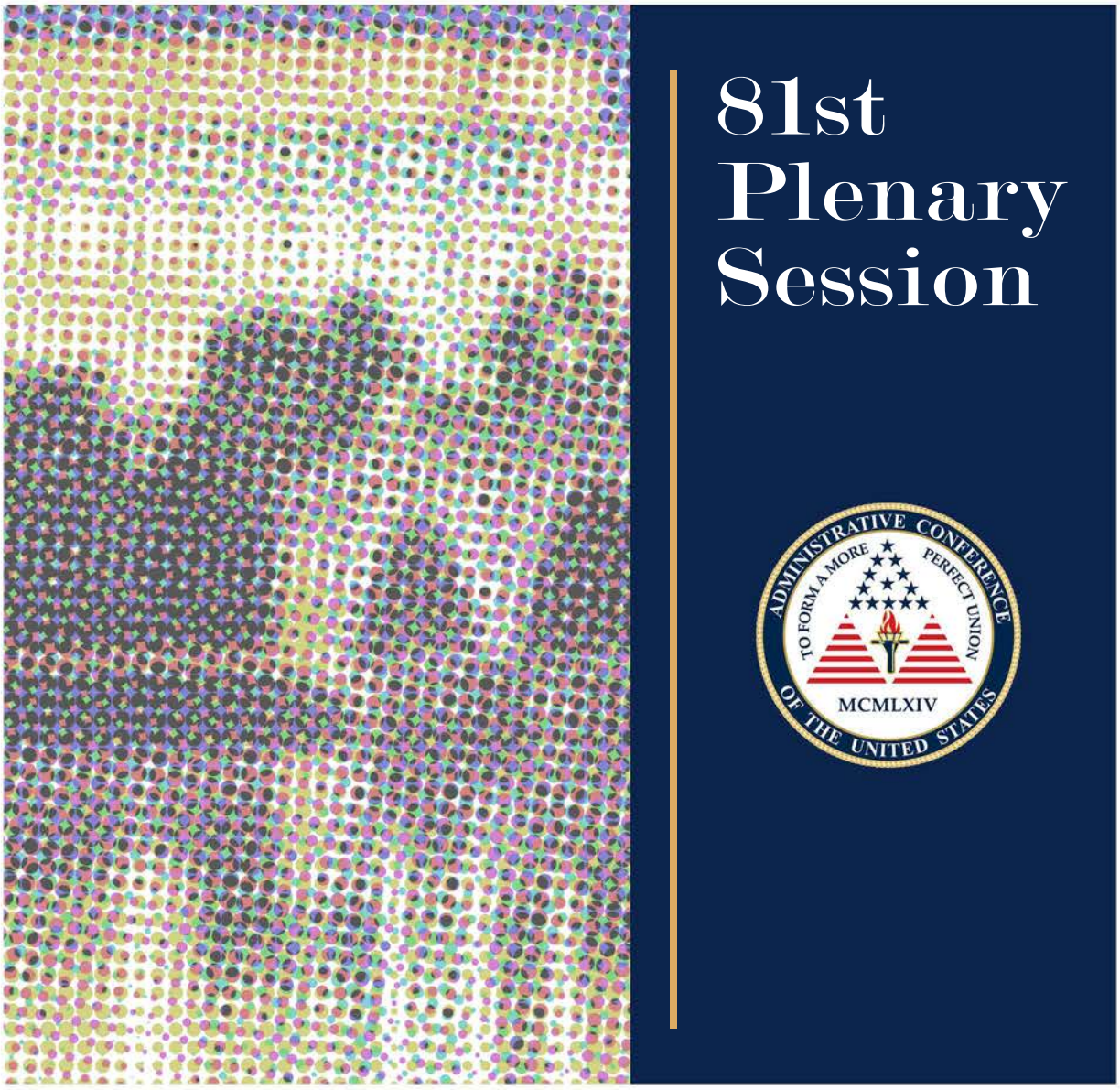
# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES




JUNE 13, 2024

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# 81st Plenary Session Agenda

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| 9:00 | **Call to Order**<br>**Opening Remarks by Chair Andrew Fois**<br>**Initial Business**<br>*Vote on Adoption of Minutes and Resolution Governing the Order of Business* |
| 9:30 | **Remarks**<br>Eugene Scalia<br>*Partner, Gibson Dunn & Crutcher LLP; Secretary of Labor, 2019–2021* |
| 10:00 | **Consider Recommendation**<br>*Choice of Forum for Judicial Review of Agency Rules* |
| 11:15 | **Consider Recommendation**<br>*Individualized Guidance* |
| 12:30 | **Lunch** |
| 1:30 | **Consider Recommendation**<br>*Participation of Senate-Confirmed Officials in Administrative Adjudication* |
| 2:45 | **Consider Recommendation**<br>*Congressional Constituent Service Inquiries* |
| 4:00 | **Presentation and Discussion**<br>*Model Rules of Representative Conduct* |
| 4:30 | **Closing Remarks 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.

# 80th Plenary Session Minutes

December 14, 2023

## I. Call to Order and Opening Remarks

The 80th Plenary Session of the Administrative Conference of the United States (ACUS) commenced at approximately 9 a.m. on December 14, 2023. ACUS Chair Andrew Fois called the meeting to order, 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 79th Plenary Session.

Chair Fois then gave the Chair's Report, briefly describing the recent work of the agency, highlighting several studies currently underway, notable ACUS publications that have recently been, or will soon be, released, and ongoing roundtables and forums through which ACUS provides opportunities for agencies to convene and share information.

## II. Keynote Address: The Honorable Cass R. Sunstein

At approximately 9:45 a.m., Professor Cass R. Sunstein, Founder and Director of the Program on Behavioral Economics and Public Policy at Harvard Law School and former Administrator of the Office of Information and Regulatory Affairs, addressed the Assembly. During his remarks, Professor Sunstein discussed the importance of identifying and reducing administrative burdens, such as "time taxes," encountered by the public when interacting with federal agencies and programs. Professor Sunstein explored how concepts from the field of behavioral economics can aid in the identification and reduction of undue administrative burdens, noted that not all administrative burdens are unwarranted (and, in some circumstances, may be desirable), and described recent efforts by the Biden Administration to reduce burdens on the public.

## III. Initial Business

At the conclusion of Professor Sunstein's keynote address, Chair Fois reviewed the rules for debating and voting on matters at the Plenary Session. ACUS members then approved the minutes for the 79th Plenary Session and adopted the resolution governing the order of business at the 80th 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: Best Practices for Adjudication Not Involving an Evidentiary Hearing

Chair Fois introduced the proposed recommendation, thanking Nadine Mancini (Government Member), Chair of the Committee on Adjudication; project consultant Michael Asimow; and Matthew Gluth, ACUS Staff Counsel. Mr. Asimow provided an overview of the

report and Ms. Mancini 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. 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: Identifying and Reducing Burdens in Administrative Processes

Chair Fois introduced the proposed recommendation, thanking Eloise Pasachoff (Public Member), Chair of the Committee on Administration and Management; project consultants Pamela Herd, Donald Moynihan, and Amy Widman; and Matthew Gluth, ACUS Staff Counsel. Mr. Moynihan 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.

## VI. Lunch Hour Roundtable: Discussion with Former ACUS Chairs to Commemorate the 80th Plenary Session

During the lunch break, Chair Fois welcomed Sally Katzen (Acting Chairwoman, 1994), Paul R. Verkuil (Chairman, 2010–2015), and Matthew L. Wiener (Acting Chairman, 2017–2022) to discuss ACUS's history, compare their experiences serving as Chair, and explore how the agency's work might evolve in the future. At the conclusion of the discussion, Chair Fois, Ms. Katzen, Mr. Verkuil, and Mr. Wiener took questions from the audience.

## VII. Special Award Presentation: Paul R. Verkuil Committee Room Plaque

In recognition of the pivotal role he played in the re-establishment of ACUS and his visionary leaderships while serving as Chair of the Conference, Chair Fois presented Mr. Verkuil with a plaque designating the ACUS Committee Room as the Paul R. Verkuil Committee Room. Mr. Verkuil thanked Chair Fois and offered brief remarks.

## VIII. Consideration of Proposed Recommendation: Improving Timeliness in Agency Adjudication

Chair Fois introduced the proposed recommendation, thanking: Raymond Limon (Government Member), Chair of the Ad Hoc Committee on Timeliness in Agency Adjudication; ACUS in-house researchers Jeremy Graboyes (Research Director) and Jennifer Selin (Attorney Advisor); and Lea Robbins, ACUS Staff Counsel. Dr. Selin provided an overview of the report, and Mr. Limon 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.

## IX. Consideration of Proposed Recommendation: User Fees

Chair Fois introduced the proposed recommendation, thanking Helen Serassio (Government Member), Chair of the Committee on Regulation; project consultant Erika Lietzan; and Kazia Nowacki, ACUS Staff Counsel. Ms. Lietzan provided an overview of the report, and Ms. Serassio 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.

## X. Closing Remarks & Adjournment

Following adoption of the final recommendation on the agenda, Chair Fois thanked Members and staff for their attendance and participation in the day's proceedings and invited in-person attendees to join ACUS staff for light refreshments following adjournment. At approximately 5:00 p.m., Chair Fois adjourned the 80th Plenary Session of the Administrative Conference of the United States.

# 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.

# Member List

## Council Members

**Funmi Olorunnipa Badejo,** *Head of Compliance* , Palantir Technologies
**Shakuntla L. Bhaya,** *Attorney at Law,* Law Offices of Doroshow, Pasquale, Krawitz & Bhaya
**Ronald A. Cass,** *President,* Cass & Associates, PC
**Kristen M. Clarke,** *Assistant Attorney General for Civil Rights,* U.S. Department of Justice
**Andrew Fois,** *Chairman,* Administrative Conference of the U.S.
**Leslie B. Kiernan,** *General Counsel* , U.S. Department of Commerce
**Fernando Raul Laguarda,** *General Counsel,* AmeriCorps
**Neil H. MacBride,** *General Counsel,* U.S. Department of the Treasury
**Anne Joseph O'Connell,** *Adelbert H. Sweet Professor of Law,* Stanford Law School
**Nitin Shah,** *Director & Associate General Counsel,* Shopify
**Jonathan C. Su,** *Partner,* Latham & Watkins LLP

## Government Members

**James L. Anderson,** *Deputy General Counsel, Supervision, Legislation, & Enforcement Branch,* Federal Deposit Insurance Corporation
**David J. Apol,** *General Counsel,* U.S. Office of Government Ethics
**Samuel R. Bagenstos,** *General Counsel,* U.S. Department of Health & Human Services
**Gregory R. Baker,** *Deputy General Counsel for Administration,* Federal Election Commission
**Laura Barhydt,** *Senior Regulatory Counsel,* U.S. Office of Personnel Management
**Eric S. Benderson,** *Associate General Counsel for Litigation & Claims,* U.S. Small Business Administration
**Krystal J. Brumfield,** *Associate Administrator for the Office of Government-wide Policy,* U.S. General Services Administration
**Brooke Poole Clark,** *General Counsel,* U.S. Nuclear Regulatory Commission
**Daniel Cohen,** *Assistant General Counsel for Regulation,* U.S. Department of Transportation
**Michael J. Cole,** *Senior Attorney, Office of General Counsel,* Federal Mine Safety and Health Review Commission
**Peter J. Constantine,** *Associate Solicitor, Office of Legal Counsel,* U.S. Department of Labor **Susan M. Davies,** *Acting Assistant Attorney General,* U.S. Department of Justice
**Rita P. Davis,** *Deputy General Counsel,* U.S. Department of Defense
**Seth R. Frotman,** *General Counsel,* Consumer Financial Protection Bureau
**Ami Grace-Tardy,** *Assistant General Counsel for Legislation, Regulation and Energy Efficiency,* U.S. Department of Energy

**Carson M. Hawley,** *Deputy Assistant General Counsel, Marketing, Regulatory, and Food Safety Programs Division,* U.S. Department of Agriculture
**Richard J. Hipolit,** *Deputy General Counsel for Legal Policy,* U.S. Department of Veterans Affairs
**Janice L. Hoffman,** *Associate General Counsel,* Centers for Medicare & Medicaid Services
**Erica Sigmund Hough,** *Deputy Associate General Counsel,* Federal Energy Regulatory Commission
**Phillip C. Hughey,** *General Counsel,* Federal Maritime Commission
**Kristin N. Johnson,** *Commissioner,* U.S. 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,** *Vice Chairman,* U.S. Merit Systems Protection Board
**Philip J. Lindenmuth,** *Executive Counsel to the Chief Counsel,* Internal Revenue Service
**Hilary Malawer,** *Deputy General Counsel, Office of the 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, Office of the General Counsel,* 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
**Roxanne L. Rothschild,** *Executive Secretary,* National Labor Relations Board
**Jay R. Schwarz,** *Senior Counsel, Legal Division,* Board of Governors of the Federal Reserve System
**Helen Serassio,** *Associate General Counsel, Cross-Cutting Issues Law Office,* U.S. Environmental Protection Agency
**Miriam Smolen,** *Senior Deputy General Counsel,* Federal Housing Finance Agency
**Caitlin M. Stephens,** *Acting Assistant General Counsel for Administrative Law,* U.S. International Trade Commission
**Jessica B. Stone,** *Director,* Occupational Safety and Health Administration
**Stephanie J. Tatham,** *Senior Policy Analyst and Attorney, Office of Information and Regulatory Affairs,* U.S. Office of Management and Budget
**David A. Trissell,** *General Counsel,* U.S. Postal Regulatory Commission
**Daniel Vice,** *Assistant General Counsel, Regulatory Affairs Division,* U.S. Consumer Product Safety Commission
**Miriam E. Vincent,** *Staff Attorney, Legal Affairs and Policy Division, Office of the Federal Register,* U.S. National Archives and Records Administration
**Chin Yoo,** *Deputy Associate General Counsel,* Federal Communications Commission

