

DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

REGULATORY ENFORCEMENT MANUALS

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INTRODUCTION

In recent years, the Administrative Conference of the United States (ACUS) has conducted several well-received recommendation projects concerning the availability of agency guidance documents. This study began as an attempt to expand those efforts into guidance documents concerning regulatory enforcement. Compared to adjudication, which is governed by Sections 554, 556, and 557 of the Administrative Procedure Act (APA), the APA and related caselaw provide comparatively little in terms of instructions for agency personnel engaged in enforcement activities. Other sources of binding law exist, such as provisions found in agency enabling acts.¹ However, agencies are left with a great deal of discretion in how they undertake inspections, investigations, audits, and related activities as precursors to assessing penalties, ordering remedial action, or adjudicating claims against regulated entities.

Many agencies have developed documents, often called “enforcement manuals,” which provide agency personnel with a single, authoritative resource for enforcement-related policies. Enforcement manuals generally have the primary purpose of governing the activities of agency enforcement staff engaged in investigating potential violations of the law over which the agency has enforcement authority. For purposes of this study, these activities include all steps the agency takes to detect and investigate potential violations of law prior to the bringing of adjudicatory proceedings, either internally or before a court of law. Such activities include inspections, audits, investigations, pre-adjudicatory negotiations concerning remedial action, evidence-gathering,

¹ To take one example, the Consumer Financial Protection Bureau’s (CFPB’s) enabling act defines the regulatory space in which the agency is empowered to take action and also contains provisions which empower the agency to undertake investigatory activities such as subpoenaing documents and taking testimony. *See* 12 U.S.C. § 5531 (empowering the agency to take action with regard to “unfair, deceptive, or abusive acts or practices”); 12 U.S.C. § 5562 (empowering the CFPB to issue subpoenas and demands for oral or written testimony or tangible things).

and other activities culminating in the decision whether to take corrective action against the regulated entity.

In order to fulfill their purpose, enforcement manuals collect a wide range of information concerning how the agency undertakes enforcement activities, information which is potentially of value to entities outside the agency itself. This study was undertaken to address whether and when enforcement manuals provide an effective means for agencies to communicate enforcement-related information and policies, both internally and publicly.

To identify best practices, I studied agency enforcement manual-related policies for a large subset of federal agencies, identifying agencies that both possess and do not possess publicly available enforcement manuals. Publicly available manuals were studied for form and content. Semi-structured interviews were conducted with six agencies, some of which have publicly available enforcement manuals, and some which do not. One agency interviewed had a publicly available enforcement manual at one time but has withdrawn it, while another is currently in the process of developing its first enforcement manual. Through analyzing publicly available manuals and interviewing enforcement officials at agencies with a wide variety of practices concerning their enforcement manuals (or lack thereof), this study considers the range of perspectives on the development, use, and public availability of enforcement manuals throughout the federal bureaucracy. The overall goal is to inform agencies which are developing or revising their enforcement manuals of potential best practices drawn from the experiences of their fellow agencies.

This report has three main parts. The first part deals with preliminary information and analysis concerning threshold questions of how “enforcement manual” was defined for purposes of this project, the relationship between enforcement manuals and other forms of enforcement-

related regulatory guidance, and law relevant to the development and promulgation of enforcement manuals (such as the Freedom of Information Act (FOIA)). The second part is the study's core empirical analysis. It begins by orienting the discussion with case studies of the agencies interviewed in semi-structured interviews, with the goal of providing a relatively deep understanding of how enforcement manuals and related enforcement guidance play a role in agency enforcement missions. The second part then discusses more general lessons learned from the case studies and documentary review of publicly available manuals. The third and final major section of this report offers potential best practices for ACUS's consideration.

I. BACKGROUND

A. What Is an Enforcement Manual?

Because this project is a study of agency enforcement manuals, there exists a pair of threshold questions which heavily influence any analysis: First, what is an enforcement manual, and second, what other forms of regulatory guidance fulfill similar purposes to enforcement manuals?

In the canonical case, an agency's enforcement manual details the steps an agency takes in enforcing legal requirements against the regulated community, from the moment it first turns its attention to a specific regulated entity until the conclusion of the enforcement stage. Enforcement actions can conclude in two general ways: with or without further agency action on the case. In terms of taking action, the agency may assess penalties, revoke a license, or formally order that certain remedial action be taken. Such actions are then potentially the subject of review, either internally, through a hearing before the agency, or externally, through judicial review. In other situations, the agency may present the evidence gathered in the enforcement proceeding to an adjudicative body before punitive or remedial actions are undertaken. This

adjudicatory body may be either internal to the agency, such as proceedings before an administrative law judge, or external to the agency in the case of a federal court. If the agency does not take action, its procedures may mandate that notice of a non-violation is issued to the regulated entity. For purposes of this study, “enforcement” consists only of those stages prior to the beginning of an internal or external adjudicative proceeding. Thus, while agencies may address matters related to the activities of administrative law judges or prosecutorial staff in their enforcement manuals or other guidance documents, those matters are outside the scope of this study.

An enforcement manual may deal with a wide variety of topics. Manuals generally begin with introductory material concerning their purpose and scope, the entity within the agency responsible for preparing and updating them, the agency’s overall mission, its priorities in undertaking enforcement activities, and the legal authorities that govern the agency’s enforcement activities. Enforcement manuals are often chronologically structured, beginning with the agency’s handling of complaints from outside the agency. Complaints may come from citizens’ groups, watchdog organizations, other government agencies (federal, state, local, or international), members of Congress, or the intended beneficiaries of agency action (e.g., workers injured on the job). An enforcement manual may detail the agency’s procedures for processing these complaints or for handling other matters which similarly come to the agency’s attention.² Regulated entities may come under the agency’s attention in other ways, such as through random inspections or audits, through the use of data analytic tools, and the like.³ Such

² DIV. OF ENFORCEMENT OFFICE OF CHIEF COUNSEL, SEC. EXCH. COMM’N, ENFORCEMENT MANUAL 7–12 (November 28, 2017) (complaints from members of the public, whistleblowers, state and local entities, members of Congress, and others) [hereinafter SEC ENFORCEMENT MANUAL].

³ A prior ACUS report studied the use of artificial intelligence by federal agencies, including case studies of the use of AI in enforcement activities by the Securities and Exchange Commission and Customs and Border Protection. *See*

procedures are often discussed by enforcement manuals.⁴ However, this study discusses only the contents of publicly available enforcement manuals, which, for obvious reasons, are likely to contain considerably less detail on matters concerning how the agency chooses targets for regulatory enforcement where there was no external complaint, since making such information public would risk providing regulated entities with a how-to manual for evading enforcement. Agencies may also have voluntary programs for requesting inspections, self-reporting unintentional violations or noncompliance, and the like; enforcement manuals may deal with these issues.⁵

Often, the next stage in an enforcement proceeding is a preliminary, informal investigation to determine whether the agency should devote resources to a more formal investigation against the regulated entity. An enforcement manual may detail what triggers such an investigation, what would cause the agency to devote resources to a preliminary investigation, how the agency conducts it, what staff are responsible for each role in conducting it, and the criteria for ending the preliminary stage, either without taking action against the regulated entity or escalating it to more formal proceedings.⁶ It also may discuss how the agency prioritizes potential matters which have come to the agency's attention for escalation into formal enforcement proceedings and/or how to allocate resources between matters under investigation.⁷

David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Feb. 2020) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/sites/default/files/documents/Government%20by%20Algorithm.pdf>.

⁴ *See, e.g.*, OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, U.S. DEP'T OF LABOR, DIRECTIVE CPL 02-00-164 ("Field Operations Manual") (April 14, 2020), <https://www.osha.gov/enforcement/directives/cpl-02-00-164>, at 2-4 to 2-8 (discussing and incorporating by reference standards for construction inspections; and at 10-15 (discussing and incorporating by reference standards for shipbuilding inspections).

⁵ *See id.* at 2-2 to 2-3 (discussing and incorporating by reference guidance on its Voluntary Protection Program and programs for requesting no-cost compliance inspections).

⁶ SEC ENFORCEMENT MANUAL, *supra* note 2, at 12–14 (opening a preliminary investigation).

⁷ *Id.* at 4-6.

The stages of such a proceeding may differ greatly from agency to agency. However, the enforcement manual will typically discuss such matters as the opening and processing of a case file,⁸ what is included in a case file, the oversight of line-level enforcement staff by higher agency officials (e.g. how often staff must check in or provide a report to managers),⁹ and what communication is to be allowed or conducted as a matter of course between the agency and the regulated entity, the public, and other enforcement agencies during the course of the enforcement proceeding.

Enforcement manuals generally cover a variety of materials related to the gathering of evidence in enforcement proceedings—for example, discussions of the issuance and enforcement of subpoenas, of voluntary or mandatory requests for production of documents, and of issues of witness immunity.¹⁰ The manual may also detail the criteria the agency uses to classify the severity of any violations discovered during the enforcement proceeding, as this may place enforcement matters on different tracks with regard to the punitive or remedial action the agency will seek to take, what will happen in the post-enforcement stage, and so on.¹¹ They may also discuss settlement negotiations and procedures for other forms of alternative dispute resolution or voluntary remediation, including such matters as whose approval is needed for a settlement, the way approval is sought, the types of remedies available in a settlement, the determination of the offender’s capacity to pay fines and penalties, and so on.¹² Enforcement manuals may also

⁸ At some agencies, this may be done in the earlier, less formal stage.

⁹ *E.g.*, SEC ENFORCEMENT MANUAL, *supra* note 2, at 6 (discussing quarterly reviews of matters under investigation)

¹⁰ *See id.* at 25 (subpoena enforcement and witness immunity referenced to applicable CFR sections); at 35-59 (requesting and storing documents and other evidence); and at 60-80 (witnesses and privileges).

¹¹ As an example, the Nuclear Regulatory Commission’s enforcement manual deals with the classification of violations and the exercise of enforcement discretion at considerable length. *See generally* OFFICE OF ENFORCEMENT, NUCLEAR REGULATORY COMMISSION, ENFORCEMENT MANUAL (October 22, 2021), at 91-192.

¹² DIVISION OF ENFORCEMENT, COMMODITY FUTURES TRADING COMMISSION, ENFORCEMENT MANUAL (May 20, 2020), at 25-27.

include examples, either hypothetical or taken from past enforcement actions, that illustrate how agency staff should handle certain situations and fact patterns.

Additionally, enforcement manuals often handle matters ancillary to the enforcement proceedings. Enforcement manuals often discuss the handling of materials and information obtained during the enforcement proceeding, including confidential information. They may include a discussion of ethics guidelines for enforcement staff.¹³ They can include a discussion of information and paperwork which is provided to the entity under investigation customarily or as a matter of right.¹⁴ The enforcement manual may discuss when the agency will issue press releases or otherwise make information available about the enforcement proceeding, what information will be made public, and in what form and medium the information is to be made available.¹⁵ It may include information on the agency's usual practices in coordinating enforcement actions with other federal agencies (either agencies with shared regulatory authority in a given domain or specialist law enforcement agencies such as the Department of Justice (DOJ)) or with state and local agencies with overlapping enforcement authority. Based on agency-specific factors, a large number of other matters may be included in enforcement manuals which cannot be detailed in a report at this level of generality.

At many agencies, enforcement occurs through a set of regional offices, each with enforcement authority over a specific geographical region. In other cases, all or most enforcement is handled through a centralized office, often located in the District of Columbia. In

¹³ SEC ENFORCEMENT MANUAL, *supra* note 2, at 2-3.

¹⁴ *Id.* at 18 (copies of orders opening formal investigations).

