

ACUS

**Administrative Conference of the
United States**

**82nd Plenary Session
December 12, 2024**



**Small Business Administration
Eisenhower Conference Room**

**409 Third Street SW
Washington, DC**

Table of Contents

82nd Plenary Session Agenda	3
Resolution Governing the Order of Business	5
81st Plenary Session Minutes	7
ACUS Bylaws	11
Public Meeting Policies & Procedures	17
Members	19
Office of the Chair	27
Ongoing Projects	29
Recommendation: <i>Using Algorithmic Tools in Regulatory Enforcement</i>	31
Redline Version	37
Recommendation: <i>Public Engagement in Agency Rulemaking Under the Good Cause Exemption</i>	45
Redline Version	53
Recommendation: <i>Nonlawyer Assistance and Representation</i>	61
Redline Version	71
Statement of Principles for Administrative Adjudication	81
Statement of Principles for Agency Guidance	109



82nd Plenary Session Agenda

- 9:30 Call to Order
 Opening Remarks by Chair Andrew Fois
 Initial Business
 *Vote on Adoption of Minutes and Resolution Governing the Order of
 Business*
- 10:00 Interview with Judge David S. Tatel, U.S. Court of Appeals for the District
 of Columbia Circuit (Ret.)
- Nicholas Bagley, *Public Member*
 - Cristina Rodríguez, *Public Member*
- 10:45 Consider Recommendation
 Using Algorithmic Tools in Regulatory Enforcement
- 12:00 Presentation and Discussion
 Statement of Principles for Administrative Adjudication
 Statement of Principles for Agency Guidance
- 12:15 Lunch
- 1:15 Consider Recommendation
 Public Engagement in Agency Rulemaking Under the Good Cause Exemption
- 2:30 Consider Recommendation
 Nonlawyer Assistance and Representation
- 3:45 Special Closing Remarks by Chair Fois and Adjourn

Resolution Governing the Order of Business

The time initially allotted to each item of business is separately stated in the agenda. Individual comments from the floor shall not exceed five minutes, unless further time is authorized by unanimous consent of the voting members present. A majority of the voting members present may extend debate on any item for up to 30 additional minutes. At any time after the expiration of the time initially allotted to an item, the Chair shall have discretion to move the item to a later position in the agenda.

Unless the Chair determines otherwise, amendments and substitutes to recommendations that have been timely submitted in writing to the Office of the Chair before the meeting will receive priority in the discussion of any proposed item of business; and other amendments and substitutes to recommendations will be entertained only to the extent that time permits.



81st Plenary Session Minutes

June 13, 2024

I. Call to Order

The 81st Plenary Session of the Administrative Conference of the United States (ACUS) commenced at approximately 9 a.m. on June 13, 2024. ACUS Chair Andrew Fois called the meeting to order and introduced the Honorable Eugene Scalia, who provided a keynote address.

II. Keynote Address: The Honorable Eugene Scalia

At approximately 9:15 a.m., the Honorable Eugene Scalia, Co-Chair of the Gibson Dunn & Crutcher Administrative Law & Regulatory Practice Group and former Secretary of Labor, addressed the Assembly.

At the outset of his remarks, Mr. Scalia described his late father's enduring fondness for ACUS, recalling Justice Antonin Scalia's respect for and support of the Conference and lauding the Conference's unique role as one of the few remaining forums that fosters the civil exchange and debate of competing ideas for improving the operation of the federal government. Mr. Scalia then shared his views on the proper role of presidentially appointed and Senate-confirmed officials in the administration of federal agencies and programs, sharing several anecdotes from his time as both Solicitor and Secretary of the Department of Labor that informed his views. Finally, Mr. Scalia discussed the important role that private suits for judicial review play in vindicating the rights of regulated parties and ensuring that agency actions comply with all applicable rules. At the conclusion of his prepared remarks, Mr. Scalia accepted and answered questions from members of the Assembly. In appreciation of Mr. Scalia's remarks, Chair Fois presented a framed photograph of Justice Scalia taken during his time as ACUS Chair.

III. Opening Remarks & Initial Business

At the conclusion of Mr. Scalia's keynote address, Chair Fois provided an update on recent staffing changes within the Office of the Chair, introduced members of the Council, and welcomed new members appointed since the 80th Plenary Session. Chair Fois then gave the Chair's Report, briefly describing the recent work of the agency. He highlighted several studies currently underway, recently released and forthcoming ACUS publications, and ongoing roundtables and forums through which ACUS provides opportunities for agencies to convene and share information.

Following the Chair's Report, Chair Fois reviewed the rules for debating and voting on matters at the Plenary Session. ACUS members then approved the minutes for the 80th Plenary Session and adopted the resolution governing the order of business for the 81st Plenary Session. Chair Fois then thanked members, committee chairs, staff, and consultants for their diligent work in preparing proposed recommendations for consideration by the Assembly.

IV. Consideration of Proposed Recommendation: Choice of Forum for Judicial Review of Agency Rules

Chair Fois introduced the proposed recommendation, thanking Kirti Datla (Public Member), Chair of the Committee on Judicial Review; project consultant Joseph Mead; and Kazia Nowacki, ACUS Staff Counsel.

Mr. Mead provided an overview of the report and Ms. Datla discussed the Committee's deliberations on the proposed recommendation. Chair Fois then opened the floor for debate on the proposed recommendation and consideration of amendments. During consideration of pending pre-submitted amendments, debate was suspended to resolve a quorum call requested by Public Member Kate Todd. Debate resumed after a quorum was verified by ACUS General Counsel Shawne McGibbon, and various amendments were considered and adopted. Following resolution of all proposed amendments, Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

V. Consideration of Proposed Recommendation: Individualized Guidance

Chair Fois introduced the proposed recommendation, thanking Bertrall Ross (Public Member), Chair of the Committee on Rulemaking; project consultant Shalini Ray; and Benjamin Birkhill, ACUS Staff Counsel.

Ms. Ray provided an overview of the report, and Mr. Ross discussed the Committee's deliberations. Chair Fois then opened the floor for debate on the proposed recommendation and consideration of amendments. Various amendments were considered and adopted. Following resolution of all proposed amendments, Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

VI. Consideration of Proposed Recommendation: Senate-Confirmed Officials and Administrative Adjudication

Chair Fois introduced the proposed recommendation, thanking: Nadine Mancini (Government Member), Chair of the Committee on Adjudication; ACUS in-house researchers Jeremy Graboyes (Research Director), Matthew Gluth (Deputy Research Director) and Jennifer Selin (Attorney Advisor); and Matthew Gluth, who served as Staff Counsel to the Committee.

Mr. Graboyes provided an overview of the report, and Ms. Mancini discussed the Committee's deliberations. Chair Fois then opened the floor for debate on the proposed recommendation and consideration of amendments. Various amendments were considered and adopted. Following resolution of all proposed amendments, Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

VII. Consideration of Proposed Recommendation: Agency Management of Congressional Constituent Service Inquiries

Chair Fois introduced the proposed recommendation, thanking Eloise Pasachoff (Public Member), Chair of the Committee on Administration & Management; project consultant Sean Kealy; and Conrad Dryland, ACUS Staff Counsel.

Mr. Kealy provided an overview of the report, and Ms. Pasachoff discussed the Committee's deliberations. Chair Fois then opened the floor for debate on the proposed recommendation and consideration of amendments. Various amendments were considered and adopted. Following resolution of all proposed amendments, Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

VIII. Office of the Chair Project: Working Group on Model Rules of Representative Conduct

After adoption of the final proposed recommendation on the agenda, Chair Fois introduced the Office of the Chair's Working Group on Model Rules of Representative Conduct, thanked its members for their diligent work producing the draft model rules, and welcomed

Working Group member George Cohen, Louis J. Virelli (the Group's Reporter), and Matthew Gluth (the Group's Staff Counsel) for a presentation on the content and development of the model rules.

Chair Fois then encouraged all ACUS members to review the draft model rules and submit any comments or proposed revisions to the Working Group by June 27 to facilitate their consideration at the Group's final meeting in July.

IX. Closing Remarks & Adjournment

Upon conclusion of the presentation on the draft model rules of representative conduct, Chair Fois thanked Members and staff for their attendance and participation in the day's proceedings. At approximately 5:00 p.m., Chair Fois adjourned the 81st Plenary Session of the Administrative Conference of the United States.

ACUS Bylaws

Bylaws of the Administrative Conference of the United States

Last updated: June 16, 2023

[The numbering convention below reflects the original numbering that appeared in Title 1, Code of Federal Regulations (CFR), Part 302, which was last published in 1996. Although the original numbering convention is maintained below, the bylaws are no longer published in the CFR. The official copy of the bylaws is currently maintained on the Conference's website at <https://www.acus.gov/policy/administrative-conference-bylaws>.]

§ 302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§ 591 *et seq.*, 78 Stat. 615 (1964), as amended, authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purposes of the Administrative Conference are to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest, to promote more effective participation and efficiency in the rulemaking process, to reduce unnecessary litigation and improve the use of science in the regulatory process, and to improve the effectiveness of laws applicable to the regulatory process. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

§ 302.2 Membership

(a) General

(1) Each member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly, either in person or by telephone or videoconference if that is permitted for the session or meeting involved. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. The Chairman shall, by random selection, identify one-half of the non-Government members appointed in 2010 to serve terms ending on June 30, 2011, and the other half to serve terms ending on June 30, 2012. Thereafter, all non-Government member terms shall be for two years. No non-Government members shall at any time be in continuous service beyond three terms; provided, however, that such former members may thereafter be

appointed as senior fellows pursuant to paragraph (e) of this section; and provided further, that all members appointed in 2010 to terms expiring on June 30, 2011, shall be eligible for appointment to three continuous two-year terms thereafter.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he or she leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he or she enters full-time government service. In the event a non-Government member of the Conference appointed by the Chairman resigns or becomes ineligible to continue as a member, the Chairman shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a member may designate (by e-mail) a suitably informed alternate to participate for a member in a meeting of the committee, and that alternate may have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of or liaisons to the Conference for six or more years, former members who have served as members of the federal judiciary, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Senior fellows shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) Special Counsels

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Special counsels shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication
2. Committee on Administration
3. Committee on Judicial Review
4. Committee on Regulation
5. Committee on Rulemaking

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. The Chairman, with the approval of the Council, may establish additional standing committees or rename, modify, or terminate any standing committee.

(b) Special Committees

With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. Such special committees shall expire after two years, unless their term is renewed by the Chairman with the approval of the Council for an additional period not to exceed two years for each renewal term. The Chairman may also terminate any special committee with the approval of the Council when in his or her judgment the committee's assignments have been completed.

(c) Coordination

The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

§ 302.4 Liaison Arrangements

(a) Appointment

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(b) Term

Any liaison arrangement entered into on or before January 1, 2020, shall remain in effect for the term ending on June 30, 2022. Any liaison arrangement entered into after January 1, 2020, shall terminate on June 30 in 2-year intervals in even-numbered years. The Chairman may, with the approval of the Council, extend the term of any liaison arrangement for additional terms of two years. There shall be no limit on the number of terms.

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

(1) The Office of Government Ethics and the Office of Legal Counsel have advised the Conference that non-Government members are special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. Accordingly, the Chairman of the Conference is authorized to prescribe requirements for the filing of information with respect to the employment and financial interests of non-Government members consistent with law, as he or she reasonably deems necessary to comply with these provisions of law, or any applicable law or Executive Order or other directive of the President with respect to participation in the activities of the Conference (including but not limited to eligibility of federally registered lobbyists).

(2) The Chairman will include with the agenda for each plenary session and each committee meeting a statement calling to the attention of each participant in such session or meeting the requirements of this section, and requiring each non-Government member to provide the information described in paragraph (a)(1), which information shall be

maintained by the Chairman as confidential and not disclosed to the public. Except as provided in this paragraph (a) or paragraph (b), members may vote or participate in matters before the Conference to the extent permitted by these by-laws without additional disclosure of interest.

(b) Disqualifications

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

(2) No member may vote or otherwise participate in that capacity with respect to any proposed recommendation in connection with any study as to which he or she has been engaged as a consultant or contractor by the Conference.

(c) Applicability to Senior Fellows, Special Counsel, and Liaison Representatives

This section shall apply to senior fellows, special counsel, and liaison representatives as if they were members.

§ 302.6 General

(a) Meetings

In the case of meetings of the Council and plenary sessions of the Assembly, the Chairman (and, in the case of committee meetings, the committee chairman) shall have authority in his or her discretion to permit attendance by telephone or videoconference. All sessions of the Assembly and all committee meetings shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to special counsel, and to liaison representatives (and to consultants and staff members insofar as matters on which they have been engaged are under consideration), and to persons who, prior to the commencement of the session or meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly (or, in the case of committee meetings, the approval of the chairman of the committee and unanimous consent of the committee).

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council. Action by the Council may be effected either by meeting or by individual vote, recorded either in writing or by electronic means.

(c) Proposed Amendments at Plenary Sessions

Any amendment to a committee-proposed recommendation that a member wishes to move at a plenary session should be submitted in writing in advance of that session by the date established by the Chairman. Any such pre-submitted amendment, if supported by a proper motion at the plenary session, shall be considered before any amendments that were not pre-submitted. An amendment to an amendment shall not be subject to this rule.

(d) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation. A

member's failure to file or join in such a separate statement does not necessarily indicate his or her agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Chairman or his or her designee not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(e) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(f) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

Public Meeting Policies & Procedures

Last updated: June 12, 2023

The Administrative Conference of the United States (the “Conference”) adheres to the following policies and procedures regarding the operation and security of committee meetings and plenary sessions open to the public.

Public Notice of Plenary Sessions and Committee Meetings

The Administrative Conference will publish notice of its plenary sessions in the *Federal Register* and on the Conference’s website, www.acus.gov. Notice of committee meetings will be posted only on the Conference website. Barring exceptional circumstances, such notices will be published 15 calendar days before the meeting in question. Members of the public can also sign up to receive meeting alerts at acus.gov/subscribe.

Public Access to Meetings

Members of the public who wish to attend a committee meeting or plenary session in person or remotely should RSVP online at www.acus.gov no later than two business days before the meeting. To RSVP for a meeting, go to the Calendar on ACUS’s website, click the event you would like to attend, and click the “RSVP” button. ACUS will reach out to members of the public who have RSVP’d if the meeting space cannot accommodate all who wish to attend in person.

Members of the public who wish to attend a meeting held at ACUS headquarters should first check in with security at the South Lobby entrance of Lafayette Centre, accessible from 20th Street and 21st Street NW. Members of the public who wish to attend an ACUS-sponsored meeting held at another facility should follow that facility’s access procedures.

The Conference will make reasonable efforts to provide interested members of the public remote access to all committee meetings and plenary sessions and to provide access on its website to archived video of committee meetings and plenary sessions. The Conference will make reasonable efforts to post remote access information or instructions for obtaining remote access information on its website prior to a meeting. The *Federal Register* notice for each plenary session will also include remote access information or instructions for obtaining remote access information.

Participation in Meetings

The 101 statutory members of the Conference as well as liaison representatives, special counsels, and senior fellows may speak at plenary sessions and committee meetings. Voting at plenary sessions is limited to the 101 statutory members of the Conference. Statutory members may also vote in their respective committees. Liaison representatives, special counsels, and senior fellow may vote in their respective committees at the discretion of the Committee Chair.

The Conference Chair, or the Committee Chair at committee meetings, may permit a member of the public to speak with the unanimous approval of all present voting members. The Conference expects that every public attendee will be respectful of the Conference’s staff, members, and others in attendance. A public attendee will be considered disruptive if he or

she speaks without permission, refuses to stop speaking when asked by the Chair, acts in a belligerent manner, or threatens or appears to pose a threat to other attendees or Conference staff. Disruptive persons may be asked to leave and are subject to removal.

Written Public Comments

To facilitate public participation in committee and plenary session deliberations, the Conference typically invites members of the public to submit comments on the report(s) or recommendation(s) that it will consider at an upcoming committee meeting or plenary session.

Comments can be submitted online by clicking the "Submit a comment" button on the webpage for the project or event. Comments that cannot be submitted online can be mailed to the Conference at 1120 20th Street NW, Suite 706 South, Washington, DC 20036.

Members of the public should make sure that the Conference receives comments before the date specified in the meeting notice to ensure proper consideration.

Disability or Special Needs Accommodations

The Conference will make reasonable efforts to accommodate persons with physical disabilities or special needs. If you need special accommodations due to a disability, you should contact the Staff Counsel listed on the webpage for the event or the person listed in the *Federal Register* notice no later than seven business days before the meeting.

Members

Council Members

Funmi Olorunnipa Badejo, *Head of Compliance*, Palantir Technologies
Shakuntla L. Bhaya, *Attorney at Law*, Law Offices of Doroshov, Pasquale, Krawitz & Bhaya
Ronald A. Cass, *President*, Cass & Associates, PC
Kristen Clarke, *Assistant Attorney General for Civil Rights*, U.S. Department of Justice
Andrew Fois, *Chair*, Administrative Conference of the U.S.
Leslie B. Kiernan, *General Counsel*, U.S. Department of Commerce
Fernando R. Laguarda, *Deputy General Counsel*, U.S. General Services Administration
Anne Joseph O'Connell, *Adelbert H. Sweet Professor of Law*, Stanford Law School
Nitin Shah, *Director & Associate General Counsel for Global Regulatory Affairs & Compliance*, Shopify
Damon Smith, *General Counsel*, U.S. Department of Housing and Urban Development
Jonathan C. Su, *Partner*, Latham & Watkins LLP

Government Members

David J. Apol, *General Counsel*, U.S. Office of Government Ethics
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Eric S. Benderson, *Associate General Counsel for Litigation & Claims*, U.S. Small Business Administration
Amy L. Brown, *Deputy General Counsel for Housing Programs*, U.S. Department of Housing and Urban Development
Brook Poole Clark, *General Counsel*, U.S. Nuclear Regulatory Commission
Daniel Cohen, *Assistant General Counsel for Regulation*, U.S. Department of Transportation
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Erica Siegmund Hough, *Deputy Associate General Counsel*, Federal Energy Regulatory Commission
Phillip C. Hughey, *General Counsel*, Federal Maritime Commission
Kristin N. Johnson, *Commissioner*, Commodity Futures Trading Commission
Alice M. Kottmyer, *Attorney Adviser*, U.S. Department of State

Adam Kress, *Associate General Counsel*, Surface Transportation Board
Michael Lezaja, *Senior Attorney*, Federal Trade Commission
Raymond A. Limon, *Board Member*, U.S. Merit Systems Protection Board
Philip J. Lindenmuth, *Executive Counsel to the Chief Counsel*, Internal Revenue Service
Hilary Malawer, *Deputy General Counsel*, U.S. Department of Education
Nadine N. Mancini, *General Counsel*, Occupational Safety and Health Review Commission
Christina E. McDonald, *Associate General Counsel for Regulatory Affairs*, U.S. Department of Homeland Security
Elizabeth A. M. McFadden, *Deputy General Counsel for General Law*, U.S. Securities and Exchange Commission
David Mednick, *Deputy Chief Counsel for Program Review*, U.S. Food & Drug Administration
Patrick R. Nagle, *Chief Administrative Law Judge*, Social Security Administration
Raymond Peeler, *Associate Legal Counsel*, U.S. Equal Employment Opportunity Commission
Mitchell E. Plave, *Special Counsel*, Office of the Comptroller of the Currency
David Quinn, *Assistant Chief Counsel for the Court of Appeals for Veterans Claims Litigation Group*, U.S. Department of Veterans Affairs
Roxanne L. Rothschild, *Executive Secretary*, National Labor Relations Board
Marguerite Sagatelian, *Senior Special Counsel, Legal Division*, Federal Deposit Insurance Corporation
Jay R. Schwarz, *Senior Counsel*, Board of Governors of the Federal Reserve System
Helen Serassio, *Associate General Counsel, Cross-Cutting Issues Law Office*, U.S. Environmental Protection Agency
Reema Shah, *Deputy General Counsel for Strategic Initiatives*, U.S. Department of Commerce
Miriam Smolen, *Senior Deputy General Counsel*, Federal Housing Finance Agency
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David A. Trissell, *General Counsel*, U.S. Postal Regulatory Commission
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Public Members

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Nicholas Bagley, *Professor of Law*, University of Michigan Law School
Kent H. Barnett, *Dean and J. Gilbert Reece Chair in Contract Law*, The Ohio State University Moritz College of Law
Bernard W. Bell, *Professor of Law and Herbert Hanoach Scholar*, Rutgers Law School
Maggie Blackhawk, *Professor of Law*, New York University School of Law
Susan G. Braden, *Jurist in Residence*, George Mason University Antonin Scalia Law School; *Former Chief Judge*, U.S. Court of Federal Claims
Kirti Datla, *Director of Strategic Legal Advocacy*, Earthjustice

Seth Davis, *Professor of Law*, UC Berkeley School of Law
 Jennifer B. Dickey, *Associate Chief Counsel*, U.S. Chamber Litigation Center
 Steven A. Engel, *Partner*, Dechert LLP
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 Cristina Rodríguez, *Leighton Homer Surbeck Professor of Law*, Yale Law School
 Jeffrey A. Rosen, *Of Counsel*, Cravath Swaine & Moore LLP; *Nonresident Fellow*, American Enterprise Institute
 Bertrall Ross, *Justice Thurgood Marshall Distinguished Professor of Law; Director, Karsh Center for Law and Democracy*, University of Virginia School of Law
 Ganesh Sitaraman, *New York Alumni Chancellor's Chair in Law; Director, Vanderbilt Policy Accelerator for Political Economy & Regulation*, Vanderbilt Law School
 Mila Sohoni, *Professor of Law*, Stanford Law School
 Cheryl M. Stanton, *Chief Legal & Government Affairs Officer*, BrightStar Care
 Kate Todd, *Partner*, Torridon Law PLLC
 Anthony E. Varona, *Dean and Professor of Law*, Seattle University School of Law
 Louis J. Virelli III, *Professor of Law*, Stetson University College of Law
 Melissa Feeney Wasserman, *Charles Tilford McCormick Professor of Law*, The University of Texas at Austin School of Law
 Jonathan B. Wiener, *William R. and Thomas L. Perkins Professor of Law, Professor of Environmental Policy, and Professor of Public Policy*, Duke University School of Law
 Susan Webb Yackee, *Director and Collins-Bascom Professor of Public Affairs*, University of Wisconsin-Madison La Follette School of Public Affairs

Liaison Representatives

Thomas H. Armstrong, *General Counsel*, U.S. Government Accountability Office
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Assembly Projects

(Directed toward development of recommendations for consideration and adoption by the Assembly)

Agency Investigative Procedures
Collection, Use, and Availability of Agency Adjudication Data
Consultation with State, Local, and Tribal Governments in Regulatory Policymaking
Federal Agency Collaboration with State, Local, Tribal, and Territorial Governments
Obtaining Government Records for Use in Agency Proceedings
Organization, Management, and Operation of Agency Adjudication Offices
Public Participation in Agency Adjudication
Regional Administration of Regulatory Programs

Office of the Chair

Forthcoming and Ongoing Publications
Agency Awards Under Equal Access to Justice Act
Chief Artificial Intelligence Officers
Federal Administrative Procedure Sourcebook
International Regulatory Cooperation
Effectuation of Benefits
Procedural Rules
Sourcebook of United States Executive Agencies (3d ed.)
Statement of Principles for Agency Adjudication
Statement of Principles for Agency Guidance
Statement of Principles for the Disclosure of Federal Administrative Materials
Statement of Principles for Public Engagement in Agency Rulemaking
Timing of Judicial Review of Agency Action

Recent Publications
Model Rules of Representative Conduct
Nationwide Injunctions and Federal Regulatory Programs
Sourcebook of Federal Judicial Review Statutes

Recent Forums
Federal Artificial Intelligence Use
International Regulatory Cooperation
Nationwide Injunctions: Impact on Regulatory Programs, Opportunities, and Challenges
Recent Administrative Law Developments in the Supreme Court: What's Next for Agencies?