## Public Members

**Nicholas Bagley,** *Professor of Law,* University of Michigan Law School
**Kent H. Barnett,** *Associate Dean for Academic Affairs and J. Alton Hosch Professor of Law,* University of Georgia School of Law
**Bernard W. Bell,** *Professor of Law and Herbert Hannoch 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
**Ilona R. Cohen,** *Chief Legal & Policy Officer,* HackerOne
**Kirti Datla,** *Director of Strategic Legal Advocacy,* Earthjustice
**Jennifer B. Dickey,** *Associate Chief Counsel,* U.S. Chamber Litigation Center
**John F. Duffy,** *Samuel H. McCoy II Professor of Law and Paul G. Mahoney Research Professor of Law,* University of Virginia School of Law
**David Freeman Engstrom,** *Professor of Law, Associate Dean for Strategic Initiatives, and Bernard D. Bergreen Faculty Scholar,* Stanford Law School
**Claire J. Evans,** *Partner,* Wiley Rein LLP
**Chai R. Feldblum,** *Former Partner,* Morgan Lewis & Bockius LLP
**Arjun Garg,** *Partner,* Hogan Lovells LLP
**Abbe R. Gluck,** *Alfred M. Rankin Professor of Law and Faculty Director of the Solomon Center for Health Law and Policy; Professor of Internal Medicine,* Yale Law School and Yale Medical School
**Deepak Gupta,** *Partner,* Gupta Wessler PLLC
**Emily Hammond,** *Glen Earl Weston Research Professor,* The George Washington University Law School
**Allyson N. Ho,** *Partner,* Gibson Dunn & Crutcher LLP
**Daniel E. Ho,** *William Benjamin Scott and Luna M. Scott Professor of Law,* Stanford Law School
**Thomas M. Johnson, Jr.,** *Partner,* Wiley Rein LLP
**David E. Lewis, PhD,** *Rebecca Webb Wilson University Distinguished Professor,* Vanderbilt University
**Erika Lietzan,** *William H. Pittman Professor of Law and Timothy J. Heinsz Professor of Law,* University of Missouri School of Law
**Elbert Lin,** *Partner,* Hunton Andrews Kurth LLP
**Michael A. Livermore,** *Edward F. Howrey Professor of Law,* University of Virginia School of Law
**Jennifer L. Mascott,** *Assistant Professor of Law and Co-Executive Director,* George Mason University Antonin Scalia Law School
**Jesse Panuccio,** *Partner,* Boies Schiller Flexner LLP
**Elizabeth P. Papez,** *Partner,* Gibson Dunn & Crutcher LLP
**Eloise Pasachoff,** *Agnes Williams Sesquicentennial Professor of Law,* Georgetown University Law Center
**Paul J. Ray,** *Director,* The Heritage Foundation
**Jeffrey A. Rosen,** *Of Counsel; Nonresident Fellow,* Cravath Swaine & Moore LLP; 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
**Kate A. Shaw,** *Professor of Law,* University of Pennsylvania Carey Law School

**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 and John A. Wilson Distinguished Faculty Scholar,* Stanford Law School
**Kevin M. Stack,** *Lee S. & Charles A. Speir Chair in Law and Director of Graduate Studies,* Vanderbilt Law School
**Cheryl M. Stanton,** *Chief Legal & Government Affairs Officer,* BrightStar Care
**Kate Todd,** *Partner,* Torridon Law PLLC
**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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**Matthew L. Wiener,** *Former Acting Chairman, Vice Chairman, and Executive Director,* Administrative Conference of the U.S.

# Ongoing Projects

## Assembly Projects

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

Agency Investigative Procedures
Public Engagement in Agency Rulemaking Under the Good Cause Exemption
Public Participation in Agency Adjudication
Regional Administration of Federal Regulatory Programs
Using Algorithmic Tools in Regulatory Enforcement

## Office of the Chair

**Forthcoming and Ongoing Studies / Publications**

Agency Awards Under Equal Access to Justice Act
Federal Administrative Procedure Sourcebook
International Regulatory Cooperation
Model Rules of Representative Conduct
Nonlawyer Assistance and Representation
Procedural Rules
Statement of Principles for Agency Adjudication
Statement of Principles for Agency Guidance
Timing of Judicial Review of Agency Action

**Recent Publications / Resources**

Nationwide Injunctions and Federal Regulatory Programs
Statement of Principles for the Disclosure of Federal Administrative Materials
Statement of Principles for Public Engagement in Agency Rulemaking

**Recent Forums**

Advice and Consent: Problems and Reforms in the Senate Confirmation of Executive-Branch Appointees
Forum on Assisting Parties in Federal Agency Adjudication
Forum on International Regulatory Cooperation

**Ongoing Roundtables & Working Groups**

Roundtable on Artificial Intelligence in Federal Agencies
Alternative Dispute Resolution Advisory Group
Council of Independent Regulatory Agencies
Council on Federal Agency Adjudication
Interagency Roundtable
Roundtable on State Innovations in Administrative Procedure
White House Legal Aid Interagency Roundtable
Working Group on Model Materials for Alternative Dispute Resolution

**Website Resources**

Information Interchange Bulletins
Legislative Updates
Summary of Recent Administrative Law Reform Bills
Updates in Federal Agency Adjudication

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Choice of Forum for Judicial Review of Agency Rules

## Committee on Judicial Review

## Proposed Recommendation from Committee | May 2, 2024

Final rules adopted by federal agencies are generally subject to review in the federal courts.[1] Choosing the appropriate forum for judicial review of rules requires careful consideration of a number of factors, including the procedures used to promulgate those rules, the scope or impact of an agency's rules, and the completeness of the administrative record underlying such rules.[2]

In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the Administrative Conference sought to identify principles to guide Congress in choosing the appropriate forum for judicial review of agency rules. The most significant was Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action,* which recommended that, in the case of rules adopted after notice and comment, Congress should generally provide for direct review in the courts of appeals whenever "an initial district court decision respecting the validity of the rule will ordinarily be appealed" or "the public interest requires prompt, authoritative determination of the validity of the rule."[3] Subsequent recommendations opposed altering the ordinary rules governing venue in district court actions against the United States,[4] set forth a principle for determining when it is appropriate to give the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review agency

[1] *See* 5 U.S.C. § 702. This Recommendation does not address judicial review of adjudicative orders, including those that announced principles with rule-like effect or agency actions regarding petitions for rulemaking. Additionally, the Recommendation does not address suits challenging agency delay or inaction in promulgating rules. *See* Telecomms. Rsch. Action v. Fed. Commc'ns Comm'n, 750 F.2d 70, 72 (D.C. Cir. 1984).

[2] *See generally* Joseph W. Mead, Choice of Forum for Judicial Review of Agency Rules (Mar. 15, 2024) (draft report to the Admin. Conf. of the U.S.).

[3] 40 Fed. Reg. 27,926 (July 2, 1975).

[4] Admin. Conf. of the U.S., Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the Government*, 47 Fed. Reg. 30,706 (July 15, 1982).

rules,[5] and offered guidance to Congress on the factors it should consider in determining whether to assign responsibility for review to a specialized court.[6] The Conference also addressed the choice of forum for judicial review of rules adopted under specific statutes.[7]

Several years ago, the Conference undertook a studyto identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.[8] Based on that initiative, ACUS adopted Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*,[9] which recommended that Congress address statutory provisions that create unnecessary obstacles to judicial review or overly complicate the process of judicial review. That Recommendation also prompted questions regarding "whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute."[10]

In this Recommendation, the Conference revisits the principles that should guide Congress in choosing the appropriate forum for judicial review of agency rules and in drafting clear provisions that govern the choice of forum. While this Recommendation offers drafting advice to Congress, agencies may also find it useful in responding to congressional requests for technical assistance.[11] The Conference also recommends that Congress amend 28 U.S.C. § 137 governing the assignment of certain cases to district judges.

[5] *Id*.

[6] Admin. Conf. of the U.S., Recommendation 91-9, *Specialized Review of Administrative Action*, 56 Fed. Reg. 67,143 (Dec. 30, 1991).

[7] Admin. Conf. of the U.S., Recommendation 76-4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act*, 41 Fed. Reg. 56,767 (Dec. 30, 1976); Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991).

[8] *See* Jonathan R. Siegel, Admin. Conf. of the U.S., Sourcebook of Federal Judicial Review Statutes 33 (2021).

[9] 86 Fed. Reg. 53,262 (Sept. 27, 2021).

[10] *Id*. at 53,262, n.7.

[11] *See* Admin. Conf. of the U.S., Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

**Determining the Court in Which to Seek Review**

Absent a statute providing otherwise, parties may seek judicial review of agency rules in a district court. Although this approach may be appropriate in some contexts, direct review by a court of appeals is often more appropriate. For one, district court proceedings are less necessary when an agency has already compiled an administrative record that is adequate for judicial review and further appeal is likely. Allowing parties to choose the district court in which to seek review also creates opportunities for forum shopping to a greater extent than when review is sought in a court of appeals.[12] For these and other reasons, Congress has in many contexts provided for direct review of agency rules in the courts of appeals. And in a minority of statutes, Congress has required parties to seek review in a single, specified tribunal.

In this Recommendation, the Conference generally reaffirms its earlier recommendations that Congress ordinarily should provide for direct review of agency rules by a court of appeals. The Conference believes that this principle is particularly important for rules promulgated after public notice and opportunity for comment. Such procedures produce a record that is conducive to review by an appeals court without need for additional development or factfinding, and drawing the line at rules promulgated after public notice and opportunity for comment provides a relatively clear jurisdictional rule.

**Avoiding Judge Shopping**

Many districts are subdivided into divisions with a limited number of judges or, in some cases, even only one judge. The federal venue statute does not provide that district court cases must be brought in a particular division when a rule issued by a federal agency is challenged. This raises concerns that litigants will choose to bring a case in a division with a particular judge who might resolve their case favorably—a concern that Chief Justice Roberts acknowledged in the 2021 year-end report on the federal judiciary.[13] Consistent with the Chief Justice's report, the

[12] *See* Mead, *supra* note 2; Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).

[13] U.S. SUPREME COURT, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

Judicial Conference of the United States recently announced a policy addressing these concerns and advocating that cases be assigned randomly to district judges.[14] The Conference recommends that Congress amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar, restrain, vacate, or mandate the enforcement of a federal agency rule or policy with regard to any person—that is, on a universal basis—not just the particular plaintiff who challenged the rule or policy in federal court. In this respect, it is consistent with, although not identical to, a policy of the Judicial Conference under which "[d]istrict courts should apply district-wide assignment to . . . civil actions seeking to bar or mandate nationwide enforcement of a federal law, including a rule, regulation, [or] policy . . . whether by declaratory judgment and/or any form of injunctive relief."[15]

**Commented [SC1]:** JCUS will publish the official policy in May at which point we will update this citation to the actual policy and not the press release.

**Avoiding Drafting Ambiguities**

Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions which this Recommendation addresses.[16] First, some statutes specify the forum for review of "orders" without specifying the forum for review of "rules" or "regulations." This can lead to uncertainty regarding whether "orders" includes rules, particularly because the Administrative Procedure Act defines an "order" as any agency action other than a rule.[17] Second, some statutes are unclear as to the forum in which a party may file an action challenging the validity of a rule. A lack of clarity may result from statutory silence or a choice-of-forum provision of uncertain scope.

[14] *Conference Acts to Promote Random Case Assignment*, JUD. CONF. OF THE U.S. (Mar. 12, 2024), https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment.

[15] *Id.*

[16] The Committee on Judicial Review, from which this Recommendation arose, identified a third source of ambiguity: Many statutes are unclear as to whether choice-of-forum provisions regarding rules apply only to rules promulgated by an agency or whether they apply also to other rule-related actions such as delay or inaction in promulgating a rule or the grant or denial of a petition for rulemaking. This Recommendation does not address this ambiguity. The Committee on Judicial Review has suggested it for future study by the Conference.

[17] 5 U.S.C. § 551(6).

This Recommendation urges Congress, in drafting new or amending existing provisions governing the choice of forum for the review of rules,[18] to avoid using the term "orders" to encompass rules; to state clearly the forum in which judicial review of rules is available; and to state clearly whether such provisions apply to rule-related actions other than the promulgation of a rule.

**RECOMMENDATION**

1. When drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court of appeals.
2. Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar or mandate universal enforcement of a federal agency rule or policy.
3. When drafting a statute that provides for judicial review of agency actions, Congress should state explicitly whether actions taken under the statute are subject to review by a district court or, instead, subject to direct review by a court of appeals. If Congress intends to establish separate requirements for review of rules, as distinguished from other agency actions, it should refer explicitly to "rules" and not use the term "orders" to include rules.

[18] This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address existing statutes.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Choice of Forum for Judicial Review of Agency Rules

## Committee on Judicial Review

## Proposed Recommendation for Plenary | June 13, 2024

Final rules adopted by federal agencies are generally subject to review in the federal courts.[1] ~~Choosing the appropriate forum for judicial review of rules requires careful consideration of a number of factors, including the procedures used to promulgate those rules, the scope or impact of an agency's rules, and the completeness of the administrative record underlying such rules.[2]~~

In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the Administrative Conference sought to identify principles to guide Congress in choosing the appropriate forum for judicial review of agency rules. The most significant was Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, which recommended that, in the case of rules adopted after notice and comment, Congress should generally provide for direct review in the courts of appeals whenever "an initial district court decision respecting the validity of the rule will ordinarily be appealed" or "the public interest requires prompt, authoritative determination of the validity of the rule."[3] Subsequent recommendations opposed altering the ordinary rules governing venue in district court actions against the United States,[4] set forth a principle for determining when it is appropriate to give the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review agency

**Commented [CMA1]:** Proposed Amendment from Public Member Jennifer Dickey:

Propose striking sentence 2 of the proposed recommendation (lines 2-5). The sentence is too high-level and does not seem to prefigure what comes after it in this preamble. It would be stronger to proceed straight to the discussion of the Conference's work in this area and then to the points the Conference wishes to add to its body of work.

[1] *See* 5 U.S.C. § 702. This Recommendation does not address judicial review of adjudicative orders, including those that announced principles with rule-like effect or agency actions regarding petitions for rulemaking. Additionally, the Recommendation does not address suits challenging agency delay or inaction in promulgating rules. *See* Telecomms. Rsch. & Action Ctr. v. Fed. Commc'ns Comm'n, 750 F.2d 70, 72 (D.C. Cir. 1984).

~~[2] *See generally* Joseph W. Mead, Choice of Forum for Judicial Review of Agency Rules (May 9, 2024) (report to the Admin. Conf. of the U.S.).~~

[3] 40 Fed. Reg. 27,926 (July 2, 1975).

[4] Admin. Conf. of the U.S., Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the Government*, 47 Fed. Reg. 30,706 (July 15, 1982).

**DRAFT June 10, 2024**

rules,[5] and offered guidance to Congress on the factors it should consider in determining whether to assign responsibility for review to a specialized court.[6] The Conference also addressed the choice of forum for judicial review of rules adopted under specific statutes.[7]

Several years ago, the Conference undertook a study to identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.[8] Based on that initiative, ACUS adopted Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*,[9] which recommended that Congress address statutory provisions that create unnecessary obstacles to judicial review or overly complicate the process of judicial review. That Recommendation also prompted questions regarding "whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute."[10]

In this Recommendation, the Conference revisits the principles that should guide Congress in choosing the appropriate forum for judicial review of agency rules and in drafting clear provisions that govern the choice of forum. While this Recommendation offers drafting advice to Congress, agencies may also find it useful in responding to congressional requests for technical assistance.[11] The Conference also recommends that Congress amend 28 U.S.C. § 137 governing the assignment of certain cases to district judges.

[5] *Id.*

[6] Admin. Conf. of the U.S., Recommendation 91-9, *Specialized Review of Administrative Action*, 56 Fed. Reg. 67,143 (Dec. 30, 1991).

[7] Admin. Conf. of the U.S., Recommendation 76-4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act*, 41 Fed. Reg. 56,767 (Dec. 30, 1976); Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991).

[8] *See* Jonathan R. Siegel, Admin. Conf. of the U.S., Sourcebook of Federal Judicial Review Statutes 33 (2021).