¹⁵ *See, e.g.*, NRC ENFORCEMENT MANUAL, *supra* note 11, at 165 (discussing triggering conditions and personnel responsibilities for preparing press releases concerning enforcement orders). Note that ACUS has twice undertaken recommendation projects related to press releases and other forms of agency publicity, the first in Recommendation 73-1, *Adverse Agency Publicity*, 32 Fed. Reg. 16839 (June 27, 1973). The research report for Recommendation 2016-1, *Consumer Complaint Databases*, 81 Fed. Reg. 40259 (June 21, 2016) also contains a more recent discussion of this topic. Nathan Cortez, *Agency Publicity in the Internet Era* (Sept. 25, 2015) (report to the Admin. Conf. of the U.S.).

either situation, the primary purpose of an enforcement manual is to provide information about the agency's enforcement practices to enforcement staff, serving as a source of general directives from offices and officials high in the agency's internal chain of command to line staff. They are generally developed by a centralized office of enforcement or the agency's general counsel regardless of whether actual enforcement is carried out by regional offices.¹⁶ Enforcement manuals are in many cases also made available to the public, in which case they can additionally serve the purpose of providing information to entities under investigation and the general public about the agency's enforcement process.

Because the contents of agency enforcement manuals can differ greatly from agency to agency, such manuals must also be understood in terms of what they are not. Agencies promulgate a wide variety of guidance documents which serve similar functions to enforcement manuals, either in guiding agency enforcement staff as they carry out their duties or informing regulated entities and the general public about the agency's enforcement policies and procedures.

Enforcement manuals and other forms of guidance are also to be distinguished from regulations issued by the agency with the force of law. Administrative law scholarship sometimes distinguishes between external and internal administrative law, the former binding on agencies externally through judicial review, and the latter consisting of policies, instructions, organizational forms, and other factors which bind the agency internally, without judicial intervention.¹⁷ In this context, enforcement manuals are a canonical example of internal

¹⁶ See, e.g., OSHA FIELD OPERATIONS MANUAL, *supra* note 4, at cover page (noting that the manual originates with the Directorate of Enforcement Programs); SEC ENFORCEMENT MANUAL, *supra* note 2, at 1 (noting that the manual was prepared by the Division of Enforcement's Office of Chief Counsel). The list of enforcement manuals in the appendix notes the subdivision of the agency responsible for preparing the manual where that information is prominently flagged by the manual itself.

¹⁷ The leading modern article on internal administrative law is Gillian E. Metzger & Kevin Stack, *Internal Administrative Law*, 115 MICH L. REV. 1239 (2017).

administrative law, although they may at times describe externally binding legal requirements derived from other sources.

As an initial cut, agency guidance documents may be classified as standing or periodic.¹⁸ Standing guidance documents are sometimes described by the issuing agencies themselves as “living documents”: they are not static documents issued at one point in time and left in place until repealed or superseded by another guidance document.¹⁹ Instead, their contents are revised from time to time to ensure that they accurately describe current agency practices.²⁰ Enforcement manuals are canonical standing documents: at some agencies, significant revisions are made on a roughly yearly basis, often ensuring that their contents are consonant with recently published periodic guidance documents.

Periodic guidance documents, in contrast, are informational bulletins, staff directives, guidance memoranda, and other forms of guidance, targeted at either agency staff or regulated entities. Their names, forms, and usual contents differ a great deal from agency to agency. They may be self-consciously temporary in nature, such as countless guidance documents suspending or modifying regulatory requirements for the duration of the COVID-19 pandemic,²¹ or they may be intended to remain in place indefinitely.²² The defining feature of periodic guidance is that it

¹⁸ ACUS has dealt with other forms of guidance documents in a number of recommendation projects. *See* Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61734 (Dec. 29, 2017); Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019); Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019). The consultant reports for these projects are also a source of useful material on alternative forms of guidance.

¹⁹ *See* NRC ENFORCEMENT MANUAL, *supra* note 11, at 3-4 (describing the NRC enforcement manual as a “living document” and providing links where the current version and change index can be located).

²⁰ Some agencies, such as the NRC, are meticulous in keeping records of when revisions are made to their enforcement manuals and of what changes are made in each revision. If such records are not kept, it can be difficult to ascertain what a “living document” looked like at a given time in the past.

²¹ *See* U.S. NUCLEAR REGULATORY COMM’N, ENFORCEMENT GUIDANCE MEMORANDUM 20-002, DISPOSITIONING VIOLATIONS OF NRC REQUIREMENTS DURING CORONAVIRUS DISEASE 2019 (COVID-19) (April 15, 2020), <https://www.nrc.gov/docs/ML2008/ML20083K794.pdf>

²² For example, the U.S. Coast Guard issues commandant directives on a large variety of topics, with the Coast Guard website explaining that they remain in effect until cancelled and must be reviewed once per five years. It

is almost always prominently dated, and that changes to the information, policies, or procedures laid out in the document from a later date will not be revised into the document itself, but will be promulgated through new periodic guidance, often which explicitly references older periodic guidance which is modified or revoked by the new guidance.²³

Agencies often publish periodic guidance, either internally, solely for the benefit of agency staff, or publicly, for the sake of informing regulated entities or other outsiders. These documents provide information about the agency's enforcement priorities, its interpretation of relevant legal requirements, procedures for handling enforcement actions, and so forth, all matters substantially similar to information contained in an enforcement manual. For agencies without enforcement manuals, the set of all such operative guidance documents may serve the same functional purpose as an enforcement manual, notifying agency staff and regulated entities how the agency undertakes enforcement proceedings. At most agencies, periodic guidance is promulgated much more frequently than updates are made to the enforcement manual. Particularly important documents of this sort may be attached to the enforcement manual as an appendix, especially until the manual's contents can be updated to more seamlessly integrate the information contained within.²⁴

further issues commandant notices, which are temporary but are otherwise equivalent to commandant notices. Finally it issues commandant change notices, which are permanent alterations to a standing commandant directive. Directives of over twenty-five pages are referred to as commandant instruction manuals and must contain a table of contents.

²³ Every enforcement manual listed in the appendix is also dated, and in some cases, an enforcement manual is explicitly issued as a periodic guidance document which revokes the prior version of the enforcement manual. The ontological distinction between periodic and standing guidance documents is thus not perfectly neat, although there does seem to remain an important distinction between documents which are meant to be continually revised so that they always reflect current agency practice and those which have a static, standing-until-revoked nature.

²⁴ The online edition of the NRC's enforcement manual maintains an appendix of relevant guidance documents promulgated since the last significant revision to the manual, with significant revisions occurring on average every two to three years, and with half a dozen or more relevant guidance documents promulgated in between revisions. See "Change Notice Index," <https://www.nrc.gov/reading-rm/basic-ref/enf-man/cnindex.html>, and "Appendix A: Temporary Enforcement Guidance," <https://www.nrc.gov/reading-rm/basic-ref/enf-man/app-a.html>. The National Labor Relations Board similarly provides an index of changes to each of the three substantive sections of its casehandling manual.

Additionally, many agencies promulgate standing policy documents or similar guidance that explain the agency's enforcement goals and the procedures and policies the agency uses to effectuate those goals.²⁵ In some cases, such as at the 2. Nuclear Regulatory Commission (NRC), discussed *infra*, the matters discussed in the agency's policy guidance may closely reflect those of the enforcement manual itself. The policy may discuss the types of situations in which the agency would undertake enforcement actions, the remedies available, the statutory authority for enforcement actions, factors which color the agency's classification of the severity of regulatory violations, and the extent to which the agency will make information concerning ongoing or completed enforcement actions public.²⁶ In such cases, the enforcement manual likely deals with these matters at a much higher level of detail. This extra specificity may be especially important to agency staff seeking to follow the agency's internal procedures; however, details such as when certain forms are to be filled out and when they are to be presented to whom may be less helpful from the perspective of outsiders seeking to understand the agency's enforcement activities.

Enforcement manuals generally range in length from a bit under one hundred pages to several hundred pages, while policy statements, informational bulletins, and guidance memoranda may be only a few pages in length.²⁷ This reflects both the fact that enforcement manuals often deal with a much greater number of matters than other guidance documents and that they are more detailed concerning the matters they discuss.

²⁵ Because agencies often use terminology such as 'policy statement' in different ways, not all agency documents labeled 'policy statement' will fit this description.

²⁶ See, e.g., FED. HOUS. FIN. AGENCY, ADVISORY BULL. 2013-03, FHFA ENFORCEMENT POLICY, (May 31, 2013) [https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/20130531_AB_2013-03_FHFA-Enforcement-Policy_508%20\(2\).pdf](https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/20130531_AB_2013-03_FHFA-Enforcement-Policy_508%20(2).pdf).

²⁷ In general, manuals on the shorter end of this scale incorporate a large proportion of material by reference, for example, by citing CFR sections instead of discussing their contents at length or by providing hyperlinks to other guidance documents instead of fully incorporating them into the manual.

In general, then, an enforcement manual is a single, standing guidance document, promulgated by an agency division of enforcement or general counsel and periodically updated, which contains both information on the procedures the agency undertakes in detecting and investigating potential violations of law and statements of the agency's policies and priorities which guide these activities. Staff manuals which are primarily or entirely devoted to adjudicatory procedures, such as manuals for administrative law judges or enforcement staff engaged in prosecuting alleged legal violations before the agency, are not enforcement manuals. Neither are policy statements, interpretive rules, or other documents which clearly fall into categories of guidance document, although the contents of these documents may overlap with enforcement manuals. Enforcement manuals are not externally binding on the agency or regulated entities, although they may restate or interpret binding rules from other documents.

While this typology guided the search for enforcement manuals which served as the empirical basis of this study, there are gray areas frequently encountered. Agencies may have multiple enforcement manuals, dividing the contents either by the regulated activities covered by the manual or by the stage in the proceeding. An agency's enforcement manual may be a small part—or a set of small parts—of a larger staff manual, as with the Internal Revenue Manual (IRM). Agencies may have a number of staff manuals, each containing portions of the subject matter of a canonical enforcement manual, without any being primarily an enforcement manual as here defined. In many cases, fine judgement calls had to be made concerning whether a given document constituted an enforcement manual for purposes of the empirical investigations which were the basis of this report.

B. Legal Background

This report intersects with the substantive law of mandatory disclosure of agency materials under FOIA. Two topics are particularly relevant. The first concerns the extent to which enforcement manuals are covered by the proactive disclosure provisions of FOIA, 5 U.S.C. § 552(a), which requires the disclosure of certain materials, either in the *Federal Register* or electronically. The second concerns whether enforcement manuals are shielded from disclosure in response to a FOIA request under the Section 552(b) exemptions, especially 552(b)(2), which concerns matters that are “related solely to the internal personnel rules and practices of the agency,” and 552(b)(7)(E), which deals with records or materials compiled for law enforcement purposes which “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” While this report is not intended to advise agencies or any other party concerning their legal rights or obligations, each of these matters will be briefly discussed below.²⁸

1. FOIA Mandatory Disclosures

Under FOIA’s general scheme, a limited class of materials must be proactively made available by agencies even without any request for them from the public, and a much larger class of materials must be made available to members of the public upon request unless one of a list of enumerated exceptions applies. Of the mandatory disclosure provisions, two are potentially significant. 5 U.S.C. § 552(a)(1)(D) requires that agencies publish in the *Federal Register*

²⁸ Much of the FOIA discussion is based on the Department of Justice’s Guide to the Freedom of Information Act. U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT (“DOJ Guide”), <https://www.justice.gov/oip/doj-guide-freedom-information-act-0> (last visited September 1, 2022). The DOJ Guide is an influential and frequently updated treatise on FOIA.

substantive agency rules and policies of general applicability. Enforcement manuals are often specific, in prominent language in the opening pages of the manual, that they do not generate binding rules and cannot be relied on, as matters of external administrative law, by either the agency or parties appearing before it. Additionally, enforcement manuals often stand alongside policy statements, as in the case of the 2. Nuclear Regulatory Commission, discussed *infra*, which are separate documents far more likely to fall within the requirements of section 552(a)(1)(D). *Federal Register* publication should not be required where the manual merely reiterates information which is published elsewhere in the *Federal Register*.²⁹ The fact that enforcement manuals are not intended to create externally binding law would seem to place them outside substantive rules within the purview of section 552(a)(1)(D).³⁰ Further, they are likely not statements of general policy or interpretations of general applicability as the enforcement manual itself does not sufficiently impact substantive rights standing apart from the rules interpreted or operationalized by the manual.³¹ The relevant consideration would seem to be

²⁹ See *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1351 (10th Cir. 1987) (holding that legal memoranda which “merely reiterate[d] the statutory and regulatory rules . . . and thus did not constitute a change in any rule or policy” of the agency were not subject to *Federal Register* publication requirement).