Roundtables
Roundtable on Artificial Intelligence in Federal Agencies
Council of Independent Regulatory Agencies
Council on Federal Agency Adjudication
Interagency Roundtable
Roundtable on State Administrative Procedural Practices
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Website Resources
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Using Algorithmic Tools in Regulatory Enforcement

Committee on Regulation

Proposed Recommendation for Plenary | December 12, 2024

1 The use of artificial intelligence (AI) and other algorithmic tools is changing how
2 government agencies do their work. As the Administrative Conference has recognized, these
3 tools “hold out the promise of lowering the cost of completing government tasks and improving
4 the quality, consistency, and predictability of agencies’ decisions.” At the same time, these tools
5 “raise concerns about the full or partial displacement of human decision making and discretion.”¹
6 The Conference adopted Statement #20, *Agency Use of Artificial Intelligence*, in 2020 to help
7 agencies consider when and how to use algorithmic tools appropriately.² More recently, it
8 adopted specific recommendations addressing the use of algorithmic tools to review regulations,³
9 manage public comments,⁴ and provide guidance to the public.⁵

10 In this Recommendation, the Conference turns to the use of algorithmic tools in
11 regulatory enforcement. An algorithmic tool is a computer-based process that “uses a series of
12 rules or inferences drawn from data to transport specified inputs into outputs to make decisions
13 or support decision making,” and includes the use of AI technologies.⁶ Many agencies engage in
14 regulatory enforcement—that is, detecting, investigating, and prosecuting potential violations of

¹ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

² *Id.*

³ Admin. Conf. of the U.S., Recommendation 2023-3, *Using Algorithmic Tools in Retrospective Review of Agency Rules*, 88 Fed. Reg. 42,681 (July 3, 2023).

⁴ Admin. Conf. of the U.S., Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36,075 (July 8, 2021).

⁵ Admin. Conf. of the U.S., Recommendation 2022-3, *Automated Legal Guidance at Federal Agencies*, 87 Fed. Reg. 39,798 (July 5, 2022).

⁶ Statement #20, *supra* note 1.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

15 the laws they administer. These agencies are often “faced with assuring the compliance of an
16 increasing number of entities and products without a corresponding growth in agency
17 resources.”⁷ As agencies seek to identify ways to make regulatory compliance “more effective
18 and less costly,”⁸ many are considering how they can use algorithmic tools to perform regulatory
19 enforcement tasks such as monitoring compliance; detecting potential noncompliance;
20 identifying potential subjects for investigation, inspection, or audit; and gathering evidence to
21 determine whether corrective action against a regulated person is warranted. Indeed, a report to
22 the Conference analyzing the use of AI in federal administrative agencies found that “AI has
23 made some of its most substantial inroads in the context of agency enforcement activities.”⁹

24 The use of algorithmic tools in regulatory enforcement presents additional unique
25 opportunities for agencies. When used appropriately, such tools may enable agencies to perform
26 enforcement tasks even more efficiently, accurately, and consistently. Algorithmic tools may be
27 particularly useful in performing many of the most time- and resource-intensive tasks associated
28 with regulatory enforcement, such as synthesizing voluminous records, determining patterns in
29 complex filings, and helping identify activities that might require additional review by a human.

30 At the same time, significant challenges and concerns arise in agencies’ use of
31 algorithmic tools in regulatory enforcement.¹⁰ The Conference has previously identified possible
32 risks associated with agencies’ use of algorithmic tools, including insufficient transparency,

⁷ See, e.g., Admin. Conf. of the U.S., Recommendation 2012-7, *Agency Use of Third-Party Programs to Assess Regulatory Compliance*, 78 Fed. Reg. 2941, 2941 (Jan. 15, 2013).

⁸ *Id.* at 2941. In Recommendation 2012-7, the Conference noted that agencies “may leverage private resources and expertise in ways that make regulation more effective and less costly.” *Id.* at 2942.

⁹ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm in Federal Administrative Agencies* (Feb. 2020) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/document/government-algorithm-artificial-intelligence-federal-administrative-agencies>; Cary Coglianese, *A Framework for Governmental Use of Machine Learning* (Dec. 8, 2020) (report to the Admin. Conf. of the U.S.) available at <https://www.acus.gov/document/framework-governmental-use-machine-learning-final-report>.

¹⁰ Michael Karanicolas, *Artificial Intelligence and Regulatory Enforcement* (Sept. 27, 2024) (draft report to the Admin. Conf. of the U.S.); see also Recommendation 2023-3, *supra* note 3; Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Recommendation 2021-1, *supra* note 4; Statement #20, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

33 internal and external oversight, and explainability;¹¹ the potential to unintentionally create or
34 exacerbate “harmful biases” by encoding and deploying them at scale;¹² and the possibility that
35 agency personnel will devolve too much decisional authority to AI systems.¹³ Such risks are
36 heightened when, as in the regulatory enforcement context, agencies use algorithmic tools to
37 make decisions or take actions that impact a person’s rights, civil liberties, privacy, safety, equal
38 opportunities, or access to government resources or services.¹⁴

39 Since the Conference issued Statement #20, Congress enacted the AI in Government Act,
40 which directs the Director of the Office of Management and Budget (OMB) to provide agencies
41 with guidance on removing barriers to agency AI use “while protecting civil liberties, civil
42 rights, and economic and national security” and on best practices for identifying, assessing, and
43 mitigating harmful bias.¹⁵ Executive Order 13960, *Promoting the Use of Trustworthy Artificial*
44 *Intelligence in the Federal Government*, identifies principles for agencies when designing,
45 developing, acquiring, and using AI and directs agencies to inventory their uses of AI and make
46 them publicly available.¹⁶ Executive Order 14110, *Safe, Secure, and Trustworthy Development*
47 *and Use of Artificial Intelligence*, requires agencies to designate Chief AI Officers, who have
48 primary responsibility for overseeing their agencies’ AI use and coordinating with other
49 agencies, and establishes the Chief AI Officer Council to coordinate the development and use of
50 AI across agencies.¹⁷ OMB Memorandum M-24-10, *Advancing Governance, Innovation, and*

¹¹ “Explainability” allows those using or overseeing AI systems to “gain deeper insights into the functionality and trustworthiness of the system, including its outputs,” and helps users understand the potential impacts and purposes of an AI system. NAT. INST. OF STANDARDS & TECH., ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) (2023).

¹² Statement #20, *supra* note 1, at 3.

¹³ *See id.*, at 3–4.

¹⁴ *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-10, ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE 29 (2024) (providing a comprehensive definition of “rights-impacting” uses of AI) [hereinafter OMB MEMO].

¹⁵ Pub. L. No. 116-260, div. U, title 1, § 104 (2020) (codified at 40 U.S.C. § 11301 note).

¹⁶ *See* Exec. Order No. 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78939 (Dec. 3, 2020).

¹⁷ Exec. Order No. 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75191 (Oct. 30, 2023); OMB MEMO, *supra* note 14.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

51 *Risk Management for Agency Use of Artificial Intelligence*, which implements the AI in
52 Government Act and Executive Order 14110, provides guidance to agencies on strengthening the
53 effective and appropriate use of AI, advancing innovation, and managing risks, particularly those
54 related to rights-impacting uses of AI.¹⁸ Memorandum M-24-10 further provides risk-
55 management practices for agency uses of AI that impact people’s rights which are derived from
56 the Office of Science and Technology Policy’s Blueprint for an AI Bill of Rights and the
57 National Institute of Standards and Technology’s AI Risk Management Framework.¹⁹ Those
58 practices include “conducting public consultation; assessing data quality; assessing and
59 mitigating disparate impacts and algorithmic discrimination; providing notice of the use of AI;
60 continuously monitoring and evaluating deployed AI; and granting human consideration and
61 remedies for adverse decisions made using AI.”²⁰ Additionally, OMB issued Memorandum M-
62 24-18, *Advancing the Responsible Acquisition of Artificial Intelligence in Government*, which
63 “integrat[es] these considerations for AI risk management into agency acquisition planning.”²¹

64 Consistent with these authorities, this Recommendation provides a framework for using
65 algorithmic tools in regulatory enforcement in ways that promote the efficient, accurate, and
66 consistent administration of the law while also safeguarding rights, civil liberties, privacy, safety,
67 equal opportunities, and access to government resources and services.

RECOMMENDATION

- 68 1. When considering possible uses of algorithmic tools to perform regulatory
69 enforcement tasks, agencies should consider whether and to what extent these tools
70 will:
71 a. Promote efficiency, accuracy, and consistency;

¹⁸ See OMB MEMO, *supra* note 14, at 29.

¹⁹ *Id.*; see OFF. OF SCI. & TECH. POL’Y, EXEC. OFF. OF THE PRESIDENT, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022); AI RMF 1.0, *supra* note 11.

²⁰ Exec. Order No. 14110, *supra* note 17.

²¹ OFF. MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-18, ADVANCING THE RESPONSIBLE ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2024), at 1.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 72 b. Create or exacerbate unlawful or harmful biases;
- 73 c. Produce an output that agency decisionmakers can understand and explain;
- 74 d. Devolve decisional authority to automated systems;
- 75 e. Adversely affect rights, civil liberties, privacy, safety, equal opportunities, and
- 76 access to government resources or services;
- 77 f. Use inappropriately or reveal publicly, directly or indirectly, confidential
- 78 business information or trade secrets; and
- 79 g. Impact the public’s perception of the agency and how fairly it administers
- 80 regulatory programs.
- 81 2. When agencies use algorithmic tools to perform regulatory enforcement tasks, they
- 82 should assess the risks associated with using such tools, including those in
- 83 Paragraph 1, and put in place oversight mechanisms and data quality assurance
- 84 practices to mitigate such risks. In a risk assessment process, agencies should
- 85 consider a number of factors, including:
- 86 a. The tendency of such tools to produce unexpected outcomes that could go
- 87 beyond their intended uses or have the potential for biased or harmful
- 88 outcomes;
- 89 b. Oversight procedures available to the agency and the public to ensure
- 90 responsible use of such tools;
- 91 c. The ability to customize tools and systems to the agency’s ongoing needs and
- 92 to specific use cases;
- 93 d. Training and testing methodologies used in developing and maintaining such
- 94 tools; and
- 95 e. Quality assurance practices available for data collection and use, including the
- 96 dependency of such tools on the completeness and veracity of the underlying
- 97 data on which they rely.
- 98 3. When agencies use algorithmic tools to perform regulatory enforcement tasks,
- 99 agencies should ensure that any agency personnel who use such tools or rely on their
- 100 outputs to make enforcement decisions receive adequate training on the capabilities



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 101 and risks of such tools and understand how to appropriately assess their outputs
102 before relying on them.
- 103 4. When agencies provide notice to regulated persons of an action taken during an
104 investigation, inspection, audit, or prosecution, they should specify if an algorithmic
105 tool provided a significant basis for taking that action, consistent with existing legal
106 requirements.
- 107 5. Agencies should notify the public on their websites of any algorithmic tools they use
108 to investigate, inspect, audit, or gather evidence to discover non-compliance by
109 regulated entities, consistent with existing legal requirements.
- 110 6. Agencies that use or are considering using algorithmic tools in regulatory
111 enforcement should engage with persons interested in or affected by the use of such
112 tools to identify possible benefits and harms associated with their use.
- 113 7. Agencies that use algorithmic tools to perform regulatory enforcement tasks should
114 provide effective processes whereby persons can voice concerns or file complaints
115 regarding the use or outcome resulting from the use of such tools so that agencies
116 may respond or take corrective action.
- 117 8. The Chief AI Officer Council should facilitate collaboration and the exchange of
118 information among agencies that use or are considering using algorithmic tools in
119 regulatory enforcement.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Using Algorithmic Tools in Regulatory Enforcement

Committee on Regulation

Proposed Recommendation for Plenary | December 12, 2024

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and an additional amendment from the Council (with source shown in the margin).

1 The use of artificial intelligence (AI) and other algorithmic tools is changing how
2 government agencies do their work. As the Administrative Conference has recognized, these
3 tools “hold out the promise of lowering the cost of completing government tasks and improving
4 the quality, consistency, and predictability of agencies’ decisions.” At the same time, these tools
5 “raise concerns about the full or partial displacement of human decision making and discretion.”¹
6 The Conference adopted Statement #20, *Agency Use of Artificial Intelligence*, in 2020 to help
7 agencies consider when and how to use algorithmic tools appropriately.² More recently, it
8 adopted specific recommendations addressing the use of algorithmic tools to review regulations,³
9 manage public comments,⁴ and provide guidance to the public.⁵

10 In this Recommendation, the Conference turns to the use of algorithmic tools in
11 regulatory enforcement. An algorithmic tool is a computer-based process that “uses a series of
12 rules or inferences drawn from data to ~~transport-transform~~ specified inputs into outputs to make

¹ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

² *Id.*

³ Admin. Conf. of the U.S., Recommendation 2023-3, *Using Algorithmic Tools in Retrospective Review of Agency Rules*, 88 Fed. Reg. 42,681 (July 3, 2023).

⁴ Admin. Conf. of the U.S., Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36,075 (July 8, 2021).

⁵ Admin. Conf. of the U.S., Recommendation 2022-3, *Automated Legal Guidance at Federal Agencies*, 87 Fed. Reg. 39,798 (July 5, 2022).

DRAFT December 9, 2024



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 decisions or support decision making,” and includes the use of AI technologies.⁶ Many agencies
14 engage in regulatory enforcement—that is, detecting, investigating, and prosecuting potential
15 violations of the laws they administer. These agencies are often “faced with assuring the
16 compliance of an increasing number of entities and products without a corresponding growth in
17 agency resources.”⁷ As agencies seek ~~to identify~~ ways to make regulatory compliance “more
18 effective and less costly,”⁸ many are considering how they can use algorithmic tools to perform
19 regulatory enforcement tasks such as monitoring compliance; detecting potential noncompliance;
20 identifying potential subjects for investigation, inspection, or audit; and gathering evidence to
21 determine whether corrective action against a regulated person is warranted. Indeed, a report to
22 the Conference analyzing the use of AI in federal administrative agencies found that “AI has
23 made some of its most substantial inroads in the context of agency enforcement activities.”⁹

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25 opportunities for agencies. When used appropriately, such tools may enable agencies to perform
26 enforcement tasks even more efficiently, accurately, and consistently. Algorithmic tools may be
27 particularly useful in performing many of the most time- and resource-intensive tasks associated
28 with regulatory enforcement, such as synthesizing voluminous records, determining patterns in
29 complex filings, and ~~helping identify~~ activities that might require additional review by a
30 human ~~being~~.

⁶ ~~Statement #20~~ Recommendation 2023-3, *supra* note 13.

⁷ See, e.g., Admin. Conf. of the U.S., Recommendation 2012-7, *Agency Use of Third-Party Programs to Assess Regulatory Compliance*, 78 Fed. Reg. 2941, 2941 (Jan. 15, 2013).

⁸ *Id.* at 2941. In Recommendation 2012-7, the Conference noted that agencies “may leverage private resources and expertise in ways that make regulation more effective and less costly.” *Id.* at 2942.

⁹ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm in Federal Administrative Agencies* (Feb. 2020) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/document/government-algorithm-artificial-intelligence-federal-administrative-agencies>; Cary Coglianese, *A Framework for Governmental Use of Machine Learning* (Dec. 8, 2020) (report to the Admin. Conf. of the U.S.) available at <https://www.acus.gov/document/framework-governmental-use-machine-learning-final-report>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

31 At the same time, significant challenges and concerns arise in agencies' use of
32 algorithmic tools in regulatory enforcement.¹⁰ The Conference has previously identified possible
33 risks associated with agencies' use of algorithmic tools, including insufficient transparency,
34 internal and external oversight, and explainability;¹¹ the potential to unintentionally create or
35 exacerbate "harmful biases" by encoding and deploying them at scale;¹² and the possibility that
36 agency personnel will devolve too much decisional authority to AI systems.¹³ Such risks are
37 heightened when, as in the regulatory enforcement context, agencies use algorithmic tools to
38 make decisions or take actions that **impact-affect** a person's rights, civil liberties, privacy, safety,
39 equal opportunities, or access to government resources or services.¹⁴

40 Since the Conference issued Statement #20, Congress enacted the AI in Government Act,
41 which directs the Director of the Office of Management and Budget (OMB) to provide agencies
42 with guidance on removing barriers to agency AI use "while protecting civil liberties, civil
43 rights, and economic and national security" and on best practices for identifying, assessing, and
44 mitigating harmful bias.¹⁵ Executive Order 13,960, *Promoting the Use of Trustworthy Artificial*
45 *Intelligence in the Federal Government*, identifies principles for agencies when designing,
46 developing, acquiring, and using AI and directs agencies to inventory their uses of AI and make

¹⁰ Michael Karanicolas, Artificial Intelligence and Regulatory Enforcement (Sept-Dec. 279, 2024) (draft report to the Admin. Conf. of the U.S.); see also Recommendation 2023-3, *supra* note 3; Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Recommendation 2021-1, *supra* note 4; Statement #20, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

¹¹ "Explainability" allows those using or overseeing AI systems to "gain deeper insights into the functionality and trustworthiness of the system, including its outputs," and helps users understand the potential **impacts-effects** and purposes of an AI system. NAT'L INST. OF STANDARDS & TECH., ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) 16 (2023).

¹² Statement #20, *supra* note 1, at 3.

¹³ See *id.*, at 3-4.

¹⁴ See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-10, ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE 29 (2024) (providing a comprehensive definition of "rights-impacting" uses of AI) [hereinafter OMB MEMO].

¹⁵ Pub. L. No. 116-260, div. U, title 1, § 104 (2020) (codified at 40 U.S.C. § 11301 note).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

47 ~~them~~ those inventories publicly available.¹⁶ Executive Order 14,110, *Safe, Secure, and*
48 *Trustworthy Development and Use of Artificial Intelligence*, requires agencies to designate Chief
49 AI Officers, who have primary responsibility for overseeing their agencies' AI use and
50 coordinating with other agencies, and establishes the Chief AI Officer Council to coordinate the
51 development and use of AI across agencies.¹⁷ OMB Memorandum M-24-10, *Advancing*
52 *Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, which
53 implements the AI in Government Act and Executive Order 14,110, provides guidance to
54 agencies on strengthening the effective and appropriate use of AI, advancing innovation, and
55 managing risks, particularly those related to rights-impacting uses of AI.¹⁸ Memorandum M-24-
56 10 further provides risk-management practices for agency uses of AI that ~~impact~~ affect people's
57 rights, which are derived from the Office of Science and Technology Policy's Blueprint for an
58 AI Bill of Rights and the National Institute of Standards and Technology's AI Risk Management
59 Framework.¹⁹ Those practices include "conducting public consultation; assessing data quality;
60 assessing and mitigating disparate impacts and algorithmic discrimination; providing notice of
61 the use of AI; continuously monitoring and evaluating deployed AI; and granting human
62 consideration and remedies for adverse decisions made using AI."²⁰ Additionally, OMB issued
63 Memorandum M-24-18, *Advancing the Responsible Acquisition of Artificial Intelligence in*

¹⁶ See Exec. Order No. 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78,939 (Dec. 3, 2020).

¹⁷ Exec. Order No. 14,110 § 10.1(b), *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75,191, 75,218 (Oct. 30, 2023); OMB MEMO, *supra* note 14.

¹⁸ See OMB MEMO, *supra* note 14, at 29.

¹⁹ *Id.*; see OFF. OF SCI. & TECH. POL'Y, EXEC. OFF. OF THE PRESIDENT, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022); AI RMF 1.0, *supra* note 11.

²⁰ Exec. Order No. 14,110, *supra* note 17.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

64 *Government*, which “integrat[es] these considerations for AI risk management into agency
65 acquisition planning.”²¹

66 Consistent with these authorities, this Recommendation provides a framework for using
67 algorithmic tools in regulatory enforcement in ways that promote the efficient, accurate, and
68 consistent administration of the law while also safeguarding rights, civil liberties, privacy, safety,
69 equal opportunities, and access to government resources and services.