[9] 86 Fed. Reg. 53,262 (Sept. 27, 2021).

[10] *Id.* at 53,262, n.7.

[11] *See* Admin. Conf. of the U.S., Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

**Determining the Court in Which to Seek Review**

Absent a statute providing otherwise, parties may seek judicial review of agency rules in a district court. Although this approach may be appropriate in some contexts, direct review by a court of appeals is often more appropriate. For one, district court proceedings are less necessary when an agency has already compiled an administrative record that is adequate for judicial review and further appeal of a district-court decision is likely. Allowing parties to choose the district court in which to seek review also creates opportunities for forum shopping to a greater extent than when review is sought in a court of appeals.[12] For these and other reasons, Congress has in many contexts provided for direct review of agency rules in the courts of appeals. And in a minority of statutes, Congress has required parties to seek review in a single, specified tribunal.

In this Recommendation, the Conference generally reaffirms its earlier recommendations that Congress ordinarily should provide for direct review of agency rules by a court of appeals. The Conference believes that this principle is particularly important for rules promulgated ~~after~~ through public notice and opportunity for comment. Such procedures produce a record that is conducive to review by an appeals court without need for additional development or factfinding, and drawing the line at rules promulgated after public notice and opportunity for comment provides a relatively clear jurisdictional rule.

**Avoiding Judge Shopping**

Rules specifying a forum for judicial review may have an effect on a potential litigant's ability to seek out a forum they believe will be most favorable to their arguments. Forum shopping has significant policy consequences. For example, it may cause the public to view the courts as partisan or to view litigation as just a game. The Conference recognizes that forum shopping is a complicated issue and does not seek to provide a full treatment of that issue in this Recommendation at this time.

[12] *See* Mead, *supra* note 2; Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).

This Recommendation addresses one part of that complicated issue. Many districts are subdivided into divisions with a limited number of judges or, in some cases, even only one judge. The federal venue statute does not provide that district court cases must be brought in a particular division when a rule issued by a federal agency is challenged. This raises concerns that litigants will choose to bring a case in a division with a particular judge who might resolve their case favorably—a concern that Chief Justice Roberts acknowledged in the 2021 year-end report on the federal judiciary.[13] Consistent with the Chief Justice's report, the Judicial Conference of the United States recently announced a policy addressing these concerns and advocating that cases be assigned randomly to district judges.[14] The Conference recommends that Congress amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar, restrain, vacate, or mandate the enforcement of a federal agency rule or policy with regard to any person—that is, on a universal basis—not just the particular plaintiff who challenged the rule or policy in federal court. In this respect, it is consistent with, although not identical to, a policy of the Judicial Conference under which "[d]istrict courts should apply district-wide assignment to . . . civil actions seeking to bar or mandate nationwide enforcement of a federal law, including a rule, regulation, [or] policy . . . whether by declaratory judgment and/or any form of injunctive relief."[15]

As noted, the Conference recognizes that this recommendation forms only a small piece of the challenge of addressing forum shopping. The Conference also recognizes that discussions of forum shopping in this context often also implicate other complex issues, such as the use of nationwide injunctions. To "reduce unnecessary litigation in the regulatory process" and "improve the effectiveness of laws applicable to the regulatory process,"[16] the Conference encourages Congress to continue to consider these difficult and important issues.

**Commented [SC2]:** The Judicial Conference of the United States will publish the policy in May. The manager's amendment for the plenary session will propose modifying this footnote to cite the published policy and not the press release.

**Commented [CA3]:** Proposed Amendment from Council

[13] U.S. SUPREME COURT, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[14] *Conference Acts to Promote Random Case Assignment*, JUD. CONF. OF THE U.S. (Mar. 12, 2024), https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment.

[15] *Id.*

[16] 5 U.S.C. § 591.

**Avoiding Drafting Ambiguities**

Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions which this Recommendation addresses.[17] First, some statutes specify the forum for review of "orders" without specifying the forum for review of "rules" or "regulations." This can lead to uncertainty regarding whether "orders" includes rules, particularly because the Administrative Procedure Act defines an "order" as any agency action other than a rule.[18] Second, some statutes are unclear as to the forum in which a party may file an action challenging the validity of a rule. A lack of clarity may result from statutory silence or a choice-of-forum provision of uncertain scope.

This Recommendation urges Congress, in drafting new or amending existing provisions governing the choice of forum for the review of rules,[19] to avoid using the term "orders" to encompass rules; to state clearly the forum in which judicial review of rules is available; and to state clearly whether such provisions apply to rule-related actions other than the promulgation of a rule.

## RECOMMENDATION

1. When drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court of appeals.
2. Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar or mandate universal enforcement of a federal agency rule or policy.

[17] The Committee on Judicial Review, from which this Recommendation arose, identified a third source of ambiguity: Many statutes are unclear as to whether choice-of-forum provisions regarding rules apply only to rules promulgated by an agency or whether they apply also to other rule-related actions such as delay or inaction in promulgating a rule or the grant or denial of a petition for rulemaking. This Recommendation does not address this ambiguity. The Committee on Judicial Review has suggested it for future study by the Conference.

[18] 5 U.S.C. § 551(6).

[19] This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address existing statutes.

**Commented [CMA4]:** Comment from Special Counsel Jeffrey Lubbers:

A more substantive question I might raise has to do with singling out "rules promulgated using notice-and-comment procedures" for court-of-appeals review. If Congress were to use that dividing line in legislation, what would that mean for legislative rules that have been issued without N & C because they qualified for an exemption in section 553? Would those have to be challenged in district court? Would such a result lead agencies to feel they should gratuitously allow N & C simply to have the review forum be in the court of appeals?

**Commented [CMA5]:** See Proposed Amendment from Public Member Jennifer Dickey (attached) on striking Recommendation 2. See also Comment from Senior Fellow Ronald M. Levin (attached) in response.

3. When drafting a statute that provides for judicial review of agency actions, Congress should state explicitly whether actions taken under the statute are subject to review by a district court or, instead, subject to direct review by a court of appeals. If Congress intends to establish separate requirements for review of rules, as distinguished from other agency actions, it should refer explicitly to "rules" and not use the term "orders" to include rules.

Proposed Amendments from Public Member Jennifer Dickey on *Choice of Forum for Judicial Review of Agency Rules*

Propose striking sentence 2 of the proposed recommendation (lines 2-5). The sentence is too high-level and does not seem to prefigure what comes after it in this preamble. It would be stronger to proceed straight to the discussion of the Conference's work in this area and then to the points the Conference wishes to add to its body of work.

Propose striking recommendation #2 (and lines 32-33 and 50-65) for several reasons. First, this has been a matter of significant controversy and discussion amongst Congress and the judiciary over the last few months. It is not an issue that has gone unnoticed and needs the Conference to shine a light on it or provide expertise. To the contrary, wading into this issue now could have negative consequences for the Conference's bipartisan support in Congress, which is necessary both for the Conference's budget and for action on some of its other projects (for example, our recommendation on legislation to increase proactive disclosure of agency legal materials).

Second, recommendation #2 seems to be at cross-purposes with recommendation #1. If the Conference believes that the best course of action is that judicial review of most agency rules should go straight to the federal courts of appeals, then why would the Conference suggest amending the assignment practices of such actions in district courts? The Conference should instead focus on encouraging Congress to send more cases involving judicial review of agency rules straight to the appellate court.

Third, the preamble does not adequately support recommendation #2. The sole rationale given seems to be avoiding judge shopping, but the preamble does not explain why judge shopping is of particular concern in this context as opposed to others—bankruptcy, patent suits, affirmative suits by the federal government, etc. Perhaps the argument is that the Conference's particular interest is administrative law, but recommendation #2 deals with only a subset of such cases. Indeed, the preamble is so sparsely reasoned that it is notable that the description of recommendation #2 in the preamble does not even match the recommendation text. Indeed, the preamble at line 59 seems to unwittingly take sides in the debate about the meaning of "vacatur" in the APA (i.e. does it mean universal vacatur or as to the person) by suggesting that universal vacatur is appropriate, contrary to the position the executive branch has taken in the Supreme Court under the last two Administrations. Worst of all, the judge shopping rationale seems to endorse the idea that our judges do not bring to each case their best efforts to apply the law to the facts, but rather a bias toward or against a particular plaintiff. Particularly given the current political discussions taking place about the American judicial system (recusal issues, trials of high-profile political figures), it does not seem wise for us to be wading into these waters.

Fourth, the preamble does not respond to the countervailing concerns that have been raised about division-specific assignments. For example, under the current special venue rules that apply to APA suits, lawsuits against the federal government may ordinarily be filed in any district in which at least one of the plaintiffs resides. Plaintiffs residing in compact districts will feel little effects from a rule requiring district-wide assignment. But plaintiffs residing in sprawling districts (typically in more rural areas or geographically larger states) will experience

significantly increased costs if they (and/or their attorneys) must travel hundreds of miles to appear in front of a far-flung judge for hearings. Such increased costs may be significant for the individuals and nonprofit organizations who typically bring these types of APA actions. Particularly given that APA suits can go up to appellate courts, it is not clear why a desire to eliminate perceived judge shopping in the district courts outweighs the very real impacts on plaintiffs.

For these reasons, I propose amending the recommendation to delete recommendation #2 and focus on the longstanding Conference policy of supporting more direct circuit review of agency actions and avoiding drafting ambiguities in judicial review statutes. Taking sides in the assignment controversy would only distract from those important points.

Comment from Senior Fellow Ronald M. Levin on *Choice of Forum for Judicial Review of Agency Rules*

This is a reply to Public Member Jennifer Dickey's comment. As relevant here, she calls for deletion of paragraph # 2 of the proposed recommendation. That paragraph reads: "Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar or mandate universal enforcement of a federal agency rule or policy."

Joseph Mead's consultant's report to the Conference discusses the background and rationale for this proposal, particularly at pages 39-42. I encourage interested members of the Conference to read that discussion. I will not attempt to cover the same ground here. However, Ms. Dickey makes a few arguments that the report did not discuss. I will offer some brief replies to those points.

1. Ms. Dickey's biggest concern seems to be that "the judge shopping rationale seems to endorse the idea that our judges do not bring to each case their best efforts to apply the law to the facts, but rather a bias toward or against a particular plaintiff." I recall no discussion of bias during the committee meetings that gave rise to the proposed recommendation. I cannot speak to what was in the minds of other committee members, but I responded directly to this argument in a recent article:

> It is difficult to conceive of any public policy that could justify allowing such stark judge-shopping. The practice is somewhat analogous to a hypothetical system in which an appellant at the court of appeals level were permitted to choose which three members of the court should hear its appeal. That procedure would surely be recognized as improper, and that recognition would not depend on an assumption that any of the circuit's judges, considered individually, would render a biased decision. Rather, it would be improper because an element of randomization in the assignment of judges to significant cases tends to promote stability and moderation in the legal system. Similarly, judge-shopping within the divisions of a district court subverts that safeguard.[1]

2. Ms. Dickey suggests that paragraph # 2 would "be at cross-purposes with" paragraph # 1, which urges Congress to provide that certain agency rules should be subject to direct review by a court of appeals. I can discern no sense in which these two measures would actually conflict with one another. It's true that, to the extent that Congress implements #1, the range of rules to which #2 would be relevant would be reduced. However, paragraph #1 would, by its terms, apply only to rules adopted through notice-and-comment procedures, and only to rules adopted under new legislation, not under existing legislation. Paragraph #2 would certainly not be superfluous with regard to other rules.

3. Ms. Dickey objects that "the preamble at line 59 seems to unwittingly take sides in the debate about the meaning of 'vacatur' in the APA (i.e. does it mean universal vacatur or as to the person) by suggesting that universal vacatur is appropriate, contrary to the position the executive branch has taken in the Supreme Court under the last two Administrations." It's not surprising that the Committee would have made this assumption, because ACUS has been on record as recognizing the legality of vacatur under the APA for more than a decade. ACUS

[1] *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2033-34 (2023).

Recommendation 2013-6, Remand Without Vacatur. To be more precise, that recommendation maintained that a court should have discretion *not* to vacate, but that proposition would have made no sense unless it assumed that vacatur was also an option. Indeed, the preamble noted that "[t]raditionally, courts have reversed and set aside agency actions they have found to be arbitrary and capricious, unlawful, unsupported by substantial evidence, or otherwise in violation of an applicable standard of review."

In case anyone wonders why the recommendation did not support the legality of vacatur under the APA more explicitly, the simple explanation is that in 2013 nobody questioned its legality. That's why the preamble, when summarizing the controversy about the legality of remand *without* vacatur, responded only to suggestions that vacatur must be *mandatory*. It's only in recent years that revisionists have called longstanding assumptions about the legality of APA vacatur into question.[2]

4. Finally, Ms. Dickey argues that, if the committee proposal were enacted, "plaintiffs residing in sprawling districts (typically in more rural areas or geographically larger states) will experience significantly increased costs if they (and/or their attorneys) must travel hundreds of miles to appear in front of a far-flung judge for hearings." Although, notoriously, some recent judge-shopping episodes have involved filings in strategically chosen divisions that were convenient to *neither* party, I would agree that in some instances a lottery among divisions in a judicial district would result in assignment of cases to inconvenient divisions. In such a case, however, the regular change of venue statute, 28 U.S.C. § 1404, would allow a party to move for transfer to a different division. The question then is: which judge should adjudicate that motion: The judge in the division in which the plaintiff originally filed (which the plaintiff may have strategically chosen), or the "lottery winner" judge to whom the case gets assigned under the reform proposal? Surely, the latter judge would be in no worse a position to make a disinterested ruling on the motion, and might well be in a better position to do so.

[2] I have responded to the revisionists' APA arguments in the article cited above. *Id*. at 2005-19.

# Individualized Guidance

## Committee on Rulemaking

## Proposed Recommendation from Committee | May 1, 2024

Agencies provide written guidance to help explain their programs and policies, announce interpretations of legal materials and how they intend to exercise their discretion, and communicate other important information to regulated entities, regulatory beneficiaries, and the broader public. When used appropriately, guidance documents—including what the Administrative Procedure Act (APA) calls general statements of policy and interpretive rules[1]—can be important instruments of administration and of great value to agencies and the public. The Administrative Conference has adopted numerous recommendations to help agencies use and develop guidance documents effectively and appropriately, to make them publicly available, and to ensure that such documents are well organized, up to date, and easily accessible.[2]

In many federal programs, individuals may request written guidance from an agency regarding how the law applies to a requester's specific circumstances.[3] Such "individualized guidance" goes by a variety of names, including advisory opinions, opinion letters, and letters of

[1] 5 U.S.C. § 553(b)(A). Some agencies define or use the term "guidance" to include materials that may not qualify as interpretive rules or policy statements under the APA. *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

[2] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2022-3, *Automated Legal Guidance*, 87 Fed. Reg. 39,798 (July 5, 8, 2022); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35,992 (June 25, 2014); Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

[3] This Recommendation does not cover guidance that is not requested by a member of the public, such as an agency warning letter explaining why the agency believes a regulated party is in violation of a law or regulation.

interpretation.[4] The Internal Revenue Service issues private letter rulings to provide tax law advice to taxpayers,[5] for example, and the Securities and Exchange Commission issues no-action letters to provide advice regarding whether a product, service, or action may violate federal securities law.[6] In some programs, the provision of individualized guidance is authorized by statute; in others, agencies offer individualized guidance on their own initiative as a public service.