³⁰ See, e.g., *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977) (publication required where the document “impose[s] mandatory obligations on members of the public” and is “of such a nature that knowledge of it is needed to keep the outside interests informed of the agency’s requirements in respect to any subject within its competence.”) (internal quotation marks omitted).

³¹ See, e.g., *National Ass’n of Concerned Veterans v. Secretary of Defense*, 487 F. Supp. 192 (D.D.C. 1979) (stating that this occurs only where the rule has “a direct and significant impact upon the substantive rights of the general public or a segment thereof.”) (quoting *Lewis v. Weinberger*, 415 F. Supp. 652, 659 (D.N.M. 1976)). *Franklet v. United States*, 578 F. Supp. 1552 (N.D. CA. 1984) concerned information of a type which might theoretically be found in an enforcement matter. That case concerned “frivolous” tax returns insofar as taxpayers claimed lower tax liability in light of their objection to funding the military on religious or ethical grounds. The court held that, even if the IRS had developed guidelines concerning what would be frivolous tax returns, *Federal Register* publication “is not required when ‘(1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results.’” 578 F. Supp. at 1558 (quoting *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983)). Interpretations thus do not need to be published in the *Federal Register* if they “change nothing” and “have no impact on the substantive rights of any segment of the public.” *Id.* at 1558-59 (internal quotation marks omitted).

whether the manual creates new rights or substantive rules—in which case it must be published in the *Federal Register*—or whether it instead merely clarifies existing rules or rights.³²

Thus, (a)(1)(D) is likely of limited pertinence to enforcement manuals. Agencies may run into (a)(1)(D) issues where they use the manual to establish new rules not already published on the *Federal Register* or where it sets policy not already available in policy statements which are published. However, there may exist circumstances in which portions of an enforcement manual may fall within (a)(1)(D)'s scope.

Of greater relevance, section 552(a)(2)(C) mandates that “Each agency . . . shall make available for public inspection in an electronic format . . . administrative staff manuals and instructions to staff that affect a member of the public.” Take, for example, *Stokes v. Brennan*.³³ That case concerned the Department of Labor’s withholding, in a FOIA context, of manuals, slides, films, and other materials used to train Occupational Safety and Health Administration (OSHA) inspectors, in other words, training materials for enforcement staff which might come within a very broad definition of “enforcement manual.” The Department ceded that the manual was both a staff manual and it affected members of the public. However, it relied on a

³² Compare *Diller Active, Inc. v. Schweiker*, 556 F. Supp. 478 (D.D.C. 1983) with *Herron v. Hecker*, 576 F. Supp. 218 (N.D. Cal. 1983). In *Diller Active*, the court held that the Provider Reimbursement Manual used to help determine reasonable compensation for Medicare providers did not have to be published in the *Federal Register*. The manual did not “impose mandatory obligations” but merely “serve[d] as aids” in determining compensation, with discretion available on a case-by-case basis. 556 F. Supp. at 483. In *Herron*, the court found that the Social Security Administration’s claims manual had to be published on the *Federal Register* insofar as the manual set binding standards for exemptions to the then-extant \$1500 net worth cap for receiving SSI benefits. The court found that the manual provisions at issue constituted rules under Section 551(4) of the APA and common usage, as they “declare[d] policies generally binding on the affected public; . . . provide[d] specific standards to regulate future actions of the affected public; and . . . ma[d]e a substantive impact on the rights and duties of persons subject to their limitations.” 576 F. Supp. at 230. Further, in *Lake Mohave Boat Owners Ass’n v. National Park Serv.*, 78 F.3d 1360, 1368 (9th Cir. 1995), the court seemed to suggest that (a)(2)(C)’s “administrative staff manual” publication requirement constitutes an *exception* to the *Federal Register* publication requirement: “Even if [regulated entity] could establish that [agency’s] failure to publish [staff manual] adversely affected its substantive rights, we find that [staff manual] is an agency staff manual governed by § 552(a)(1). Accordingly, [agency] is not required to publish [staff manual] in the *Federal Register*, under the exemption provided in § 552(a)(2)(c).”

³³ 476 F.2d 699 (5th Cir. 1973).

distinction, originating in the 1965 Senate Report on FOIA, between administrative manuals and law enforcement manuals.³⁴ Law enforcement manuals include situations in which disclosure “would *significantly impede* the enforcement process.”³⁵ The 5th Circuit, relying on the 6th Circuit’s *Hawkes v. Internal Revenue Service* case, found that law enforcement “is adversely affected only when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform his actions to an agency’s understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a)(2)(C).”³⁶ The *Stokes* and *Hawkes* courts contrasted such law enforcement materials with other materials that simply assist the public in understanding the agency’s view of the law and how to comply with it. The training materials in *Stokes* clearly did not jeopardize law enforcement activities because compliance would not “tend to defeat the purpose of inducing maximum voluntary compliance by revealing classes or types of violations which must be left undetected or unremedied because of limited resources.”³⁷

Stokes held that the training materials were administrative staff manuals, covered by subsection (a)(2)(c), as, perhaps obviously, the court found that access to training materials would not sufficiently jeopardize the law enforcement activities of the agency. *Hawkes* itself concerned the IRS’s IRM, one of the enforcement manuals studied in this report. In that case, the court of appeals remanded to the agency, ordering it to undertake an *in camera* review concerning which portions of the agency manual were administrative staff manuals for purposes

³⁴ This distinction is crucial to FOIA Exemption 7(E), briefly discussed below.

³⁵ *Stokes v. Brennan*, 476 F.2d 699, 701 (quoting *Hawkes v. Internal Revenue Service*, 467 F.2d 787, 795 (6th Cir. 1972)) (emphasis in original).

³⁶ *Id.*

³⁷ *Id.* at 702.

of (a)(2)(C) and were therefore covered by FOIA's mandatory disclosure provisions, and which were instead "law enforcement" manuals as described above.

Thus, one important consideration in whether an enforcement manual, or a portion thereof, is subject to mandatory electronic disclosure under (a)(2)(C) is whether the manual is a law enforcement manual or an administrative manual, and at least some federal caselaw seems to draw the line in terms of whether the material is of a sort which would significantly impede the agency's attempt to discover violations through allowing regulated entities to avoid detection. At the other end of the spectrum, some caselaw has held that particular manuals do not sufficiently "affect" the public and are thereby in a sense too insignificant for disclosure to be mandatory. *Stanley v. Department of Defense* was such a case.³⁸ *Stanley* concerned a FOIA request for "all administrative staff manuals" and "all public domain documents," made to a number of military hospitals. While the court in that case began with the black letter premise that "The provisions of FOIA are to be interpreted broadly to achieve the goal of full disclosure,"³⁹ it ultimately declined to order disclosure. As with much of the caselaw on FOIA's mandatory disclosure provisions, the court focused on the problem of "secret law," with FOIA generally requiring "disclosure of documents which have the force and effect of law."⁴⁰ The court relied on the D.C. Circuit's opinion in *Smith v. N.T.S.B.*, 981 F.2d 1326 (1993), which reasoned that the mandatory disclosure provisions are intended to provide the public with "guidance and notice of the law so that each member of the public can act accordingly," which "require[s] disclosure of 'all the documents having precedential significance.'"⁴¹ The mandatory disclosure provisions should give

³⁸ 1999 U.S. Dist. Lexis 23585, No. 98-4116 (S.D. Ill. June 22, 1999).

³⁹ *Id.* Slip. Op. at 9 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)).

⁴⁰ *Id.* at 10 (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-54 (1975)).

⁴¹ *Id.* at 10-11 (quoting *Smith*, 981 F.2d at 1328).

the private citizen “the essential information to enable him to deal effectively and knowledgeably with the Federal agencies.”⁴²

The *Stanley* court thus cited numerous trial and appellate-level decisions for the basic distinction between staff manuals where nondisclosure would risk creating “secret law” and where disclosure would advance “knowledgeable and voluntary compliance with the law” or, alternatively, manuals which deal only with “housekeeping” matters. The court ultimately decided that the requested military hospital manuals were not subject to mandatory disclosure, as they affected government employees, not members of the public, analogizing the case to *National Treasury Employees Union v. Dep’t of the Treasury*, 487 F. Supp. 1321 (D.D.C. 1980), a case which refused to order (a)(2)(C) disclosure of a collective bargaining handbook which concerned labor negotiations between the Internal Revenue Service (IRS) and its employees.

Stanley can perhaps be usefully contrasted with *Smith v. NTSB*, 881 F.2d 1326 (D.C. Cir. 1993). In *Smith*, the Federal Aviation Administration suspended a pilot’s license for 60 days, relying on a provision in an appendix to its enforcement manual which stated that suspensions of such licenses “should not be less than 60 days” and thereby functionally established a mandatory minimum sentence. This portion of the enforcement manual was not publicly available at the time of the offense. The agency made numerous arguments that a sanctions policy was not covered by (a)(2)(C), but the court rejected them all. While the *Smith* opinion does not use the term “secret law,” the court went to great lengths to establish the public’s strong interest in knowing the sanctions attached to particular legal violations and why such information is thus distinguishable from the mere housekeeping matters in cases like *Stanley*.

⁴²*Id.* at 11 (quoting *Afshar v. Dep’t of State*, 702 F.2d 1125, 1142 n. 21 (D.C. Cir. 1983)).

To summarize, there appear to be two primary considerations in whether an enforcement manual (or portions thereof) is a staff manual subject to mandatory disclosure under (a)(2)(C). First, law enforcement manuals which detail the procedures that the agency uses to detect and catch those who violate the law are likely exempted from mandatory disclosure as they are not “administrative” manuals at all. Second, manuals which contain purely internal matters, such as rules for operating a military hospital, do not “affect” the public and are thereby not subject to (a)(2)(C) disclosure. Matters “affect” the public insofar as they convey information needed to allow regulated entities to knowingly and voluntarily comply with the law, and matters particularly affect the public where nondisclosure would generate the threat that regulated entities are being bound by “secret” law known to the agency but not to the public. Obviously these two inquiries are highly dependent on the contents of the at-issue manual, and different courts may come to different conclusions regarding any particular manual.

