



## Rules on Rulemakings

### Committee on Regulation

#### Proposed Recommendation for Committee | November 5, 2020

1 Numerous agencies have promulgated rules setting forth the policies and procedures they  
2 will follow when conducting their informal rulemaking process.<sup>1</sup> They can cover a variety of  
3 practices, including processes for initiating and seeking public input on new rules, coordinating  
4 with the White House and other agencies as a rule is being formulated, and obtaining approval  
5 from agency leadership before a proposed rule is issued or finalized. Agencies refer to these rules  
6 by different names. This Recommendation calls them “rules on rulemakings.”

7 Rules on rulemakings vary—in terms of the particular matters they address, their scope  
8 and comprehensiveness, and other characteristics—but they share several common features.  
9 First, they authoritatively reflect the agency’s position as to what procedures it will observe  
10 when adopting new rules. By “authoritative,” the Recommendation means that a rule on  
11 rulemakings sets forth the procedures that agency officials responsible for drafting and finalizing  
12 new rules will follow in at least most cases, though it may contemplate the possibility that  
13 agency leadership could authorize using an alternative set of procedures.<sup>2</sup>

14 Second, rules on rulemakings do not simply summarize or explain rulemaking  
15 requirements of the Administrative Procedure Act and other statutes, although they often serve  
16 an explanatory function at the same time that they set forth the procedures the agencies will

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<sup>1</sup> This Recommendation does not address rulemakings subject to the formal hearing requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 556–557.

<sup>2</sup> *Cf.* Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017).



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17 follow in conducting rulemakings. Rules on rulemakings set forth additional commitments by an  
18 agency concerning how it will conduct rulemakings. And third, agencies disseminate rules on  
19 rulemakings publicly rather than just internally. They appear on agency websites and are often  
20 published not only the *Federal Register* but also in the version of the *Federal Register* called the  
21 Code of Federal Regulations (CFR).

22 Rules on rulemakings can serve at least four important objectives. First, they promote  
23 efficiency by ensuring that both agency officials and those outside the agency know where to go  
24 to find the agency's rulemaking policies. Second, they promote predictability by informing the  
25 public that the agency will follow particular procedures, thereby allowing the public to plan their  
26 participation in the rulemaking process accordingly. Third, they promote accountability by  
27 ensuring that agency leadership has approved the policies and procedures the agency will follow.  
28 And they can also provide accountability in connection with individual rulemakings by creating  
29 an internal approval process by which agency leadership reviews proposed and final rules.  
30 Finally, they promote transparency by affording the public access to the agency's internal  
31 procedures pertaining to its rulemaking process.

32 In promulgating a rule on rulemakings, an agency may wish to solicit public comment to  
33 inform its development, even if it is subject to 5 U.S.C. § 553's exemption from notice-and-  
34 comment procedures as a rule of procedure, general statement of policy, or otherwise. As the  
35 Administrative Conference has acknowledged in past recommendations, public comment can  
36 both provide valuable input from the public and enhance public acceptance of the agency's  
37 rules.<sup>3</sup>

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<sup>3</sup> See Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (Jul. 8, 1992); see also Recommendation 2019-1, *supra* note 2; Recommendation 2017-5, *supra* note 2.



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38 An agency may also wish to publish its rule on rulemakings in the CFR. Doing so can  
39 enhance transparency and facilitate accountability. Importantly, publishing a rule on rulemakings  
40 in the CFR does not, by itself, make the rule on rulemakings judicially enforceable.<sup>4</sup>

41 This Recommendation does not address whether, when, or on what legal bases a court  
42 might enforce a rule on rulemakings against an agency. As Paragraph 7 below provides,  
43 however, an agency that does not wish to be bound by its rule on rulemakings may wish to  
44 include a provision in its rule on rulemakings stating that such rules do not create any rights or  
45 benefits, substantive or procedural.<sup>5</sup> Courts should consider such provisions in determining  
46 whether to hold rules on rulemakings enforceable. To avoid discouraging agencies from  
47 promulgating rules on rulemakings, the courts should give great deference to the agency's  
48 characterization of whether a particular rule on rulemakings is judicially enforceable, only  
49 binding on agency staff, merely information on general practices for the public and/or may be  
50 waived in particular circumstances.<sup>6</sup>

**Commented [TR1]:** Note for the Committee: Following up on the discussion from the last meeting, we've reviewed existing rules on rulemakings, and five out of the twenty-seven rules reviewed included such a disclaimer.