Agency practices vary in several key respects. Some individualized guidance is issued in a relatively formal manner (such as a signed letter on agency letterhead), while other individual guidance may be issued in relatively informal ways (such as in the body of an email).[7] Some individualized guidance is reviewed and issued by agency heads or other senior officials, while other individualized guidance is prepared and issued by lower-level officials. Some individualized guidance has no legally binding effect on the agency or requester, while other such guidance may, for example, provide the requester with a defense to an agency enforcement action.[8]

Individualized guidance offers many benefits. It facilitates communication between an agency and requesters, reduces uncertainty, promotes compliance, spurs useful transactions, and can be faster and less costly than other agency actions. For example, agencies may provide individualized guidance to help a regulated party better understand whether its conduct may be

[4] This Recommendation does not attempt to situate individualized guidance within the APA's categories of "rule," "order," "license," "sanction," or "relief," and it does not seek to define agency processes for providing individualized guidance as "rulemaking" or "adjudication." *See* 5 U.S.C. § 551. Individualized guidance is distinguished from declaratory orders, which agencies may issue in the context of an adjudication to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). Unlike most individualized guidance, declaratory orders are final agency actions and legally binding. *See* Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

[5] See Admin. Conf. of the U.S., Recommendation 70-2, *SEC No-Action Letters Under Section 4 of the Securities Act of 1933*, 1 ACUS 34 (1970).

[6] *See* Admin. Conf. of the U.S., Recommendation 75-5, *Internal Revenue Service Procedures: Taxpayer Services and Complaints*, 41 Fed. Reg. 3986 (Jan. 27, 1976).

[7] This Recommendation does not address guidance provided orally.

[8] *See generally* Shalini Bhargava Ray, Individualized Guidance in the Federal Bureaucracy (Apr. 4, 2024) (draft report to the Admin. Conf. of the U.S.).

permissible, and this may limit the need for future enforcement action. In addition, making individualized guidance publicly available can inform other interested persons about how the agency evaluates issues that may affect them.

At the same time, individualized guidance may raise concerns. Even if an agency does not intend to use individualized guidance to bind the public, requesters or others may nevertheless choose to follow the guidance strictly to limit the perceived risk of sanction in a future agency proceeding. Agencies also risk providing inconsistent guidance if they lack appropriate procedures for developing and reviewing it. In addition, some members of the public may lack equal access to processes for requesting individualized guidance or have limited opportunities to participate in processes for developing individualized guidance that affects them.

These benefits can be increased, and these concerns addressed, through the best practices identified in this Recommendation. The Recommendation encourages agencies, when appropriate, to establish procedures for providing individualized guidance to members of the public. It identifies procedures agencies should use to process requests for such guidance fairly, efficiently, and accurately, and it encourages agencies to make the guidance available to agency personnel and the public. It cautions agencies not to treat individualized guidance as creating binding standards on the public but identifies circumstances in which agencies should consider allowing the public to rely on such guidance (that is, circumstances in which agencies should consider adhering to guidance that is favorable to a person in a subsequent agency proceeding despite the nonbinding character of the guidance). Finally, it addresses circumstances in which agencies should use individualized guidance to support development of general rules.

This Recommendation recognizes the wide variation in the programs that agencies administer, the resources available to agencies, and the needs and preferences of persons with whom they interact. Agencies should account for these differences when implementing the best practices below and tailor their individualized guidance procedures accordingly.

# RECOMMENDATION

## Individualized Guidance Policies

1. In response to requests from members of the public for written guidance, agencies should, consistent with their resources, priorities, and missions, provide individualized guidance—that is, written guidance regarding how the law applies to requesters' specific circumstances.
2. Agencies should not treat individualized guidance as creating standards with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.
3. Agencies should develop policies regarding whether and when it is appropriate to allow a requester or other individual to rely on individualized guidance and, in so doing, consider factors including:
    a. The applicability of constitutional, statutory, or other authorities mandating or prohibiting a party's entitlement to rely on such guidance;
    b. The certainty of the relevant facts and law at the time the agency issued the guidance;
    c. Changes in facts or law after initial issuance of the guidance;
    d. The accuracy and completeness of the information the requester provided at the time it sought the guidance;
    e. The formality of the agency's individualized guidance procedure, including the position and authority of the agency officials involved in developing and issuing the guidance;
    f. Whether a person other than the requester of individualized guidance may rely on it, which might depend on the similarity of the person's circumstances to the requester's circumstances; and
    g. Whether allowing reliance is necessary to prevent significant hardship.
4. Agencies should explain in individualized guidance provided to requesters the extent to which requesters or others can rely on that guidance.

5. Even if agencies do not provide for persons to rely on individualized guidance, agencies should, when appropriate and lawful, minimize hardships on persons who nevertheless acted in conformity with the guidance, such as by reducing or waiving any penalty for past non-compliance or taking enforcement action with solely prospective effect.
6. Agencies with ombuds offices should provide opportunities for members of the public to seek assistance from such offices as a supplement to individualized guidance or to resolve issues related to individualized guidance. Agencies should also involve such offices in efforts to improve agency policies and procedures related to individualized guidance.

**Individualized Guidance Procedures**

7. Agencies should develop written procedures for requesting and issuing individualized guidance. Agencies should publish such procedures in the *Federal Register* and, as appropriate, codify them in the *Code of Federal Regulations*. Agencies should also make the procedures publicly available on their websites and, if applicable, in other agency publications. The procedures should describe:
    a. How members of the public may submit requests for individualized guidance, including the office(s) or official(s) responsible for receiving requests;
    b. The type(s) of individualized guidance members of the public may request;
    c. Any matters that the agency will not address through individualized guidance, including the rationale for not providing guidance as to such matters;
    d. The information that the requester should include with the request for individualized guidance;
    e. Whether the agency will make individualized guidance and any related information (including the identity of the requester and information from the request) publicly available as described in paragraphs 10 through 13;
    f. Any fees the agency charges for providing individualized guidance, as well as any provisions for waivers of, exemptions from, or reduced rates for such fees;

g. Any opportunities for public participation in the preparation of individualized guidance;

h. The manner in which a response to a request for individualized guidance will be provided to the requester;

i. To the extent practicable, the expected timeframe for responding to requests for individualized guidance;

j. Whether requesters may seek review of individualized guidance by a higher-level official; and

k. The agency's policy, developed as described in paragraph 3, regarding whether and when it is appropriate for a requester or other individual to rely on individualized guidance.

8. Agencies should develop procedures for agency personnel to manage and process requests for individualized guidance, including:

a. Allowing for electronic submission of, and response to, requests;

b. Creating methods for identifying and tracking requests;

c. Maintaining past responses to requests in a manner that allows agency personnel to identify and consider them when developing responses to new requests that present similar or related issues; and

d. Ensuring that relevant personnel receive training in the agencies' individualized guidance procedures.

9. In cases in which members of the public other than the requester are likely to have information relevant to the request or are likely to be significantly affected by the agency's action, agencies should consider soliciting public participation before issuing individualized guidance.

**Public Availability of Individualized Guidance**

10. Absent substantial countervailing considerations, agencies should make publicly available on their websites any individualized guidance that affects, or may be of interest

to, persons other than the requester, including regulated persons and regulatory beneficiaries.

11. When making individualized guidance available on their websites, agencies should, as appropriate:
    a. Identify the date, requester, and subject matter of the guidance;
    b. Identify the legal authority under which the guidance was issued and under what circumstances other parties may rely on the guidance; and
    c. Use other techniques to help the public find relevant information, such as indexing or tagging individualized guidance by general topic area.
12. When making individualized guidance publicly available, agencies should redact any information that is sensitive or otherwise protected from disclosure consistent with the Freedom of Information Act or other relevant information laws.
13. Agencies should keep individualized guidance on their websites current. If an agency modifies or rescinds a publicly available individualized guidance document, it should indicate on the face of the document that it has been modified or rescinded and direct readers to any successor guidance and any explanation for the modification or rescission.

**Centralized Accessibility of Individualized Guidance Materials**

14. Agencies that provide individualized guidance should maintain a page on their websites that provides easy access to the procedures described in Paragraph 7, all individualized guidance that they make publicly available as described in paragraphs 10 through 13, and information about electronically submitting a request for individualized guidance.

**Use of Individualized Guidance in Aid of General Rulemaking**

15. Agencies should periodically review individualized guidance to identify matters that may warrant the development of a general rule.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Individualized Guidance

## Committee on Rulemaking

## Proposed Recommendation for Plenary | June 13, 2024

Agencies provide written guidance to help explain their programs and policies, announce interpretations of legal materials and how they intend to exercise their discretion, and communicate other important information to regulated entities, regulatory beneficiaries, and the broader public. When used appropriately, guidance documents—including what the Administrative Procedure Act (APA) calls general statements of policy and interpretive rules[1]—can be important instruments of administration and of great value to agencies and the public. The Administrative Conference has adopted numerous recommendations to help agencies use and develop guidance documents effectively and appropriately, to make them publicly available, and to ensure that such documents are well organized, up to date, and easily accessible.[2]

In many federal programs, individuals may request written guidance from an agency regarding how the law applies to a requester's specific circumstances.[3] Such "individualized guidance" goes by a variety of names, including advisory opinions, opinion letters, and letters of

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interpretation.[4] The Internal Revenue Service issues private letter rulings to provide tax law advice to taxpayers,[5] for example, and the Securities and Exchange Commission issues no-action letters to provide advice regarding whether a product, service, or action may violate federal securities law.[6] In some programs, the provision of individualized guidance is authorized by statute; in others, agencies offer individualized guidance on their own initiative as a public service.

Agency practices vary in several key respects. Some individualized guidance is issued in a relatively formal manner (such as a signed letter on agency letterhead), while other individual guidance may be issued in relatively informal ways (such as in the body of an email).[7] Some individualized guidance is reviewed and issued by agency heads or other senior officials, while other individualized guidance is prepared and issued by lower-level officials. Some individualized guidance has no legally binding effect on the agency or requester, while other such guidance may, for example, provide the requester with a defense to an agency enforcement action.[8]

Individualized guidance offers many benefits. It facilitates communication between an agency and requester, reduces uncertainty, promotes compliance, spurs useful transactions, and can be faster and less costly than other agency actions. For example, agencies may provide individualized guidance to help a regulated party better understand whether its conduct may be

[4] This Recommendation does not attempt to situate individualized guidance within the APA's categories of "rule," "order," "license," "sanction," or "relief," and it does not seek to define agency processes for providing individualized guidance as "rulemaking" or "adjudication." *See* 5 U.S.C. § 551. Individualized guidance is distinguished from declaratory orders, which agencies may issue in the context of an adjudication to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). Unlike most individualized guidance, declaratory orders are final agency actions and legally binding. *See* Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

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[8] *See generally* Shalini Bhargava Ray, Individualized Guidance in the Federal Bureaucracy (June 4, 2024) (report to the Admin. Conf. of the U.S.).

permissible, and this may limit the need for future enforcement action. In addition, making individualized guidance publicly available can inform other interested persons about how the agency evaluates issues that may affect them.

At the same time, individualized guidance may raise concerns. Even if an agency does not intend to use individualized guidance to bind the public, requesters or others may nevertheless choose to follow the guidance strictly to limit the perceived risk of sanction in a future agency proceeding. Agencies also risk providing inconsistent guidance if they lack appropriate procedures for developing and reviewing it. In addition, some members of the public may lack equal access to processes for requesting individualized guidance or have limited opportunities to participate in processes for developing individualized guidance that affects them.

These benefits can be increased, and these concerns addressed, through the best practices identified in this Recommendation. The Recommendation encourages agencies, when appropriate, to establish procedures for providing individualized guidance to members of the public. It identifies procedures agencies should use to process requests for such guidance fairly, efficiently, and accurately, and it encourages agencies to make the guidance available to agency personnel and the public. It cautions agencies not to treat individualized guidance as creating binding standards on the public but identifies circumstances in which agencies should consider allowing the public to rely on such guidance (that is, circumstances in which agencies should consider adhering to guidance that is favorable to a person in a subsequent agency proceeding despite the nonbinding character of the guidance). It also urges agencies to involve their ombuds offices in supplementing or improving guidance to the public.[9] Finally, it addresses circumstances in which agencies should use individualized guidance to support development of general rules.

This Recommendation recognizes the wide variation ~~in~~ among the programs that agencies administer, the resources available to agencies, and the needs and preferences of

[9] *See also* Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

persons with whom they interact. Agencies should account for these differences when implementing the best practices below and tailor their individualized guidance procedures accordingly.

## RECOMMENDATION

### Individualized Guidance Policies

1. ~~In response to requests from members of the public for written guidance, agencies should, consistent with their resources, priorities, and missions, provide individualized guidance—that is, written guidance regarding how the law applies to requesters' specific circumstances.~~To the extent of, and in a manner consistent with, their resources, priorities, and missions, agencies should respond to requests from members of the public for written guidance by providing individualized written guidance regarding how the law applies to requesters' specific circumstances. Agencies should avoid charging fees for such guidance that would impose undue burdens on people of limited means.
2. Agencies should not treat individualized guidance as creating standards with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.
3. Agencies should develop policies regarding whether and when it is appropriate to allow a requester or other individual to rely on individualized guidance. I ~~and, i~~n so doing, agencies should consider factors including:
    a. The applicability of constitutional, statutory, or other authorities mandating or prohibiting a party's entitlement to rely on such guidance;
    ~~a.~~b. The accuracy and completeness of the information the requester provided at the time it sought the guidance;
    ~~b.~~c. The certainty of the relevant facts and law at the time the agency issued the guidance;
    ~~c.~~d. Changes in facts or law after initial issuance of the guidance;
    ~~d. The accuracy and completeness of the information the requester provided at the time it sought the guidance;~~

**Commented [CA1]:** Proposed Amendment from Council #1

e. The formality of the agency's individualized guidance procedure, including the position and authority of the agency officials involved in developing and issuing the guidance;
f. Whether a person other than the requester of individualized guidance may rely on it, which might depend on the similarity of the person's circumstances to the requester's circumstances; and
g. Whether allowing reliance is necessary to prevent significant hardship.

4. Agencies should explain in individualized guidance provided to requesters the extent to which requesters or others can rely on that guidance.
5. Even if agencies do not recognize a right or provide support for persons to rely on individualized guidance, agencies should, when appropriate and lawful, minimize hardships on persons who nevertheless acted in conformity with the guidance, such as by reducing or waiving any penalty for past non-compliance or taking enforcement action with solely prospective effect.
6. Agencies with ombuds offices should provide opportunities for members of the public to seek assistance from such offices ~~as a~~to supplement ~~to~~ individualized guidance or to resolve issues related to individualized guidance. Agencies should also involve such offices in efforts to improve agency policies and procedures related to individualized guidance.