2. FOIA Exemption 2

As mentioned above, FOIA section 552(b)(2) exempts from disclosure records that are “related solely to the internal personnel rules and practices of an agency.” For much of FOIA’s history, there existed confusion on the scope of Exemption 2, tracing back to differing interpretations of the exemption in the 1965-66 House and Senate Reports on FOIA. Under the Senate Report, Exemption 2 protected only trivial, internal personnel records.⁴³ An early Supreme Court decision, *Dep’t of the Air Force v. Rose*, put this as whether the record deals with “matter[s] in which the public could not reasonably be expected to have an interest.”⁴⁴ This narrow interpretation of Exemption 2 became known as “low 2.” The House Report adopted a

⁴³ See S. Rep. No. 89-813, at 8 (1965) (providing, as examples of protected materials, policies and rules related to personnel use of parking facilities, the regulation of lunch hours, and statements of policy regarding sick leave).

⁴⁴ 425 U.S. 352, 369-70 (1976).

more expansive interpretation of Exemption 2.⁴⁵ This “high 2” interpretation would result in placing a much greater proportion of the contents of typical enforcement manuals within the scope of Exemption 2.⁴⁶ However, the Supreme Court ultimately adopted the narrower “low 2”-only interpretation in *Milner v. Dep’t of the Navy*, 562 U.S. 562 (2011). *Milner* explicitly rejected the House Report’s statement that Exemption 2 would cover “[o]perating rules, guidelines, and manuals of procedure for government investigators or Examiners,”⁴⁷ and it rejected the government’s similar contention that Exemption 2 should cover “records concerning an agency’s internal rules and practices for its personnel to follow in the discharge of their governmental functions.”⁴⁸ Based on a reading of the plain text of Exemption 2, the *Milner* court ruled that “high 2” materials were not protected by Exemption 2, because 552(b)(2) states that only materials related “solely to the internal personnel rules and practices of an agency” are protected. “Internal personnel rules and practices” was similarly interpreted narrowly as those which are of a human resources nature, “concern[ing] the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits.”⁴⁹ Under both earlier caselaw on the “low 2” standard ultimately adopted by *Milner* and the post-*Milner* caselaw, there are situations in which Exemption 2 will likely cover materials contained in enforcement manuals. However, the DOJ guide notes that “[r]elatively few courts

⁴⁵ See H. Rep. No. 89-1497, at 10 (1966).

⁴⁶ On what came to be known as “high 2,” see *Crooker v. ATF* 670 F.2d 1051 (D.C. Cir. 1981), a landmark case in the “high 2” domain, which held that Exemption 2 covered certain substantive matters which were “predominantly” internal.

⁴⁷ *Milner*, 562 U.S. at 574 (quoting the House Report).

⁴⁸ *Id.* at 577. The DOJ Guide to the Freedom of Information Act provides as examples of “low [Exemption] 2” exempt materials in the caselaw prior to *Milner*—those materials under the test that *Milner* would eventually adopt—FBI office room numbers, telephone numbers, and employee ID numbers; internal time deadlines and procedures, recordkeeping directions, instructions on contacting staff for assistance; cover letters; internal markings related to agency file control systems; and a host of similar materials “of no genuine interest to the public.” See DOJ Guide, *supra* note 28, *Exemption 2*, at 3-4.

⁴⁹ *Milner*, 562 U.S. at 570.

have ruled on the application of Exemption 2 in a post-*Milner* context” and collects much of the caselaw from the post-*Milner* landscape⁵⁰ As sorting out contested doctrinal issues is beyond the scope of this report, interested readers should consult the DOJ guide and other resources.

3. *FOIA Exemption 5*

Section 552(b)(5) of FOIA exempts from disclosure “inter-agency or intra-agency memorandums or letters which that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.” In certain circumstances, Exemption 5 may protect certain materials found in enforcement manual-like documents.

An example is found in *National Association of Criminal Defense Lawyers v. U.S. Department of Justice*, 844 F.3d 246 (D.C. Cir. July 19, 2016). That case concerned a FOIA request to get access to the Federal Criminal Defense Discovery Blue Book, a manual prepared by the Department on discovery procedures, including the government’s legal obligations to provide discovery to criminal defendants. The D.C. Circuit Court of Appeals agreed with the government that the contents of the book were attorney work product, protected against the discovery privilege, and, therefore, by Exemption 5.⁵¹ The court reasoned that the manual contained Department “litigation strategies,” containing “practical, how-to advice” concerning future litigation that the agency was likely to become involved in, and not merely the sort of statements of agency policy which comprised the U.S. Attorneys’ Manual, a publicly available

⁵⁰ DOJ Guide, *supra* note 28, *Exemption 2*, at 8-9.

⁵¹ The government also argued that the Blue Book was protected under Exemption 7(E), discussed below. However, because both the circuit court and the trial court found that it was protected under Exemption 5, the 7(E) argument was mooted and never addressed on the merits. The court likewise did not find it necessary to address other litigation privileges, such as the deliberative process privilege, which might fall within Exemption 5.

document.⁵² The court found plaintiffs' arguments irrelevant (a) that the manual was not prepared in anticipation of any particular case and disagreed with arguments that its function was (b) primarily non-adversarial or (c) that of a neutral treatise. Important for present purposes, in the analysis of argument (a), the court reinterpreted past holdings in two cases involving documents, such as memoranda, prepared in anticipation of enforcement actions. The court distinguished the Blue Book from those documents, because, unlike documents concerning audits, the Blue Book's entire purpose was to prepare agency attorneys for litigation.⁵³ It thus risked showing the agency's hand in litigation, even if it was not prepared with a specific future case in mind.

It should be noted that Exemption 5 covers other litigation privileges besides the work product privilege. It is thus more expansive than suggested by the mere facts of *National Association of Criminal Defense Lawyers*. The interested reader is again referred to the DOJ Guide for a fuller discussion of the issues.

4. FOIA Exemption 7

At least as pertinent to Exemption 2 for enforcement manuals is FOIA exemption 7. Exemption 7 exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" meets one of six criteria. Most likely to be relevant to enforcement manuals is Exemption 7(E), which exempts materials which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or which would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."⁵⁴

⁵² *Id.* at 7.

⁵³ *Id.* at 11.

⁵⁴ 5 U.S.C. 552(b)(7)(E).

Also of potential relevance is Exemption 7(A), where production “could reasonably be expected to interfere with enforcement proceedings,” although I have located almost no caselaw dealing with enforcement manual-like documents in an Exemption 7(A) context. Courts differ in their interpretations of 7(E) on several important matters, which are detailed in the DOJ guide. It should be noted, however, that in at least some circuits, Exemption 7(E) is applied liberally, exempting a great deal of information related to enforcement and investigation from FOIA disclosure. The D.C. Circuit has explained that “Exemption 7(E) sets a relatively low bar for the agency to justify withholding: ‘Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law.’”⁵⁵

II. EMPIRICAL ANALYSIS

A. Methodology

This study was based on two primary sources of data. The first was a study of publicly available agency enforcement materials. A goal was to obtain as many agency enforcement manuals as possible for study and to compare them for form and content, with the intent to learn what types of information enforcement manuals generally convey. The most useful sources for locating publicly available manuals were agency websites and Google searches for “enforcement manual,” “operations manual,” and related keywords, either generally or targeting specific agency web domains. Westlaw searches also led to additional results. Although Westlaw is not

⁵⁵ *Blackwell v. FBI*, 646 F.3d 37, 42 (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)). *Mayer Brown* dealt with information which might fall within an enforcement manual: information concerning “settlement strategies and objectives, assessments of litigating hazards, and acceptable ranges of percentages of settlement.” 562 F.3d 1190, 1192 (quoting the district court opinion below). The D.C. Circuit there held that this information was protected by 7(E).

an excellent source for locating guidance documents, I learned of the existence of a few enforcement manuals, for example, because they were the subject of FOIA requests that led to litigation for which written judicial opinions are archived by the service. The appendix lists the enforcement manuals which were located and used in preparing this report and provides links to those manuals.

This methodology created a set of fifteen documents which could be considered enforcement manuals under a broad definition, a sufficient dataset to generalize about publicly available enforcement manuals. However, since not every relevant webpage on every federal agency website could be scrutinized for links to relevant documents and not every agency in the federal government was consulted for this project, there are certainly publicly available enforcement manuals which were not analyzed for this study. The reader should thus keep in mind that generalizations about enforcement manuals contained in this report are based only on publicly available enforcement manuals (and information about nonpublic manuals obtained in interviews with agency officials, discussed *infra*) and only on the manuals listed in the appendix.

Because, to a large degree, the purpose of this study was to compare regulatory enforcement manuals to other forms of guidance used by agencies, it was important to scrutinize a representative sample of enforcement guidance, both from agencies with enforcement manuals and those without. By the time of this study, many federal agency websites have been modernized as excellent sources for locating important guidance documents. Conversations with agency staff led to the identification of other important guidance documents. While agencies differ in their practices regarding making enforcement materials available through the *Federal Register*, this represented another source of documents for analysis. The *Federal Register* is keyword searchable and sortable by agency, publication date, type of document, and so on. Non-

manual enforcement guidance was thus analyzed, with a special focus on those agencies which were selected for case studies.

Documentary analysis performed for this study led to the identification of several federal agencies which were especially interesting for purposes of this study. For example, the Federal Trade Commission (FTC) recently withdrew an enforcement manual that had been in effect since 1971,⁵⁶ and the Federal Housing Finance Agency is currently in the process of developing its first enforcement manual.

Six agencies in total were interviewed regarding their enforcement manuals and/or enforcement practices: the NRC, U.S. Coast Guard, Federal Housing Finance Agency, FTC, Federal Energy Regulatory Commission (FERC), and Internal Revenue Service. Interviews ranged from approximately 45 minutes to one hour. The goal was to conduct interviews with staff in agency enforcement divisions and/or general counsel's offices to learn about (a) how the agency enforcement manual was used internally by the agency; (b) the agency's sense of how the manual was used externally by regulated entities and members of the public; and (c) how the enforcement manual was developed and updated, including who had responsibility for maintaining the enforcement manual. These interviews thus led to an understanding of the agency's goals and the thought processes of agency staff which could not be gleaned from agency websites and guidance documents alone. They thus served both as a mode of confirming or disconfirming any conclusions initially drawn from the review of agency promulgated

⁵⁶ See *FTC Operating Manual*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc/foia/frequently-requested-records/ftc-operating-manual#:~:text=Since%20many%20parts%20of%20the%20Operating%20Manual%20did,FTC.gov%2C%20after%20review%2C%20the%20Operating%20Manual%20was%20withdrawn> (last visited August 31, 2021) (discussing the withdrawal of the Operating Manual). A version of the withdrawn Operating Manual was located using Google Books and was analyzed for this report.

documents and a source for information and insights which could not be found in the documents themselves.

Three of these agencies, the FTC, the FERC, and the NRC, were selected for the comparatively in-depth case studies described below. The FTC was chosen because it serves as an example of a federal agency with a broad and important enforcement mission without an enforcement manual, and the NRC because its frequently updated, extensive enforcement manual serves as a potential source of many best practices for agencies which wish to make their enforcement manuals available to the general public. FERC was of interest because it has a nonpublic manual and because its staff has engaged in significant consideration of whether the manual should be made public at a future date. It thus provided a unique source of insight on agency thought processes concerning whether to make enforcement manuals public.

Because the purpose of this study is to understand whether centralized agency enforcement manuals are useful for actors both inside and outside the agency, a number of core questions guided the analysis. First, what information is typically conveyed by an agency enforcement manual? Second, regardless of whether the agency has an enforcement manual or not, is this information conveyed through other guidance documents in a similarly clear and efficient manner? Third, to what extent are enforcement manuals serving an important resource in communicating the agency's priorities and policies to regulated entities? Fourth, when does it make sense for the agency enforcement manual to be publicly available? The analysis below begins with these questions addressed in the context of the three case studies and then moves into a general analysis based on the documentary analysis and interviews.