RECOMMENDATION

- 70 1. When considering possible uses of algorithmic tools to perform regulatory
71 enforcement tasks, agencies should consider whether and to what extent ~~these such~~
72 tools will:
- 73 a. Promote efficiency, accuracy, and consistency;
 - 74 b. Create or exacerbate unlawful or harmful biases;
 - 75 c. Produce an output that agency decisionmakers can understand and explain;
 - 76 d. Devolve decisional authority to automated systems;
 - 77 e. Adversely affect rights, civil liberties, privacy, safety, equal opportunities, and
78 access to government resources or services;
 - 79 f. Use inappropriately or reveal publicly, directly or indirectly, confidential
80 business information or trade secrets; and
 - 81 g. ~~Impact Affect~~ the public’s perception of the agency and how fairly it
82 administers regulatory programs.
- 83 2. When agencies use algorithmic tools to perform regulatory enforcement tasks, they
84 should assess the risks associated with using such tools, including those in
85 Paragraph 1, and put in place oversight mechanisms and data quality assurance
86 practices to mitigate such risks. ~~In~~ During a risk assessment process, agencies should
87 consider, among other things, the a number of factors, including:

²¹ OFF. MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-18, ADVANCING THE RESPONSIBLE ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2024), at 1.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 88 a. ~~The ability to customize tools and systems to the agency's ongoing needs~~
89 ~~and to specific use cases;~~
- 90 ~~a.b. The tendency of such tools to produce unexpected outcomes that could go~~
91 ~~beyond their intended uses or have the potential for biased or harmful~~
92 ~~outcomes;~~
- 93 c. ~~Training and testing methodologies used in developing and maintaining such~~
94 ~~tools;~~
- 95 d. ~~Quality assurance practices available for data collection and use, including the~~
96 ~~dependency of such tools on the completeness and veracity of the underlying~~
97 ~~data on which they rely; and~~
- 98 ~~b.c. Oversight procedures available to the agency and the public to ensure~~
99 ~~responsible use of such tools;~~
- 100 ~~e.a. The ability to customize tools and systems to the agency's ongoing needs and~~
101 ~~to specific use cases;~~
- 102 ~~d.f. Training and testing methodologies used in developing and maintaining such~~
103 ~~tools; and~~
- 104 ~~e.g. Quality assurance practices available for data collection and use, including the~~
105 ~~dependency of such tools on the completeness and veracity of the underlying~~
106 ~~data on which they rely.~~
- 107 3. When agencies use algorithmic tools to perform regulatory enforcement tasks,
108 agencies should ensure that any agency personnel who use such tools or rely on their
109 outputs to make enforcement decisions receive adequate training on the **capabilities,**
110 **and risks, and limits** of such tools and understand how to appropriately assess their
111 outputs before relying on them.
- 112 4. When agencies provide notice to regulated persons of an action taken during an
113 investigation, inspection, audit, or prosecution, they should specify if an algorithmic
114 tool provided a **significant meaningful** basis for taking that action, consistent with
115 existing legal requirements.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 116 5. Consistent with legal requirements, Agencies agencies should notify the public on
117 their websites of any algorithmic tools they use to investigate, inspect, audit, or gather
118 evidence to discover non-compliance by regulated entities, consistent with existing
119 legal requirements along with information about the data used by such tools.
- 120 6. Agencies that use or are considering using algorithmic tools in regulatory
121 enforcement should engage with persons interested in or affected by the use of such
122 tools to identify possible benefits and harms associated with their use.
- 123 7. Agencies that use algorithmic tools to perform regulatory enforcement tasks should
124 provide effective processes whereby persons can voice concerns or file complaints
125 regarding the use or outcome resulting from the use of such tools so that agencies
126 may respond or take corrective action.
- 127 8. The Chief AI Officer Council should facilitate collaboration and the exchange of
128 information among agencies that use or are considering using algorithmic tools in
129 regulatory enforcement.

Commented [CA1]: Proposed Amendment from Council.



Public Engagement in Agency Rulemaking Under the Good Cause Exemption

Committee on Rulemaking

Proposed Recommendation for Plenary | December 12, 2024

1 Public participation plays an essential role in agency rulemaking. Agencies facilitate such
2 participation through public engagement activities designed to elicit input from the public,
3 including efforts to enhance public understanding of the rulemaking process and foster
4 meaningful public participation in it. As the Administrative Conference has recognized, “[b]y
5 providing opportunities for public input and dialogue, agencies can obtain more comprehensive
6 information, enhance the legitimacy and accountability of their decisions, and increase public
7 support for their rules.”¹ The Administrative Procedure Act (APA) recognizes the value of public
8 participation in rulemaking by generally requiring agencies to publish a notice of proposed
9 rulemaking in the *Federal Register* and provide interested persons an opportunity to provide
10 written comments on rulemaking proposals.²

11 However, notice-and-comment procedures can be time-consuming and resource-
12 intensive, and there are circumstances in which the costs of those procedures may outweigh their
13 benefits in terms of public participation. For this reason, the APA permits agencies to forgo
14 notice-and-comment procedures when they find for “good cause” that such procedures would be
15 “impracticable, unnecessary, or contrary to the public interest” and they incorporate this finding
16 and “a brief statement of reasons” for it in their rules.³ Notice and comment may be
17 “impracticable” when an agency “finds that due and timely execution of its functions would be

¹ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

² 5 U.S.C. § 553(b)–(c).

³ *Id.* § 553(b)(B).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

18 impeded by the notice otherwise required [by the APA].”⁴ Notice and comment may be
19 “unnecessary” when a rule is “a routine determination, insignificant in nature and impact, and
20 inconsequential to the industry and to the public” or when the agency lacks discretion regarding
21 the substance of the rule.⁵ And notice and comment may be “contrary to the public interest” in
22 “the rare circumstance when ordinary procedures—generally presumed to serve the public
23 interest—would in fact harm that interest.”⁶

24 The Conference has long encouraged robust public participation in agency rulemaking
25 and has identified effective methods for engaging with the public outside of, and to supplement,
26 the notice-and-comment process.⁷ The fact that *notice and comment* is unnecessary,
27 impracticable, or contrary to the public interest does not mean that *no* public engagement is
28 appropriate. Indeed, such engagement may be especially important precisely because standard
29 notice and comment is not occurring. And such engagement can also help agencies determine
30 whether the good cause exemption is applicable.

31 Of course, the same factors that make a comment period inappropriate may weigh equally
32 against other types of public engagement as well. Neither the agency nor the public is well
33 served by needless or counterproductive efforts to engage the public. Such circumstances are
34 rare, however. The goal of this recommendation is to identify ways in which agencies can
35 meaningfully and usefully engage the public even when relying on the good cause exception.

36 Agencies engage with the public in a variety of ways when invoking the good cause
37 exemption. The two primary rulemaking mechanisms are usually referred to as direct final

⁴ *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *see also* ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947).

⁵ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d at 754); *Metzenbaum v. Fed. Energy Regulatory Comm’n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982).

⁶ *Mack Trucks, Inc.*, 682 F.3d at 95.

⁷ *See* Recommendation 2018-7, *supra* note 1; *see also* Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

38 rulemaking and interim final rulemaking.⁸ When notice and comment is unnecessary, agencies
39 sometimes use direct final rulemaking, in which the agency simultaneously publishes a final rule
40 and solicits comments on it, with the rule going into effect only if no significant adverse
41 comments are received. When notice and comment is impracticable or contrary to the public
42 interest, agencies sometimes use interim final rulemaking, in which they request public comment
43 on a final rule at the same time the rule is published for the purpose of deciding whether to
44 reaffirm, modify, or replace the published rule in light of those comments. Agencies sometimes
45 also use other, more informal procedures—including publishing requests for information,
46 engaging in targeted outreach, and convening listening sessions with interested persons—when
47 they invoke the good cause exemption.

48 The Conference has addressed direct final rulemaking and interim final rulemaking in
49 prior recommendations. In Recommendation 83-2, *The “Good Cause” Exemption from APA*
50 *Rulemaking Requirements*, the Conference encouraged agencies to “provide a post-promulgation
51 comment opportunity for rules they adopt under the good cause exemption.”⁹ In
52 Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, the
53 Conference recommended that agencies “use direct final rulemaking in all cases where the
54 ‘unnecessary’ prong of the good cause exemption is available, unless the agency determines that
55 the process would not expedite issuance of such rules,” and provided best practices for doing so.
56 In Recommendation 95-4, the Conference recommended that agencies use interim final
57 rulemaking when they conclude that using notice-and-comment procedures would be
58 “impracticable” or “contrary to the public interest,” and provided best practices for doing so.

59 The Conference is revisiting the topic of public engagement in rulemaking under the
60 good cause exemption for two reasons. First, best practices for public engagement have become

⁸ The APA does not define direct final rulemaking or interim final rulemaking. Agencies developed these terms to describe commonly used processes for engaging with the public when they invoke the good cause exemption.

⁹ Admin. Conf. of the U.S., Recommendation 83-2, *The “Good Cause” Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31,180 (July 7, 1983).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

61 increasingly important as agencies rely more frequently on the good cause exemption.¹⁰ Second,
62 there have been legal developments since 1995, particularly a 2020 decision by the Supreme
63 Court on interim final rulemaking.¹¹

64 Based on a reexamination of agency rulemaking practices under the good cause
65 exemption,¹² this Recommendation identifies best practices for enhancing public engagement in
66 rulemaking under the good cause exemption, particularly when agencies use direct final
67 rulemaking and interim final rulemaking. It also encourages agencies to use alternative
68 methods—such as publishing requests for information, engaging in targeted outreach, convening
69 listening sessions with interested persons, and soliciting post-adoption comments—to reap the
70 benefits of robust public participation even when they rely properly on the good cause
71 exemption. These recommendations constitute policy recommendations to agencies and are not
72 intended to reduce legal risk. Recommendations 83-2 and 95-4 are superseded to the extent that
73 they recommend public engagement practices that are inconsistent with this recommendation.

RECOMMENDATION

Direct Final Rulemaking

- 74 1. Except in the rare instance that an agency determines that direct final rulemaking would
75 not expedite issuance of a rule, an agency should use direct final rulemaking when it:
- 76 a. For good cause finds that it is “unnecessary” to undertake notice-and-comment
77 rulemaking; and
 - 78 b. Concludes that the rule is unlikely to elicit any significant adverse comments.
- 79 2. When an agency uses direct final rulemaking, it should publish in the *Federal Register* a
80 rule that:

¹⁰ See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012); see also CONG. RES. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016).

¹¹ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020).

¹² See Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rulemaking, (Oct. 4, 2024) (draft report to the Admin. Conf. of the U.S.).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 81 a. Identifies the rule as a “direct final rule”;
- 82 b. Provides a brief statement explaining the basis for the agency’s finding that it is
- 83 unnecessary to undertake notice-and-comment rulemaking;
- 84 c. Provides a statement of the rule’s basis and purpose and explains the issues the
- 85 agency considered in developing the rule;
- 86 d. Provides a period of at least 30 days during which interested persons may submit
- 87 comments regarding the substance of the rule or the agency’s finding that notice-
- 88 and-comment rulemaking is unnecessary;
- 89 e. Explains that the agency will withdraw the direct final rule if it receives any
- 90 significant adverse comments and specifies any additional actions that the agency
- 91 may take if it withdraws the direct final rule;
- 92 f. Specifies when the rule will take effect if the agency receives no significant
- 93 adverse comments;
- 94 g. If applicable, specifies whether the agency will issue a subsequent notice in the
- 95 *Federal Register* confirming that the agency received no significant adverse
- 96 comments (see Paragraph 5); and
- 97 h. Identifies any companion proposed rule, as described in Paragraph 3.
- 98 3. When an agency issues a direct final rule, it may consider publishing in the same issue of
- 99 the *Federal Register* a companion proposed rule that will serve as a notice of proposed
- 100 rulemaking if the agency later withdraws the direct final rule upon receiving any
- 101 significant adverse comments. In the event the agency receives significant adverse
- 102 comments, the agency should consider providing an additional period for public
- 103 comment.
- 104 4. An agency should consider any comment received during direct final rulemaking to be a
- 105 significant adverse comment if the comment explains why:
- 106 a. The rule would be inappropriate, including challenges to the rule’s underlying
- 107 premise or approach; or
- 108 b. The rule would be ineffective or unacceptable without a change.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 109 5. The agency should provide that a direct final rule will take effect at least 30 days after the
110 close of the comment period if the agency receives no significant adverse comments or at
111 least 30 days after publication of a subsequent notice in the *Federal Register* confirming
112 that the agency received no significant adverse comments. An agency that does not
113 publish a confirmation notice should consider providing an effective date greater than 30
114 days after the close of the comment period if the agency believes it is necessary to ensure
115 that it has adequate time to withdraw the rule in the event it receives significant adverse
116 comment.
- 117 6. If the agency receives any significant adverse comments or otherwise decides to
118 withdraw the direct final rule before it takes effect, the agency should publish a notice in
119 the *Federal Register* that states that the agency is withdrawing the direct final rule and
120 describes any further rulemaking the agency will conduct on the matter. If the agency
121 previously requested comments in a companion proposed rule as described in Paragraph
122 3, the agency may proceed with notice-and-comment rulemaking consistent with the
123 proposed rule.

Interim Final Rulemaking

- 124 7. An agency is encouraged to use interim final rulemaking when it:
- 125 a. For good cause finds that it is “impracticable” to undertake notice-and-comment
126 rulemaking; or
 - 127 b. For good cause finds that it is “contrary to the public interest” to undertake notice-
128 and-comment rulemaking.
- 129 8. When an agency uses interim final rulemaking, it should publish in the *Federal Register*
130 a rule that:
- 131 a. Identifies the rule as an “interim final rule”;
 - 132 b. Provides a brief statement explaining the basis for the agency’s finding that is
133 “impracticable” or “contrary to the public interest” to undertake notice-and-
134 comment rulemaking;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 135 c. Provides a statement of the rule’s basis and purpose and explains the issues the
136 agency considered in developing the rule;
- 137 d. Provides a period of at least 30 days (or in most cases 60 days for a “[s]ignificant
138 regulatory action” under Executive Order 12,866 as amended by Executive Order
139 14,094) during which interested persons may submit comments regarding the
140 substance of the rule or the agency’s finding that notice-and-comment rulemaking
141 is impracticable or contrary to the public interest;
- 142 e. Explains that the agency will consider any comments that it receives in response
143 to the interim final rule;
- 144 f. As applicable, sets forth the agency’s plans for supplemental public engagement
145 (see Paragraph 11) and solicits public input on those public engagement plans;
- 146 g. Explains that the rule is being adopted without prior notice and comment,
147 specifies the date upon which the rule will take effect, and identifies the rule’s
148 expiration date if applicable; and
- 149 h. Specifies that the agency will consider the comments and complete the
150 rulemaking by reaffirming, modifying, or withdrawing the interim final rule (see
151 Paragraph 9).
- 152 9. An agency should complete the interim final rulemaking by publishing a new final rule in
153 the *Federal Register* that responds to all significant comments and reaffirms, modifies, or
154 withdraws the interim final rule as appropriate. Consistent with agency resources and
155 priorities, an agency should publish the new final rule as expeditiously as possible and
156 should prioritize rules that are considered “[s]ignificant regulatory actions” under
157 Executive Order 12,866 as amended by Executive Order 14,094.

Supplemental Public Engagement

- 158 10. When appropriate, an agency should use supplemental forms of public engagement,
159 including those identified in Recommendation 2018-7, *Public Engagement in*
160 *Rulemaking*, before invoking the good cause exemption when such engagement would
161 help the agency (a) determine if notice-and-comment rulemaking is unnecessary,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 162 impracticable, or contrary to the public interest or (b) develop the rule. The agency
163 should explain in the direct or interim final rule what supplemental public engagement
164 the agency undertook.
- 165 11. An agency should consider using supplemental forms of public engagement after issuing
166 an interim final rule. Consistent with Executive Order 13,563 and Recommendation
167 2021-2, *Periodic Retrospective Review*, an agency should prioritize for retrospective
168 review interim final rules that are significant regulatory actions under Executive Order
169 12,866 as amended by Executive Order 14,094. An agency should explain in any
170 subsequent final rule what supplemental public engagement the agency undertook.
- 171 12. Consistent with Recommendation 2014-4, *“Ex Parte” Communications in Informal*
172 *Rulemaking*, an agency should disclose ex parte communications that occur during
173 supplemental public engagement. For purposes of applying Recommendation 2014-4, an
174 interim final rule should be considered the equivalent of a notice of proposed rulemaking.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Engagement in Agency Rulemaking Under the Good Cause Exemption

Committee on Rulemaking

Proposed Recommendation for Plenary | December 12, 2024

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Public participation plays an essential role in agency rulemaking. Agencies facilitate such
2 participation through public engagement activities designed to elicit input from the public,
3 including efforts to enhance public understanding of the rulemaking process and foster
4 meaningful public participation in it. As the Administrative Conference has recognized, “[b]y
5 providing opportunities for public input and dialogue, agencies can obtain more comprehensive
6 information, enhance the legitimacy and accountability of their decisions, and increase public
7 support for their rules.”¹ The Administrative Procedure Act (APA) recognizes the value of public
8 participation in rulemaking by generally requiring agencies to publish a notice of proposed
9 rulemaking in the *Federal Register* and provide interested persons an opportunity to
10 ~~submit~~provide written comments on rulemaking proposals.²

11 However, notice-and-comment procedures can be time-consuming and resource-
12 intensive, and there are circumstances in which the costs of those procedures may outweigh their
13 benefits in terms of public participation. For this reason, the APA permits agencies to forgo
14 notice-and-comment procedures when, among other reasons, they find for “good cause” that

¹ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

² 5 U.S.C. § 553(b)–(c).

Commented [CA1]: Proposed Amendment from Council #1

The proposed amendment would clarify that there are other circumstances in which the APA permits agencies to forgo notice-and-comment rulemaking.

DRAFT December 9, 2024



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

15 such procedures would be “impracticable, unnecessary, or contrary to the public interest” and
16 they incorporate this finding and “a brief statement of reasons” for it in their rules.³ Notice and
17 comment may be “impracticable” when an agency “finds that due and timely execution of its
18 functions would be impeded by the notice otherwise required [by the APA].”⁴ Notice and
19 comment may be “unnecessary” when a rule is “a routine determination, insignificant in nature
20 and impact, and inconsequential to the industry and to the public”⁵ or when the agency lacks
21 discretion regarding the substance of the rule.⁶ And notice and comment may be “contrary to the
22 public interest” in “the rare circumstance when ordinary procedures—generally presumed to
23 serve the public interest—would in fact harm that interest.”⁷

24 The Conference has long encouraged robust public participation in agency rulemaking
25 and has identified effective methods for engaging with the public outside of, and to supplement,
26 the notice-and-comment process.⁸ The fact that *notice and comment* is unnecessary,
27 impracticable, or contrary to the public interest does not mean that *no* public engagement is
28 appropriate. Indeed, such engagement may be especially important precisely because standard
29 notice and comment is not occurring. And such engagement can also help agencies determine
30 whether the good cause exemption is applicable.

31 Of course, the same factors that make a comment period inappropriate may weigh equally
32 against other types of public engagement as well. Neither the agency nor the public is well
33 served by needless or counterproductive efforts to engage the public. Such circumstances are

³ *Id.* § 553(b)(B).

⁴ *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *see also* ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947).

⁵ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d at 754).

⁶ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d at 754); *Metzenbaum v. Fed. Energy Regulatory Comm’n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982).

⁷ *Mack Trucks, Inc.*, 682 F.3d at 95.

⁸ *See* Recommendation 2018-7, *supra* note 1; *see also* Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

34 rare, however. The goal of this Recommendation is to identify ways in which agencies can
35 meaningfully and usefully engage the public even when relying on the good cause exemption.

36 Agencies engage with the public in a variety of ways when invoking the good cause
37 exemption. The two primary rulemaking mechanisms are usually referred to as direct final
38 rulemaking and interim final rulemaking.⁹ When notice and comment is unnecessary, agencies
39 sometimes use direct final rulemaking, in which the agency simultaneously publishes a final rule
40 and solicits comments on it, with the rule going into effect only if no significant adverse
41 comments are received. When notice and comment is impracticable or contrary to the public
42 interest, agencies sometimes use interim final rulemaking, in which they request public comment
43 on a final rule at the same time the rule is published for the purpose of deciding whether to
44 reaffirm, modify, or replace the published rule in light of those comments. Agencies sometimes
45 also use other, more informal procedures—including publishing requests for information,
46 engaging in targeted outreach, and convening listening sessions with interested persons—when
47 they invoke the good cause exemption.

48 The Conference has addressed direct final rulemaking and interim final rulemaking in
49 prior recommendations. In Recommendation 83-2, *The “Good Cause” Exemption from APA*
50 *Rulemaking Requirements*, the Conference encouraged agencies to “provide a post-promulgation
51 comment opportunity for rules they adopt under the good cause exemption.”¹⁰ In
52 Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, the
53 Conference recommended that agencies “use direct final rulemaking in all cases where the
54 ‘unnecessary’ prong of the good cause exemption is available, unless the agency determines that
55 the process would not expedite issuance of such rules,” and provided best practices for doing so.
56 In Recommendation 95-4, the Conference recommended that agencies use interim final

⁹ The APA does not define direct final rulemaking or interim final rulemaking. Agencies developed these terms to describe commonly used processes for engaging with the public when they invoke the good cause exemption.

¹⁰ Admin. Conf. of the U.S., Recommendation 83-2, *The “Good Cause” Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31,180 (July 7, 1983).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

57 rulemaking when they conclude that using notice-and-comment procedures would be
58 “impracticable” or “contrary to the public interest,” and provided best practices for doing so.

59 The Conference is revisiting the topic of public engagement in rulemaking under the
60 good cause exemption for two reasons. First, best practices for public engagement have become
61 increasingly important as agencies rely more frequently on the good cause exemption.¹¹ Second,
62 there have been legal developments since 1995, particularly a 2020 decision by the Supreme
63 Court on interim final rulemaking.¹²

64 Based on a reexamination of agency rulemaking practices under the good cause
65 exemption,¹³ this Recommendation identifies best practices for enhancing public engagement in
66 rulemaking under the good cause exemption, particularly when agencies use direct final
67 rulemaking and interim final rulemaking. It also encourages agencies to use alternative
68 methods—such as publishing requests for information, engaging in targeted outreach, convening
69 listening sessions with interested persons, and soliciting post-adoption comments—to reap the
70 benefits of robust public participation even when they rely properly on the good cause
71 exemption. ~~These recommendations constitute policy recommendations to agencies and are not~~
72 ~~intended to reduce legal risk.~~ Recommendations 83-2 and 95-4 are superseded to the extent that
73 they recommend public engagement practices that are inconsistent with this Recommendation.