**Commented [CA2]:** Proposed Amendment from Council #2

**Individualized Guidance Procedures**

7. Agencies should develop written procedures for requesting and issuing individualized guidance. Agencies should publish such procedures in the *Federal Register* and, as appropriate, codify them in the *Code of Federal Regulations*. Agencies should also make the procedures publicly available on their websites and, if applicable, in other agency publications. The procedures should describe:
   a. How members of the public may submit requests for individualized guidance, including the office(s) or official(s) responsible for receiving requests;
   b. The type(s) of individualized guidance members of the public may request;

c. Any matters that the agency will not address through individualized guidance, including the rationale for not providing guidance as to such matters;
d. The information that the requester should include with the request for individualized guidance;
e. Whether the agency will make individualized guidance and any related information (including the identity of the requester and information from the request) publicly available as described in paragraphs 10 through 13;
f. Any fees the agency charges for providing individualized guidance, as well as any provisions for waivers of, exemptions from, or reduced rates for such fees;
g. Any opportunities for public participation in the preparation of individualized guidance;
h. The manner in which a response to a request for individualized guidance will be provided to the requester;
i. To the extent practicable, the expected timeframe for responding to requests for individualized guidance;
j. Whether requesters may seek review of individualized guidance by a higher-level official; and
k. The agency's policy, developed as described in paragraph 3, regarding whether and when it is appropriate for a requester or other individual to rely on individualized guidance.

8. Agencies should develop procedures for agency personnel to manage and process requests for individualized guidance, including:
a. Allowing for electronic submission of, and response to, requests;
b. Creating methods for identifying and tracking requests;
c. Maintaining past responses to requests in a manner that allows agency personnel to identify and consider them when developing responses to new requests that present similar or related issues; and
d. Ensuring that relevant personnel receive training in the agencies' individualized guidance procedures.

9. In cases in which members of the public other than the requester are likely to have information relevant to the request or are likely to be significantly affected by the agency's action, agencies should consider soliciting public participation before issuing individualized guidance.

**Public Availability of Individualized Guidance**

10. Absent substantial countervailing considerations, agencies should make publicly available on their websites any individualized guidance that affects, or may be of interest to, persons other than the requester, including regulated persons and regulatory beneficiaries.
11. When making individualized guidance available on their websites, agencies should, as appropriate:
    a. Identify the date, requester, and subject matter of the guidance;
    b. Identify the legal authority under which the guidance was issued and under what circumstances other parties may rely on the guidance; and
    c. Use other techniques to help the public find relevant information, such as indexing or tagging individualized guidance by general topic area.
12. When making individualized guidance publicly available, agencies should redact any information that is sensitive or otherwise protected from disclosure consistent with the Freedom of Information Act or other relevant information laws.
13. Agencies should keep individualized guidance on their websites current. If an agency modifies or rescinds a publicly available individualized guidance document, it should indicate on the face of the document that it has been modified or rescinded and direct readers to any successor guidance and any explanation for the modification or rescission.

**~~Centralized~~ Accessibility of Individualized Guidance Materials**

14. Agencies that provide individualized guidance should maintain a page on their websites that provides easy access to the procedures described in Paragraph 7, all individualized

guidance that they make publicly available as described in paragraphs 10 through 13, and information about electronically submitting a request for individualized guidance.

~~14.~~15. Agencies should ensure that their processes for requesting and receiving individualized guidance (see Paragraph 7) and their individualized guidance webpages (see Paragraph 14) are accessible to persons with disabilities.

Commented [CA3]: Proposed Amendment from Council #3

**Use of Individualized Guidance in Aid of General Rulemaking**

~~15.~~16. Agencies should periodically review individualized guidance to identify matters that may warrant the development of a general rule.

# Participation of Senate-Confirmed Officials in Administrative Adjudication

## Committee on Adjudication

## Proposed Recommendation from Committee | May 1, 2024

Tens of thousands of federal agency officials participate in administrative adjudication. Most are members of the career civil service hired and supervised under the civil service laws. Several thousand, like administrative law judges (ALJs) and many other administrative judges, are appointed by a department head.[1] Some, like many agency heads, are appointed by the President with the advice and consent of the Senate. It is to such "PAS" officials that federal laws typically assign authority to adjudicate matters, and it is PAS officials who—by rule, delegation of authority, and the development of norms, practices, and organizational cultures—work with career civil servants and other officials to structure systems of administrative adjudication and oversee their operation, ensuring some measure of political accountability.

PAS officials often participate indirectly and directly in administrative adjudication. Indirectly, they may establish agency subunits and positions responsible for adjudicating cases. They may appoint and supervise adjudicators,[2] and they may appoint and supervise, or oversee the appointment and supervision of, other adjudicative personnel. PAS officials may coordinate with the President and Congress to help ensure that adjudicative subunits have the resources they need to adjudicate cases in a fair, accurate, consistent, efficient, timely, and politically responsive

[1] *See* Lucia v. United States, 585 U.S. 237 (2018). Under the Constitution's Appointments Clause, art. II § 2, cl. 2, "Officers of the United States" must be appointed through presidential nomination and Senate confirmation, except that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The Supreme Court has interpreted the term "Department" in this context to mean "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 511 (2010).

[2] *See Lucia*, 585 U.S. at 251 (holding that administrative law judges employed by the Securities and Exchange Commission are "Officers of the United States" and must be appointed in accordance with the Appointments Clause).

manner.[3] PAS officials may also establish rules of procedure and practice to structure administrative adjudication,[4] and they may develop substantive rules that supply the law in adjudications.

Additionally, PAS officials may participate directly in administrative adjudication, serving as the final, executive-branch decision maker in cases arising under the statutes they administer.[5] Although questions regarding whether, when, and how PAS officials participate directly in the adjudication of cases are not new, they have gained new salience in recent years. Most notably, in *United States v. Arthrex*,[6] the Supreme Court held that a statute providing for the administrative resolution of certain patent disputes violated the Appointments Clause by vesting final decisional authority in adjudicators in the U.S. Patent and Trademark Office's Patent Trial and Appeal Board, whose members are neither PAS officials nor subject to at-will removal. The Court remedied the violation by holding unenforceable the statutory restraint on the authority of a PAS official, the Director of the Patent and Trademark Office, to review the Board's decisions.

While Congress has, for some programs, determined by statute whether, when, and how PAS officials participate directly in the adjudication of cases, for many programs, Congress has given agencies the discretion to develop procedures and practices that are effective and appropriate for the specific programs they administer. This Recommendation provides a

[3] *See* Admin. Conf. of the U.S., Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, 89 Fed. Reg. 1513 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).

[4] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); *see also* 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); 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).

[5] *See* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021).

[6] 141 S. Ct. 1970 (2021).

framework to help agencies develop effective procedures and practices, when required or appropriate, for direct participation by PAS officials in the adjudication of individual cases.

It does not address whether Congress or agencies should, for constitutional or other reasons, provide for direct participation by PAS officials in the adjudication of individual cases under specific programs. Nor does this recommendation address the broader question of whether and when agencies should develop policies through rulemaking, adjudication, setting enforcement priorities, or other means. Of course, Congress and agencies must pay careful attention to such questions and ensure that laws, rules, and policies comport with applicable legal requirements.

To develop effective and appropriate procedures and practices, agencies must consider, in addition to applicable constitutional and statutory requirements, the characteristics of PAS officials and the potential consequences of such characteristics for fair, accurate, consistent, efficient, and timely adjudication. While there is wide variation among PAS positions and PAS officials, at least five characteristics commonly distinguish PAS positions and officials from other agency positions and officials, especially career civil servants.

First, as the Administrative Conference has previously noted, there are often numerous vacancies in PAS positions.[7] Frequent vacancies exist for several reasons, including delays related to the appointments process. When adjudicative functions are assigned to PAS positions, vacancies in those positions can affect the timeliness of adjudication. At some agencies, for example, vacancies or the lack of a quorum have resulted in long delays.[8]

Second, there is relatively high turnover in PAS positions, and PAS officials almost always serve in their positions for a shorter time than career civil servants. Thus PAS officials may lack preexisting relationships with agency employees, knowledge of agency processes, and

[7] *See* Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71,352 (Dec. 27, 2019).

[8] *See* Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 58–61 (Apr. 12, 2024) (draft report to the Admin. Conf. of the U.S.).

the specialized adjudicative expertise that career adjudicators develop as a result of their work and experience in this area.

Third, unlike civil servants who are hired without regard to political affiliation, activity, or beliefs,[9] PAS officials are often nominated by the President at least in part *because* of their political affiliation, activity, or beliefs. PAS officials are also subject to removal by the President, although a statute may impose for-cause or other limitations on removal. Unlike officials appointed by a department head or the President alone, however, PAS officials are also confirmed by the Senate, which may make them more attentive to Congress than career agency officials.[10] On the one hand, such exposure to politics may help ensure that agency decision making, including the development of policy through case-by-case adjudication, remains publicly accountable. And given their relationships with the President, other political appointees, and Congress, PAS officials may be well equipped to address systemic problems, identified through the adjudication of cases, that require intra- or interbranch coordination. On the other hand, the involvement of political appointees in administrative adjudication may raise concerns about the impartiality and objectivity of agency decision making.[11]

Fourth, unlike career adjudicators, who are often appointed based on prior adjudicative or litigation experience,[12] PAS officials are often appointed for other reasons such as prior experience in a particular industry or familiarity with a particular policy domain. PAS officials may have better access to substantive, subject-matter expertise than other agency decision makers, which may improve the quality of policies developed through case-by-case adjudication. On the other hand, they may lack experience or familiarity with the procedural aspects of administrative adjudication.

[9] 5 U.S.C. § 2301.

[10] *See* Gluth, Graboyes & Selin, *supra* note 8, at 45–46.

[11] *See id.* at 56–57.

[12] *See* 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).

Fifth, PAS officials often sit atop agency hierarchies, and statutes often assign PAS officials, especially the heads of cabinet departments, a broad range of responsibilities, potentially including the administration of multiple programs and, under any given program, multiple functions (e.g., rulemaking, investigation, prosecution) in addition to adjudication.[13] Such responsibilities can provide PAS officials with a unique opportunity to coordinate policymaking within and across programs, promote consistent decision making, and gain better awareness of the adjudicative and regulatory systems for which they are statutorily responsible. On the other hand, PAS officials may lack the capacity to decide cases in a fair, accurate, consistent, efficient, and timely manner. The combination of adjudicative and non-adjudicative functions (e.g., investigation, prosecution, rulemaking) in a single decision maker may also raise concerns about the integrity of agency proceedings and the effectiveness of agency policymaking.[14]

Considering these and other characteristics, and consistent with statutory and regulatory requirements, agencies must determine whether participation by PAS officials in the adjudication of cases provides an effective mechanism for directing and supervising systems of administrative adjudication and, if it does, what procedures and practices will permit PAS officials to adjudicate cases in a manner that best promotes fairness, accuracy, consistency, efficiency, and timeliness. The Conference has addressed some of these issues in previous recommendations, most notably in Recommendation 68-8, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*;[15] Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*;[16] Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*;[17] Recommendation 2020-3, *Agency Appellate Systems*;[18]

[13] *See* Gluth, Graboyes & Selin, *supra* note 8, at 46–48.

[14] *See id*. at 62–63.

[15] 38 Fed. Reg. 19,783 (July 23, 1973).

[16] 48 Fed. Reg. 57,461 (Dec. 30, 1983).

[17] 84 Fed. Reg. 2139 (Feb. 6, 2019).

[18] 86 Fed. Reg. 6618 (Jan. 22, 2021).

and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.[19] Recognizing that agencies must consider applicable constitutional and statutory requirements and the unique characteristics of the programs they administer, this Recommendation builds on these earlier recommendations but focuses exclusively on identifying best practices to help agencies determine whether, when, and how PAS officials should participate directly in the adjudication of individual cases.

## RECOMMENDATION

### Determining Whether and When Officers Appointed by the President With the Advice and Consent of the Senate—PAS Officials—Should Participate in the Adjudication of Cases

1. When a statute authorizes a PAS official or collegial body of PAS officials to adjudicate matters arising under the statute, and such authority is delegable as a constitutional and statutory matter, the agency ordinarily should delegate to one or more non-PAS adjudicators responsibility for conducting initial proceedings (i.e., receiving and evaluating evidence and arguments and issuing a decision). PAS officials, individually or as a collegial body, who retain statutory authority to conduct initial proceedings should exercise such authority only if a matter is exceptionally significant or broadly consequential, and they have the capacity to personally receive and evaluate evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and timely manner.
2. When a statute authorizes a PAS official or a collegial body of PAS officials to adjudicate matters arising under the statute or review lower-level decisions rendered by other adjudicators, and such authority is delegable as a constitutional and statutory matter, the agency should determine in which types of cases it would be beneficial for a PAS official or collegial body of PAS officials to review lower-level decisions rendered by other adjudicators and in which it would be more appropriate to delegate final

[19] 88 Fed. Reg. 2312 (Jan. 13, 2023).

decision-making authority to a non-PAS official (e.g., an agency "Judicial Officer") or a collegial body of non-PAS officials (e.g., a final appellate board). Circumstances in which it may be beneficial for an agency to provide for review by a PAS official or a collegial body of PAS officials include:

a. Cases that involve legal or factual issues that are exceptionally significant or broadly consequential;
b. Cases that involve a novel or important question of law, policy, or discretion, such that direct participation by one or more PAS officials would promote centralized or politically accountable coordination of policymaking; and
c. When participation by one or more PAS officials in the adjudication of individual cases would promote consistent decision making by agency adjudicators.

3. When it would be beneficial to provide for review by a PAS official or a collegial body of PAS officials, the agency should, consistent with constitutional and statutory requirements, determine the appropriate structure for such review. Structural options include:

a. *Providing the only opportunity for administrative review of lower-level decisions*. This option may be appropriate when caseloads are relatively low and individual cases frequently raise novel or important questions of law, policy, or discretion.
b. *Delegating first-level review authority to a non-PAS official, such as an agency "Judicial Officer," or appellate board and retaining authority to exercise second-level administrative review in exceptional circumstances*. This option may be appropriate when caseloads are relatively high and individual cases only occasionally raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.
c. *Delegating final review authority to another PAS official*. This option may be appropriate, for example, when individuals, by virtue of holding another PAS

position, have greater access to subject-matter expertise or greater capacity to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.

d. *For collegial bodies of PAS officials, delegating first-level review authority to a single member or panel, and retaining authority for the collegial body as a whole to exercise second-level (and final) administrative review*. This option may be appropriate when a collegial body manages a relatively high caseload and most individual cases do not raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.