B. Case Studies

1. Federal Trade Commission

The FTC has enforcement authority involving more than 70 federal statutes. It is responsible for protecting consumers and market competition against deceptive, unfair, fraudulent, and anticompetitive trade practices. Statutory enforcement activity concerns a range of activities, from preventing anti-doping in the horseracing industry,⁵⁷ to enforcing internet standards intended to protect children online and prevent the unsolicited emailing of pornography,⁵⁸ to preventing anticompetitive mergers and acquisitions under the Clayton Act.⁵⁹ Enforcement authority is primarily exercised by the Bureaus of Consumer Protection and Competition.

In 1971, the FTC promulgated the FTC Operating Manual, an agency-wide enforcement manual. The document would have been one of the longest and most comprehensive covered by this study. The manual divided early-stage enforcement activities into preliminary investigations and formal investigations, discussed the closing of investigations with and without action taken against the entity under investigation, and had extensive sections on case processing and tracking, the provision of guidance and advisory opinions to regulated industries, public outreach (including speeches, educational programs, and responses to requests from news media), interactions with state and local law enforcement entities, the handling of confidential information, and special provisions related to specific industries.

⁵⁷ Horseracing Integrity and Safety Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-120, 134 Stat. 1182 (2021).

⁵⁸ See Protecting Children in the 21st Century Act, 15 U.S.C. § 6552-53; Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C §§ 7701-7713.

⁵⁹ 15 U.S.C. §§ 12-27, as amended.

However, the FTC recently withdrew its Operating Manual. Attempts to locate it on the FTC website turn up a page explaining that, as a staff manual, the Manual was not a “rule or statement of the Commission” and never bound the FTC or created any legal rights, and that it did not “accurately reflect Commission practice.”⁶⁰ The webpage directs interested parties to the agency’s rules of organization, procedures, and rules of practice, located at 16 C.F.R. Ch. 1 subch. A, and to a webpage which provides links to information concerning the FTC’s enforcement activities regarding each of the statutes over which it has enforcement authority.

A semi-structured interview was conducted with FTC counsel concerning its enforcement manual, the reason for its withdrawal, any substitute sources of guidance used now that the Operating Manual is no longer in force, and any effects of the lack of a centralized enforcement manual, either internally, on agency staff, or externally, on regulated entities.

The primary reason the enforcement manual was withdrawn, according to agency counsel, is that it was out of date, reflecting agency practices from a past era which only minimally resemble those of the contemporary FTC. While the Operating Manual divided agency investigatory activities into preliminary and formal stages and provided detailed procedures especially for the formal stage, counsel indicated that the agency now found it preferable to use a more flexible approach, tailored to the individual circumstances of each investigation, and designed to increase the efficiency and fairness of the proceeding. Even in broad outlines, then, the manual no longer reflected agency enforcement procedures. In the absence of an overall enforcement manual, agency staff were not left adrift: each of the two enforcement bureaus, Competition and Consumer Protection, maintain non-publicly available guidance documents which guide enforcement activities and better reflect contemporary bureau

⁶⁰ Federal Trade Commission, *FTC Operating Manual* (last visited Oct. 6, 2022), <https://www.ftc.gov/about-ftc/foia/frequently-requested-records/ftc-operating-manual>.

practices than the enforcement manual. Additionally, the agency maintains a non-public facing Administrative Manual, which served alongside the Operating Manual and is still in force. The Administrative Manual contains internal policies and procedures of use to agency attorneys involved in investigations and litigation. In cases where existing guidance documents still leave gaps in enforcement procedures and policies of the sort that an enforcement manual might cover, staff can turn to the agency's Office of General Counsel, which can resolve such issues on a case-by-case basis.

Furthermore, agency staff expressed that the lack of a publicly available enforcement manual does not seem to leave regulated entities unable to understand the agency's practices and priorities: as mentioned, the CFR provides an authoritative, readily accessible discussion of the agency's governing procedures insofar as they are legally binding. The FTC also frequently publishes guidance documents targeted at consumers and regulated industries, which are sorted on the agency's website topically, so that consumers can easily find guidance documents related to, for example, "Credit, Loans, and Debt," and regulated entities can find general guidance on "Advertising and Marketing," or guidance related to specific industries, such as "Automobiles" or "Real Estate and Mortgages."

Interviewees thus conveyed that they did not consider it to be worth the resources to rewrite its enforcement manual to reflect current agency practices. It found that alternative forms of guidance were more than sufficient to both inform the public and guide the behavior of enforcement staff, without the constant need to monitor an enforcement manual for out-of-date provisions.⁶¹ To the extent that the manual was out-of-date, its elimination perhaps removed the

⁶¹ This basic idea, that the expense of maintaining an up-to-date enforcement manual could be prohibitive in comparison with the benefits of promulgating one, was expressed also in an interview for this study conducted with attorneys from the United States Coast Guard, which itself has a wide variety of enforcement powers concerning

potential for confusing or misleading regulated entities. For example, industry counsel who complained that given paperwork was not provided within an internal deadline set by the out-of-date enforcement manual might need to be reminded that the manual was a non-binding guidance document and that he or she had no legitimate reliance interest on the agency following the procedures laid out within.⁶² To the extent that such confusion results from a manual which no longer reflects current agency practices, there thus seem to exist circumstances, the agency believes, under which the absence of a publicly available manual is preferable to its existence.

2. *Nuclear Regulatory Commission*

The NRC is an independent agency responsible for regulating civilian uses of nuclear materials, in applications including nuclear power plants, nuclear medicine, and academic research. Its authority covers nuclear reactors, nuclear waste, and radioactive materials and their byproducts. It has enforcement authority over licensing (including license revocation), can assess civil penalties, and can issue various other kinds of orders intended to bring regulated entities into compliance with regulatory standards. In addition to enforcement authority over nuclear

maritime safety, migrant and smuggling interdiction, environmental protection, and other matters. Coast Guard counsel expressed that, in some of these areas, it was moving away from centralized, standing enforcement manuals concerning all information on e.g., maritime safety enforcement, in favor of more narrowly tailored guidance documents such as periodic bulletins and staff directives.

⁶² While almost all enforcement manuals are classified as guidance documents, and thus, as a rule, they do not legally bind either the agency or the regulated entity, there still exist potential legal, as well as practical, issues with a badly out of date enforcement manual. In my interview with personnel from the Internal Revenue Service, staff counsel indicated that judges and opposing counsel in tax litigation often focus on perceived inconsistencies between the Internal Revenue Manual and agency practice in review of agency action. My independent analysis of caselaw also suggested that courts sometimes consult enforcement manuals as guides to how the agency understands its enforcement practices, including those which the agency itself feels to be binding. As one example, in *Honeywell Int'l Inc. v. United States*, 142 Fed. Cl. 91 (Fed. Cl. 2019), at issue was whether the regulated entity was obligated to pay fees related to an enforcement order issued by the NRC. The question turned on the proper interpretation of the word “sanction” in an NRC regulation. In siding with the regulated entity, the court refused to give the agency *Auer* deference. It found that the regulation was unambiguous in foreclosing the agency’s proffered interpretation, pointing to the agency’s own enforcement manual as confirming the court’s plain meaning interpretation of “sanction.”

materials and nuclear reactors, the NRC has enforcement authority over related matters such as discrimination against whistleblowers.

The NRC maintains two important, standing enforcement guidance documents: the Enforcement Policy and the Enforcement Manual. The Enforcement Policy is a 92-page document which discusses many of the general topics of an enforcement manual, including the statutory authority underlying the commission's activities, the NRC's enforcement process, the assessment of the severity of discovered enforcement violations, and the handling of violations, including through the assessment of civil penalties. It provides guidance on the exercise of enforcement discretion, with specific examples of how the agency would assess the severity of violations involving several fact patterns. It provides information on the NRC's enforcement processes and how regulated entities can provide input into enforcement proceedings involving them. The Enforcement Policy is promulgated by the Commission itself and is frequently updated, with the most recent update occurring in January 2022.

The Enforcement Manual, in contrast, is a significantly larger document, at 449 pages, excluding online appendices. Unlike the Enforcement Policy, it is not promulgated by the Commission itself, but instead the Office of Enforcement. It provides directions to regional and headquarter offices, serving as the primary source of staff guidance on enforcement procedures and providing a background information on the NRC's enforcement activities. The Enforcement Manual is explicitly intended to conform to the Enforcement Policy, operationalizing the Enforcement Policy for agency staff in more concrete terms. Initially, the basic idea was that the Enforcement Policy would be more externally focused, while the Enforcement Manual would be primarily for internal use. However, agency staff indicated in our interview that both documents are now extensively used by external entities.

The manual, available on the NRC's website, contains three parts. The first describes the NRC's enforcement program, details the handling of violations, discusses tools such as demands for information on regulated entities and the preparation of closeout letters at the end of the investigation, and contains guidelines on how the NRC exercises its enforcement discretion. The second part concerns policies and information related to specific sorts of enforcement matters, such as those involving nuclear reactors or the disposition of radioactive materials. The third part of the manual collects enforcement guidance documents which have not yet been incorporated into the manual (including temporary and interim guidance), standard forms and other documents used by enforcement staff, and other information not integrated into the body of the manual. The online edition of the manual also includes an index to any changes made to its text, going back to 2000. In general, significant revisions to the manual occur once every two to four years, with about five to ten changes made between revisions, often for the purpose of adding guidance memoranda to the appendix until they can be incorporated into the manual's text.

The enforcement manual and enforcement policy make up the NRC's standing enforcement guidance. The NRC promulgates revisions to the enforcement policy through notice and comment in the *Federal Register*. Additionally, the policy can be updated on an interim basis through the issuance of an interim enforcement policy guidance document, and enforcement guidance memoranda are issued to enforcement staff to provide updates to enforcement processes pending updates to the manual.

One can get a sense of external parties' use of the NRC's enforcement manual by analyzing who participates in notice and comment concerning the enforcement policy and the agency's guidance documents. An interviewee from the NRC indicated that commenters include nuclear lobbying groups, radiographers, hospitals, commercial power plants, manufacturing

facilities, environmental groups, industry law firms, Native American Tribes, employee groups, and community groups concerned with nearby power plants. This suggests that strong interest in the NRC's enforcement policies and practices extends well beyond the regulated entities themselves. While some participants in the process, such as hospitals and power plants, are regulated entities, others, including environmental groups and Native American Tribes, are members of the public directly interested in the NRC's fulfillment of its overall mission of ensuring the safe handling of nuclear materials. Others, such as employee groups interested in the NRC's handling of whistleblower nondiscrimination, are not themselves regulated entities, but they are significantly more closely tied to the agency's regulatory mission, as the direct and intended beneficiaries of regulation, than members of the general public.

3. *Federal Energy Regulatory Commission*

FERC explains its mission as “Assist[ing] consumers in obtaining reliable, safe, secure, and economically efficient energy services at a reasonable cost through appropriate regulatory and market means, and collaborative efforts.”⁶³

FERC has enforcement authority involving market manipulation, fraud, anticompetitive conduct, electric reliability standards, threats to the nation's energy infrastructure, and conduct threatening the transparency of regulated markets. Enforcement matters thus range from those concerning generators improperly linked in the power grid, misrepresentations in or failure to follow certificates concerning energy infrastructure, utilities engaged in activities not covered by their licenses, violations of reliability standards, actions against energy trading financial entities, and other matters. The agency maintains a nonpublic enforcement manual, although interviewees noted that FERC has engaged in internal discussions concerning whether the manual should be

⁶³ Federal Energy Regulatory Commission, *About FERC* (Sept. 5, 2022), <https://www.ferc.gov/what-ferc>.

made public. The manual provides detailed guidance for the Office of Enforcement on the procedures involved in investigations and enforcement actions against regulated entities.