RECOMMENDATION

Direct Final Rulemaking

74 1. Except in the rare instance that an agency determines that direct final rulemaking would
75 not expedite issuance of a rule, an agency should use direct final rulemaking when it:

¹¹ See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012); see also CONG. RES. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016).

¹² *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020).

¹³ See Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rulemaking, (Dec 04, 2024) (draft report to the Admin. Conf. of the U.S.).

Commented [CA2]: Proposed Amendment from Council #2

The Council does not believe this sentence is necessary. The proposed recommendation, like most ACUS recommendations, identifies best practices and does not purport to identify legal requirements.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 76 a. For good cause finds that it is “unnecessary” to undertake notice-and-comment
77 rulemaking; and
78 b. Concludes that the rule is unlikely to elicit any significant adverse comments.
- 79 2. When an agency uses direct final rulemaking, it should publish in the *Federal Register* a
80 rule that:
- 81 a. Identifies the rule as a “direct final rule”;
82 b. Provides a brief statement explaining the basis for the agency’s finding that it is
83 unnecessary to undertake notice-and-comment rulemaking;
84 c. Provides a statement of the rule’s basis and purpose and explains the issues the
85 agency considered in developing the rule;
86 d. Provides a period of at least 30 days during which interested persons may submit
87 comments regarding the substance of the rule ~~or the agency’s finding that notice-~~
88 ~~and comment rulemaking is unnecessary;~~
89 e. Explains that the agency will withdraw the direct final rule if it receives any
90 significant adverse comments and specifies any additional actions that the agency
91 may take if it withdraws the direct final rule;
92 f. Specifies when the rule will take effect if the agency receives no significant
93 adverse comments (see Paragraph 5);
94 g. If applicable, specifies whether the agency will issue a subsequent notice in the
95 *Federal Register* confirming that the agency received no significant adverse
96 comments (see Paragraph 5); and
97 h. Identifies any companion proposed rule, as described in Paragraph 3.
- 98 3. When an agency issues a direct final rule, it may consider publishing in the same issue of
99 the *Federal Register* a companion proposed rule that will serve as a notice of proposed
100 rulemaking if the agency later withdraws the direct final rule upon receiving any
101 significant adverse comments. In the event the agency receives significant adverse
102 comments, the agency should consider providing an additional period for public comment
103 for the companion proposed rule.

Commented [CM3]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers #1:

The member believes that significant adverse comments should not include comments regarding the agency’s finding that notice and comment is unnecessary. The member believes that this language is inconsistent with Paragraph 4 (defining such comments) and that the language would make it harder for agencies to use the DFR process.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 104 4. An agency should consider any comment received during direct final rulemaking to be a
105 significant adverse comment if the comment explains why:
- 106 a. The rule would be inappropriate, including challenges to the rule’s underlying
107 premise or approach; or
108 b. The rule would be ineffective or unacceptable without a change.
- 109 5. ~~Absent exceptional circumstances for providing a different effective date, the~~ The agency
110 should provide that a direct final rule will take effect at least 30 days after the close of the
111 comment period if the agency receives no significant adverse comments or at least 30
112 days after publication of a subsequent notice in the *Federal Register* confirming that the
113 agency received no significant adverse comments. An agency should normally publish
114 such a confirmation notice, but if it does not, it ~~An agency that does not publish a~~
115 ~~confirmation notice~~ should consider providing an effective date greater than 30 days after
116 the close of the comment period if the agency believes it is necessary to ensure that it has
117 adequate time to withdraw the rule (in time to meet the needs of the Office of the Federal
118 Register) in the event it receives significant adverse comments.
- 119 6. If the agency receives any significant adverse comments or otherwise decides to
120 withdraw the direct final rule before it takes effect, the agency should publish a notice in
121 the *Federal Register* that states that the agency is withdrawing the direct final rule and
122 describes any further rulemaking the agency will conduct on the matter. If the agency
123 previously requested comments in a companion proposed rule as described in Paragraph
124 3, the agency may proceed with notice-and-comment rulemaking consistent with the
125 proposed rule.

Interim Final Rulemaking

- 126 ~~7. An agency is encouraged to use interim final rulemaking when it, for good cause finds~~
127 ~~that it is “impracticable” or “contrary to the public interest” to undertake notice-and-~~
128 ~~comment rulemaking.~~
- 129 a. ~~For good cause finds that it is “impracticable” to undertake notice and comment~~
130 ~~rulemaking; or~~

Commented [CA4]: Proposed Amendment from Council #3

The proposed amendment acknowledges that there may be circumstances in which an effective date of less or greater than 30 days after the close of the comment period may be appropriate.

Commented [CM5]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers #2

The member believes that an agency should normally publish a confirmation notice indicating that it received no significant adverse comments. The member also believes this sentence should more clearly explain that the Office of the Federal Register will automatically publish the rule in the CFR if the agency does not timely indicate that the rule should be withdrawn.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

~~b.7. For good cause finds that it is “contrary to the public interest” to undertake notice and comment rulemaking.~~

8. When an agency uses interim final rulemaking, it should publish in the *Federal Register* a rule that:

- a. Identifies the rule as an “interim final rule”;
- b. Provides a brief statement explaining the basis for the agency’s finding that is “impracticable” or “contrary to the public interest” to undertake notice-and-comment rulemaking;
- c. Provides a statement of the rule’s basis and purpose and explains the issues the agency considered in developing the rule;
- d. Provides a period of at least 30 days (or in most cases at least 60 days, in particular for a “major rules” under the Congressional Review Act “significant regulatory action” under Executive Order 12,866 as amended by Executive Order 14,094) during which interested persons may submit comments regarding the substance of the rule or the agency’s finding that notice-and-comment rulemaking is impracticable or contrary to the public interest;
- e. Explains that the agency will consider any comments that it receives in response to the interim final rule;
- f. As applicable, sets forth the agency’s plans for supplemental public engagement (see Paragraph 11) and solicits public input on those public engagement plans;
- g. Explains that the rule is being adopted without prior notice and comment, specifies the date upon which the rule will take effect, and identifies the rule’s expiration date if applicable; and
- h. Specifies that the agency will consider the comments and complete the rulemaking by reaffirming, modifying, or withdrawing the interim final rule (see Paragraph 9).

9. An agency should ~~conclude~~complete the interim final rulemaking by publishing a new final rule in the *Federal Register* that responds to all significant comments and reaffirms, modifies, or withdraws the interim final rule as appropriate. Consistent with agency

Commented [CA6]: Proposed Amendment from Council #4 (see associated amendments at paragraphs 9 and 11)

The Council believes it is preferable to cite to a standard set by statute (rather than by executive order) for determining whether a rule is considered major or significant. The proposed amendment therefore refers to “major rules” under the Congressional Review Act rather than “significant regulatory actions” under Executive Order 12,866 as amended by Executive Order 14,094.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

160 resources and priorities, an agency should publish the new final rule as expeditiously as
161 possible and should prioritize “major rules” under the Congressional Review Act that are
162 considered “[s]ignificant regulatory actions” under Executive Order 12,866 as amended
163 by Executive Order 14,094.

Commented [CA7]: Proposed Amendment from Council #4
(see associated amendments at paragraphs 4 and 11)

Supplemental Public Engagement

- 164 10. When appropriate, an agency should use supplemental forms of public engagement,
165 including those identified in Recommendation 2018-7, *Public Engagement in*
166 *Rulemaking*, before considering whether to invoke~~invoking~~ the good cause exemption
167 when such engagement would help the agency (a) determine if notice-and-comment
168 rulemaking is unnecessary, impracticable, or contrary to the public interest or (b) develop
169 the rule. The agency should explain in the direct or interim final rule what supplemental
170 public engagement the agency undertook.
- 171 11. An agency should consider using supplemental forms of public engagement after issuing
172 an interim final rule. Consistent with Executive Order 13,563 and Recommendation
173 2021-2, *Periodic Retrospective Review*, an agency should prioritize for retrospective
174 review interim final rules that are “major rules” under the Congressional Review Act
175 significant regulatory actions under Executive Order 12,866 as amended by Executive
176 Order 14,094. An agency should explain in any subsequent final rule what supplemental
177 public engagement the agency undertook.
- 178 12. Consistent with Recommendation 2014-4, “*Ex Parte*” *Communications in Informal*
179 *Rulemaking*, an agency should disclose ex parte communications that occur during
180 supplemental public engagement. For purposes of applying Recommendation 2014-4, an
181 interim final rule should be considered the equivalent of a notice of proposed rulemaking.

Commented [CA8]: Proposed Amendment from Council #4
(see associated amendments at paragraphs 4 and 9)



Nonlawyer Assistance and Representation in Agency Adjudications

Committee on Adjudication

Proposed Recommendation for Plenary | December 12, 2024

1 Millions of people each year participate in administrative adjudicative proceedings to
2 access federal programs and resolve legal issues. Some adjudicative proceedings are simple
3 enough—or could be made simple enough—for people to navigate on their own. But many are
4 so complex, or involve such significant stakes, that people engaging with them benefit from
5 representation by individuals with expertise in those programs or assistance from individuals
6 who can help them navigate the proceedings.

7 It is helpful to distinguish between “representation” and “assistance.” Representation is
8 used to denote that the individual is “standing in the shoes” of the participant and can speak for
9 that individual even when they are not present. Other activities that likely indicate representation
10 include counseling on eligibility for an agency program or signing official records.¹ “Assistance”
11 is broader and used to indicate many other forms of help that may be beneficial to a person in
12 dealing with an agency; this may include educating someone on process, counseling someone
13 about rights and remedies generally, and, in some cases, helping someone navigate a form or
14 benefits application. In most cases, representation will include various forms of assistance, but
15 assistance does not include representation.

16 Representation and assistance, whether by lawyers or nonlawyers, are particularly
17 valuable, even in seemingly straightforward adjudicatory proceedings, when they help people
18 access relevant and accurate information about agency programs, program eligibility, and

¹ Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986) (FOOTNOTE 2).

DRAFT November 21, 2024

Commented [AC1]: Proposed Amendment from the Committee on Adjudication:

The Committee voted to replace the original title of this Recommendation (*Nonlawyer Assistance and Representation*).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

19 information on how to correctly complete forms and submit required information.² For example,
20 although the use of digital technologies, such as online forms and virtual hearings, is an effective
21 strategy for increasing accessibility, it can also act as a barrier for people who lack access to
22 digital tools or lack the skills to navigate these systems. Such challenges can be present for
23 anyone, but those lacking representation or assistance may become so overwhelmed that they
24 give up and forego rights and benefits to which they are entitled.³ In other instances, errors can
25 be exacerbated by a lack of representation or assistance and lead to unfair outcomes.

26 Representation and assistance not only help participants in adjudicatory proceedings but
27 also benefit agencies. Without representation or assistance, an individual may be less likely to
28 properly and timely complete adjudicative requirements, which can delay proceedings.
29 Additionally, those without representation or assistance may require more support from the
30 agency, including the adjudicator, which can strain resources and reduce efficiency.⁴

31 Many people, however, particularly low-income people and members of historically
32 underserved communities, are unable to access representation or assistance.⁵ One barrier is the
33 critical shortage of affordable legal services. This concern is particularly acute in remote and
34 rural areas, where not only are lawyers relatively scarce and may not have relevant expertise, but
35 they may not be accessible to people who need them due to the long distances required to visit in
36 person, inability to consult virtually, and other barriers.

37 Federal agencies have long innovated various ways to widen the pool of available
38 representatives and expand assistance. For example, many agencies currently permit participants

² WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN FEDERAL ADMINISTRATIVE PROCEEDINGS: NONLAWYER ASSISTANCE AND OTHER STRATEGIES 1 (2023) [hereinafter WH-LAIR REPORT].

³ Pamela Herd, Donald Moynihan, & Amy Widman, Identifying and Reducing Burdens in Administrative Processes 41 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).

⁴ Admin. Conf. of the U.S., Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*, 81 Fed. Reg. 94319 (Dec. 23, 2016); *see also*, Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986); WH-LAIR REPORT, *supra* note 2, at 19 (“Studies have shown that legal assistance improves legal outcomes.”).

⁵ *See* Amy Widman, *Nonlawyer Assistance and Representation* (Oct. 2, 2024) (draft report to the Admin. Conf. of the U.S.).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

39 in agency adjudications to be represented by qualified or accredited nonlawyers.⁶ In many
40 instances, the decision maker (whether or not an administrative law judge) makes an informal
41 determination whether a representative is “qualified,” but some adjudicative systems provide for
42 a formal accreditation system to determine which nonlawyer representatives are qualified to
43 practice in those systems.⁷

44 Increasing availability of nonlawyer representation and assistance can be particularly
45 beneficial in meeting the needs of communities of special populations, including veterans and
46 servicemembers, members of tribal communities, people with disabilities, people with criminal
47 records, immigrants, and disaster survivors.⁸ Members of such communities often benefit from
48 representation and assistance provided by nongovernmental organizations, advocacy groups, and
49 others already operating to meet the needs and face the challenges within such communities.
50 These community ties function as a way to build trust among participants and serve as a deep
51 source of knowledge and expertise that can bear on representation and assistance. That trust can
52 in turn inspire public confidence in agency adjudication. Agencies can engage with such groups
53 to help increase availability and awareness of nonlawyer representation and assistance in these
54 communities.

⁶ See 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”). Examples of nonlawyers who represent or assist parties in agency proceedings include other licensed professionals such as accountants, social workers, and paralegals; law students; union representatives; human resources professionals; corporate officers; tribal advocates; agency employees; community members; and family members. The Conference recognizes that there is an ongoing discussion about the best way to describe representatives who do not hold an active law license. For the purposes of this Recommendation, the Conference refers to this group as “nonlawyer representatives” because it is consistent with two prior recommendations of the Conference, the *Model Rules of Representative Conduct*, and the 2023 report of the White House Legal Aid Interagency Roundtable. Use of the term “nonlawyer” is not meant to suggest any deficiencies in representation offered by such individuals, nor should it deter any individual agency from adopting a different term. The Conference encourages agencies to remain attentive to the ongoing discussion within the legal community about terminology in this area and to consider updating their usage accordingly.

⁷ Federal law may specify criteria or processes that an agency must use in determining whether a nonlawyer representative is qualified to represent participants in proceedings before it. See, e.g., 5 U.S.C. § 500(c) (providing that individuals duly qualified to practice as a certified public accountant in a state may represent participants in Internal Revenue Service proceedings upon filing with the agency a written declaration as specified by law).

⁸ See WH-LAIR REPORT, *supra* note 2, at vii.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

55 There are barriers to increasing availability of nonlawyer representation and assistance,
56 including barriers that agencies may be able to address through their rules regarding
57 representation and assistance. Agencies vary in their requirements, oversight, and encouragement
58 of such representation and assistance. Overly burdensome requirements for representatives to
59 establish their qualifications or to become accredited to practice before particular agencies can
60 unnecessarily reduce the availability of nonlawyer representation. When agencies do not
61 affirmatively inform participants of the availability of such representation or assistance,
62 participants may not be aware of these resources.

63 The issue of nonlawyer representation and assistance has been a long-standing concern of
64 the Administrative Conference. As early as 1986, the Conference recommended that agencies
65 permit and encourage nonlawyer representation and assistance because of the substantial number
66 of individuals needing or desiring representation and assistance in filling out forms, filing claims,
67 and appearing in agency proceedings who were unable to afford or otherwise obtain such
68 representation or assistance by lawyers.⁹ In 2023, the Conference adopted two recommendations
69 addressing agency adjudicatory processes that encourage agencies to allow participants in many
70 adjudications “to be represented by a lawyer or a lay person with relevant expertise”¹⁰ and to
71 establish “rules authorizing accredited or qualified nonlawyer representatives to practice before
72 the agency.”¹¹ And in 2024, the Conference’s Chair released *Model Rules of Representative*
73 *Conduct*, that, among other topics, address the qualifications and conduct of nonlawyer
74 representatives.¹²

75 This Recommendation expands on the Conference’s previous recommendations by
76 identifying best practices for incorporating and increasing representation and assistance by
77 permitting broader practice by nonlawyers in different types of adjudicative systems and

⁹ Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986).

¹⁰ Admin. Conf. of the U.S., Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, 89 Fed. Reg. 1509 (Jan. 10, 2024).

¹¹ Admin. Conf. of the U.S., Recommendation 2023-6, *Identifying and Reducing Burdens on the Public in Administrative Proceedings*, 89 Fed. Reg. 1511 (Jan. 10, 2024).

¹² ADMIN. CONF. OF THE U.S., MODEL RULES OF REPRESENTATIVE CONDUCT (2024). The Model Rules were developed by a working group of public- and private-sector representatives.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

78 providing guidance to make processes governing nonlawyer representation and assistance more
79 accessible and transparent.

RECOMMENDATION

Availability of Nonlawyer Assistance

- 80 1. Agencies should permit nonlawyers—including friends, family members, and other
81 individuals—to assist participants throughout the adjudicative process. For example,
82 agencies should freely allow nonlawyers to help participants navigate and complete
83 forms, obtain necessary documents and records, and accompany participants to
84 interviews and hearings for moral support, unless there is reason to exclude such
85 individuals (e.g., allowing participation in an interview or hearing could cause a
86 disruption or adversely impact testimony).
- 87 2. Agencies should encourage and expand opportunities for nonlawyer assistance through
88 programs that authorize, educate, and/or certify individuals to provide participants with
89 information, support, and dedicated assistance, either by staffing and operating such
90 programs directly or providing guidance and grant funding to nonprofit organizations.

Availability of Nonlawyer Representation

- 91 3. To increase the availability of representation for participants in their adjudications,
92 agencies should establish rules authorizing qualified (see paragraphs 4-5) and, as
93 appropriate, accredited (see paragraphs 6-9) nonlawyer representatives to practice before
94 them.

Qualifications of Nonlawyer Representatives

- 95 4. Agencies should establish reasonable qualifications required for nonlawyer
96 representatives to practice before them. When determining whether a nonlawyer is
97 qualified to represent a participant in an agency proceeding, agencies should consider the
98 factors listed in the *Model Rules of Representative Conduct*, such as the representative's



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 99 relationship to the participant; their knowledge, expertise, or skill; and their fitness to
100 serve.
- 101 5. Agencies should provide that an individual who is disbarred from practicing law is not
102 permitted to serve as a nonlawyer representative before the agency.

Accreditation of Nonlawyer Representatives

- 103 6. In addition to establishing qualifications for nonlawyer representatives, the following
104 types of agencies should consider developing and implementing accreditation programs
105 for nonlawyer representatives to help ensure the quality and competency of
106 representation in their adjudicative proceedings:
- 107 a. Agencies conducting adversarial adjudications with evidentiary hearings;
 - 108 b. Agencies that adjudicate a high volume of cases involving historically
109 underserved communities; and
 - 110 c. Agencies with adjudications that involve specialized or technical subject matter.
- 111 7. Agencies with accreditation programs should consider requiring initial and continuing
112 education for nonlawyer representatives, either by providing such education directly or
113 by working with organizations that employ, educate, or mentor nonlawyer
114 representatives.
- 115 8. Agencies should regularly review the requirements of their accreditation programs to
116 ensure they are beneficial without adding unnecessary burdens.
- 117 9. Agencies with programs for accrediting, educating, and regulating nonlawyer
118 representatives who practice before them should have dedicated funding to ensure
119 availability of representation and reduce wait times for accreditation.

Oversight and Enforcement

- 120 10. Agencies should establish rules to govern the conduct and ethical obligations of
121 nonlawyer representatives. Agencies should consider adopting in whole or in part the
122 *Model Rules of Representative Conduct*.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 123 11. Agencies should establish procedures for reviewing allegations or evidence of
124 noncompliance by nonlawyer representatives with their rules of conduct; adjudicating
125 allegations that nonlawyer representatives have violated those rules; and imposing
126 sanctions on nonlawyer representatives found to have violated the rules of conduct.
127 Agencies should also ensure they have procedures for enforcing such sanctions.
128 12. Agencies should provide for administrative review of any sanctions imposed on
129 nonlawyer representatives for violation of relevant conduct rules.

Transparency with Regard to Representation and Assistance

- 130 13. To improve participants' awareness of options for representation and assistance,
131 including by qualified or accredited nonlawyers, agencies should inform participants
132 about such options early and throughout adjudications, including at levels of decision-
133 making prior to an opportunity for a hearing and by posting relevant information on their
134 websites.
135 14. Agencies should publish the following in the *Code of Federal Regulations* and on their
136 websites:
137 a. Rules prescribing the qualifications required for nonlawyer representatives;
138 b. Rules for accrediting, educating, and regulating nonlawyer representatives, for
139 agencies with formal accreditation programs; and
140 c. Rules governing the conduct and ethical obligations of nonlawyer representatives,
141 as well as procedures for adjudicating alleged violations of these rules and
142 imposing sanctions.
143 15. To inform and protect participants, agencies should publish on their websites the names
144 of nonlawyer representatives who have been sanctioned, the nature of the sanction, and,
145 as relevant, the specified period of the sanction. Agencies may omit certain information
146 regarding the nature of the violation or sanction as necessary to preserve recognized
147 privacy interests.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Coordination and Collaboration with Regard to Representation and Assistance

- 148 16. Agencies with overlapping subject matters, similar adjudication systems, or similar
149 regulatory structures for nonlawyer representation should identify opportunities for
150 interagency coordination of accreditation or education programs for nonlawyer
151 representatives, to save resources and promote consistency.
- 152 17. When authorized by law, agencies should expand grant funding opportunities for
153 nonprofit organizations that employ, educate, or mentor nonlawyers who represent or
154 assist participants.
- 155 18. Agencies should work with law and other professional school clinics to expand programs
156 that allow students to represent participants under the supervision of lawyers or other
157 accredited professionals or provide assistance to participants.
- 158 19. Agencies should engage with community-based organizations, nongovernmental
159 organizations, advocacy groups, and other organizations that can assist in building trust
160 among participants and improve nonlawyer representation and assistance by bringing
161 knowledge of and expertise in issues facing those communities.
- 162 20. Agencies should collaborate with state bar associations and other relevant licensing
163 authorities to reduce the effect that state prohibitions against unauthorized practice of law
164 may have on the ability of nonlawyers to represent parties before them.