**Initiating Review by PAS Officials**

4. An agency ordinarily should provide that a decision subject to review by a PAS official or a collegial body of PAS officials becomes final and binding after a specified number of days unless, as applicable:
    a. A party or other interested person files a petition for review, if a statute entitles a party or other interested person to such review;
    b. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon petition by a party or other interested person;
    c. A PAS official or collegial body of PAS officials exercises discretion to review the lower-level decision upon referral by the adjudicator or appellate board (as a body or through its chief executive or administrative officer) that issued the decision;
    d. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon request by a federal official who oversees a program impacted by a decision, or his or her delegate; or
    e. A PAS official or collegial body of PAS officials exercises discretion to review the decision sua sponte.

5. When a PAS official or collegial body of PAS officials serves as a first-level reviewer, an agency should develop a policy for determining the circumstances in which such review may be exercised. Review may be warranted if there is a reasonable probability that:
    a. The adjudicator who issued the lower-level decision committed a prejudicial procedural error or abuse of discretion;
    b. The lower-level decision includes an erroneous finding of material fact;
    c. The adjudicator who issued the lower-level decision erroneously interpreted the law or agency policy;
    d. The case presents a novel or important issue of law, policy, or discretion; or
    e. The lower-level decision presents a recurring issue or an issue that agency adjudicators have decided in different ways, and the PAS official or officials can resolve the issue more accurately and efficiently through precedential decision making.
6. When a PAS official or collegial body of PAS officials serves as a second-level reviewer, an agency should determine the circumstances in which such review may be warranted. To avoid multilevel review of purely factual issues, the agency should limit second-level review by a PAS official or collegial body of PAS officials to circumstances in which there is a reasonable probability that:
    a. The case presents a novel or important issue of law, policy, or discretion, or
    b. The first-level reviewer erroneously interpreted the law or agency policy.
7. When agency rules permit parties or other interested persons to file a petition requesting that a PAS official or a collegial body of PAS officials review a lower-level decision and review is discretionary, the agency should require that petitioners explain in the petition why such review is warranted with reference to the grounds for review identified in Paragraph 5 or 6, as applicable. Agency rules should permit other parties or interested persons to respond to the petition or file a cross-petition.
8. An agency should provide that if a PAS official or collegial body of PAS officials, or a delegate, does not exercise discretion to grant a petition for review within a set time period, the petition is deemed denied.

9. In determining whether to provide for interlocutory review by a PAS official or collegial body of PAS officials of rulings by agency adjudicators, an agency should evaluate whether such review can be conducted in a fair, accurate, consistent, efficient, and timely manner, considering the best practices identified in Recommendation 71-1, *Interlocutory Appeal Procedures*.
10. When a PAS official or collegial body of PAS officials exercises discretion to review a lower-level decision (e.g., by granting a petition or accepting a referral), the agency should:
    a. Notify the parties;
    b. Provide a brief statement of the grounds for review; and
    c. Provide the parties a reasonable time to submit written arguments.

**PAS Official Review Process**

11. A PAS official or collegial body of PAS officials who reviews a lower-level decision ordinarily should limit consideration to the evidence and legal issues considered by the adjudicator who issued that decision. The PAS official or collegial body of PAS officials should consider new evidence and legal issues, if at all, only if the proponent of new evidence or a new legal issue shows that it is material to the outcome of the case and that, despite his or her due diligence, it was not available when the record closed. In such situations, the PAS official or collegial body of PAS officials should determine whether it would be more effective to consider the new evidence or legal issue or instead to remand the case to another adjudicator for further development and consideration.
12. An agency should provide a PAS official or collegial body of PAS officials discretion to permit oral argument on his or her own initiative or upon a party's request if doing so would assist the PAS official(s) in deciding the matter.
13. In cases when a PAS official or collegial body of PAS officials will decide a novel or important question of law, policy, or discretion, the agency should provide the PAS official(s) discretion to solicit arguments from interested members of the public, for

example by inviting amicus participation, accepting submission of written comments, or holding a public hearing to receive oral comments.

**Integrity of the Decision-Making Process**

14. Each agency at which PAS officials participate in the adjudication of individual cases should establish a process for considering whether participation by a particular PAS official in a case would violate government-wide or agency-specific ethics standards and should determine whether and, if so, in what circumstances PAS officials should recuse themselves from participating in a case.

**Coordination of Policymaking and Decision Making by Agency Adjudicators**

15. An agency ordinarily should treat decisions of PAS officials as precedential if they address novel or important issues of law, policy, or discretion, or if they resolve recurring issues or issues that other agency adjudicators have decided in different ways. Unless the agency treats all decisions of PAS officials as precedential, in determining whether and under what circumstances to treat such decisions as precedential, the agency should consider the factors listed in Paragraph 2 of Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.
16. Each agency should review periodically petitions for review and decisions rendered by PAS officials to determine whether issues raised repeatedly indicate that the agency, its adjudicators, or the public may benefit from notice-and-comment rulemaking or development of guidance.

**Adjudicative Support for PAS Officials**

17. When a PAS official or collegial body of PAS officials adjudicates individual cases, agencies should assign or delegate case-related functions to non-PAS officials, when appropriate, including:
    a. Performing routine tasks such as managing dockets and case filings;

managing proceedings, including the submission of materials and the scheduling of oral arguments;

b. Responding to routine motions;

c. Dismissing, denying, and granting petitions for review in routine circumstances when such action is clearly warranted, for example when a petition is untimely, a party requests to withdraw a petition, or the parties to a proceeding agree to a settlement;

d. Conducting the preliminary review of lower-level decisions, evidence, and arguments;

e. Conducting the preliminary evaluation of petitions for review and petitions for reconsideration;

f. Identifying unappealed decisions that may warrant review by a PAS official or collegial body of PAS officials;

g. Encouraging settlement and approving settlement agreements;

h. Conducting legal and policy research;

i. Recommending case dispositions;

j. Preparing draft decisions and orders for review and signature by a PAS official or collegial body of PAS officials;

k. Transmitting decisions and orders to parties and making them publicly available; and

l. Staying decisions and orders pending judicial review or reconsideration by a PAS official or collegial body of PAS officials.

18. When a PAS official or collegial body of PAS officials adjudicates individual cases, the agency should determine which offices or officials are best suited to perform assigned or delegated functions such as those in paragraph 17 in a fair, accurate, consistent, efficient, and timely manner. Possibilities include:

a. Adjudicators and staff who serve at an earlier level of adjudication;

b. Full-time appeals counsel;

c. Advisors to a PAS official;

d. The chief legal officer or personnel under his or her supervision; and

e. A Clerk or Executive Secretary or personnel supervised by such officials.

In making such determinations, the agency should ensure adequate separation between personnel who support a PAS official or collegial body of PAS officials in an adjudicative capacity and those who support the PAS official(s) in an investigative or prosecutorial capacity.

**Transparency**

19. Each agency should provide updated access on its website to decisions issued by PAS officials, whether or not designated as precedential, and associated supporting materials. In publishing decisions, the agency should redact identifying details to the extent required to prevent an unwarranted invasion of personal privacy and any information that implicates sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors. In indexing decisions on its website, the agency should clearly indicate which decisions are issued by PAS officials.
20. Each agency ordinarily should presume that oral arguments and other review proceedings before PAS officials are open to public observation. Agencies may choose to close such proceedings, in whole or in part, to the extent consistent with applicable law and if there is substantial justification to do so, as described in Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*.

**Development and Publication of Procedures for Adjudication by PAS Officials**

21. Each agency should promulgate and publish procedural regulations governing the participation of PAS officials in the adjudication of individual cases in the *Federal Register* and codify them in the *Code of Federal Regulations*. These regulations should cover all significant procedural matters pertaining to adjudication by PAS officials. In addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency Appellate Systems*, such regulations should address, as applicable:

a. Whether and, if so, which PAS officials may participate directly in the adjudication of cases;
b. The level(s) of adjudication (e.g., hearing level, first-level appellate review, second-level appellate review) at which a PAS official or collegial body of PAS officials have or may assume jurisdiction of a case (see Paragraphs 1–3);
c. Events that trigger participation by a PAS official or collegial body of PAS officials (see Paragraph 4);
d. An exclusive, nonexclusive, or illustrative list of circumstances in which a PAS official or collegial body of PAS officials will or may review a decision or assume jurisdiction of a case, if assumption of jurisdiction or review is discretionary (see Paragraphs 5–6);
e. The availability, timing, and procedures for filing a petition for review by a PAS official or collegial body of PAS officials, including any opportunity for interlocutory review, and whether filing a petition is a mandatory prerequisite to judicial review (see Paragraphs 7 and 9);
f. The actions the agency will take upon receiving a petition (e.g., grant, deny, or dismiss it), and whether the agency's failure to act on a petition within a set period of time constitutes denial of the petition (see Paragraph 8);
g. The form, contents, and timing of notice provided to the parties to a case when proceedings before a PAS official or collegial body of PAS officials are initiated (see Paragraphs 9–10);
h. The record for decision making by a PAS official or collegial body of PAS officials and the opportunity, if any, to submit new evidence or raise new legal issues (see Paragraph 11);
i. Opportunities for oral argument (see Paragraph 12);
j. Opportunities for public participation (see Paragraph 13);
k. The process for considering whether participation by a PAS official in a case would violate government-wide or agency-specific ethics standards and, if so,

in what circumstances PAS officials should recuse themselves from participating in a case (see Paragraph 14);

l. The treatment of decisions by PAS officials as precedential (see Paragraph 15);

m. Any significant delegations of authority to agency adjudicators; appellate boards; staff attorneys; clerks and executive secretaries; other support personnel; and, in the case of collegial bodies of PAS officials, members who serve individually or in panels consisting of fewer than all members (see Paragraphs 17–18);

n. Any delegations of review authority or alternative review procedures in effect when a PAS position is vacant or a collegial body of PAS officials lacks a quorum; and

o. The public availability of decisions issued by PAS officials and supporting materials, and public access to proceedings before PAS officials (see Paragraphs 19–20).

22. An agency should provide updated access on its website to the regulations described in Paragraph 21 and all other relevant sources of procedural rules and related guidance documents and explanatory materials.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# ~~Participation of Senate-Confirmed Officials in Administrative Adjudication~~

# Senate-Confirmed Officials and Administrative Adjudication

**Committee on Adjudication**

**Proposed Recommendation for Plenary | June 13, 2024**

Tens of thousands of federal agency officials participate in administrative adjudication. Most are members of the career civil service hired and supervised under the civil service laws. Several thousand, like administrative law judges (ALJs) and many other administrative judges, are appointed by a department head.[1] Some, like many agency heads, are appointed by the President with the advice and consent of the Senate. It is to such "PAS" officials that federal laws typically assign authority to adjudicate matters, and it is PAS officials who—by rule, delegation of authority, and the development of norms, practices, and organizational cultures—work with career civil servants and other officials to structure systems of administrative adjudication and oversee their operation, ensuring some measure of political accountability.

PAS officials often participate indirectly and directly in administrative adjudication. Indirectly, they may establish agency subunits and positions responsible for adjudicating cases. They may appoint and supervise adjudicators,[2] and they may appoint and supervise, or oversee

[1] *See* Lucia v. United States, 585 U.S. 237 (2018). Under the Constitution's Appointments Clause, art. II § 2, cl. 2, "Officers of the United States" must be appointed through presidential nomination and Senate confirmation, except that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." ~~The Supreme Court has interpreted the term "Department" in this context to mean "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 511 (2010).~~

[2] *See Lucia*, 585 U.S. at 251 (holding that administrative law judges employed by the Securities and Exchange Commission are "Officers of the United States" and must be appointed in accordance with the Appointments Clause).

**DRAFT June 9, 2024**

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

The Committee voted to replace the original title of this Recommendation (*Participation of Senate-Confirmed Officials in Administrative Adjudication*).

**Commented [CA2]:** Proposed Amendment from Council #1:

This proposed amendment would remove the explanation of the term "Department" as used in the Appointments Clause given developing case law since *Free Enterprise Fund*.

the appointment and supervision of, other adjudicative personnel. PAS officials may coordinate with the President and Congress to help ensure that adjudicative subunits have the resources they need to adjudicate cases in a fair, accurate, consistent, efficient, timely, and politically responsive manner.[3] PAS officials may also establish rules of procedure and practice to structure administrative adjudication,[4] and they may develop substantive rules that supply the law in adjudications.

Additionally, PAS officials may participate directly in administrative adjudication, serving as the final, executive-branch decision makers in cases arising under the statutes they administer.[5] Although questions regarding whether, when, and how PAS officials participate directly in the adjudication of cases are not new, they have gained new salience in recent years. Most notably, in *United States v. Arthrex*,[6] the Supreme Court held that a statute providing for the administrative resolution of certain patent disputes violated the Appointments Clause by vesting final decisional authority in adjudicators in the U.S. Patent and Trademark Office's Patent Trial and Appeal Board, whose members are neither PAS officials nor subject to at-will removal. The Court remedied the violation by holding unenforceable ~~the statutory restraint~~any statutory prohibition on the authority of a PAS official, the Director of the Patent and Trademark Office, to review the Board's decisions.

**Commented [CA3]:** Proposed Amendment from Council #2:

The Council believes the phrase "any statutory prohibition" more accurately describes the statute at issue in *Arthrex*.

While Congress has, for some programs, determined by statute whether, when, and how PAS officials participate directly in the adjudication of cases, for many programs, Congress has given agencies the discretion to develop procedures and practices that are effective and

[3] *See* Admin. Conf. of the U.S., Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, 89 Fed. Reg. 1513 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).

[4] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); *see also* 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); 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).

[5] *See* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021).

[6] ~~141 S. Ct. 1970~~594 U.S. 1 (2021).

appropriate for the specific programs they administer. This Recommendation provides a framework to help agencies develop effective procedures and practices, when required or appropriate, for direct participation by PAS officials in the adjudication of individual cases.

It does not address whether Congress or agencies should, for constitutional or other reasons, provide for direct participation by PAS officials in the adjudication of individual cases under specific programs. Nor does this recommendation address the broader question of whether and when agencies should develop policies through rulemaking, adjudication, setting enforcement priorities, or other means. Of course, Congress and agencies must pay careful attention to such questions and ensure that laws, rules, and policies comport with applicable legal requirements.

To develop effective and appropriate procedures and practices, agencies must consider, in addition to applicable constitutional and statutory requirements, the characteristics of PAS officials and the potential consequences of such characteristics for fair, accurate, consistent, efficient, and timely adjudication. While there is wide variation among PAS positions and PAS officials, at least five characteristics commonly distinguish PAS positions and officials from other agency positions and officials, especially career civil servants.

First, as the Administrative Conference has previously noted, there are often numerous vacancies in PAS positions.[7] Frequent vacancies exist for several reasons, including delays related to the appointments process. When adjudicative functions are assigned to PAS positions, vacancies in those positions can affect the timeliness of adjudication. At some agencies, for example, vacancies or the lack of a quorum have resulted in long delays.[8]

Second, there is relatively high turnover in PAS positions, and PAS officials almost always serve in their positions for a shorter time than career civil servants. Thus PAS officials

[7] *See* Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71,352 (Dec. 27, 2019).