While FERC's enforcement manual is not publicly available, the agency maintains a number of other guidance documents which serve to provide transparency to the public concerning its enforcement activities and to provide information relevant to defense counsel appearing before the Commission. These include annual reports on enforcement, a number of policy statements, and staff white papers. The annual reports are promulgated every November and serve to inform the public on the statutory authority for its enforcement activities, its enforcement procedures, and significant cases FERC has worked on in the past year. It contains a statement of FERC's current enforcement priorities, including the types of matters it is involved in investigating. Agency staff opined that the reports are often particularly useful in cases of no action, in which the report can clarify ways that the Commission has chosen to exercise its prosecutorial discretion or has otherwise decided on a policy of non-enforcement. The Commission has also promulgated policy statements or white papers on enforcement, compliance, anti-market manipulation enforcement, effective energy trading compliance practices, staff guidance, the disclosure of exculpatory material, and penalty guidelines, which are publicly available and provide information concerning its thought processes and activities in these domains. Thus, while there is no publicly available enforcement manual, much of the information which would be contained in such manuals, both generally and in relation to specific types of enforcement, is contained in other publicly available documents.

Counsel for FERC noted in our interview that, generally, the defense bar which appears before it is small and well-versed in the Commission's enforcement practices. To the extent that there are areas of confusion or concern, the specialized bar generally does not hesitate to contact

the agency itself to resolve ambiguities. However, interviewees suggested that there was some potential that a publicly available manual might assist less expert counsel appearing before the agency in understanding the agency's enforcement proceedings at a step-by-step level, even though the manual was written primarily to inform agency staff of best practices. Agency counsel opined that the greatest benefit of further disclosure would almost certainly be the transparency it would bring to agency enforcement proceedings. Comparatively, counsel minimized the extent to which it thought public availability would reduce the agency's workload in dealing with concerns or questions directly from the defense bar, and it noted that there would be a significant expense involved in revising the manual for public consumption, for example, in making certain that statements concerning internal agency procedures were not erroneously interpreted as procedural rights affecting outside parties.

4. Discussion

The agencies surveyed for this study maintain a wide variety of practices regarding their enforcement manuals. The most basic division concerns whether the agency maintains an enforcement manual. While enforcement manuals may represent an efficient method to collect the agency's practices and policies along with information important to the activities of the agency's enforcement staffs, some agencies, such as the FTC, have made a deliberate choice to not use an enforcement manual. Others, such as the United States Coast Guard (USCG), have scaled back the extent to which an enforcement manual subsumes and replaces the need for consulting other forms of guidance documents. In interviews, both the FTC and the USCG expressed that the costs, in labor time, of maintaining an enforcement manual were important considerations in either eliminating, in the case of the FTC, or reducing the centrality of, in the case of the USCG, their enforcement manuals.

Even agencies with enforcement manuals noted the large expense in maintaining them. The IRS's IRM, which covers enforcement as well as the agency's other activities, is one of the largest and most comprehensive guidance documents produced by the federal government. Interviewees noted that keeping its manual up to date requires the daily attention of expert staff, with it being necessary for manual sections to be written, checked for conformity with current agency practices, and updated by staff with expertise in the subject matter of the section in question; this inherently diverts high-level staff away from the activities core to their job descriptions toward keeping an eye on the manual for a substantial proportion of their work time. Failure to devote sufficient resources to keeping the manual current risks misleading agency staff, regulated entities, and the public about the agency's activities and places the former group in a distinct informational advantage, as agency staff are in a much better position to remain apprised of the situations in which the enforcement manual does not reflect current agency practices and priorities. Members of the public, and, to a lesser degree, regulated entities and their counsel, are in an inferior position to gain awareness of discrepancies between the agency's manual and its actual behavior. Additionally, manuals can be more or less comprehensive, entailing a greater or lesser need to supplement the use of the manual with other forms of guidance documents. Tradeoffs concerning whether to have a manual, and, if so, how comprehensive the manual should be made on an agency-by-agency basis, with careful consideration of the agency's institutional capacity to keep the manual up-to-date, the potential groups (internal and external) interested in the manual, and the extent to which there exists a gap in terms of how easy it is for these groups to locate relevant information in other sources. Also relevant is the regulatory environment in which the agency operates: the more rapidly changing

the agency's goals and procedures, the greater the expense of keeping a manual up to date, and, relatedly, the greater the potential capacity to mislead created by an out-of-date manual.

Of agencies which maintain enforcement manuals, there exists an additional important division concerning whether the manual is publicly available. Agencies with both public and nonpublic enforcement manuals were surveyed for this report, as was at least one agency, FERC, which was considering undergoing the time-consuming process of modifying a non-public enforcement manual for the purpose of rendering it appropriate for public distribution. The greatest benefit cited by interviewees in making their manuals publicly available was transparency: more detailed knowledge of agency procedures and policies provides greater insight into agency decision-making and may blunt perceptions of arbitrariness or unfairness in sometimes adversarial enforcement proceedings.⁶⁴ These transparency benefits extend not only to regulated entities, since greater enforcement transparency can also serve the direct and indirect beneficiaries of regulation. Greater transparency thus potentially causes the benefit of enhanced buy-in of the agency's priorities by the regulated community and may ultimately make the agency's enforcement mission easier.

The transparency of a publicly available enforcement manual also comes with costs. Some information is simply unfit to be made publicly available, such as incredibly detailed information concerning the agency's exercise of enforcement discretion. The IRS, for example, would not want to publicize a policy that enforcement activities leading toward penalties should not be undertaken against a taxpayer engaged in a certain form of noncompliance unless the dollar amount of underpayment caused by the noncompliance reaches a certain threshold.

⁶⁴ See, e.g., *CFTC's Division of Enforcement Issues First Public Enforcement Manual*, COMMODITY FUTURES TRADING COMMISSION (May 8, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7925-19>. As discussed above, this was also mentioned regarding FERC's deliberations on whether to make its enforcement manual public.

Regarding such matters, an agency with a publicly available enforcement manual must decide to either maintain two forms of the enforcement manual, one redacted for public availability and one unredacted for internal use only, or instead maintain both a public enforcement manual and separate manual-like guidance documents which concern those matters which should not be publicly known. Agencies may mix these, having both an enforcement manual which redacts sentences or paragraph-length sections for public consumption and separate guidance documents which concern nonpublic procedures and information with greater specificity.⁶⁵

After transparency, the second largest benefit to the publication of enforcement manuals is the provision of information to regulated entities and the public. This project's survey of enforcement manuals revealed a wide range of potentially publicly useful information contained in them, and with a wide variety of parties interested in distinct kinds of material. Some forms of information in enforcement manuals, such as the agency's understanding of the rules of confidentiality and evidentiary privileges, are primarily useful to agency staff and to regulated entities engaged in enforcement proceedings before the agency. Other information, such as information concerning the general exercise of enforcement discretion, are of potentially broad public interest.

Furthermore, the benefits of further transparency are not evenly distributed. Highly specialized agencies often undertake enforcement actions against regulated communities that are primarily represented by specialized defense bars—that is, by counsel who are highly proficient, repeat players before the agency. Such counsel can be expected to be familiar with the agency's practices even with lower levels of transparency, and they may cultivate relationships with

⁶⁵ My understanding, based on discussions with the IRS personnel, is thus that, while they do maintain some nonpublic enforcement guidance documents, many manual-like documents have been eliminated in recent years in favor of redacted IRM sections.

agency counsel which render them disproportionately willing to seek out needed information through direct contact with the agency. In contrast, less sophisticated entities, those represented by non-expert counsel, certain intended beneficiaries of agency regulation, and the broader public likely have disproportionately weaker understandings of agency enforcement activities. Access to enforcement manuals and related enforcement guidance are likely to have higher benefits for these groups, at least insofar as they are easy to locate and to understand. On the other side, the negative impacts of out of date or otherwise misleading enforcement guidance may also be greater for entities which do not have ongoing relationships with the agency.

The discussion above of notice and comment at the NRC provides a lens on this range of interests. Each type of group potentially possesses a different type of interest in access to enforcement manuals and other measures which provide transparency of the agency's enforcement practices. The interests of regulated entities extends to those which have never become the subject of enforcement action themselves. Such entities have a strong interest in understanding the agency's enforcement practices and priorities, including matters such as how the agency exercises its prosecutorial discretion. Enforcement policy guidance, enforcement manuals, and related documents can help an agency achieve good-faith compliance with the agency's expectations by clarifying the agency's understanding of the background regulatory requirements.⁶⁶ Such entities are also interested in the agency's interpretation of its enforcement

⁶⁶ Such information can have both legitimate and illegitimate uses for regulated entities. On the legitimate side, enforcement manuals and other guidance documents may provide a better understanding of the agency's understanding of regulatory requirements than statutes, regulations, caselaw, and other sources interpreted without the aid of agency guidance. Even if the regulated entity understands the background law differently from the agency, complying with the agency's understanding of the law will often be preferable to inviting the risk of enforcement action--and potentially litigation--targeting the entity. Regulated entities thus have strong legitimate interests in knowing as much as possible about the agency's handling of regulatory enforcement. On the illegitimate side, more complete information involving the agency's thought processes and its use of discretion can assist "bad" actors whose primary goal is to comply with the bare minimum necessary to avoid fines, license revocations, or other adverse action, regardless of the actual operative legal requirements. Such entities can use any additional

powers, such as the agency’s understanding of the scope of its subpoena power, and any guidelines the agency sets for settlements and other forms of dispute resolution. Finally, regulated entities have an interest in having the agency follow its own procedures. Although enforcement manuals are not externally binding, the centralized offices of enforcement which promulgate them generally expect line-level enforcement staff to comply with the standards it has established. To the extent that the regulated entity is aware of these standards, it may be able to appeal to agency officials to ensure that they are followed, as a form of internal administrative law.

Additionally, a wide range of third parties are interested in regulatory enforcement. Many can be classified as the direct beneficiaries of enforcement efforts. For example, employees protected by workplace safety regulations or consumers protected by product safety regulations have a tangible relationship to the agency’s regulatory mission. These entities have a strong interest in how the agency takes in complaints or handles confidential information obtained throughout the investigation. They may wish to raise complaints themselves if they believe their workplace, or products they have purchased, fall beneath regulatory standards, and they may wish to know how the agency promulgates information concerning enforcement actions—for example, to know whether an inability to locate information on a regulated entity suggests that the entity is above board. Information concerning how often the agency conducts inspections and when it publishes press releases are useful here. There are additionally less direct beneficiaries of

information concerning, for example, the agency’s exercise of prosecutorial discretion to avoid acting to achieve compliance with regard to certain categories of violation, thereby endangering the interests of any sector of the public the agency’s regulatory mission is intended to protect. The circumstances under which it serves the agency’s—and the public’s—interest to tip the agency’s hand on such matters was a constant topic of discussion in the interviews conducted for this report. It is likely impossible to make any general recommendations which are not uselessly vague on when the benefits stemming from the effects further transparency will have on “good” regulated entities will outweigh the negative benefits further transparency will have on “bad” entities. Almost all agencies interviewed indicated that they wished to be as transparent as reasonably possible, but what counts as reasonably possible will differ from regulatory environment to regulatory environment.

regulatory action, such as Native American tribes located in areas near nuclear facilities. They have similar interests and may wish to know for example, how to voice their concerns to the agency or how to submit evidence related to ongoing enforcement actions, even if they are not directly involved in enforcement in the way that an employee of a regulated employer might be. An agency deciding whether to make its enforcement manual public must consider the nature of the information in the manual, who is likely to find each type of information useful, and the extent to which this information is available in other sources, particularly sources which are as logically structured and easy to locate as manuals. Generally, the agency itself is in the best position to understand the range of groups directly or indirectly impacted by its activities and to make these assessments on a case-by-case basis.