Data

- 165 21. Agencies should gather and maintain baseline comparative data on representation,
166 including by nonlawyers, to (1) help agencies and others assess whether rules and
167 procedures regarding nonlawyer representation are achieving agency goals in making
168 such representation available and accessible; and (2) identify opportunities for expanding
169 access to representation. Such data should include, at a minimum, the type and number of
170 nonlawyer representatives; the outcomes, in aggregate, of cases in which parties have no
171 representation, lawyer representation, or nonlawyer representation; the number of
172 pending applications for accreditation; and average wait time for applications to be



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

173 reviewed. Agencies should make data regarding representation publicly available and
174 regularly update it.

175 22. To the extent practicable, agencies should gather and maintain data on assistance,
176 including by nonlawyers, to assess participants' experiences with and access to various
177 forms of assistance. Agencies may collect such information by, for example, surveying
178 participants regarding whether they received any assistance, the type of assistance they
179 received, and the effectiveness of such assistance. Agencies may also require grantees, as
180 a condition of their grants, to report on the types of assistance they provide, the number
181 of participants they assist, and the outcomes of such assistance (e.g., the individual
182 applied for or received benefits). Agencies should make data on assistance publicly
183 available and regularly update it.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Nonlawyer Assistance and Representation in Agency Adjudications

Committee on Adjudication

Proposed Recommendation for Plenary | December 12, 2024

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Millions of people each year participate in administrative adjudicative proceedings to
2 access federal programs and resolve legal issues. Some adjudicative proceedings are simple
3 enough—or could be made simple enough—for people to navigate on their own. But many are
4 so complex, or involve such significant stakes, that people engaging with them benefit from
5 representation by individuals with expertise in those programs or assistance from individuals
6 who can help them navigate the proceedings.

7 It is helpful to distinguish between “representation” and “assistance.” Representation is
8 used to denote that the individual is “standing in the shoes” of the participant and can speak for
9 that individual even when they are not present. Other activities that likely indicate representation
10 include counseling on eligibility for an agency program or signing official records.¹ “Assistance”
11 is broader and used to indicate many other forms of help that may be beneficial to a person in
12 dealing with an agency; this may include educating someone on process, counseling someone
13 about rights and remedies generally, and, in some cases, helping someone navigate a form or
14 benefits application. In most cases, representation will include various forms of assistance, but
15 assistance does not include representation.

¹ Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25,641, 25,642 n.2 (July 16, 1986) (FOOTNOTE 2).

DRAFT December 9, 2024

Commented [CoA1]: Proposed Amendment from the Committee on Adjudication:

The Committee voted to replace the original title of this Recommendation (*Nonlawyer Assistance and Representation*).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

16 Representation and assistance, whether by lawyers or nonlawyers, are particularly
17 valuable, even in seemingly straightforward adjudicatory proceedings, when they help people
18 access relevant and accurate information about agency programs, program eligibility, and
19 information on how to ~~correctly complete forms correctly~~ and submit required information.² For
20 example, although the use of digital technologies, such as online forms and virtual hearings, is an
21 effective strategy for increasing accessibility, it can also act as a barrier for people who lack
22 access to digital tools or lack the skills to navigate these systems. Such challenges can be present
23 for anyone, but those lacking representation or assistance may become so overwhelmed that they
24 ~~give up and forego~~ rights and benefits to which they are entitled.³ ~~In other instances, errors can~~
25 ~~be exacerbated by a lack of representation or assistance and lead to unfair outcomes. More~~
26 ~~generally, a lack of representation or assistance often can lead to incorrect or unfair outcomes.~~

27 Representation and assistance not only help participants in adjudicatory proceedings but
28 also benefit agencies. Without representation or assistance, an individual may be less likely to
29 properly and timely complete adjudicative requirements, which can delay proceedings.
30 Additionally, those without representation or assistance may require more support from the
31 agency, including the adjudicator, which can strain resources and reduce efficiency.⁴

32 Many people, however, particularly low-income people and members of historically
33 underserved communities, are unable to access representation or assistance.⁵ One barrier is the
34 ~~critical~~ shortage of affordable legal services. This concern is particularly acute in remote and
35 rural areas, where not only are lawyers relatively scarce and may not have relevant expertise, but

² WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN FEDERAL ADMINISTRATIVE PROCEEDINGS: NONLAWYER ASSISTANCE AND OTHER STRATEGIES 1 (2023) [hereinafter WH-LAIR REPORT].

³ Pamela Herd, Donald Moynihan, & Amy Widman, Identifying and Reducing Burdens in Administrative Processes 41 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).

⁴ Admin. Conf. of the U.S., Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016); see also, Admin. Conf. of the U.S., Recommendation 86-1, *supra* note 1, at 25,642 *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986); WH-LAIR REPORT, *supra* note 2, at 19 (“Studies have shown that legal assistance improves legal outcomes.”).

⁵ See Amy Widman, *Nonlawyer Assistance and Representation* (Oct. 2/Dec. 9, 2024) (draft report to the Admin. Conf. of the U.S.).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

36 they may not be accessible to people who need them due to the long distances required to visit in
37 person, inability to consult virtually, and other barriers.

38 Federal agencies have long innovated various ways to widen the pool of available
39 representatives and expand assistance. For example, many agencies currently permit participants
40 in agency adjudications to be represented by qualified or accredited nonlawyers.⁶ In many
41 instances, the decision maker (whether or not an administrative law judge) makes an informal
42 determination whether a representative is “qualified,” but some adjudicative systems provide for
43 a formal accreditation system to determine which nonlawyer representatives are qualified to
44 practice in those systems.⁷

45 Increasing availability of nonlawyer representation and assistance can be particularly
46 beneficial in meeting the needs of communities of special populations, including veterans and
47 servicemembers, members of tribal communities, people with disabilities, people with criminal
48 records, immigrants, and disaster survivors.⁸ Members of such communities often benefit from
49 representation and assistance provided by nongovernmental organizations, advocacy groups, and
50 others already operating to meet the needs and face the challenges within such communities.
51 These community ties function as a way to build trust among participants and serve as a deep
52 source of knowledge and expertise that can bear on representation and assistance. That trust can

⁶ See 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”). Examples of nonlawyers who represent or assist parties in agency proceedings include other licensed professionals such as accountants, social workers, and paralegals; law students; union representatives; human resources professionals; corporate officers; tribal advocates; agency employees; community members; and family members. The Conference recognizes that there is an ongoing discussion about the best way to describe representatives who do not hold an active law license. For the purposes of this Recommendation, the Conference refers to this group as “nonlawyer representatives” because it is consistent with two prior recommendations of the Conference, the *Model Rules of Representative Conduct*, and the 2023 report of the White House Legal Aid Interagency Roundtable. Use of the term “nonlawyer” is not meant to suggest any deficiencies in representation offered by such individuals, nor should it deter any individual agency from adopting a different term. The Conference encourages agencies to remain attentive to the ongoing discussion within the legal community about terminology in this area and to consider updating their usage accordingly.

⁷ Federal law may specify criteria or processes that an agency must use in determining whether a nonlawyer representative is qualified to represent participants in proceedings before it. See, e.g., 5 U.S.C. § 500(c) (providing that individuals duly qualified to practice as a certified public accountant in a state may represent participants in Internal Revenue Service proceedings upon filing with the agency a written declaration as specified by law).

⁸ See WH-LAIR REPORT, *supra* note 2, at vii.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

53 in turn inspire public confidence in agency adjudication. Agencies can engage with such groups
54 to help increase availability and awareness of nonlawyer representation and assistance in these
55 communities.

56 There are barriers to increasing availability of nonlawyer representation and assistance,
57 including barriers that agencies may be able to address through their rules regarding
58 representation and assistance. Agencies vary in their requirements, oversight, and encouragement
59 of such representation and assistance. ~~Overly burdensome requirements for representatives to~~
60 ~~establish their qualifications or to become accredited to practice before particular agencies can~~
61 ~~unnecessarily reduce the availability of nonlawyer representation. While reasonable requirements~~
62 ~~for qualification or accreditation, as well as continuing education, help ensure the quality and~~
63 ~~competence of representation, overly burdensome requirements can unnecessarily reduce the~~
64 ~~availability of nonlawyer representation.~~ When agencies do not affirmatively inform participants
65 of the availability of such representation or assistance, participants may not be aware of these
66 resources.

67 The issue of nonlawyer representation and assistance has been a long-standing concern of
68 the Administrative Conference. As early as 1986, the Conference recommended that agencies
69 permit and encourage nonlawyer representation and assistance because of the substantial number
70 of individuals needing or desiring representation and assistance in filling out forms, filing claims,
71 and appearing in agency proceedings who were unable to afford or otherwise obtain such
72 representation or assistance by lawyers.⁹ In 2023, the Conference adopted two recommendations
73 addressing agency adjudicatory processes that encourage agencies to allow participants in many
74 adjudications “to be represented by a lawyer or a lay person with relevant expertise”¹⁰ and to
75 establish “rules authorizing accredited or qualified nonlawyer representatives to practice before
76 the agency.”¹¹ And in 2024, the Conference’s Chair released *Model Rules of Representative*

⁹ Admin. Conf. of the U.S., Recommendation 86-1, *supra* note 1, at 25,642 *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25641 (July 16, 1986).

¹⁰ Admin. Conf. of the U.S., Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, 89 Fed. Reg. 1509 (Jan. 10, 2024).

¹¹ Admin. Conf. of the U.S., Recommendation 2023-6, *Identifying and Reducing Burdens on the Public in Administrative Proceedings*, 89 Fed. Reg. 1511 (Jan. 10, 2024).

Commented [CA2]: Proposed Amendment from Council #1 (see associated amendments at paragraphs 4, 7, and 8)

The amendments proposed here and in paragraphs 4, 7, and 8 clarify that agencies must consider how agency-imposed requirements affect the availability of representation.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

77 *Conduct*, that, among other topics, address the qualifications and conduct of nonlawyer
78 representatives.¹²

79 This Recommendation expands on the Conference’s previous recommendations by
80 identifying best practices for incorporating and increasing representation and assistance by
81 permitting broader practice by nonlawyers in different types of adjudicative systems and
82 providing guidance to make processes governing nonlawyer representation and assistance more
83 accessible and transparent.

RECOMMENDATION

Availability of Nonlawyer Assistance

- 84 1. Agencies should permit nonlawyers—including friends, family members, and other
85 individuals—to assist participants throughout the adjudicative process. For example,
86 agencies should freely allow nonlawyers to help participants navigate and complete
87 forms, obtain necessary documents and records, and accompany participants to
88 interviews and hearings for moral support, unless there is reason to exclude such
89 individuals (e.g., allowing participation in an interview or hearing could cause a
90 disruption or adversely ~~impact~~ affect testimony).
- 91 2. Agencies should encourage and expand opportunities for nonlawyer assistance through
92 programs that authorize, educate, and/or certify individuals to provide participants with
93 information, support, and dedicated assistance, either by staffing and operating such
94 programs directly or providing guidance and/or grant funding to nonprofit organizations
95 to perform those functions.

Commented [CMA3]: Proposed Amendment from Senior Fellow Jonathan Rose #1: I would move Availability of Nonlawyer Representation and Paragraphs 3-12 to the beginning, followed by Availability of Nonlawyer Assistance and current Paragraphs 1-2.

Commented [CMA4]: Proposed Amendment from Senior Fellow Jonathan Rose #2: In the Section on Availability of Nonlawyer Assistance I would reverse the order of Paragraphs 1 and 2.

¹² Admin. Conf. of the U.S., Model Rules of Representative Conduct ADMIN. CONF. OF THE U.S., MODEL RULES OF REPRESENTATIVE CONDUCT (2024). The Model Rules were developed by a working group of public- and private-sector representatives.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Availability of Nonlawyer Representation

- 96 3. To increase the availability of representation for participants in their adjudications,
97 agencies should establish rules authorizing qualified (see paragraphs 4-5) and, as
98 appropriate, accredited (see paragraphs 6-9) nonlawyer representatives to practice before
99 them.

Qualifications of Nonlawyer Representatives

- 100 4. Agencies should establish reasonable qualifications required for nonlawyer
101 representatives to practice before them, without adding unnecessary burdens. When
102 determining whether a nonlawyer is qualified to represent a participant in an agency
103 proceeding, agencies should consider the factors listed in the *Model Rules of*
104 *Representative Conduct*, such as the representative's relationship to the participant; their
105 knowledge, expertise, experience, or skill; and their fitness to serve.
- 106 5. Agencies should provide that an individual who is disbarred from practicing law is not
107 permitted to serve as a nonlawyer representative before the agency.

Commented [CA5]: Proposed Amendment from Council #1 (see corresponding amendments at lines 59-64 and paragraphs 7 and 8)

Commented [CMA6]: Proposed Amendment from Senior Fellow Jonathan Rose #3.

Commented [CA7]: Proposed Amendment from Council #2

The Council is concerned that a categorical ban on practice by disbarred attorneys may reduce unnecessarily the availability of representation. Assessing "fitness to serve" (paragraph 4) in determining whether a nonlawyer is qualified to represent participants provides agencies an adequate opportunity to consider disbarment on a case-by-case basis.

Accreditation of Nonlawyer Representatives

- 108 6. In addition to establishing qualifications for nonlawyer representatives, the following
109 types of agencies should consider developing and implementing accreditation programs
110 for nonlawyer representatives to help ensure the quality and competency of
111 representation in their adjudicative proceedings:
- 112 a. Agencies conducting adversarial adjudications with evidentiary hearings;
 - 113 b. Agencies that adjudicate a high volume of cases involving historically
114 underserved communities; and
 - 115 c. Agencies with adjudications that involve specialized or technical subject matter.
- 116 7. Agencies with accreditation programs should consider requiring implementing reasonable
117 initial and continuing education requirements for nonlawyer representatives, either by
118 providing such education directly or by working with organizations that employ, educate,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 119 or mentor nonlawyer representatives. In doing so, agencies should avoid imposing
120 education requirements that unnecessarily burden representatives. |
- 121 8. Agencies regularly should regularly review the requirements of their accreditation
122 programs to ensure they are reasonable and beneficial without adding unnecessary
123 burdens.
- 124 9. Agencies with programs for accrediting, educating, and regulating nonlawyer
125 representatives who practice before them should have dedicated funding to ensure
126 availability of representation and reduce wait times for accreditation.

Commented [CA8]: Proposed Amendment from Council #1
(see corresponding amendments at lines 59-64 and
paragraphs 4 and 8)

Commented [CA9]: Proposed Amendment from Council #1
(see corresponding amendments at lines 59-64 and
paragraphs 4 and 7)

Commented [CA10]: Proposed Amendment from Council
#3

The Council believes that separate, insulated funding may
not be necessary so long as adequate funding is available for
this purpose.

Oversight and Enforcement

- 127 10. Agencies should establish rules to govern the conduct and ethical obligations of
128 nonlawyer representatives. Agencies should consider adopting in whole or in part the may
129 wish to use the Model Rules of Representative Conduct as a resource in establishing such
130 rules. |
- 131 11. Agencies should establish procedures for reviewing allegations or evidence of
132 noncompliance by nonlawyer representatives with their rules of conduct; adjudicating
133 allegations that nonlawyer representatives have violated those rules; and imposing
134 sanctions on nonlawyer representatives found to have violated the rules of conduct.
135 Agencies should also ensure they have procedures for enforcing such sanctions.
- 136 12. Agencies should provide for administrative review of any sanctions imposed on
137 nonlawyer representatives for violation of relevant conduct rules.

Commented [CA11]: Proposed Amendment from Council
#4

As rewritten, this paragraph would encourage agencies to use
the Model Rules as a helpful resource without explicitly
condoning the content of the Model Rules in its entirety.

Transparency with Regard to Representation and Assistance

- 138 13. To improve participants' awareness of options for representation and assistance,
139 including by qualified or accredited nonlawyers, agencies should inform participants
140 about such options early and throughout adjudications, including at levels of decision-
141 making prior to an opportunity for a hearing and by posting relevant information on their
142 websites.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 143 14. Agencies should publish the following in the *Code of Federal Regulations* and on their
144 websites:
- 145 a. Rules prescribing the qualifications required for nonlawyer representatives;
 - 146 b. Rules for accrediting, educating, and regulating nonlawyer representatives, for
147 agencies with formal accreditation programs; and
 - 148 c. Rules governing the conduct and ethical obligations of nonlawyer representatives,
149 as well as procedures for adjudicating alleged violations of these rules and
150 imposing sanctions.
- 151 15. To inform and protect future participants, agencies should publish on their websites the
152 names of nonlawyer representatives who are currently barred from serving as
153 representatives have been sanctioned, the nature of the sanction, and, as relevant, the
154 specified period of the sanction. Agencies may omit certain information regarding the
155 nature of the violation or sanction as necessary to preserve recognized privacy interests.
156 Agencies should consider establishing, when appropriate, procedures for removing
157 information about sanctioned representatives from their websites after a certain period of
158 time has elapsed or a sanction is no longer in effect.

Commented [CMA12]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers: I don't like the "name and shame" aspect of Paragraph 15. I think the government should engage in such stigmatizing as little as possible. At most, the names of representatives who are currently *persona non grata* would be enough. It may also discourage representation that is needed. It also seems to cover situations where a representative who has been too aggressive is bounced from a case without more.

Commented [CA13]: Proposed Amendment from Council #5

Coordination and Collaboration with Regard to Representation and Assistance

- 159 16. Agencies with overlapping subject matters, similar adjudication systems, or similar
160 regulatory structures for nonlawyer representation should identify opportunities for
161 interagency coordination of accreditation or education programs for nonlawyer
162 representatives, to save resources and promote consistency.
- 163 17. When authorized by law, agencies should expand grant funding opportunities for
164 nonprofit organizations that employ, educate, or mentor nonlawyers who represent or
165 assist participants.
- 166 18. Agencies should work with law and other professional school clinics to expand programs
167 that allow students to represent participants under the supervision of lawyers or other
168 accredited professionals or provide assistance to participants.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 169 19. Agencies should engage with community-based organizations, nongovernmental
170 organizations, advocacy groups, and other organizations that can assist in building trust
171 among participants and improve nonlawyer representation and assistance by bringing
172 knowledge of and expertise in issues facing those communities.
- 173 20. Agencies should collaborate with state bar associations and other relevant licensing
174 authorities to reduce the effect that state prohibitions against unauthorized practice of law
175 may have on the ability of nonlawyers to represent parties before them.

Data

- 176 21. Agencies should gather and maintain baseline comparative data on representation,
177 including by nonlawyers, to (1) help agencies and others assess whether rules and
178 procedures regarding nonlawyer representation are achieving agency goals in making
179 such representation available and accessible; and (2) identify opportunities for expanding
180 access to representation. Such data should include, at a minimum, the type and number of
181 nonlawyer representatives; the outcomes, in aggregate, of cases in which parties have no
182 representation, lawyer representation, or nonlawyer representation; the number of
183 pending applications for accreditation; and average wait time for applications to be
184 reviewed. Agencies should make data regarding representation publicly available,
185 including on their websites, and regularly update it.
- 186 22. To the extent practicable, agencies should gather and maintain data on assistance,
187 including by nonlawyers, to assess participants' experiences with and access to various
188 forms of assistance. Agencies may collect such information by, for example, surveying
189 participants regarding whether they received any assistance, the type of assistance they
190 received, and the effectiveness of such assistance. To help with the assessment of funding
191 opportunities, Agencies- agencies may also require grantees, as a condition of their
192 grants, to report on the types of assistance they provide, the number of participants they
193 assist, and the outcomes of such assistance (e.g., the individual applied for or received
194 benefits). Agencies should make data on assistance publicly available, including on their
195 websites, and regularly update it.

Commented [CA14]: Proposed Amendment from Council #6 (see associated amendment at line 194)

Commented [CA15]: Proposed Amendment from Council #7
As amended, this paragraph would clarify that the purpose of requiring grantees to collect such information is to enable agencies to assess the performance of grant-funded assistance and not necessarily to condition the award of future grants to entities based on their past performance in achieving particular outcomes (which may have unintended consequences).

Commented [CA16]: Proposed Amendment from Council #6 (see associated amendment at line 185)

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**STATEMENT OF PRINCIPLES FOR
ADMINISTRATIVE ADJUDICATION**

Office of the Chair
Administrative Conference of the United States

This Statement was prepared by the Office of the Chair of the Administrative Conference of the United States (ACUS) based on recommendations adopted by the ACUS Assembly. The Statement was not adopted by the ACUS Assembly and does not necessarily reflect the views of ACUS (including its Council, committees, or members).

Statement of Principles for Administrative Adjudication

*INITIAL OFFICE OF THE CHAIR DRAFT FOR REVIEW BY THE ASSEMBLY
AT THE 82ND PLENARY SESSION*

December 12, 2024

1 Federal agencies adjudicate millions of cases each year, including applications for
2 benefits and services, applications for licenses and permits, and enforcement actions against
3 persons suspected of violating the law. Tens of thousands of federal agency officials participate
4 in administrative adjudication.

5 Agencies rely on a wide range of procedural, organizational, personnel, technological,
6 and other initiatives to organize, manage, and conduct adjudications. These initiatives may be
7 directed by statutes, such as the Administrative Procedure Act (APA) or agencies' organic
8 statutes. But agencies nonetheless retain significant discretion in how they design and conduct
9 their adjudicative systems.

10 The Administrative Conference of the United States (ACUS) has adopted dozens of
11 recommendations and statements identifying best practices for administrative adjudication.
12 Additionally, working groups convened by the ACUS Chair have developed three sets of model
13 rules to help agencies implement best practices.