[8] *See* Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 58–6140–42 (~~Apr~~June 9–12, 2024) (~~draft~~ report to the Admin. Conf. of the U.S.).

may lack preexisting relationships with agency employees, knowledge of agency processes, and the specialized adjudicative expertise that career adjudicators develop as a result of their work and experience in this area.

Third, unlike civil servants who are hired without regard to political affiliation, activity, or beliefs,[9] PAS officials are often nominated by the President at least in part *because* of their political affiliation, activity, or beliefs. PAS officials are also subject to removal by the President, although a statute may impose for-cause or other limitations on removal. Unlike officials appointed by a department head or the President alone, however, PAS officials are also confirmed by the Senate, which may make them more attentive to Congress than career agency officials.[10] On the one hand, such exposure to politics may help ensure that agency decision making, including the development of policy through case-by-case adjudication, remains publicly accountable. And given their relationships with the President, other political appointees, and Congress, PAS officials may be well equipped to address systemic problems, identified through the adjudication of cases, that require intra- or interbranch coordination. On the other hand, the involvement of political appointees in administrative adjudication may raise concerns about the impartiality and objectivity of agency decision making.[11]

Fourth, unlike career adjudicators, who are often appointed based on prior adjudicative or litigation experience,[12] PAS officials are often appointed for other reasons such as prior experience in a particular industry or familiarity with a particular policy domain. PAS officials may have better access to substantive, subject-matter expertise than other agency decision makers, which may improve the quality of policies developed through case-by-case adjudication. On the other hand, they may lack experience or familiarity with the procedural aspects of administrative adjudication.

[9] 5 U.S.C. § 2301.

[10] *See* Gluth, Graboyes & Selin, *supra* note 8, at 45–46.

[11] *See* id. Gluth, Graboyes & Selin, *supra* note 8 at 45–57.

[12] *See* 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).

Fifth, PAS officials often sit atop agency hierarchies, and statutes often assign PAS officials, especially the heads of cabinet departments, a broad range of responsibilities, potentially including the administration of multiple programs and, under any given program, multiple functions (e.g., rulemaking, investigation, prosecution) in addition to adjudication.[13] Such responsibilities can provide PAS officials with a unique opportunity to coordinate policymaking within and across programs, promote consistent decision making, and gain better awareness of the adjudicative and regulatory systems for which they are statutorily responsible. On the other hand, because PAS officials often face many competing demands on their time, they may have less practical capacity to devote to the adjudication of individual cases than other officials whose primary function is to adjudicate cases. ~~PAS officials may lack the capacity to decide cases in a fair, accurate, consistent, efficient, and timely manner.~~ Additionally, some have raised concerns in certain contexts that the combination of adjudication and enforcement functions (investigation and prosecution) in a single official may affect the integrity of agency proceedings. Some have also raised concerns in certain contexts that the combination of adjudication and rulemaking functions in a single official may encourage the resolution of important legal and policy issues through case-by-case adjudication, even when general rulemaking offers a better mechanism for resolving such issues~~The combination of adjudicative and non-adjudicative functions (e.g., investigation, prosecution, rulemaking) in a single decision maker may also raise concerns about the integrity of agency proceedings and the effectiveness of agency policymaking.~~[14]

Considering these and other characteristics, and consistent with statutory and regulatory requirements, agencies must determine whether participation by PAS officials in the adjudication of cases provides an effective mechanism for directing and supervising systems of administrative adjudication and, if it does, what procedures and practices will permit PAS officials to adjudicate cases in a manner that best promotes fairness, accuracy, consistency, efficiency, and timeliness. The Conference has addressed some of these issues in previous recommendations, most notably

**Commented [CA4]:** Proposed Amendment from Council #3:

The proposed amendments are intended to clarify the nature and extent of such concerns.

[13] ~~*See* Gluth, Graboyes & Selin, *supra* note 8, at 46–48.~~

[14] *See* ~~*id.*~~Gluth, Graboyes & Selin, *supra* note 8, at ~~62~~52–~~63~~56.

in Recommendation 68-8, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*;[15] Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*;[16] Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*;[17] Recommendation 2020-3, *Agency Appellate Systems*;[18] and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.[19] Recognizing that agencies must consider applicable constitutional and statutory requirements and the unique characteristics of the programs they administer, this Recommendation builds on these earlier recommendations but focuses exclusively on identifying best practices to help agencies determine whether, when, and how PAS officials should participate directly in the adjudication of individual cases.

## RECOMMENDATION

### Determining Whether and When Officers Appointed by the President With the Advice and Consent of the Senate—PAS Officials—Should Participate in the Adjudication of Cases

1. When a statute authorizes a PAS official or collegial body of PAS officials to adjudicate matters arising under the statute, and such authority is delegable as a constitutional and statutory matter, the agency ordinarily should delegate to one or more non-PAS adjudicators responsibility for conducting initial proceedings (i.e., receiving and evaluating evidence and arguments and issuing a decision). PAS officials, individually or as a collegial body, who retain statutory authority to conduct initial proceedings ordinarily should exercise such authority only if:

[15] 38 Fed. Reg. 19,783 (July 23, 1973).

[16] 48 Fed. Reg. 57,461 (Dec. 30, 1983).

[17] 84 Fed. Reg. 2139 (Feb. 6, 2019).

[18] 86 Fed. Reg. 6618 (Jan. 22, 2021).

[19] 88 Fed. Reg. 2312 (Jan. 13, 2023).

a. ~~a~~ A matter is exceptionally significant or broadly consequential, and they have the capacity personally to ~~personally~~ receive and evaluate evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and timely manner~~.~~; or

~~1.~~b. There are no disputed issues of fact, the matter to be decided does not require taking much evidence, and resolution of the matter turns on qualitative judgments of a broad nature.

2. When a statute authorizes a PAS official or a collegial body of PAS officials to adjudicate matters arising under the statute or review lower-level decisions rendered by other adjudicators, and such authority is delegable as a constitutional and statutory matter, the agency should determine in which types of cases it would be beneficial for a PAS official or collegial body of PAS officials to review lower-level decisions rendered by other adjudicators and in which it would be more appropriate to delegate final decision-making authority to a non-PAS official (e.g., an agency "Judicial Officer") or a collegial body of non-PAS officials (e.g., a final appellate board). If a PAS official or collegial body of PAS officials delegates final decision-making authority to lower-level officials, they should adopt alternative mechanisms to ensure adequate direction and supervision of decision makers exercising delegated authority. Circumstances in which it may be beneficial for an agency to provide for review by a PAS official or a collegial body of PAS officials include:
    a. Cases that involve legal or factual issues that are exceptionally significant or broadly consequential;
    b. Cases that involve a novel or important question of law, policy, or discretion, such that direct participation by one or more PAS officials would promote centralized or politically accountable coordination of policymaking; and
    c. When participation by one or more PAS officials in the adjudication of individual cases would promote consistent decision making by agency adjudicators.

**Commented [CA5]:** Proposed Amendment from Council #4

**Commented [CA6]:** Proposed Amendment from Council #5:

The proposed amendment would clarify, consistent with the Supreme Court's Appointments Clause jurisprudence, that inferior officers must be "directed and supervised at some level" by PAS officials.

3. When it would be beneficial to provide for review by a PAS official or a collegial body of PAS officials, the agency should, consistent with constitutional and statutory requirements, determine the appropriate structure for such review. Structural options include:
    a. *Providing the only opportunity for administrative review of lower-level decisions*. This option may be appropriate when caseloads are relatively low and individual cases frequently raise novel or important questions of law, policy, or discretion.
    b. *Delegating first-level review authority to a non-PAS official, such as an agency "Judicial Officer," or appellate board and retaining authority to exercise second-level administrative review in exceptional circumstances*. This option may be appropriate when caseloads are relatively high and individual cases only occasionally raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.
    c. *Delegating final review authority to another PAS official*. This option may be appropriate, for example, when individuals, by virtue of holding another PAS position, have greater access to subject-matter expertise or greater capacity to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.
    d. *For collegial bodies of PAS officials, delegating first-level review authority to a single member or panel, and retaining authority for the collegial body as a whole to exercise second-level (and final) administrative review*. This option may be appropriate when a collegial body manages a relatively high caseload and most individual cases do not raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.

4. An agency ordinarily should provide that a decision subject to review by a PAS official or a collegial body of PAS officials becomes final and binding after a specified number of days unless, as applicable:
    a. A party or other interested person files a petition for review, if a statute entitles a party or other interested person to such review;
    b. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon petition by a party or other interested person;
    c. A PAS official or collegial body of PAS officials exercises discretion to review the lower-level decision upon referral by the adjudicator or appellate board (as a body or through its chief executive or administrative officer) that issued the decision;
    d. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon request by a federal official who oversees a program impacted by a decision, or his or her delegate; or
    e. A PAS official or collegial body of PAS officials exercises discretion to review the decision sua sponte.
5. When a PAS official or collegial body of PAS officials serves as a first-level reviewer, an agency should develop a policy for determining the circumstances in which such review may be exercised. Review may be warranted if there is a reasonable probability that:
    a. The adjudicator who issued the lower-level decision committed a prejudicial procedural error or abuse of discretion;
    b. The lower-level decision includes an erroneous finding of material fact;
    c. The adjudicator who issued the lower-level decision erroneously interpreted the law or agency policy;
    d. The case presents a novel or important issue of law, policy, or discretion; or
    e. The lower-level decision presents a recurring issue or an issue that agency adjudicators have decided in different ways, and the PAS official or officials

can resolve the issue more accurately and efficiently through precedential decision making.

6. When a PAS official or collegial body of PAS officials serves as a second-level reviewer, an agency should determine the circumstances in which such review may be warranted. To avoid multilevel review of purely factual issues, the agency should limit second-level review by a PAS official or collegial body of PAS officials to circumstances in which there is a reasonable probability that:
    a. The case presents a novel or important issue of law, policy, or discretion, or
    b. The first-level reviewer erroneously interpreted the law or agency policy.
7. When agency rules permit parties or other interested persons to file a petition requesting that a PAS official or a collegial body of PAS officials review a lower-level decision and review is discretionary, the agency should require that petitioners explain in the petition why such review is warranted with reference to the grounds for review identified in Paragraph 5 or 6, as applicable. Agency rules should permit other parties or interested persons to respond to the petition or file a cross-petition.
8. An agency should provide that if a PAS official or collegial body of PAS officials, or a delegate, does not exercise discretion to grant a petition for review within a set time period, the petition is deemed denied.
9. In determining whether to provide for interlocutory review by a PAS official or collegial body of PAS officials of rulings by agency adjudicators, an agency should evaluate whether such review can be conducted in a fair, accurate, consistent, efficient, and timely manner, considering the best practices identified in Recommendation 71-1, *Interlocutory Appeal Procedures*.
10. When a PAS official or collegial body of PAS officials exercises discretion to review a lower-level decision (e.g., by granting a petition or accepting a referral), the agency should:
    a. Notify the parties;
    b. Provide a brief statement of the grounds for review; and
    c. Provide the parties a reasonable time to submit written arguments.

**PAS Official Review Process**

11. A PAS official or collegial body of PAS officials who reviews a lower-level decision ordinarily should limit consideration to the evidence and legal issues considered by the adjudicator who issued that decision. The PAS official or collegial body of PAS officials should consider new evidence and legal issues, if at all, only if (a) the proponent of new evidence or a new legal issue shows that it is material to the outcome of the case and that, despite ~~his or her~~ due diligence, it was not available when the record closed, or (b) consideration of a new legal issue is necessary to clarify agency law or policy. In such situations, the PAS official or collegial body of PAS officials should determine whether it would be more effective to consider the new evidence or legal issue or instead to remand the case to another adjudicator for further development and consideration.
12. An agency should provide a PAS official or collegial body of PAS officials discretion to permit oral argument on ~~his or her~~their own initiative or upon a party's request if doing so would assist the PAS official(s) in deciding the matter.
13. In cases when a PAS official or collegial body of PAS officials will decide a novel or important question of law, policy, or discretion, the agency should provide the PAS official(s) discretion to solicit arguments from interested members of the public, for example by inviting amicus participation, accepting submission of written comments, or holding a public hearing to receive oral comments.

**Integrity of the Decision-Making Process**

14. To promote impartiality and the appearance of impartiality in adjudication, ~~Each~~ each agency at which PAS officials participate in the adjudication of individual cases should establish a process for considering whether participation by a particular PAS official in a case would violate government-wide or agency-specific ethics standards ~~and should determine whether and, if so, in what circumstances PAS officials should recuse themselves from participating in a case~~.

**Commented [CA7]:** Proposed Amendment from Council #6

**Commented [CA8]:** Proposed Amendment from Council #7 (see associated amendment at paragraph 21(k))

15. An agency ordinarily should treat decisions of PAS officials as precedential if they address novel or important issues of law, policy, or discretion, or if they resolve recurring issues or issues that other agency adjudicators have decided in different ways. Unless the agency treats all decisions of PAS officials as precedential, in determining whether and under what circumstances to treat such decisions as precedential, the agency should consider the factors listed in Paragraph 2 of Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*.
16. Each agency periodically should review ~~periodically~~ petitions for review and decisions rendered by PAS officials to determine whether issues raised repeatedly indicate that the agency, its adjudicators, or the public may benefit from ~~notice-and-comment~~ rulemaking or development of guidance.

**Adjudicative Support for PAS Officials**

17. When a PAS official or collegial body of PAS officials adjudicates individual cases, agencies should assign or delegate case-related functions to non-PAS officials, when appropriate, including:
    a. Performing routine tasks such as managing dockets and case filings; managing proceedings, including the submission of materials and the scheduling of oral arguments;
    b. Responding to routine motions;
    c. Dismissing, denying, and granting petitions for review in routine circumstances when such action is clearly warranted, for example when a petition is untimely, a party requests to withdraw a petition, or the parties to a proceeding agree to a settlement;
    d. Conducting the preliminary review of lower-level decisions, evidence, and arguments;
    e. Conducting the preliminary evaluation of petitions for review and petitions for reconsideration;

**Commented [CA9]:** Proposed Amendment from Council #8.

This amendment would remove "notice-and-comment" because presumably an agency might resolve issues raised repeatedly in petitions and decisions through rules that are *not* required to undergo notice and comment (e.g., rules of practice or procedure).

f. Identifying unappealed decisions that may warrant review by a PAS official or collegial body of PAS officials;
g. Encouraging settlement and approving settlement agreements;
h. Conducting legal and policy research;
i. Recommending case dispositions;
j. Preparing draft decisions and orders for review and signature by a PAS official or collegial body of PAS officials;
k. Transmitting decisions and orders to parties and making them publicly available; and
l. Staying decisions and orders pending ~~judicial review or~~ reconsideration by a PAS official or collegial body of PAS officials or judicial review.

18. When a PAS official or collegial body of PAS officials adjudicates individual cases, the agency should determine which offices or officials are best suited to perform assigned or delegated functions such as those in paragraph 17 in a fair, accurate, consistent, efficient, and timely manner. Possibilities include:
    a. Adjudicators and staff who serve at an earlier level of adjudication;
    b. Full-time appeals counsel;
    c. Advisors to a PAS official;
    d. The chief legal officer or personnel under his or her supervision; and
    e. A Clerk or Executive Secretary or personnel supervised by such officials.