**Commented [TR2]:** Proposed edit from Senior Fellow E. Donald Elliott.

**RECOMMENDATION**

- 51 1. Agencies should consider promulgating rules setting forth the policies and procedures  
52 they will follow when conducting their informal rulemaking process (rules on  
53 rulemakings).
- 54 2. In issuing rules on rulemakings, agencies should consider including provisions  
55 addressing the following topics (which reflect topics frequently covered in existing  
56 agency rules on rulemakings):

<sup>4</sup> See, e.g., Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (stating that "publication in the Code of Federal Regulations, or its absence" is only "a snippet of evidence of agency intent" that the published pronouncement has binding effect).  
<sup>5</sup> See, e.g., 49 C.F.R. § 5.23.  
<sup>6</sup> See, e.g., Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 228 (D.C. Cir. 2007) ("[W]e have previously relied on similar disclaimers as relevant to the conclusion that a guidance document is non-binding.").



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- 57 (a) Procedures prior to the issuance of a notice of proposed rulemaking (e.g., regulatory  
58 plan processes, advance notices of proposed rulemaking);
- 59 (b) Procedures connected with the notice-and-comment process (e.g., materials to be  
60 published on Regulations.gov with the notice, minimum comment period to be  
61 allowed);
- 62 (c) Procedures connected with the presidential review process, if applicable;
- 63 (d) Procedures for reassessing existing rules; and
- 64 (e) Internal approval procedures for issuing and finalizing rules (e.g., treatment of post-  
65 comment period communications).
- 66 3. Agencies should make rules on rulemakings available in a prominent, easy-to-find place  
67 on the portion of their websites dealing with rulemaking matters. Agencies should use  
68 techniques like linked tabs, pull-down menus, indexing, tagging, and sorting tables to  
69 ensure that relevant documents are easily findable. Agencies should also design their  
70 search engines to allow one to easily identify relevant documents.
- 71 4. Agencies should consider, in addition to issuing rules on rulemakings, providing an  
72 generalized explanation of how the rulemaking process works without setting forth any  
73 procedures that the agency will follow to educate the public. Such explanations might be  
74 integrated within a rule on rulemakings itself, or they might be contained in separate  
75 explanatory documents (e.g., documents identifying frequently asked questions). When  
76 providing such explanations, an agency should, to the extent practicable, distinguish  
77 between procedures it intends to follow and material that is provided purely by way of  
78 background.
- 79 5. Agencies should consider citing their rules on rulemakings in any proposed or final rule  
80 that draws upon the procedures contained therein.
- 81 6. Agencies should consider seeking public input on rules on rulemakings (whether through  
82 notice and comment or some other mechanism), whether or not they are required to do so  
83 under the Administrative Procedure Act (5 U.S.C. § 553).

**Commented [TR3]:** Proposed edit from Senior Fellow Peter L. Strauss.

**Commented [TR4]:** Proposed edits from Senior Fellow Peter L. Strauss.

**Commented [TR5]:** Note for the Committee: During the second Committee meeting, there seemed to be consensus that the twenty-six-item list was too long and that the items should be grouped. We welcome discussion on this proposed grouping and whether a longer list of items should appear in an appendix.

**Commented [TR6]:** Proposed edit from Senior Fellow Peter L. Strauss.

**Commented [TR7]:** Note for the Committee: Should the Recommendation say anything about *Federal Register* or CFR publication?

**Commented [TR8]:** Proposed edits from Senior Fellow Peter L. Strauss.

**Commented [TR9]:** Note for the Committee: At the second Committee meeting, the Committee discussed whether this recommendation should be included but did not reach consensus. We flag this for discussion.



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- 84 7. If agencies do not wish for their rules on rulemakings to be enforceable in court on  
85 judicial review of a rule alleged to have been issued inconsistently with the rule on  
86 rulemakings, they should consider including a statement within their rules on  
87 rulemakings that such rules do not create any rights or benefits, substantive or procedural.  
88 8. If agencies desire the flexibility to take a different approach than that set forth in the rule  
89 on rulemakings, they should consider drafting the rule in such a way that permits officials  
90 at a higher level of the agency hierarchy to authorize other officials within the agency to  
91 take action that varies from the rule on rulemakings.