14 Based on a review of these materials, the ACUS Office of the Chair prepared this
15 Statement of Principles to provide readers with a concise description of common principles and
16 best practices identified by ACUS and a starting point for accessing relevant ACUS resources. It
17 is intended to help agencies and agency adjudicators manage adjudication systems and adjudicate
18 individual cases in a fair, accurate, consistent, efficient, and timely manner. (For definitions of
19 "adjudication" and "adjudicator," as ACUS has used those terms, see below.)

20 In using this guide, readers should take into account the unique circumstances of specific
21 agencies. Agencies operate under different legal authorities, carry out distinct missions,
22 adjudicate different types of cases, and have varying resources at their disposal.

23 The Office of the Chair will update this Statement from time to time as ACUS adopts
24 new recommendations that address agency adjudication.

Adjudication

25 The APA defines “adjudication” as “any agency process for the formulation of an
26 “order.”¹ An “order” (often called simply a “decision”) is “the whole or a part of a final
27 disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a
28 matter other than rule making but including licensing.”²

29 ACUS recommendations typically use the term “adjudication” in a narrower sense than
30 the APA. One representative definition, offered by Professor Michael Asimow in a reference
31 guide prepared for ACUS and reflected in recent ACUS recommendations, is:

32 [A] decision by government officials made through an administrative process to
33 resolve a claim or dispute between a private party and the government or between
34 two private parties arising out of a government program.

35 Professor Asimow’s guide provides additional information about the agency processes that this
36 definition includes and excludes.³

37 Adjudication can take many forms depending on the agency and program. The traditional
38 classification of adjudication, reflected in the APA, divides it into “formal” adjudication and
39 “informal” adjudication. In cases of formal adjudication, the agency must use the procedures
40 described in the adjudication and hearing sections of the APA (5 U.S.C. § 554, 556–557).
41 Informal adjudication is not subject to the requirements of these sections and is sometimes said
42 to be conducted “outside” the APA.

43 The distinction between “formal” and “informal,” however, is misleading in some
44 respects. That is because statutes and agency rules often require procedures for informal
45 adjudications that are at least as “formal”—or trial-like—as adjudications conducted according
46 to the APA’s adjudication and hearing sections.⁴ As an alternative, recent ACUS
47 recommendations identify three types of adjudication:

¹ 5 U.S.C. § 551(7).

² 5 U.S.C. § 551(6).

³ MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8 (2019).

⁴ *See id.* at 5–6.

48 (1) First, adjudication in which a statute grants parties the opportunity for an evidentiary
49 hearing governed by the APA’s adjudication and hearing sections. This is sometimes
50 referred to as “Type A” adjudication.

51 (2) Second, adjudication in which a statute, agency rule, or executive order grants parties
52 the opportunity for an evidentiary hearing that is not governed by the APA’s
53 adjudication and hearing sections. This is sometimes referred to as “Type B”
54 adjudication.

55 (3) Third, adjudication in which the law does not grant parties the opportunity for an
56 evidentiary hearing. This is sometimes referred to as “Type C” adjudication.⁵

57 An “evidentiary hearing” is “an adjudicatory proceeding at which the parties make evidentiary
58 submissions and have an opportunity to rebut testimony and arguments made by the opposition,
59 and to which the exclusive record principle applies.”⁶ Under the exclusive record principle, the
60 adjudicator is “confined to considering evidence and arguments from the parties produced during
61 the hearing process (as well as matters officially noticed) when determining factual issues.”⁷

62 Several ACUS recommendations on adjudication are limited to adjudications in which
63 there is a legally required opportunity for an evidentiary hearing, whether or not governed by the
64 APA’s hearing and adjudication sections,⁸ and one recommendation is limited to adjudications in
65 which there is a legally required opportunity for an evidentiary hearing “outside” the APA.⁹
66 Another recommendation is limited to adjudications in which there is no legally required

⁵ See Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

⁶ ASIMOW, *supra* note 3, at 10.

⁷ *Id.*

⁸ See, e.g., Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6,618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*, 84 Fed. Reg. 71,350 (Dec. 27, 2019); Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2,139 (Feb. 6, 2019); see also ADMIN. CONF. OF THE U.S., MODEL ADJUDICATION RULES (rev. 2018), <https://www.acus.gov/model-rules/model-adjudication-rules>.

⁹ See Recommendation 2016-4, *supra* note 5; see also ASIMOW, *supra* note 3.

67 opportunity for an evidentiary hearing.¹⁰ Other recommendations—including many related to
68 management, transparency, accessibility, and technology use—apply more broadly.¹¹

Adjudicator

69 Broadly speaking, an “adjudicator” is any agency official who decides a case individually
70 or who participates as a member of a multi-member body that decides a case. Many different
71 types of officials serve as adjudicators, including officials appointed by the President with the
72 advice and consent of the Senate (PAS officials) and members of the civil service. Adjudicators
73 also serve in different capacities; some preside over hearings, for example, while others serve in
74 an appellate capacity.

75 Administrative law judges (ALJs) are perhaps the best known type of adjudicators. ALJs
76 preside over most hearings governed by the APA’s adjudication and hearing sections. There are
77 about 2,000 ALJs employed by agencies across the federal government. ALJs are members of
78 the civil service. ALJs are appointed by agency heads,¹² and since 2018, they have been recruited
79 and selected exclusively through agency-administered processes.¹³ Statutes and rules adopted by
80 the Office of Personnel Management govern their supervision.¹⁴

81 Adjudicators other than ALJs preside over adjudications in which the law grants parties
82 the opportunity for an evidentiary hearing that is not governed by the APA’s adjudication and
83 hearing sections. These adjudicators go by many titles, including administrative judge and
84 agency-specific titles such as “immigration judge,” “veterans law judge,” and “administrative

¹⁰ See Admin. Conf. of the U.S., Recommendation 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*, 89 Fed. Reg. 1,509 (Jan. 10, 2024).

¹¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, 89 Fed. Reg. 1,513 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1,722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2,142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

¹² 5 U.S.C. § 3105; see also *Lucia v. SEC*, 585 U.S. 237 (2018).

¹³ See Exec. Order No. 13,843, *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32,755 (July 13, 2018); see also Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).

¹⁴ 5 U.S.C. §§ 554, 557, 3105, 3344, 4301(D)(2), 5372, 7521; 5 C.F.R. pt. 930, subpt. B.

85 patent judge.” Such adjudicators often are referred to collectively as “administrative judges”
86 (AJs).¹⁵

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¹⁵ See generally Kent Barnett et al., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal (Sep. 24, 2018) (report to the Admin. Conf. of the U.S.).

STATEMENT OF PRINCIPLES

Allocation of Tasks

- 87 1. Agencies should adopt procedures that standardize the allocation of tasks among
88 adjudicators, managers, staff attorneys, and paralegal support staff.¹
- 89 2. Agencies should automate routine tasks that do not require a significant exercise of
90 discretion when automation will not adversely affect decisional quality or program
91 integrity.²
- 92 3. Agencies should outsource routine tasks that do not require a significant exercise of
93 discretion—such as transcribing, scanning records, or mailing correspondence—when it
94 would be more efficient and cost-effective for a contractor to perform them and there are
95 no legal or policy reasons to assign the tasks to agency personnel.³
- 96 4. Agencies, particularly those that decide a significant number of cases, ordinarily should
97 assign responsibility for conducting initial proceedings (i.e., receiving and evaluating
98 evidence and arguments and issuing a decision) to individual adjudicators (e.g., an ALJ
99 or an AJ) rather than PAS officials, boards, or panels.⁴
- 100 5. When it would be beneficial to provide for review by a PAS official or a collegial body
101 of PAS officials, agencies should, consistent with constitutional and statutory
102 requirements, determine the appropriate structure for such review. Options include:
- 103 a. Providing the only opportunity for administrative review of lower-level decisions;
104 b. Delegating first-level review authority to a non-PAS officials, such as an agency
105 “Judicial Officer,” or an appellate board and retaining authority to exercise
106 second-level administrative review in exceptional circumstances;
107 c. Delegating final review authority to another PAS official; and
108 d. For collegial bodies of PAS officials, delegating first-level review authority to a
109 single member or panel, and retaining authority for the collegial body as a whole
110 to exercise second-level (and final) administrative review.⁵

Caseload Management

- 111 6. Agencies should adopt organizational performance goals that encourage and provide
112 clear expectations for timeliness.⁶

- 113 7. Agencies should adopt procedures for the effective management of their caseloads,
114 including, as appropriate, procedures for:
- 115 a. Resolving multiple cases in a single proceeding, such as by aggregating similar
116 claims;⁷
 - 117 b. Resolving recurring legal or factual issues, such as through precedential decision
118 making or substantive rulemaking;⁸
 - 119 c. Using alternative dispute resolution (ADR) techniques;⁹
 - 120 d. Using simplified or expedited procedures;¹⁰
 - 121 e. Using remote hearings (e.g., virtual, video teleconference, telephone);¹¹ and
 - 122 f. Screening cases at intake to resolve procedural issues as early as possible, identify
123 cases that may be appropriate for less time- and resource-intensive processes
124 (such as those listed above), and identify cases that can be resolved quickly
125 because they are legally and factually straightforward, and identify cases that
126 should be prioritized or expedited.¹²
- 127 8. Agencies, particularly those with large caseloads, should consider implementing
128 electronic case management systems.¹³ At a minimum, such systems should track the
129 number of proceedings of each type pending, commenced, and concluded during a
130 standard reporting period within and across all levels of an adjudication system. For each
131 case pending at each level of an adjudication system, an electronic case management
132 system should capture:
- 133 a. The current status of the case;
 - 134 b. The number of days required to meet critical case processing milestones;
 - 135 c. The identities of adjudicators and any personnel who assisted in evaluating
136 evidence, writing decisions, or performing other case-processing tasks;
 - 137 d. The procedural history of the case, including any actions and outcomes on
138 administrative or judicial review;
 - 139 e. The issues presented in the case and how they were resolved;
 - 140 f. Whether private parties are represented; and
 - 141 g. Any other data the agency determines to be helpful.¹⁴

Appointment and Supervision of Personnel

- 142 9. Agencies should design and administer guidelines and procedures for hiring
143 adjudicators—including ALJs and AJs—to reach an optimal and broad pool of applicants
144 and ensure that adjudicators will carry out the functions of their offices impartially and
145 maintain the appearance of impartiality.¹⁵
- 146 10. If agencies use timeliness or productivity measures to appraise the performance of non-
147 ALJs (including AJs, managers, and support personnel) or establish timeliness or
148 productivity expectations for ALJs (who are not subject to performance appraisals), they
149 should ensure that such measures and expectations are reasonable and objective, provide
150 clear expectations for timeliness, and do not lead personnel to take actions that would
151 adversely affect decisional quality or the fairness or integrity of proceedings.¹⁶
- 152 11. Agencies that employ more than one ALJ should designate a chief ALJ responsible for
153 overseeing training, receiving and investigating complaints of misconduct, and
154 developing case processing guidelines in consultation with other ALJs and interested
155 persons.¹⁷
- 156 12. Agencies should offer training, as appropriate, for adjudicators, managers, staff attorneys,
157 and paralegal support staff regarding:
- 158 a. Fair, accurate, and efficient case management, especially prehearing processes;¹⁸
 - 159 b. Using ADR techniques;¹⁹
 - 160 c. Professional development;²⁰
 - 161 d. Using electronic case management systems;²¹
 - 162 e. Using online processes;²²
 - 163 f. Conducting remote proceedings;²³
 - 164 g. Interacting with self-represented parties;²⁴

Adoption of Procedural Rules

- 165 13. Agencies should adopt rules, published in the *Federal Register* and codified in the *Code*
166 *of Federal Regulations*, that set forth all significant procedures and practices that affect
167 persons outside the agency.²⁵ Such rules should address, as applicable:
- 168 a. The conduct of proceedings in which there is no opportunity for an evidentiary
169 hearing;²⁶

- 170 b. Pre-hearing procedures, including discovery and issuance of subpoenas;²⁷
171 c. The conduct of evidentiary hearings, including the admission of evidence;²⁸
172 d. Agency appellate review;²⁹
173 e. Precedential decision making;³⁰
174 f. The participation of PAS officials in the adjudication of individual cases;³¹
175 g. Issuance of decisions;³²
176 h. Recusal of adjudicators;³³
177 i. The participation and conduct of attorney and non-attorney representatives;³⁴
178 j. Public access to and participation in adjudicative proceedings;³⁵
179 k. Remote hearings;³⁶
180 l. Online processes;³⁷
181 m. Filing fees and circumstances in which filing fees may be waived or reduced;³⁸
182 n. Implementation of the Equal Access to Justice Act;³⁹ and
183 o. Quality assurance systems.⁴⁰
- 184 14. Agencies should solicit public input when they materially revise existing or adopt new
185 procedural rules. Agencies should use notice-and-comment procedures unless the costs of
186 such procedures would outweigh the benefits.⁴¹

Procedures for Adjudications Not Involving an Evidentiary Hearing

- 187 15. Agencies should adopt procedures that promote the integrity of proceedings. Such
188 procedures should, as appropriate:
- 189 a. Reflect appropriate standards of neutrality;
 - 190 b. Require the recusal of employees who have financial or other conflicts of interest
191 in matters they are investigating or deciding or who may be viewed as not
192 impartial; and
 - 193 c. Require internal separation of decisional and adversarial personnel in cases
194 involving serious sanctions.⁴²
- 195 16. Agencies should notify parties of the initial, proposed, or preliminary decision, including
196 the reasons for that decision, in sufficient detail and in sufficient time to allow parties to
197 contest the decision and submit evidence to support their position. Notices should contain
198 the following information, as applicable:

- 199 a. Whether the agency provides a second chance to achieve compliance;
200 b. The manner by which the party can submit additional evidence and argument to
201 influence the agency’s initial, proposed, or preliminary decision;
202 c. The amount of time before further agency action will be taken; and
203 d. Whether and, if so, how parties may access materials in the agency’s case file.⁴³
204 17. Agencies should allow parties an adequate opportunity to furnish adjudicators with
205 evidence and arguments. Agencies should permit parties to rebut adverse information if
206 credibility issues are present.⁴⁴
207 18. Agencies should provide an oral or written, plain-language statement setting forth the
208 rationale for each decision, including the factual and other bases for the decision, at an
209 appropriate level of detail.⁴⁵
210 19. Agencies should provide for the administrative review of decisions by higher-level
211 adjudicators or other reviewers unless review is impracticable because of high caseload,
212 lack of available staff, time constraints, or low stakes.⁴⁶
213 20. Agencies with an ombuds program should empower ombuds to handle complaints about
214 proceedings. Agencies without an ombuds program should consider establishing one, or
215 sharing one with similarly situated agencies, for that purpose.⁴⁷

Procedures for Adjudications Involving an Evidentiary Hearing

216 *The Office of the Chair has developed Model Adjudication Rules⁴⁸ that reflect the*
217 *principles identified in this section. Agencies that conduct adjudications in which there is*
218 *a legally required opportunity for an evidentiary hearing are encouraged to use the*
219 *Model Adjudication Rules as a resource to draft new or revise existing rules.*

- 220 21. Agencies should adopt procedures that promote the integrity of proceedings. Such
221 procedures should, as appropriate:
222 a. Require a decision to be based on an exclusive record;⁴⁹
223 b. Address independent research by adjudicators and support staff;⁵⁰
224 c. Prohibit ex parte communications relevant to the merits of a case between persons
225 outside the agency and adjudicators and support staff;⁵¹
226 d. Require internal separation of decisional and adversarial personnel;⁵² and

- 227 e. Provide for the recusal of adjudicators other than agency heads in cases of actual
228 partiality and instances in which adjudicators may appear to be partial.⁵³
- 229 22. Agencies should adopt pre-hearing procedures that, as appropriate:
- 230 a. Require notice of hearings to parties by appropriate means and sufficiently far in
231 advance so that they may prepare for hearings;⁵⁴
- 232 b. Permit parties to inspect unprivileged materials in agency files that are not
233 otherwise protected;⁵⁵
- 234 c. Provide a process by which parties may seek to keep certain information
235 confidential or made subject to a protective order to protect privacy, confidential
236 business information, or national security;⁵⁶
- 237 d. Authorize adjudicators to require parties to participate in prehearing conferences
238 when doing so would simplify a hearing or promote settlement;⁵⁷
- 239 e. Authorize adjudicators to order discovery through depositions, interrogatories,
240 and other methods of discovery used in civil trials, upon a showing of need and
241 cost justification;⁵⁸ and
- 242 f. Permit summary judgment, upon a party's motion, in cases in which there are no
243 disputed issues of material fact.⁵⁹
- 244 23. Agencies should ensure that hearing notices are written in plain language and contain the
245 following information, as applicable:
- 246 a. Procedures for requesting a hearing;⁶⁰
- 247 b. The time, date, and place or manner of the hearing;⁶¹
- 248 c. The legal authority under which the hearing is to be held;⁶²
- 249 d. The issues of fact and law to be decided;⁶³
- 250 e. Discovery options, including procedures for subpoenaing documents and
251 witnesses;⁶⁴
- 252 f. Information about representation and assistance;⁶⁵
- 253 g. Opportunities for alternative dispute resolution;⁶⁶
- 254 h. Options for written hearings and oral hearings (e.g., in-person, video, virtual,
255 telephone);⁶⁷
- 256 i. Deadlines for filing pleadings and documents;⁶⁸
- 257 j. Opportunity for appellate review;⁶⁹

- 258 k. Availability of judicial review;⁷⁰ and
259 l. Information about relevant procedural rules and explanatory materials.⁷¹
260 24. Agencies should adopt procedures for hearings that, as appropriate:
261 a. Authorize adjudicators to make use of written-only hearings in appropriate cases,
262 such as those that solely involve disputes concerning interpretation of statutes or
263 rules, or legislative facts as to which experts offer conflicting views;⁷²
264 b. Authorize adjudicators to exclude unreliable evidence and exclude evidence the
265 probative value of which is substantially outweighed by other factors, including
266 its potential for undue consumption of time;⁷³
267 c. Specify rules on official notice that identify the procedures that adjudicators must
268 follow when an agency decision rests on official notice of a material fact;⁷⁴ and
269 d. Allow an opportunity for rebuttal, such as cross-examination of adverse witnesses
270 or submission of additional written or oral evidence, but authorize adjudicators to
271 limit or preclude cross-examination or require it be conducted in camera in
272 appropriate cases.⁷⁵
273 25. Agencies should require that adjudicators provide written or transcribable decisions that
274 include findings of fact and conclusions of law.⁷⁶
275 26. Agencies should provide for agency appellate review of hearing-level decisions and
276 adopt appropriate procedures for such review. Such procedures should, as appropriate:
277 a. Reflect an appellate model of judicial review in which the standard of review is
278 not de novo with respect to findings of fact and application of law to facts;⁷⁷
279 b. Permit parties to file exceptions and make arguments;⁷⁸
280 c. Limit the introduction of new evidence on appeal that is not already in the
281 administrative record from the hearing-level adjudication;⁷⁹ and
282 d. Provide opportunities for oral argument, amicus participation, and public
283 comment in appropriate cases, such as cases that are expected to result in a
284 precedential decision and cases involving issues of great public interest; issues of
285 concern beyond the parties to the case; specialized or technical matters; and novel
286 or substantial questions of law, policy, or discretion.⁸⁰

Coordination and Oversight

- 287 27. Agencies should collect information on an ongoing basis regarding the operation and
288 performance of their adjudication systems.⁸¹ Agencies should use electronic case
289 management systems to collect such information (see Principle 8) and, as appropriate,
290 quality assurance methods (e.g., formal quality assessments, informal peer review,
291 sampling and targeted case selection).⁸² Agencies should also collect information about
292 operation and performance through regular communications with interested persons
293 within the agency (e.g., adjudicators, managers, staff attorneys, paralegal support staff)
294 and outside the agency (e.g., parties, representatives).⁸³ In addition to maintaining open
295 lines of communication,⁸⁴ methods for obtaining information from interested persons
296 include:
- 297 a. Surveys;⁸⁵
 - 298 b. Focus groups;⁸⁶
 - 299 c. Listening sessions and other meetings;⁸⁷
 - 300 d. Requests for public comment, such as requests for information published in the
301 *Federal Register*;⁸⁸
 - 302 e. Online feedback forms and complaint portals;⁸⁹
 - 303 f. Consultation with nongovernmental organizations, advocacy groups, and other
304 members of the private sector who assist members of the public;⁹⁰ and
 - 305 g. Use of ombuds.⁹¹
- 306 28. Agencies should use collected information—on a periodic, regular, or ongoing basis—to
307 assess and identify strategies to remediate issues associated with:
- 308 a. Decisional quality and the performance of quality assurance systems;⁹²
 - 309 b. Timeliness of decision making, organizational performance goals, and timeliness
310 or productivity expectations or measures for individual employees;⁹³
 - 311 c. The effectiveness of procedural rules, policies, and case management practices,⁹⁴
312 including the extent to which they impose unnecessary administrative burdens on
313 parties;⁹⁵
 - 314 d. The effectiveness of explanatory materials;⁹⁶
 - 315 e. The effectiveness of electronic case management systems;⁹⁷
 - 316 f. The effectiveness of remote hearings;⁹⁸

- 317 g. The effectiveness of online processes;⁹⁹
 - 318 h. The effectiveness and appropriateness of filing fees;¹⁰⁰ and
 - 319 i. The effectiveness of services for self-represented parties.¹⁰¹
- 320 29. Agencies should ensure coordination across relevant agency components and collaborate
- 321 with other agencies and relevant entities outside the private government to identify best
- 322 practices for improving decisional quality, fairness, efficiency, and timeliness.¹⁰²

Representation and Assistance

323 *The Office of the Chair has developed Model Rules of Representative Conduct¹⁰³ that*

324 *reflect the principles identified in this section. Agencies are encouraged to use the Model*

325 *Rules of Representative Conduct as a resource to draft new or revise existing rules.*

326 *Agencies that conduct proceedings that are subject to the Equal Access to Justice Act are*

327 *also encouraged to use the Model Rules for Implementation of the Equal Access to*