Agencies with publicly available enforcement manuals must also consider the potential to mislead regulated entities and the public. Generally, enforcement manuals are guidance documents, externally binding neither the agency nor the regulated community.⁶⁷ Enforcement manuals usually contain a statement in their introduction noting this and stating that regulated entities cannot legally rely upon them, on the information in the manual being accurate, or on the procedures set forth in the manual being perfectly followed by the agency. However, to the extent that the agency places information about its procedures in the public domain, it is certain that the regulated community will expect compliance with these procedures as a general matter and will sometimes feel aggrieved to the extent they are not followed. Divergence between actual agency practice and the guidelines set forth in the manual thus turn the transparency benefit of public availability into a burden. At least one agency interviewed thus noted that, to

⁶⁷ See, e.g., *Elec. Privacy Info. Ctr. V. IRS*, 910 F.3d 1232, 1244-45 (D.C. Cir. 2018) (noting in regard to plaintiff's allegation that the IRS failed to act under 5 U.S.C. 701(1), that while "an agency can create a non-discretionary duty by binding itself through a regulation carrying the force of law" the IRM is "a non-binding document [which] cannot impose on an agency an enforceable duty to act").

the extent it has *binding* procedures, they are reflected in the agency's rules of procedure in the CFR, and that the use of that source, along with consulting other resources such as other guidance documents and simply reaching out to agency enforcement staff concerning the specifics of the case, kept entities under investigation informed in lieu of a publicly available enforcement manual. This would seem to be especially true to the extent that the publicly available manual is not up to date. Concerning the need to reach out to the agency for information one-to-one, several agencies interviewed additionally expressed that they did not see publicly available enforcement manuals as reducing the workload of agencies in responding to such queries: any details concerning the agency's policies or information concerning its enforcement activities made publicly available simply become the subject of further questions and concerns from regulated entities and their attorneys, so that, in many cases, transparency may be essentially the sole benefit of public availability. Maintaining a log of changes to the manual, with past versions available, can ameliorate these issues.⁶⁸

The NRC, discussed above, represents one side of another divide in agency practices. Of those agencies which have manuals, there may be another standing guidance document, such as its enforcement policy, which already details the agency's enforcement activities sufficiently for external actors. The NRC has both a less comprehensive policy statement, containing information at a level of generality which is likely to be more useful to regulated entities and the public attempting to understand the NRC's activities, and an enforcement manual, which provides instructions to staff at a much higher level of granularity. Both sets of documents are publicly available.

⁶⁸ The NRC and NLRB manuals are cited as examples at Note 17, *supra*.

In a variation, FERC promulgates, in addition to its policy statement and non-public manual, annual reports on enforcement every November. These reports discuss the current priorities and practices of the office of enforcement, while also detailing specific enforcement matters undertaken by the office in the prior year. While shorter and less comprehensive, they thus overlap with the contents and purposes of enforcement policy guidance and enforcement manuals. In our interview, FERC staff indicated that the annual reports are important sources of public information in understanding agency practices, as they discuss the fact patterns of both cases in which the agency acted against regulated entities and, even more importantly in their view, cases in which the agency chose to exercise its prosecutorial discretion and not take action and the reasons for the exercise of prosecutorial discretion. While some enforcement manuals and policy statements, such as those of the NRC, contain some discussion of fact patterns the agency has dealt with in the context of enforcement, documents like the FERC annual reports provide another lens into the agency's internal thought processes which may ameliorate the transparency benefits of a publicly available enforcement manual as partially duplicative. The transparency benefits of making an agency enforcement manual publicly available must thus be weighed in terms of how much *additional* value is added, in light of the agency's specific circumstances and the other guidance documents promulgated by the agency, either periodically or as standing guidance.

III. RECOMMENDATIONS

1. Agencies should consider whether it would be beneficial to develop a centralized enforcement manual to provide information concerning the policies and procedures the agency uses to investigate potential violations of regulatory requirements. In doing so, they should consider the following factors: (a) the availability of existing on-point guidance documents; (b) the number of

these documents, and, concomitantly, the ease of locating the document containing relevant information; (c) the costs of producing an enforcement manual and keeping it current with the agency's regulatory enforcement; and (d) the agency's institutional capacity to keep the manual up-to-date.

The agencies surveyed for this report range from those which have had enforcement manuals in continual use for many years, to those in the process of developing their first enforcement manuals, to those which are in the process of de-emphasizing their enforcement manuals in favor of other forms of guidance documents, to those which have recently withdrawn their enforcement manuals entirely. From speaking with agencies along this spectrum, there are clearly both pros and cons to maintaining an agency-wide enforcement manual. Unfortunately, the strength of the pros and cons seem to be strongly correlated with one another: an agency which publishes a large number of guidance documents periodically concerning the processes by which it undertakes enforcement actions and the policies which guide enforcement discretion may find it particularly useful to collect this guidance, in summary form or through incorporation by reference, into an enforcement manual. An enforcement manual can in such circumstances be an incredibly useful reference document for agency staff, when compared to surveying the range of guidance documents available either on its website or internally. However, the greater the number and complexity of the guidance documents which need to be incorporated into the enforcement manual, the more time and effort it will take to keep the enforcement manual up to date, or, alternatively, the more quickly the enforcement manual will become outdated and of limited value to the agency. Few obvious patterns emerged in this study, suggesting that whether to maintain a comprehensive enforcement manual, or, alternatively, whether to rely on other forms of guidance document piecemeal, will have to be made on an agency-by-agency basis,

based on factors related to the needs and capacities of the agency's enforcement staff. As a general matter, keeping enforcement manuals current with agency guidance and practices requires the commitment of a considerable amount of institutional capacity. The benefits and burdens of disclosure should thus be carefully weighed before an agency decides to make its enforcement manual publicly available.

2. If agencies decide to develop enforcement manuals, they should decide which information will be most useful, both to agency staff, and, if the manual is publicly available, to the broader public. In general, a comprehensive enforcement manual might address the agency's structure, particularly the components of the agency that have authority over investigations and other enforcement activities; the methods by which complaints are brought to the agency's attention; other methods for beginning preliminary enforcement procedures; evidentiary standards for bringing a complaint; standards for sorting detected violations by severity; agency procedures for settlements and other forms of dispute resolution; standards for assessing the penalties demanded in settlement negotiations; a discussion of how enforcement staff provide information such as press releases to the general public about enforcement activities; ethics rules guiding agency enforcement activities; rules for communications with regulated entities during the course of enforcement proceedings; the agency's understanding of its powers to issue subpoenas and other requests for information; standards governing the handling of classified information obtained from regulated entities; discussions of inter-agency coordination with federal, state, local, and/or international agencies; statutes of limitations and other legal rules which significantly impact enforcement activities; the agency's internal methods for documenting enforcement activities and the violations detected; and other matters.

The discussion of what constitutes an enforcement manual at the beginning of this report attempts to provide a brief overview of the materials most commonly located in enforcement manuals. Some enforcement manuals omit material included by the typical enforcement manual, while others include materials which are rarely encountered in the survey of publicly available manuals which served as the basis for this report. Agencies developing their own enforcement manuals should consider which of these it makes sense to include, given the context of the agency's own enforcement proceedings. Similarly, agencies which already have enforcement manuals should consider whether it makes sense to add any of the commonly included materials which their manual omits.

The list in this recommendation was prepared on the basis of several of the more canonical enforcement manuals, by which I mean those which contain most of the information found in typical enforcement manuals and which do not focus a great deal on matters outside the scope of this report. The interested reader may wish to look at the table of contents of the enforcement manuals of the SEC, the NRC, the FEC, the FAA, and/or the CFTC as examples of canonical enforcement manuals.

3. Agencies with enforcement manuals should maintain clear procedures and responsibilities for keeping the enforcement manual up to date. As a best practice, manuals may explicitly deal with such matters as (a) who, by office or title, is responsible for updating specific chapters, sections, or other subdivisions of the manual; (b) how often each chapter, section, or other subdivision of the manual is to be checked for accuracy with the agency's current policies and practices; and (c) considerations concerning the format and organization of any new or updated manual sections.

This report discusses the costs of maintaining an enforcement manual as well as the potential downsides of keeping in circulation an out-of-date enforcement manual. Where an agency has decided to promulgate and maintain an enforcement manual, the manual can serve its purpose only if it is a current, authoritative source concerning the agency's enforcement priorities and practices. While the body of the enforcement manual itself cannot be kept up to date in real time, best practices involve maintaining a catalogue of significant changes reflected in the agency's other guidance documents which would need to be reflected in a fully up-to-date enforcement manual. Recent enforcement-related guidance documents can be appended to electronic versions of the enforcement manual until their substance can be updated into the body of the manual. At a somewhat higher labor cost, the agency can also maintain an index of changes to the enforcement manual, which cross-references recent guidance documents to the specific sections of the enforcement manual which have been superseded or otherwise updated by those guidance documents.

Most importantly, an agency utilizing a publicly accessible enforcement manual should maintain clear procedures and responsibilities for keeping it up to date. Internal editions of enforcement manuals can include, in metadata appended to each manual section, information concerning the office or personnel expected to keep the section up to date. Regular communication, including meetings, between the centralized office of enforcement responsible for promulgating the manual and the line staff responsible for following it will be necessary to keep the manual adequately up to date. Interviewees with the IRS, whose enforcement manual is one of the most comprehensive in the federal government, expressed that keeping an eye on sections of the manual under their responsibility requires the daily attention of agency attorneys, facilitated by clear lines of responsibility regarding who is responsible for which parts of the

manual. Agencies maintaining less comprehensive manuals will doubtlessly find the burden proportionately lower, but institutions need to be maintained which clearly set guidelines on who is responsible for doing what and when to updating the manual.

Agencies should especially make explicit who is responsible for drafting new enforcement manual sections, for revising each section or other subdivision of the manual, and who needs to review and approve of changes to the manual. As a potential source of best practices, the IRM contains an extensive discussion of the procedures for updating an IRM section, the expected format of new and updated sections, the flagging of parties responsible for keeping each section up to date, and related matters.⁶⁹ While the IRM is far more expansive and complex than typical enforcement manuals, its extensive discussion, totaling more than 80 pages in computer printout, can likely be adapted to the needs of other agencies.

4. Agencies that have developed internal enforcement manuals should consider whether outside entities, including regulated entities and members of the public, are likely to benefit from public access to the manual. In doing so, agencies should consider: (a) the range of external groups with an interest in the agency's regulatory mission and enforcement activities; (b) whether other sources are available which provide access to similarly authoritative information of the sort relevant to each group's interests; (c) whether alternative sources are comparably easy to access and search for relevant information when compared to an enforcement manual with a table of contents and index; (d) whether the enforcement manual will provide additional transparency of a sort which will assist outside parties in understanding the agency's enforcement practices and priorities; and (e) the overall balance of costs and benefits, for both the agency and the public, of making the agency's enforcement manual public.

⁶⁹ See Internal Revenue Manual, 1.11.2 Internal Revenue Manual (IRM) Process (May 19, 2022), https://www.irs.gov/irm/part1/irm_01-011-002.

