide comprehensive, current, accessible, and comprehensible public availability to these materials. In a number of recent recommendations, ACUS has urged agencies to develop their own plans for disclosure of varying types of legal materials.

A legislative requirement for agencies to develop their own internal plans and procedures would aim to improve governmental transparency in much the same way that other social objectives have been addressed through forms of management-based governance. Under a management-based governance approach, relevant entities are "expected to produce plans that comply with general criteria designed to promote the targeted social goal." Management-based governance is appropriate to address "problems where it is difficult to prescribe a one-size-fits-all solution" and difficult to define or measure outcomes in a manner that could facilitate requirements stated in terms of a level of performance. The sheer variety of agencies and agency materials, combined with the difficulty—if not impossibility—of assessing performance when records have not in fact been disclosed, make a management-based approach particularly well-suited to the challenge of ensuring availability of agency legal materials. In addition, the problem of ensuring affirmative disclosure of agency legal materials is in significant respects intrinsically a management problem—namely, one of records management—which makes it appropriate to require agencies to take affirmative, documented management steps, much as Congress did with respect to guidance materials in the FDA Modernization Act. In essence a management-based governance approach seeks to create both mechanisms and incentives for agency efforts to make their legal materials accessible to the public.

The existence of FOIA's exemptions provides an additional rationale for agencies to provide the public with a detailed disclosure plan that includes the criteria the agency uses for categorizing any material as exempt from affirmative disclosure. For example, as noted earlier, an agency general counsel's office produces opinions that serve as precedents for agency lawyers and

policymakers, akin in some ways to the body of Office of Legal Counsel opinions. We have tentatively recommended in Part II.A that such opinions be expressly covered by FOIA's affirmative disclosure obligations, but we have also acknowledged that FOIA's exemption for attorney-client privileged material might permit withholding such a document in part or in full if its release would cause foreseeable harm. Under our tentative recommendation for affirmative disclosure plans, for example, if an agency's general counsel's office selectively discloses some decisions that are a part of a larger defined corpus of opinions but which (i) involve determinations of law that reference earlier opinions in that corpus and (ii) effectively bind agency officials, the chief legal officer's office must set forth the criteria in the agency's affirmative disclosure plan by which it decides whether to release those opinions to the public.

In this way, an agency's affirmative disclosure plan would, with respect to agency legal opinions, follow the salutary practice adopted by the U.S. Department of Justice's Office of Legal Counsel (OLC), which makes available on its website a document that describes the considerations that go into whether it releases to the public particular opinions prepared by the Office. Indeed, an agency could go further and use its disclosure plan to outline how the agency legal counsel office, or the agency more generally, will approach satisfying its obligation to conduct the statutorily required foreseeable harm analysis before deciding to withhold a document.

13. Congress should direct the Office of the Federal Register (OFR) to study how best to organize presidential directives on the OFR website to make presidential directives of interest easily ascertainable, such as by codifying them and making them full-text searchable.

OFR provides an online archive of executive orders and other presidential proclamations and directives which is not as easily searchable as the content within that archive merits. As of this date, nearly 14,000 executive orders and 10,500 presidential proclamations have been published in the *Federal Register*. These are often quite important in their direct effects on the rights and obligations of private citizens, in structuring agency procedures, and in setting forth policies that agencies are obligated to pursue. The Office of the Federal Register codified all executive orders and proclamations from April 13, 1945, through January 20, 1989. But the codification rapidly became outdated because more proclamations and executive orders were being issued. Although OFR continues to maintain disposition tables of executive orders, as well as a subject matter index within these tables, these tables and indices still make it more difficult to locate and more difficult to understand the current legal status or effect of particular executive orders than it should be. Congress could require OFR to identify strategies for keeping its codification of the corpus of presidential materials updated on a regular basis, much as electronic versions of the United States Code are maintained. Although we are not in a position to specify how to best organize presidential directives, the importance of these materials and the centrality of OFR to any open government endeavor justifies further study and adequate funding to find ways to improve OFR's contributions to the public accessibility of presidential directives.