328 *Justice Act.¹⁰⁴*

- 329 30. Agencies should allow participants in adjudications to be represented by lawyers.¹⁰⁵
- 330 31. Agencies should allow participants in adjudications to be represented by qualified or
- 331 accredited nonlawyers and should adopt procedural rules governing who is qualified or
- 332 accredited to practice before them.¹⁰⁶
- 333 32. Agencies should consider adopting rules governing the participation and conduct of
- 334 lawyer and nonlawyer representatives to promote the accessibility, fairness, integrity, and
- 335 efficiency of adjudicative proceedings. Such procedures should authorize adjudicators, as
- 336 permitted by law, to sanction attorneys for misconduct. Agencies should provide that
- 337 such sanctions are subject to agency appellate review.¹⁰⁷
- 338 33. Agencies should not prevent participants from obtaining assistance or support from
- 339 friends, family members, or other individuals in presenting their cases.¹⁰⁸

Accessibility

- 340 34. Agencies, particularly those that decide cases in which parties are self-represented,
- 341 should make proceedings as accessible as possible for participants, such as by:
- 342 a. Providing forms and other important materials as early as possible;¹⁰⁹

- 343 b. Providing practice manuals and guides that explain and illustrate agency
344 procedures;¹¹⁰
- 345 c. Providing self-represented parties with materials informing them of their right to
346 representation, potential benefits of representation, and options for obtaining
347 representation;¹¹¹
- 348 d. Following plain-language guidelines when drafting procedural rules and
349 explanatory materials, providing assistance, and preparing notices and
350 decisions;¹¹²
- 351 e. Providing processes for participants to communicate in real-time with agency
352 personnel or agency partners;¹¹³
- 353 f. Making important documents—such as notices and procedural instructions—
354 available in languages understood by people who frequently participate in agency
355 proceedings;¹¹⁴
- 356 g. Providing self-help materials (e.g., instruction manuals, reference guides,
357 instructional videos) and general training sessions regarding virtual hearings and
358 online processes;¹¹⁵
- 359 h. Providing training for agency personnel on interacting with self-represented
360 parties, including parties who are not proficient in English or have a mental or
361 physical disability;¹¹⁶
- 362 i. Identifying and reducing administrative burdens that participants face in
363 administrative adjudications;¹¹⁷ and
- 364 j. Exploring the possible benefits of offering automated legal guidance tools.¹¹⁸
- 365 35. Agencies should offer virtual hearings consistent with applicable laws and their needs, in
366 accordance with principles of fairness and efficiency and with due regard for participant
367 satisfaction.¹¹⁹
- 368 36. Agencies should develop online self-help portals that allow users, as applicable and when
369 feasible, to:
- 370 a. Update contact information, including email addresses, phone numbers, and
371 physical addresses;
- 372 b. Complete and submit forms;
- 373 c. File briefs, evidence, and other documents;

- 374 d. Receive service of documents, including documents filed by other parties and
375 agency notices and orders;
- 376 e. View and download case documents;
- 377 f. Make payments (e.g., filing fees, application fees, civil penalties);
- 378 g. Schedule meetings, conference, hearings, and other appointments;
- 379 h. Access virtual appointments;
- 380 i. View case status information and information about deadlines, appointments, and
381 wait times, when agencies can reliably predict them;
- 382 j. Receive reminders about upcoming deadlines and appointments; and
- 383 k. Receive notifications about new documents, status changes, and other
384 developments in their cases.¹²⁰

Transparency

- 385 37. Agencies should allow evidentiary hearings and appellate proceedings to be open to the
386 public but retain the ability to close such proceedings, consistent with applicable law,
387 when the public interest in open proceedings is outweighed by the need to protect other
388 interests such as national security, law enforcement, confidentiality of business
389 information or documents, or the personal privacy of the parties, including the interests of
390 minors or juveniles.¹²¹
- 391 38. Agencies should make important materials regarding their adjudications readily
392 accessible to the public (e.g., on their websites). Such materials may include, as
393 applicable:
- 394 a. The provisions of the APA relating to adjudication;¹²²
- 395 b. Statutory provisions providing procedural rules for adjudication;¹²³
- 396 c. Agency-promulgated rules of procedure with legal effect;¹²⁴
- 397 d. Generally applicable policies and practices governing the appointment and
398 oversight of ALJs and AJs;¹²⁵
- 399 e. Guidance documents and explanatory materials relating to adjudicative procedure,
400 including materials designed for persons appearing before an agency (e.g.,
401 practice manuals, FAQs) and materials designed for agency personnel (e.g.,
402 administrative staff manuals, instructions to staff, benchbooks);¹²⁶

- 403 f. Agency-specific forms that individuals must use;¹²⁷
- 404 g. Adjudicator-specific practice procedures applicable across multiple cases, such as
- 405 standing orders;¹²⁸
- 406 h. Decisions issued by PAS officials,¹²⁹ precedential decisions,¹³⁰ and all final
- 407 opinions and orders issued after a legally required opportunity for an evidentiary
- 408 hearing;¹³¹
- 409 i. Settlement agreements in agency enforcement proceedings;¹³²
- 410 j. Supporting materials (e.g., pleadings, motions, briefs) filed in adjudicative
- 411 proceedings;¹³³
- 412 k. Transcripts and recordings of adjudicative proceedings.¹³⁴
- 413 l. Rules governing representatives' conduct and comments, illustrations, and other
- 414 explanatory materials to help clarify how such rules work in practice;¹³⁵
- 415 m. Information concerning qualifications for representatives, how to file a complaint,
- 416 and a summary of the disciplinary process;¹³⁶
- 417 n. Disciplinary actions for representative misconduct or summaries of them;¹³⁷
- 418 o. Average processing times and aggregate processing data for claims pending,
- 419 commenced, and concluded during a standard reporting period;¹³⁸
- 420 p. Any deadlines or processing goals for adjudicating cases;¹³⁹
- 421 q. Information about plans for and progress in addressing timeliness concerns;¹⁴⁰
- 422 r. Timeliness or productivity expectations for ALJs (who are not subject to
- 423 performance appraisals) and timeliness or productivity measures used to appraise
- 424 the performance of other agency personnel;¹⁴¹ and
- 425 s. Data in case management systems in a de-identified form (i.e., with all personally
- 426 identifiable information removed) to enable continued research by individuals
- 427 outside of the agency.¹⁴²

Adjudication and Policymaking

- 428 39. Agencies should consider resolving recurring legal or factual issues, in appropriate
- 429 circumstances, through mechanisms such as precedential decision making and
- 430 substantive rulemaking.¹⁴³

- 431 40. Agencies should establish appropriate mechanisms by which quality assurance personnel
432 can communicate with agency rule writers and operations support personnel to allow
433 them to consider whether recurring problems identified by quality assurance systems
434 should be addressed or clarified by rules, operational guidance, or decision support
435 tools.¹⁴⁴
- 436 41. An agency ordinarily should treat decisions of PAS officials as precedential if they
437 address novel or important issues of law, policy, or discretion, or if they resolve recurring
438 issues or issues that other agency adjudicators have decided in different ways.¹⁴⁵
- 439 42. Agencies should establish a process by which adjudicators, other agency officials, parties,
440 and the public can request that a specific nonprecedential appellate decision be
441 designated as precedential.¹⁴⁶
- 442 43. Each agency periodically should review petitions for review and decisions rendered by
443 PAS officials to determine whether issues raised repeatedly indicate that the agency, its
444 adjudicators, or the public may benefit from rulemaking or development of guidance.¹⁴⁷

ENDNOTES

¹ Recommendation 2023-7, ¶ 8; *see also* Recommendation 2024-3, ¶¶ 17–18.

² Recommendation 2023-7, ¶ 10; *see also* Statement #20.

³ Recommendation 2023-7, ¶ 11.

⁴ Recommendations 2024-3, ¶ 1; 2016-4, ¶ 19.

⁵ Recommendations 2024-3, ¶¶ 2–13; 83-3, ¶ 3; 68-6, ¶ 1.

⁶ Recommendations 2023-7, ¶ 3; 86-7, ¶¶ 1, 2; 78-3, ¶ 3.

⁷ Recommendations 2023-7, ¶ 6; 2016-2, ¶¶ 3–10; 86-7, ¶ 9.

⁸ Recommendations 2023-7, ¶ 6; 2022-4, ¶ 1; 2016-2, ¶ 2.

⁹ Recommendations 2016-4, ¶ 12; 88-5, ¶ 1; 86-3, ¶ 1; 87-5.

¹⁰ Recommendations 90-6, ¶ 1; 86-7, ¶ 3.

¹¹ Recommendations 2021-4, ¶ 1; 2014-7, ¶ 1; 2011-4, ¶ 1; 86-7, ¶ 10.

¹² Recommendation 2023-7, ¶ 7.

¹³ Recommendation 2018-3, ¶ 1.

¹⁴ Recommendations 2023-7, ¶ 1; 2021-10, ¶ 15; 2016-6, ¶ 4(a); 2018-3, ¶¶ 1, 3, 6.

¹⁵ Recommendations 2019-9, ¶¶ 3, 22; 2019-2, ¶ 1, 4; 92-7, ¶ 2(B); 69-6.

¹⁶ Recommendation 2023-7, ¶ 4.

¹⁷ Recommendation 92-7, ¶ 2.

¹⁸ Recommendations 2023-7, ¶ 21; 86-7, ¶ 12; 70-4.

¹⁹ Recommendations 88-5, ¶ 5; 86-7, ¶¶ 6, 12.

²⁰ Recommendation 92-7, ¶ III(B)(1).

²¹ Recommendation 2018-3, ¶ 2(a).

²² Recommendation 2023-4, ¶ 23.

²³ Recommendations 2021-4, ¶¶ 10–11; 2014-7, ¶¶ 4–5; 2011-4, ¶ 3(e).

²⁴ Recommendation 2016-6, ¶ 3.

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- ²⁵ Recommendations 2023-5, ¶ 14; 2016-4, ¶ 28.
- ²⁶ Recommendation 2023-5, ¶ 14.
- ²⁷ Recommendations 2016-4, ¶ 21; 70-4.
- ²⁸ Recommendations 2016-4, ¶¶ 18–24; 2019-6, ¶ 4.
- ²⁹ Recommendations 2020-3, ¶ 2–3; 2016-4, ¶ 26; 83-3; *see also* Recommendation 68-6, ¶ 2.
- ³⁰ Recommendations 2022-4, ¶ 17; 2016-4, ¶ 27.
- ³¹ Recommendation 2024-3, ¶ 21.
- ³² Recommendation 2016-4, ¶ 25.
- ³³ Recommendation 2018-4, ¶ 1.
- ³⁴ Recommendation 2021-9, ¶ 1.
- ³⁵ Recommendation 2021-6, ¶ 1.
- ³⁶ Recommendation 2021-4, ¶ 2, 6.
- ³⁷ Recommendation 2023-4, ¶ 22.
- ³⁸ Recommendation 2023-8, ¶ 8.
- ³⁹ Recommendation 2019-4.
- ⁴⁰ Recommendation 2021-10, ¶ 21.
- ⁴¹ Recommendations 2022-4, ¶ 19; 2020-3, ¶ 5; 92-1, ¶ 2.
- ⁴² Recommendation 2023-5, ¶¶ 8–11.
- ⁴³ Recommendation 2023-5, ¶¶ 1–2.
- ⁴⁴ Recommendation 2023-5, ¶¶ 3–4.
- ⁴⁵ Recommendation 2023-5, ¶ 12.
- ⁴⁶ Recommendation 2023-5, ¶ 13.
- ⁴⁷ Recommendation 2023-5, ¶¶ 17–20; *see generally* Recommendations 2016-5; 90-2.
- ⁴⁸ Admin. Conf. of the U.S., Model Adjudication Rules (rev. 2018), <https://www.acus.gov/model-rules/model-adjudication-rules>.
- ⁴⁹ Recommendation 2016-4, ¶ 1.
- ⁵⁰ Recommendation 2019-6.
- ⁵¹ Recommendations 2016-4, ¶ 2; 93-1, ¶ 2.
- ⁵² Recommendations 2016-4, ¶ 393-1, ¶ 2.
- ⁵³ Recommendations 2018-4, ¶¶ 2–3; 2016-4, ¶ 5; *see also* Recommendation 2024-3, ¶ 13.
- ⁵⁴ Recommendation 2016-4, ¶ 6.
- ⁵⁵ Recommendation 2016-4, ¶ 9.
- ⁵⁶ Recommendation 2016-4, ¶ 7.
- ⁵⁷ Recommendations 2016-4, ¶ 5; 70-4, ¶ 1.
- ⁵⁸ Recommendations 2016-4, ¶ 10; 70-4, ¶¶ 2–9.
- ⁵⁹ Recommendations 2016-4, ¶ 12; 70-3.
- ⁶⁰ Recommendation 2016-4, ¶ 6(a).
- ⁶¹ Model Adjudication Rules § 300(A).
- ⁶² Model Adjudication Rules § 300(A); Recommendation 2021-4, ¶ 7.
- ⁶³ Recommendation 2016-4, ¶ 6.
- ⁶⁴ Recommendation 2016-4, ¶ 6(b).
- ⁶⁵ Recommendation 2016-4, ¶ 6(c).
- ⁶⁶ Recommendation 2016-4, ¶ 6(d).
- ⁶⁷ Recommendation 2016-4, ¶ 6(h).
- ⁶⁸ Recommendation 2016-4, ¶ 6(e).
- ⁶⁹ Recommendation 2016-4, ¶ 6(g).
- ⁷⁰ Recommendation 2016-4, ¶ 6(h).
- ⁷¹ Recommendation 2016-4, ¶ 6(i).
- ⁷² Recommendation 2016-4, ¶ 21.
- ⁷³ Recommendations 2016-4, ¶ 23; 86-2, ¶ 2.
- ⁷⁴ Recommendation 2019-6, ¶ 4.
- ⁷⁵ Recommendation 2016-4, ¶ 24.
- ⁷⁶ Recommendation 2016-4, ¶ 25.

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- ⁷⁷ Recommendations 2024-3, ¶ 11; 2020-3, ¶¶ 5–6, 10; 83-3, ¶ 4; *see also* Recommendation 68-6, ¶ 2.
- ⁷⁸ Recommendations 2024-3, ¶ 7; 2016-4, ¶ 26.
- ⁷⁹ Recommendations 2024-3, ¶ 11; 2020-3, ¶ 10.
- ⁸⁰ Recommendations 2024-3, ¶ 13; 2022-4, ¶ 9; 2020-3, ¶ 10.
- ⁸¹ Recommendations 2023-7, ¶ 1; 2021-10, ¶ 15.
- ⁸² Recommendations 2023-7, ¶ 1; 2023-5, ¶ 21; 2021-10, ¶ 14; 2018-3, ¶ 6(a); 73-3, ¶ 1–4; Rec. 69-6.
- ⁸³ Recommendations 2023-7, ¶ 1; 2023-4, ¶ 19; 2016-4, ¶ 31.
- ⁸⁴ Recommendations 2023-7, ¶ 2; 2021-4, ¶ 12.
- ⁸⁵ Recommendations 2023-7, ¶ 2(a); 2023-6, ¶ 5(a); 2023-4, ¶ 19.
- ⁸⁶ Recommendation 2023-6, ¶ 5(a).
- ⁸⁷ Recommendations 2023-7, ¶ 2(b); 2023-4, ¶ 19.
- ⁸⁸ Recommendations 2023-7, ¶ 2(c); 2023-6, ¶ 5(b); 2011-4, ¶ 3(c).
- ⁸⁹ Recommendations 2023-7, ¶ 2(d); 2023-6, ¶ 5(c); 2020-3, ¶ 25.
- ⁹⁰ Recommendation 2023-6, ¶ 5(e).
- ⁹¹ Recommendations 2023-7, ¶ 2(e); 2023-5, ¶ 17–20; *see generally* Recommendations 2016-5; 90-2.
- ⁹² Recommendations 2023-5, ¶ 21; 2021-10, ¶¶ 1, 23.
- ⁹³ Recommendations 2023-7, ¶¶ 1–2, 3(c), 4(g); 2018-3, ¶ 6(c).
- ⁹⁴ Recommendations 2023-7, ¶ 12; 2018-3, ¶ 6(a); 2016-4, ¶ 30.
- ⁹⁵ Recommendation 2023-6, ¶ 6.
- ⁹⁶ Recommendation 2016-4, ¶ 30.
- ⁹⁷ Recommendation 2021-10, ¶ 16.
- ⁹⁸ Recommendations 2021-4, ¶¶ 13–15; 2014-7, ¶ 11; 2011-4, ¶ 3(b).
- ⁹⁹ Recommendation 2023-4, ¶ 19.
- ¹⁰⁰ Recommendation 2023-8, ¶ 11.
- ¹⁰¹ Recommendation 2016-6, ¶ 5.
- ¹⁰² Recommendations 2023-7, ¶ 13, 16–20; 2023-6, ¶ 19–20; 2021-4, ¶ 16; 2020-3, ¶ 18; 2018-3, ¶ 6(e); 2014-7, ¶¶ 13–14; 2011-4, ¶ 3(f).
- ¹⁰³ Admin. Conf. of the U.S., Model Rules of Representative Conduct (2024), <https://www.acus.gov/document/model-rules-representative-conduct>.
- ¹⁰⁴ Recommendation 2019-2.
- ¹⁰⁵ Recommendations 2016-4, ¶ 13; 2023-5, ¶ 5.
- ¹⁰⁶ Recommendations 2016-4, ¶ 14; 2023-5, ¶ 5; 86-1, ¶ 2.
- ¹⁰⁷ Recommendations 2021-9, ¶ 1; 2016-4, ¶ 17.
- ¹⁰⁸ Recommendation 2023-5, ¶ 6.
- ¹⁰⁹ Recommendation 2016-6, ¶ 2(b).
- ¹¹⁰ Recommendation 2016-4, ¶ 29; *see also* Recommendation 2018-5, ¶ 1.
- ¹¹¹ Recommendation 2023-7, ¶ 23.
- ¹¹² Recommendations 2016-4, ¶ 16, 2016-6, ¶ 2(b); 2020-3, ¶ 11; 2023-5, ¶¶ 7, 15, 16; 2023-6, ¶ 13.
- ¹¹³ Recommendation 2016-6, ¶ 2(c).
- ¹¹⁴ Recommendation 2023-5, ¶ 16.
- ¹¹⁵ Recommendations 2021-4, ¶ 12; 2023-4, ¶ 23.
- ¹¹⁶ Recommendation 2016-6, ¶ 3.
- ¹¹⁷ Recommendation 2023-6, ¶ 6.
- ¹¹⁸ Recommendation 2022-3, ¶¶ 1–2.
- ¹¹⁹ Recommendations 2021-4, ¶ 1; 2014-7, ¶ 11; 2011-4, ¶ 1.
- ¹²⁰ Recommendation 2023-4, ¶ 2; *see also* Recommendation 2023-6, ¶ 10.
- ¹²¹ Recommendations 2021-6, ¶ 5; 2021-4, ¶ 3; 2016-4, ¶ 18; 71-6, ¶ 2; Model Adjudication Rules § 300(A).
- ¹²² Recommendation 2018-5, ¶ 1(a).
- ¹²³ Recommendation 2018-5, ¶ 1(b).
- ¹²⁴ Recommendation 2018-5, ¶ 1(c).
- ¹²⁵ Recommendation 2020-5, ¶ 1.
- ¹²⁶ Recommendation 2018-5, ¶ 1(d).
- ¹²⁷ Recommendation 2018-5, ¶ 1(e).

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- ¹²⁸ Recommendation 2018-5, ¶ 1.
¹²⁹ Recommendation 2024-3, ¶ 19.
¹³⁰ Recommendation 2022-4, ¶ 15.
¹³¹ Recommendation 2023-1, ¶ 1(a).
¹³² Recommendation 2022-6, ¶¶ 1–7.
¹³³ Recommendation 2017-1, ¶ 1.
¹³⁴ Recommendation 2021-6, ¶ 17.
¹³⁵ Recommendation 2021-9, ¶¶ 11, 13.
¹³⁶ Recommendation 2021-9, ¶ 12.
¹³⁷ Recommendation 2021-9, ¶ 14.
¹³⁸ Recommendation 2023-7, ¶ 25(i).
¹³⁹ Recommendation 2023-7, ¶ 25(ii).
¹⁴⁰ Recommendation 2023-7, ¶ 25(iii).
¹⁴¹ Recommendation 2023-7, ¶ 26.
¹⁴² Recommendation 2021-10, ¶ 22.
¹⁴³ Recommendation 2023-7, ¶ 6(ii); 2022-4, ¶ 1.
¹⁴⁴ Recommendation 2021-10, ¶ 20(b).
¹⁴⁵ Recommendation 2024-3, ¶ 15.
¹⁴⁶ Recommendation 2022-4, ¶ 8.
¹⁴⁷ Recommendation 2024-3, ¶ 16.

APPENDIX

ACUS has issued more than 120 recommendations and statements that relate, in some way, to administrative adjudication. Just over half—including most recommendations and statements adopted since 2010—relate to adjudication generally, to broad categories of adjudication, or to administration generally (though with special relevance to adjudication). About 50, most adopted before 1995, relate to adjudication under specific programs or in specific contexts.

In addition, the Office of the Chair has developed three sets of model rules as a resource for agencies that administer programs of administrative adjudication.

All adjudication-related recommendations, statements, and model rules are listed below.