Among agencies which maintain enforcement manuals, some choose to make the manual publicly available, while others do not. This decision is highly specific to the nature of the agency's enforcement mission and its regulatory goals. Enforcement manuals can contain a wealth of information of value to regulated entities. Enforcement manuals, by definition, describe the steps of an agency's enforcement proceedings in detail, and this can be of use to regulated entities appearing before the agency. Enforcement manuals may also explain the procedural rights of regulated entities before the agency, such as the agency's understanding of confidentiality privileges afforded to regulated entities providing testimony or presenting documentary evidence. Some enforcement manuals also provide examples of offenses at various levels of severity, helping the regulated entity to understand why, for example, the agency may feel that a specific penalty or other enforcement outcome fits the situation as revealed in a specific enforcement action. As discussed above, much of the information contained in enforcement manuals is of value to entities other than those which are directly regulated by the agency, including the public.

Many of these sources are also useful to third parties. For example, local communities have a vested interest in environmental protection and health and safety measures undertaken by administrative agencies. To the extent enforcement manuals discuss such matters as when and how the agency makes enforcement information publicly available, how the agency engages in public outreach and educational initiatives, and how the agency takes in tips or complaints as inputs into its enforcement programs, a large number of outside parties besides the entities directly regulated may be benefited by the enhanced transparency a publicly available enforcement manual can provide.

If the agency does not make its enforcement manual publicly available, it should ensure not only that this information is provided through other forms of publicly available guidance, but also that these other guidance documents are prominently displayed, for example, on the agency's website, and that it is easy to locate the specific guidance document of interest to a regulated entity. Much of the value of an enforcement manual is that it provides a single, authoritative source for a wealth of information about the agency's enforcement process and that any piece of information needed is easily accessible thanks to the manual's index, table of contents, and/or rational structure in its presentation of information. This can significantly reduce the cost of locating relevant information, compared to searching for relevant guidance on agency websites or elsewhere. If an agency chooses to keep its enforcement manual internally accessible only, it should ensure that these benefits are not lost, for example, through maintaining a similar index of relevant enforcement guidance on its website.

This report has also discussed the costs of making an internal enforcement manual publicly available. On the agency, this includes any additional burden in redacting enforcement manual sections which are not appropriate for public disclosure and in fielding inquiries about interpretation of the enforcement manual. For the public, costs include the risk of misleading outsiders to the extent that the enforcement manual does not accurately describe agency practices and policies. These costs on the public, of course, can be ameliorated through increased costs for the agency, in terms of devoting more resources to maintaining the enforcement manual. In deciding whether to make its enforcement manual public, the agency should undertake an assessment of the comparative costs and benefits of public availability, including those for the agency itself, the regulated community, and interested outsiders in the broader public.

5. Even if an enforcement manual is publicly available, agencies should consider whether a plain language guidance document containing related information would be useful to regulated entities and the public. Such resources as policy statements, white papers, and annual reports may provide information to the public in a more useful format than the agency's internal staff manual.

As discussed extensively above, agencies issue a large variety of standing and periodic guidance on enforcement matters. Members of the public, and, to a lesser degree, even regulated entities engaged in enforcement proceedings have little need for much of the information contained in comprehensive agency enforcement manuals. Agencies may find it useful to promulgate alternative forms of enforcement guidance, such as the enforcement policy guidance promulgated by the NRC and FHFA, and by FERC's annual reports on enforcement, all discussed *supra*. In some cases, such alternative guidance may eliminate the need for publicly available enforcement manuals and spare the agency the trouble of maintaining redacted and nonredacted forms of the enforcement manual, or of maintaining both publicly accessible enforcement manuals and nonpublic manuals which supplement the public manual with nonpublic information and procedures. In other cases, less granular documents may simply serve the general public, and especially nonexpert or less sophisticated entities, in understanding the agency's enforcement mission better than the agency's internal enforcement manual would. The availability of alternative guidance is an important factor in weighing the benefits of enforcement manual disclosure, discussed in the last recommendation.

6. Regardless of whether an agency maintains a publicly available enforcement manual, it should consider the manner of presentation of its enforcement guidance. It should consider: (a) maintaining a single webpage which gathers all enforcement guidance relevant to regulated

entities and the general public; (b) sorting guidance documents topically or by regulated party as opposed to chronologically; (c) maintaining an index or other source which details which guidance documents modify, supersede, or otherwise affect other enforcement guidance; and (d) providing plain-language explanations of guidance documents and their legal effects for categories of guidance documents which are particularly likely to be of benefit to the general public.

One of the primary benefits of public accessibility is the extent to which enforcement manuals represent easily found and searchable sources of information about agency enforcement practices. Some agencies, particularly those engaged in a very large range of disparate regulatory and enforcement activities, provide an incredibly large volume of periodic guidance. Where an agency has regulatory authority over many different industries and/or types of entities, many or most of this guidance will not be of direct interest to any particular regulated entity or intended beneficiary of regulation. Enforcement manuals can be useful here, for example, to the extent they thematically divide their contents by chapter into the enforcement of different kinds of regulatory activity or regulatory activity against different kinds of entity. Especially where no comprehensive enforcement manual is available, agencies should carefully consider the mode of presentation, on their websites and elsewhere, of periodic guidance documents. A list of hundreds of guidance documents sorted by date or alphabetically will be significantly less useful than one sorted thematically, for example, by the industry subject to particular forms of enforcement. Here, as elsewhere, the value of access to enforcement manual must always be taken as a function of availability and usefulness of other methods used to present the same information.

Additionally, electronic delivery has enhanced the potential usefulness of enforcement manuals. As a potential best practice, the NRC's practice of appending related guidance documents as appendices and maintaining a log of changes allows its enforcement manual to remain much more up-to-date than would otherwise be possible. Such practices greatly reduce the labor required to stay current with the agency's enforcement practices and procedures, as interested parties need not scrutinize a backlog of unincorporated guidance documents potentially spanning years (or even decades) to ensure it has current information.

It should be noted that ACUS has already dealt with many of these matters in Recommendation 2019-3, Public Availability of Agency Guidance Documents.⁷⁰ That recommendation dealt with the extent to which guidance documents and relevant materials should be made available to the public and in what form. Recommendation 2019-3 contains a discussion of how agencies should manage guidance documents internally, the appropriate mode of presentation on agency websites, and the extent to which agencies should make the public aware of new or updated guidance documents. Each of ACUS's general recommendations applies to the enforcement guidance context.

7. Agencies should consider soliciting feedback from regulated entities and the public on the contents of their enforcement manuals and related guidance documents. They should consider what enforcement-related activities are of interest to the general public and how important public interests can be incorporated into the policies and procedures which are the subject of their enforcement manuals.

As this report has repeatedly emphasized, a diverse set of groups are interested in much of the contents of agency enforcement manuals. An example already cited is that the individuals

⁷⁰ 84 Fed. Reg. 38931 (Aug. 8, 2019).

and groups protected by a given regulatory scheme, such as an environmental protection program, have an interest in ensuring that the agency's procedures for intaking complains and evaluating them as the potential bases for enforcement proceedings can usefully take in public complains and tips. Agencies should consider whether it makes sense to put enforcement manuals through the notice and comment process or otherwise solicit input from regulated entities and members of the public.

ACUS has already dealt with these issues in some detail in Recommendation 2018-7, Public Engagement in Rulemaking.⁷¹ That recommendation concerned methods that agencies could use to solicit public feedback in addition to notice and comment.⁷² It recommended that agencies develop general policies for public engagement in the rulemaking process which can then be tailored on a case-by-case basis. Methods discussed include "requests for information" (RFIs) and "advance notice of proposed rulemaking" (ANPRMs) promulgated in the *Federal Register*, targeted outreach to communities which may be unlikely to participate in response to RFIs and ANPRMs, and the convening of meetings with particular communities to solicit feedback. Such procedures are not only useful when conducting rulemakings with the force of law. Generally speaking, the agency's practices when soliciting information or perspectives from the public and of communicating enforcement-related information to the public are themselves of public interest. Such forms of public outreach are thus likely of value to the public where the

⁷¹ 84 Fed. Reg. 2146 (Feb. 6, 2019).

⁷² ACUS has promulgated other recommendations in this domain, broadly construed. These include Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

agency is contemplating changes to enforcement manuals or other forms of enforcement guidance.

Appendix: Publicly Available Enforcement Manuals

The following agencies have enforcement manuals which are publicly available on their websites and were relied upon in preparing this report. Links are current and working through October 5, 2022.

DIVISION OF ENFORCEMENT, COMMODITY FUTURES TRADING COMMISSION, ENFORCEMENT MANUAL (May 20, 2020), *available at* <https://www.cftc.gov/media/1966>

OFFICE OF ENFORCEMENT, CONSUMER FINANCIAL PROTECTION BUREAU, POLICIES AND PROCEDURES MANUAL (May 5, 2017), *available at* <https://www.consumerfinance.gov/foia-requests/foia-electronic-reading-room/enforcement-policies-and-procedures-manual/>

OFFICE OF COMPLIANCE AND FIELD OPERATIONS, CONSUMER PRODUCT SAFETY COMMISSION, REGULATED PRODUCTS HANDBOOK (MAY 6, 2013), *AVAILABLE AT* <https://www.cpsc.gov/s3fs-public/RegulatedProductsHandbook.pdf>

OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUCATION, CASE PROCESSING MANUAL (July 18, 2022), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>

EMPLOYEE BENEFITS SECURITY ADMINISTRATION, U.S. DEP'T OF LABOR, ENFORCEMENT MANUAL, *available at* <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual-full>

FEDERAL AVIATION ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, ORDER 2150.3C: FAA COMPLIANCE AND ENFORCEMENT PROGRAM (Sept. 18, 2018), *available at* https://www.faa.gov/documentLibrary/media/Order/FAA_Order_2150.3C.pdf

FEDERAL DEPOSIT INSURANCE CORPORATION, FORMAL AND INFORMAL ENFORCEMENT ACTIONS MANUAL (July 22, 2022), *available at* <https://www.fdic.gov/regulations/examinations/enforcement-actions/index.html>

FEDERAL DRUG ADMINISTRATION, REGULATORY PROCEDURES MANUAL (February 18, 2022), *available at* <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-manuals/regulatory-procedures-manual>
<https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-manuals/compliance-program-manual>

OFFICE OF THE GENERAL COUNSEL, FEDERAL ELECTION COMMISSION, ENFORCEMENT MANUAL (November, 1997), *available at* https://www.fec.gov/resources/cms-content/documents/1997_enforcement_manual.pdf

FEDERAL TRADE COMMISSION, OPERATING MANUAL (November 11, 1971) [withdrawn], *available at* https://www.google.com/books/edition/Operating_Manual/kcNDKkldvbgC?hl=en:

INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL (October 5, 2022), *available at* <https://www.irs.gov/irm>

OFFICE OF GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL, available in three parts *at* <https://www.nlrb.gov/guidance/key-reference-materials/manuals-and-guides>

OFFICE OF ENFORCEMENT, NUCLEAR REGULATORY COMMISSION, ENFORCEMENT MANUAL (April 15, 2022): <https://www.nrc.gov/about-nrc/regulatory/enforcement/guidance.html#manual>

OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, U.S. DEP'T OF LABOR, DIRECTIVE NO. CPL 02-00-164: FIELD OPERATIONS MANUAL (April 14, 2020), *available at* <https://www.osha.gov/enforcement/directives/cpl-02-00-164>

DIVISION OF ENFORCEMENT, SECURITIES AND EXCHANGE COMMISSION, ENFORCEMENT MANUAL (November 28, 2017), *available at* <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>