14. Congress should eliminate any statutory requirement, including in 44 U.S.C. Chapter 15 (the Federal Register Act), for a printed version of the Federal Register, allowing the official record to be a permanent digital record accessible to the public.

Consistent with the digital era which enables widespread online access to information, Congress should remove any requirement for a printed version of the Federal Register. This would eliminate the costs of printing, reprinting, wrapping, binding, and distribution. Ideally, some or all of the savings would be passed on to agencies through reductions of or elimination of publication fees. Congress should change any reference in the law that requires the "printing" of the Federal Register to "publishing," and should clarify that publishing includes making materials available online. This legislative amendment would be similar to the Federal Register Modernization Act, H.R. 1654, 116th Congress (2019-2020), which would have replaced the words "printing and distribution" in the Federal Register Act with "publishing." That legislation passed the House but died in the Senate.

C. Incentives to Disclose Agency Legal Materials

The consultant team has tentatively formulated two recommendations pertaining to enforcement of agencies' affirmative disclosure requirements with respect to their legal materials.

15. **FOIA's judicial review provision, 5 U.S.C. §552(a)(4), should be amended to clarify that district courts have the power to order compliance with agencies' affirmative disclosure obligations, including those under 5 U.S.C. §552(a)(1), 5 U.S.C. §552(a)(2), and any other provisions responsive to this set of recommendations. FOIA should also be amended to specify that members of the public seeking to enforce statutory or regulatory obligations under those affirmative portions of the Act must first file a request for affirmative disclosure of the disputed materials and exhaust FOIA's administrative remedies with respect thereto.**

There is a current circuit split interpreting language in FOIA's judicial review provision with respect to the power of the district court to order agencies to comply with affirmative disclosure provisions, indicating a lack of clarity in drafting and confusion in the law. Self-enforcement mechanisms, such as the inability of an agency to rely on a document not published as required, only work for binding legal instruments such as legislative rules. Many other categories of records do not have the kind of operative effect that would make self-enforcement mechanisms adequate as incentives for compliance.

The primary concern with clarifying the availability of a private right of action under FOIA to enforce affirmative disclosure obligations would arise if it were possible for any member of the public to sue any agency over non-compliance without the agency being made aware of the concern or any opportunity to come into compliance before litigation is initiated. This possibility would be of understandable concern for agencies, as they may have no reason to know that a member of the public believes they are out of compliance with the law. For this reason, we recommend clarifying that, while the district court has the power to order compliance, a member of the public seeking access to records under the affirmative portions of the Act must make a request for compliance to the agency and exhaust administrative remedies according to the Act prior to a lawsuit. This approach balances the need to promote compliance with the need for

agencies to have ample opportunity to rectify any shortcomings their disclosure practices may have prior to litigation.

16. **Congress should clarify that a member of the public is entitled to use 5 U.S.C. §552(a)(3) to obtain materials that an agency was required to affirmatively disclose but has failed to do so. Congress should further provide that such if a person makes a request under (a)(3) for records that should have been, but were not, affirmatively disclosed, that request qualifies for expedited processing under 5 U.S.C. §552(a)(6)(E). In addition, Congress should provide if a person makes a request under (a)(3) for records that should have been affirmatively disclosed but were not, the agency may not charge search, duplication, or review fees under 5 U.S.C. §552(a)(4)(A), regardless of requester status.**

Because members of the public are entitled to legal materials that must be affirmatively disclosed, they should be able to obtain them by a routine FOIA request if the agency has not met its affirmative disclosure obligation. A person needing a particular document in a "proceeding" or other process before the agency (or simply seeking to comply with legal requirements) should not be burdened with bringing a potentially complex and costly lawsuit to compel the agency produce all legal materials in a particular category and to comply with the other affirmative disclosure requirements relating to that category of documents. Moreover, requests for agency legal materials that the agency unlawfully failed to publish should be accorded expedited status given their recognized importance to the public, and, for similar reasons, agencies should be prohibited from charging search, duplication, or review costs in response to a FOIA request for materials it should already have affirmatively published. We believe these changes will promote the basic government obligation to ensure that "the law" is publicly available and free.