Recommendations and Statements Related to Adjudication Generally

- 68-1, *Adequate Hearing Facilities*
- 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*

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- 69-6, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*
 - 69-7, *Consideration of Alternatives in Licensing Procedures*
 - 69-9, *Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government*
 - 70-3, *Summary Decision in Agency Adjudication*
 - 70-4, *Discovery in Agency Adjudication*
 - 71-1, *Interlocutory Appeal Procedures*
 - 71-6, *Public Participation in Administrative Hearings*
 - 71-8, *Modification and Dissolution of Orders and Injunctions*
 - 72-1, *Broadcast of Agency Proceedings*
 - 72-6, *Civil Money Penalties as a Sanction*
 - 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*
 - Statement #2, *Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act*
 - Statement #3, *Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of “Rule” in the Administrative Procedure Act*
 - 74-1, *Subpena Power in Formal Rulemaking and Formal Adjudication*
 - 78-3, *Time Limits on Agency Actions*
 - 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*
 - 82-2, *Resolving Disputes Under Federal Grant Programs*
 - Statement #8, *Statement of the Administrative Conference on Discipline of Attorneys Practicing Before Federal Agencies*
 - 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*
 - 83-4, *The Use of the Freedom of Information Act for Discovery Purposes*
 - Statement #10, *Agency Use of an Exceptions Process to Formulate Policy*

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- 86-1, *Nonlawyer Assistance and Representation*
 - 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*
 - 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*
 - 86-4, *The Split-Enforcement Model for Agency Adjudication*
 - 86-7, *Case Management as a Tool for Improving Agency Adjudication*
 - 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*
 - 88-5, *Agency Use of Settlement Judges*
 - 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*
 - 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*
 - 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*
 - 90-2, *The Ombudsman in Federal Agencies*
 - 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*
 - 92-5, *Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act*
 - 92-7, *The Federal Administrative Judiciary*
 - 93-1, *Use of APA Formal Procedures in Civil Money Penalty Proceedings*
 - 95-6, *ADR Confidentiality and the Freedom of Information Act*
 - 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*
 - 2014-7, *Best Practices for Using Video Conferencing for Hearings*
 - 2015-3, *Declaratory Orders*
 - 2015-4, *Designing Federal Permitting Programs*
 - 2016-2, *Aggregation of Similar Claims in Agency Adjudication*
 - 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*
 - 2016-5, *The Use of Ombuds in Federal Agencies*
 - 2016-6, *Self-Represented Parties in Administrative Proceedings*
 - 2017-1, *Adjudication Materials on Agency Websites*
 - 2017-7, *Regulatory Waivers and Exemptions*

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- 2018-3, *Electronic Case Management in Federal Administrative Adjudication*
 - 2018-4, *Recusal Rules for Administrative Adjudicators*
 - 2018-5, *Public Availability of Adjudication Rules*
 - 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*
 - 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*
 - 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*
 - 2019-9, *Recruiting and Hiring Agency Attorneys*
 - 2020-3, *Agency Appellate Systems*
 - 2020-5, *Publication of Policies Governing Agency Adjudicators*
 - Statement #20, *Agency Use of Artificial Intelligence*
 - 2021-4, *Virtual Hearings in Agency Adjudication*
 - 2021-6, *Public Access to Agency Adjudicative Proceedings*
 - 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*
 - 2021-10, *Quality Assurance Systems in Agency Adjudication*
 - 2022-3, *Automated Legal Guidance at Federal Agencies*
 - 2022-4, *Precedential Decision Making in Agency Adjudication*
 - 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*
 - 2023-1, *Proactive Disclosure of Agency Legal Materials*
 - 2023-4, *Online Processes in Agency Adjudication*
 - 2023-5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing*
 - 2023-6, *Identifying and Reducing Burdens in Administrative Processes*
 - 2023-7, *Improving Timeliness in Agency Adjudication*
 - 2023-8, *User Fees*
 - 2024-3, *Senate-Confirmed Officials and Administrative Adjudication*
 - 2024-4, *Agency Management of Congressional Constituent Service Inquiries*

Recommendations and Statements Related to Specific Programs

- 69-5, *Elimination of Duplicative Hearings in FAA Safety De-certification Cases*
- 71-5, *Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications*
- 72-3, *Procedures of the United States Board of Parole*
- 72-7, *Preinduction Review of Selective Service Classification Orders and Related Procedural Matters*
- 72-8, *Adverse Actions Against Federal Employees*
- 73-2, *Labor Certification of Immigrant Aliens*
- 73-4, *Administration of the Antidumping Law by the Department of the Treasury*
- 73-6, *Procedures for Resolution of Environmental Issues in Licensing Proceedings*
- 74-3, *Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands*
- 75-1, *Licensing Decisions of the Federal Banking Agencies*
- 78-2, *Procedures for Determining Social Security Disability Claims*
- 80-2, *Enforcement of Petroleum Price Regulations*
- 84-1, *Public Regulation of Siting of Industrial Development Projects*
- 84-6, *Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings*
- 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government*
- 85-4, *Administrative Review in Immigration Proceedings*
- 86-5, *Medicare Appeals*
- 87-1, *Alternatives for Resolving Government Contract Disputes*
- 87-2, *Federal Protection of Private Sector Health and Safety Whistleblowers*
- 87-6, *State-Level Determinations in Social Security Disability Cases*
- 87-7, *A New Role for the Social Security Appeals Council*
- 87-9, *Dispute Procedures in Federal Debt Collection*

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- 87-12, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*
 - Statement #12, *Statement on Resolution of Freedom of Information Act Disputes*
 - 88-8, *Resolution of Claims Against Savings Receiverships*
 - Statement #13, *Dispute Resolution Procedure in Reparations and Similar Cases*
 - 89-1, *Peer Review and Sanctions in the Medicare Program*
 - 89-2, *Contracting Officers' Management of Disputes*
 - 89-4, *Asylum Adjudication Procedures*
 - 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*
 - 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*
 - 91-2, *Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings*
 - 91-3, *The Social Security Representative Payee Program*
 - 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*
 - 91-10, *Administrative Procedures Used in Antidumping and Countervailing Duty Cases*
 - 92-3, *Enforcement Procedures Under the Fair Housing Act*
 - 89-9, *Processing and Review of Visa Denials*
 - 89-10, *Improved Use of Medical Personnel in Social Security Disability Determinations*
 - Statement #14, *Mass Decisionmaking Programs: The Alien Legalization Experience*
 - Statement #15, *Procedures for Resolving Federal Personnel Disputes*
 - 88-3, *The Federal Reserve Board's Handling of Applications Under the Bank Holding Company Act*
 - 90-1, *Civil Money Penalties for Federal Aviation Violations*
 - Statement #17, *Comments on the Social Security Administration's Proposal on Reengineering the SSA Disability Process*
 - 93-2, *Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators*

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- 95-2, *Debarment and Suspension from Federal Programs*
 - 95-5, *Government Contract Bid Protests*
 - 2012-3, *Immigration Removal Adjudication*
 - 2013-1, *Improving Consistency in Social Security Disability Adjudication*
 - 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*
 - 2020-4, *Government Contract Bid Protests Before Agencies*

Model Rules

- Model Adjudication Rules (rev. 2018)
- Model Rules for Implementation of the Equal Access to Justice Act (rev. 2019)
- Model Rules of Representative Conduct (2024)

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**STATEMENT OF PRINCIPLES FOR AGENCY GUIDANCE
DOCUMENTS**

Office of the Chair
Administrative Conference of the United States

This Statement was prepared by the Office of the Chair of the Administrative Conference of the United States (ACUS) based on recommendations adopted by the ACUS Assembly. The Statement was not adopted by the ACUS Assembly and does not necessarily reflect the views of ACUS (including its Council, committees, or members).

Statement of Principles for Agency Guidance Documents

INITIAL OFFICE OF THE CHAIR DRAFT FOR REVIEW BY THE ASSEMBLY
AT THE 82ND PLENARY SESSION

December 12, 2024

1 Consistent with the Administrative Procedure Act (APA), federal agencies issue rules to
2 implement, interpret, and prescribe laws and policies that they administer and to describe their
3 organization, procedure, and practice requirements.¹ This Statement of Principles focuses on two
4 types of rules: general statements of policy (hereinafter, policy statements) and interpretive
5 rules.² Policy statements “advise the public prospectively of the manner in which the agency
6 proposes to exercise a discretionary power.”³ Interpretive rules “advise the public of the agency’s
7 construction of the statutes and rules which it administers.”⁴ Together, policy statements and
8 interpretive rules are called “guidance documents.” Agencies issue guidance documents to help
9 explain their programs and policies and to communicate other important information to the
10 public.

11 Guidance documents can take many forms, including documents issued to the general
12 public as well as documents provided in response to requests for advice from individuals
13 (referred to here as “individualized guidance”).⁵ Guidance documents also go by a variety of
14 names, including guidelines, manuals, rulings, opinion letters, circulars, and advisories.

15 Guidance documents are notable for the process by which they are adopted and their legal
16 effect. Before an agency adopts a rule, the APA generally requires the agency to publish a notice
17 of proposed rulemaking and give interested persons the opportunity to participate in the

¹ See 5 U.S.C. § 551(4) (defining the term “rule” to include “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”).

² 5 U.S.C. § 553(b)(A).

³ Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017) (quoting ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)).

⁴ Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019) (quoting ATTORNEY GENERAL’S MANUAL, *supra* note 3, at 30 n.3)

⁵ See Admin. Conf. of the U.S., Recommendation 2024-2, *Individualized Guidance*, 89 Fed. Reg. 56,277 (July 9, 2024). Recommendation 2024-2 did not seek to characterize all processes for issuing individualized guidance as being either “rulemaking” or “adjudication” under the APA.

18 rulemaking.⁶ The APA does not require these notice-and-comment procedures for guidance
19 documents, however.⁷

20 Unlike rules adopted through the notice-and-comment process, guidance documents lack
21 the “force and effect of law[.]”⁸ As a result, guidance documents are not binding on the public,
22 meaning that they do not create standards with which noncompliance may form an independent
23 basis for action in matters that determine the rights and obligations of any member of the public.⁹

24 Guidance documents can be important instruments of administration and of great value to
25 agencies and the public. Guidance documents can make agency decision making faster and less
26 costly, saving time and resources for agencies and the regulated public. Guidance documents can
27 also make agency decision making more predictable and uniform and shield regulated parties
28 from unequal treatment, unnecessary costs, and unnecessary risks, while promoting compliance
29 with the law. Given the importance and value of guidance documents, the law requires agencies
30 to make certain guidance documents available to the public in the *Federal Register* or on agency
31 websites.¹⁰

32 Since its establishment, the Administrative Conference of the United States (ACUS) has
33 adopted numerous recommendations, listed in the Appendix, to assist federal agencies in the use
34 of guidance documents. These recommendations address best practices for agency guidance in
35 general, such as providing for public participation in the development of guidance documents,
36 making guidance documents publicly available, and ensuring that guidance documents do not
37 bind the public in practice. ACUS recommendations also provide best practices for specific types

⁶ 5 U.S.C. § 553(b).

⁷ *Id.* § 553(b)(A).

⁸ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

⁹ *See* Recommendation 2019-1, *supra* note 4, at ¶ 1; Recommendation 2017-5, *supra* note 3, at ¶ 1.

Recommendation 2019-1 notes that the concept of “binding” effect can give rise to misunderstanding in some contexts, such as when guidance documents use mandatory language to describe an existing statutory or regulatory requirement or when agencies direct employees to follow guidance documents as an internal management matter.

¹⁰ *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019) (explaining that agencies must make certain guidance documents available to the public under the Federal Records Act, the Freedom of Information Act, and other agency-specific statutes).

38 of agency guidance documents, such as automated legal guidance, regulatory enforcement
39 manuals, and individualized guidance.¹¹

40 This Statement of Principles sets forth common best practices derived from ACUS
41 recommendations on agency guidance documents. The ACUS Office of the Chair will update
42 this statement from time to time as ACUS adopts new recommendations on this topic.

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¹¹ This Statement of Principles does not cover declaratory orders, which agencies may issue in an adjudication to “terminate a controversy or remove uncertainty.” 5 U.S.C. 554(e). Unlike agency guidance documents, declaratory orders are legally binding final agency actions. *See* Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

STATEMENT OF PRINCIPLES

Ensuring That Agency Guidance Does Not Bind the Public

- 43 1. Agencies should not use a guidance document to create a standard that is binding on the
44 public, that is, a standard with which noncompliance may form an independent basis for
45 action in matters that determine the rights and obligations of any member of the public.¹
- 46 2. Agencies should afford members of the public a fair opportunity to argue for the
47 modification, waiver, or rescission of a guidance document. If the guidance document is
48 amenable to alternative approaches or analyses, this opportunity should include the
49 chance to argue for lawful approaches other than those put forward by the document.²
- 50 3. Agencies may, as an internal management matter, direct some employees to act in
51 conformity with a guidance document so long as they afford the public a fair opportunity
52 to argue for its modification, waiver, or rescission (see Principle 2). However, agencies
53 should instruct employees to refrain from making any statements suggesting that a
54 guidance document is binding on the public and should instruct employees as to the
55 difference between an internal agency management requirement and a statute or
56 regulation that is binding on the public.³
- 57 4. A guidance document should state prominently that it is non-binding or that it reflects the
58 agency's current interpretation of the law and that a member of the public may take—or
59 request that the agency take—a lawful alternative approach to the one set forth in the
60 document.⁴
- 61 5. A guidance document should not include mandatory language unless the language
62 describes an existing statutory or regulatory requirement or the language is addressed to
63 agency employees consistent with Principle 3.⁵
- 64 6. In determining whether to modify, rescind, or waive a guidance document, agencies
65 should give due regard to any reasonable reliance interests. A guidance document should
66 indicate the nature of the reliance that may be placed on it and the opportunities for
67 modification, rescission, or waiver of it.⁶

Developing Agency Guidance

- 68 7. Agencies should develop different types of guidance documents as appropriate, including
69 general guidance, individualized guidance, automated legal guidance, and regulatory
70 enforcement manuals.⁷
- 71 8. Agencies should tailor guidance documents to the informational needs and level of
72 expertise of the intended audiences, including through the use of plain language best
73 practices and writing techniques.⁸

Managing Agency Guidance

- 74 9. Agencies should develop written procedures pertaining to the internal management of
75 guidance documents.⁹
- 76 10. Agency procedures for managing guidance documents should address:
- 77 a. The categories of guidance subject to the procedures;
 - 78 b. If applicable, the process for members of the public to request guidance from the
79 agency;
 - 80 c. The development process for the guidance, including any opportunity for public
81 comment;
 - 82 d. The publication and dissemination of the guidance; and
 - 83 e. The periodic review of existing guidance.¹⁰
- 84 11. Agencies should periodically review their guidance document management procedures to
85 assess their performance and identify opportunities for improvement.¹¹
- 86 12. Agencies should train staff on their guidance document management procedures and use
87 appropriate internal controls to ensure adherence to such procedures.¹²
- 88 13. Agencies should consider assigning a unique identifier to each guidance document, for
89 internal and external tracking purposes. Once assigned, such identifiers should appear on
90 the document and be used when publicly referring to it.¹³

Providing for Public Participation in the Adoption or Modification of Agency Guidance

- 91 14. Agencies should consider whether to solicit public participation before adopting or
92 modifying guidance documents. If agencies do not provide opportunities for public

93 participation before adopting or modifying guidance documents, they should consider
94 offering such opportunities after doing so.¹⁴

95 15. Agencies should consider different options for the public to participate before or after the
96 adoption or modification of guidance documents, including:

- 97 a. Invitations for written input from the public, with or without a response from the
98 agency (including requests for information published in the *Federal Register*);
- 99 b. Targeted outreach to affected persons;
- 100 c. Meetings with affected persons and other potentially interested persons, including
101 listening sessions and webinars; and
- 102 d. Advisory committee proceedings.¹⁵

103 16. When deciding whether and how to solicit public participation before the adoption or
104 modification of guidance documents (generally, or in the context of specific guidance
105 documents), agencies should consider:

- 106 a. Existing agency guidance procedures for soliciting public input, including those
107 adopted in response to the Office of Management and Budget's Final Bulletin for
108 Agency Good Guidance Practices (2007);
- 109 b. The likely increase in useful information available to agencies from broadening
110 public participation;
- 111 c. The likely increase in policy acceptance from broadening public participation;
- 112 d. Whether agencies are likely to learn more useful information by putting forward a
113 specific agency proposal or instead having a more free-ranging and less formal
114 discussion; and
- 115 e. The practicability of broader forms of public participation, taking into account the
116 time and resource constraints on agencies.¹⁶

Making Agency Guidance Publicly Available

117 17. Agencies should maintain webpages dedicated to informing the public about the
118 availability of their guidance documents and facilitating access to those documents.

119 These webpages should include:

- 120 a. Agencies' written guidance document management procedures, as described in
121 Principle 10;

- 122 b. Plain-language explanations about guidance documents and their legal effects;
123 c. A method for users to find relevant guidance documents, such as a comprehensive
124 list of such documents, links to pages where they are located, or a dedicated
125 search engine; and
126 d. A method for the public to provide feedback on problems accessing agencies’
127 guidance documents and on other issues related to the availability of those
128 documents.¹⁷
- 129 18. Agencies should maintain dedicated webpages providing the public with a
130 comprehensive set of their guidance documents. The webpages should:
- 131 a. Include, at a minimum, all guidance documents required by law to be published in
132 the *Federal Register* or otherwise to be made publicly available;
133 b. Make guidance documents available in a downloadable form; and
134 c. Include relevant information for each guidance document, such as its title, any
135 legal authorities related to the document, the date of issuance, and any assigned
136 identifying number.¹⁸
- 137 19. Agencies should publish current guidance documents on their websites and, to the extent
138 feasible, clearly mark such documents as current and identify their effective dates. If
139 agencies rescind guidance documents, they should identify the rescission dates and direct
140 the public to any successor guidance documents.¹⁹
- 141 20. Agencies should consider maintaining inoperative guidance documents on their websites
142 and, if they do so, should:
- 143 a. Organize the documents to make it easy for members of the public to find them
144 and relate them to any successor guidance documents; and
145 b. Label the documents to ensure that the public can readily understand that they are
146 no longer in effect.²⁰
- 147 21. Agencies should alert potentially interested persons to new and revised guidance
148 documents using methods such as email distribution lists, social media posts, speaking
149 opportunities at public meetings, press releases, and notifications in the *Federal*
150 *Register*.²¹

151 22. Agencies should consider providing descriptive references (such as links, if possible) to
152 relevant guidance documents in appropriate sections of the *Code of Federal Regulations*,
153 stating where the public can access the documents.²²

Using Agency Guidance in the Rulemaking Process

- 154 23. Agencies should provide guidance about the meaning and application of their final rules
155 in the preambles to those final rules. Agencies should address how a final rule advances
156 statutory objectives and should consider including—particularly for lengthy rules—a
157 section-by-section analysis that corresponds to the organization of the final rule.
158 Agencies should go beyond merely repeating the relevant statutory or regulatory text in
159 the preamble.²³
- 160 24. When providing guidance in preambles of final rules (see Principle 23), agencies should
161 not use such guidance as a substitute for regulatory language and should avoid use of
162 mandatory language except when the language describes a requirement or is addressed to
163 agency employees consistent with Principle 3.²⁴
- 164 25. Agencies should identify preambles to their final rules as sources of guidance on their
165 webpages devoted to guidance and should consider ways to integrate the guidance in
166 their preambles into other guidance documents.²⁵
- 167 26. Agencies should periodically review individualized guidance documents to identify
168 matters that may warrant the development of a general rule.²⁶

NOTES

¹ Recommendations 2019-1 ¶ 1; 2017-5 ¶ 1; 92-2, ¶ I(A).

² Recommendations 2019-1 ¶ 2; 2017-5 ¶ 2; 92-2, ¶ II(B).

³ Recommendations 2019-1 ¶¶ 3, 7; 2017-5 ¶¶ 3, 6; 92-2, ¶ III.

⁴ Recommendations 2019-1 ¶ 4; 2017-5 ¶ 4; 92-2, ¶ II(A).

⁵ Recommendations 2019-1 ¶ 5; 2017-5 ¶ 5.

⁶ Recommendations 2024-2, ¶ 3; 2019-1, ¶¶ 2, 11; 2017-5 ¶ 12.

⁷ Recommendations 2024-2, ¶ 1; 2022-5, ¶ 1; 2022-3 ¶ 1.

⁸ Recommendation 2017-3, ¶¶ 1, 8.

⁹ Recommendations 2024-2, ¶ 8; 2022-3, ¶ 5; 2019-3 ¶ 1.

¹⁰ Recommendation 2019-3 ¶ 1.

¹¹ Recommendation 2019-3 ¶ 5.

¹² Recommendation 2019-3 ¶¶ 2, 3.

¹³ Recommendation 2019-3 ¶ 4.

¹⁴ Recommendations 2019-1, ¶¶ 8–9; 2018-7, ¶¶ 6–8; 2017-5, ¶¶ 9–10; 92-2 ¶ III; 76-5, ¶ 2.

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- ¹⁵ Recommendations 2022-5, ¶ 11; 2019-1, ¶¶ 8–9; 2018-7, ¶¶ 6-8; 2017-5, ¶¶ 9–10; 92-2 ¶ III; 76-5, ¶ 2.
¹⁶ Recommendations 2019-1 ¶ 8; 2017-5, ¶ 9.
¹⁷ Recommendations 2024-2, ¶ 14; 2019-3, ¶ 7.
¹⁸ Recommendations 2024-2, ¶ 10; 2022-5, ¶ 9; 2019-3, ¶ 8(a)–(d).
¹⁹ Recommendations 2024-2, ¶ 13; 2019-3, ¶ 8(e).
²⁰ Recommendation 2021-7, ¶¶ 2–4.
²¹ Recommendations 2021-7, ¶ 6; 2019-3, ¶ 11.
²² Recommendation 2019-3, ¶ 12.
²³ Recommendation 2014-3, ¶¶ 1–2.
²⁴ Recommendation 2014-3, ¶ 4.
²⁵ Recommendation 2014-3, ¶ 5.
²⁶ Recommendation 2024-2, ¶ 15.

APPENDIX

71-3, Articulation of Agency Policies

76-2, Strengthening the Information and Notice-Giving Functions of the Federal Register

76-5, Interpretive Rules of General Applicability and Statements of General Policy

92-2, Agency Policy Statements

2014-3, Guidance in the Rulemaking Process

2017-3, Plain Language in Regulatory Drafting

2017-5, Agency Guidance Through Policy Statements

2018-7, Public Engagement in Rulemaking

2019-1, Agency Guidance Through Interpretive Rules

2019-3, Public Availability of Agency Guidance Documents

2021-7, Public Availability of Inoperative Agency Guidance Documents

2022-3, Automated Legal Guidance at Federal Agencies

2022-5, Regulatory Enforcement Manuals

2024-2, Individualized Guidance

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