    In making such determinations, the agency should ensure adequate separation between personnel who support a PAS official or collegial body of PAS officials in an adjudicative capacity and those who support the PAS official(s) in an investigative or prosecutorial capacity.

**Transparency**

19. Each agency should provide updated access on its website to decisions issued by PAS officials, whether or not designated as precedential, and associated supporting materials. In publishing decisions, the agency should redact identifying details to the extent required

to prevent an unwarranted invasion of personal privacy and any information that implicates sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors. In indexing decisions on its website, the agency should clearly indicate which decisions are issued by PAS officials.

20. Each agency ordinarily should presume that oral arguments and other review proceedings before PAS officials are open to public observation. Agencies may choose to close such proceedings, in whole or in part, to the extent consistent with applicable law and if there is substantial justification to do so, as described in Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*.

**Development and Publication of Procedures for Adjudication by PAS Officials**

21. Each agency should promulgate and publish procedural regulations governing the participation of PAS officials in the adjudication of individual cases in the *Federal Register* and codify them in the *Code of Federal Regulations*. These regulations should cover all significant procedural matters pertaining to adjudication by PAS officials. In addition to those matters identified in Paragraph 2 of Recommendation 2020-3, *Agency Appellate Systems*, such regulations should address, as applicable:
    a. Whether and, if so, which PAS officials may participate directly in the adjudication of cases;
    b. The level(s) of adjudication (e.g., hearing level, first-level appellate review, second-level appellate review) at which a PAS official or collegial body of PAS officials have or may assume jurisdiction of a case (see Paragraphs 1–3);
    c. Events that trigger participation by a PAS official or collegial body of PAS officials (see Paragraph 4);
    d. An exclusive, nonexclusive, or illustrative list of circumstances in which a PAS official or collegial body of PAS officials will or may review a decision or assume jurisdiction of a case, if assumption of jurisdiction or review is discretionary (see Paragraphs 5–6);

e. The availability, timing, and procedures for filing a petition for review by a PAS official or collegial body of PAS officials, including any opportunity for interlocutory review, and whether filing a petition is a mandatory prerequisite to judicial review (see Paragraphs 7 and 9);

f. The actions the agency ~~will~~ may take upon receiving a petition (e.g., grant, deny, or dismiss it), and whether the agency's failure to act on a petition within a set period of time constitutes denial of the petition (see Paragraph 8);

g. The form, contents, and timing of notice provided to the parties to a case when proceedings before a PAS official or collegial body of PAS officials are initiated (see Paragraphs 9–10);

h. The record for decision making by a PAS official or collegial body of PAS officials and the opportunity, if any, to submit new evidence or raise new legal issues (see Paragraph 11);

i. Opportunities for oral argument (see Paragraph 12);

j. Opportunities for public participation (see Paragraph 13);

k. The process for considering whether participation by a PAS official in a case would violate government-wide or agency-specific ethics standards, including any relevant recusal standards ~~and, if so, in what circumstances PAS officials should recuse themselves from participating in a case~~ (see Paragraph 14);

l. The treatment of decisions by PAS officials as precedential (see Paragraph 15);

m. Any significant delegations of authority to agency adjudicators; appellate boards; staff attorneys; clerks and executive secretaries; other support personnel; and, in the case of collegial bodies of PAS officials, members who serve individually or in panels consisting of fewer than all members (see Paragraphs 17–18);

n. Any delegations of review authority or alternative review procedures in effect when a PAS position is vacant or a collegial body of PAS officials lacks a quorum; and

**Commented [CA10]:** Proposed Amendment from Council #7 (see associated amendment at paragraph 14).

o. The public availability of decisions issued by PAS officials and supporting materials, and public access to proceedings before PAS officials (see Paragraphs 19–20).

22. An agency should provide updated access on its website to the regulations described in Paragraph 21 and all other relevant sources of procedural rules and related guidance documents and explanatory materials.

# Managing Congressional Constituent Service Inquiries

## Committee on Administration and Management

## Proposed Recommendation from Committee | May 3, 2024

Since the country's earliest years, constituent services have been a cornerstone of the representational activities of members of Congress. Thousands of people each year contact their elected representatives for help accessing federal programs or navigating adjudicative and other similar administrative processes. Elected representatives and their staff often submit requests to federal agencies on behalf of their constituents in such situations. This Recommendation refers to such requests as constituent service, or "casework,"[1] requests. In most circumstances, the resolution of an individual's issue should not require the assistance of the individual's elected representative or his or her staff. However, these casework requests often appear to be helpful in ensuring appropriate agency action. For agencies, congressional casework requests may reveal broader, systemic problems with their policies and procedures. For Congress, casework requests may also play an important role in oversight of executive-branch agencies, allowing members of Congress to gain greater awareness of the operation and performance of the programs Congress authorizes and funds.

Today, every member of Congress employs "caseworkers," both in Washington, D.C., and in local offices, who help constituents with requests ranging from the simple, such as assistance with government forms, to the complex, such as correcting errors in veterans' service records. While nearly all agencies receive congressional casework requests, the most frequently

[1] This Recommendation and the best practices it identifies are intended to assist agencies with improving their management and resolution of congressional casework requests. Agency management of congressional requests directed towards programmatic or policy oversight is beyond the scope of this Recommendation.

contacted include the Department of Veterans Affairs, Internal Revenue Service, Social Security Administration, Department of State, and U.S. Citizenship and Immigration Services.[2]

Agencies, especially those that receive a large volume of casework requests, have developed practices for receiving, processing, and responding to requests and interacting with congressional caseworkers. There is significant variation in these practices across a number of dimensions.

Organizationally, some agencies assign responsibility for managing casework requests to a centralized congressional liaison office, while others assign that responsibility to regional offices and staff that are empowered to work directly with caseworkers located in members' state or district offices. Still others provide additional avenues for members of the public to seek redress of grievances directly from the agency, such as through agency ombuds.[3]

Technologically, some agencies continue to use ad hoc, legacy systems to receive, process, and respond to casework requests, while others employ new technologies like internal electronic case management systems[4] and public-facing, web-based portals[5] to receive, process, and respond to casework requests in a more accurate, efficient, transparent, and timely manner.

Procedurally, many agencies have developed standard operating procedures (SOPs) for managing casework requests and made them available to caseworkers and the public. These SOPs vary widely in their content, scope, and level of detail. Some agencies have also produced

[2] *See* Sean Kealy, Congressional Constituent Service Inquiries 23 (Mar. 25, 2024) (draft report to the Admin. Conf. of the U.S.).

[3] *Cf.* Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94316 (Dec. 23, 2016). *See also* Carol S. Houk *et al.*, A Reappraisal: The Nature and Value of Ombudsmen in Federal Agencies (Nov. 14, 2016) (report to the Admin. Conf. of the U.S.).

[4] *Cf.* Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

[5] *Cf.* Admin. Conf. of the U.S., Recommendation 2023-4, *Online Process in Agency Adjudication*, 88 Fed. Reg. 42,682 (July 3, 2023).

handbooks and other informational materials like flowcharts and plain-language summaries of their SOPs to educate and assist caseworkers.

Agencies are also subject to differing legal requirements that affect when, how, and what agency personnel can communicate to congressional caseworkers in responding to a casework request. These legal requirements, including the Privacy Act of 1974, the Health Insurance Portability and Accountability Act of 1996, and agency-specific rules and guidance, typically bar agencies from sharing records or information that contain protected or personally identifiable information with congressional caseworkers unless the constituent provides an executed expression of consent.[6]

Recognizing the unique and important role that constituent services play in agency-congressional relations and congressional oversight of federal programs, this Recommendation offers best practices to help agencies receive, process, and respond to congressional casework requests in an accurate, efficient, transparent, and timely manner. Of course, agencies differ with respect to the volume of casework requests they receive, the communities they serve, their operational needs, their statutory requirements, and the resources available to them. This Recommendation recognizes that, when adopting or reviewing practices for receiving, processing, and responding to casework requests and interacting with congressional caseworkers, agencies may need to tailor these best practices to their unique circumstances.

## RECOMMENDATION

### Adopting Standard Operating Procedures

1. Agencies, especially those that receive a large volume of congressional casework requests, should develop standard operating procedures (SOPs) for tracking and managing such requests. Topics that SOPs should address include, as appropriate:

[6] *See* Kealy *supra* note 2, at 10.

a. The agency office(s) or title(s) of personnel responsible for receiving, processing, and responding to congressional casework requests and interacting with congressional caseworkers, and the responsibilities of such office(s) or personnel;
b. The procedure by which congressional caseworkers should submit casework requests to the agency, including any releases, waivers, or other documentation required by law;
c. The procedure by which agency personnel receive, process, and respond to requests, including: (i) any intra-agency assignments of responsibility for the preparation, review, and approval of draft responses; (ii) any constraints on agency personnel's ability to provide information in response to a casework request; (iii) any circumstances in which a casework request should be elevated for review by program or agency leadership; and (iv) the process by which agency personnel responsible for handling casework requests communicate with other agency personnel, including ombuds, when working to resolve a casework request, consistent with ex parte rules;
d. The agency's use of electronic case management or other systems employed for managing casework requests and status updates, including the use of a trackable unique identifier such as a docket number or case number (see Paragraph 6);
e. The agency's procedures for monitoring the progress of responses to each casework request (see Paragraphs 10–11);
f. The major legal requirements, if any, that may restrict the agency's ability to provide information to a congressional caseworker;
g. The types of communications that the agency provides to congressional caseworkers upon receiving a casework request, while processing a request, and in responding to a request;
h. Common circumstances in which agency personnel will prioritize certain casework requests and why, as well as how the agency's processing of prioritized requests differs from its handling of non-prioritized requests and any temporary

changes in prioritization or procedures that are adopted to address emergency circumstances;

i. The kinds of assistance or relief that the agency can and cannot provide in response to a casework request; and

j. Performance goals and measures for responding to casework requests (see Paragraph 9).

2. Agencies should make their SOPs on matters described in Paragraphs 1(a)–1(i) publicly available on their websites as a single, consolidated document along with plain-language materials that succinctly summarize them.

3. Agencies should provide regular trainings for both new and experienced agency personnel involved in receiving, processing, and responding to congressional casework requests to ensure their familiarity and compliance with agency SOPs.

**Managing Casework Requests**

4. Agencies should not automatically close out incoming casework requests that do not include information or documentation required for the request to be processed. Instead, agency personnel should notify congressional caseworkers that their submissions are incomplete and cooperate with the congressional caseworkers' efforts to remedy the deficiency.

5. When agencies complete a casework request, they should provide a written notice to the congressional caseworker or office, unless the caseworker or office has indicated that no written response is necessary.

**Using Technology to Streamline Request Management and Resolution**

6. Consistent with their resources, agencies that receive a large volume of congressional casework requests should adopt systems, such as electronic case management systems and web-based portals, to receive, process, and respond to requests in an accurate, efficient, transparent, and timely manner. Such systems should allow agency personnel to receive, process, and respond to casework requests consistent with established SOPs and

allow managers to monitor the status of requests and evaluate key performance goals and measures.

7. When considering adoption or development of an electronic case management system or web-based portal, agencies should consult with similarly situated agencies or units with particular expertise that may be able to share lessons learned during the adoption or development of similar systems.
8. In developing and modifying electronic case management systems and web-based portals, agencies should solicit feedback and suggestions for improvement from agency managers and personnel and, as appropriate, congressional caseworkers.

**Measuring Agency Performance**

9. Agencies should adopt performance goals for the processing of congressional casework requests and, for each goal, objective measures that use data collected consistent with Paragraph 10 to evaluate whether agency personnel are processing and responding to congressional casework requests successfully.
10. Agencies should collect data (to the extent possible, in a structured format) to allow managers to track and evaluate, as applicable:
    a. Processing times for casework requests;
    b. The nature, timing, and substance of communications between agency personnel and members of Congress and their caseworkers regarding specific casework requests;
    c. Agency actions taken in response to casework requests;
    d. The frequency with which members of Congress and their caseworkers resubmit the same request, for example, because the agency prematurely closed a previous request without fully responding to the caseworker's inquiry, and the reason(s) for the resubmission;
    e. Trainings and other assistance that agency personnel provide to members of Congress and their caseworkers regarding casework generally;
    f. The congressional offices or caseworkers from which requests originate;

g. The identities and roles of agency personnel that work on casework requests; and

h. Any other data agencies determine to be helpful in assessing the performance of their processes for receiving, processing, and responding to casework requests.

11. Agencies should evaluate on an ongoing basis whether they are meeting performance goals for the processing of congressional casework requests and, as appropriate, identify internal or external factors affecting their performance, identify opportunities for improvement, and predict future resource needs.

12. Agencies should periodically reassess performance goals, measures, and associated data collection practices to ensure they continue to reflect operational realities, programmatic developments, and the expectations of agency leaders and members of Congress and their caseworkers.

13. Senior agency officials should regularly consider whether congressional casework requests are indicators of broader policy issues or procedural hurdles that the agency should address.

**Communicating Effectively with Congress**

14. Agencies should foster strong working relationships with congressional caseworkers and maintain open lines of communication to provide information to and receive input from caseworkers on agency procedures and facilitate efficient resolution of casework requests. Options for fostering such relationships include:

a. Providing a point of contact to whom caseworkers can direct questions about individual casework requests or casework generally;

b. Maintaining a centralized webpage on the agency's website, consistent with Paragraph 2, where caseworkers can access the agency's SOPs; any plain language materials that succinctly summarize the agency's SOPs; and any releases, waivers, or other documentation that caseworkers must submit with requests;

c. Providing training or other events—in person in Washington, D.C., or regionally, or online in a live or pre-recorded format—through which agency personnel can share information with congressional caseworkers about the agency's procedures for receiving, processing, and responding to congressional casework requests (and, for agencies that frequently receive a high volume of casework requests, holding such events regularly and either in person or live online, to the extent practicable, in a manner that facilitates receipt of user experience feedback);

d. Participating in trainings or other casework-focused events organized by other agencies and congressional offices, including the Office of the Chief Administrative Officer of the House of Representatives and the Senate's Office of Education and Training; and

e. Organizing periodic, informal meetings with congressional offices and caseworkers with whom the agency regularly interacts to answer questions and solicit feedback.

15. Agencies should periodically solicit input and user experience-related feedback from congressional caseworkers on the timeliness and accuracy of agencies' responses to casework requests.

16. When communicating with congressional caseworkers in the course of receiving, processing, or responding to casework requests, agencies should ensure that each communication identifies, as appropriate, any applicable legal constraints on the agency's ability to provide the information or assistance requested.

17. Congress should consider directing its training or administrative offices, such as the Office of the Chief Administrative Officer of the House of Representatives and the Senate's Office of Education and Training, to create a webpage that consolidates links to agencies' SOPs in one place for ready access by congressional caseworkers. Agencies should cooperate with any such effort, including by alerting the designated offices to any changes to the webpage at which their SOPs may be accessed.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Managing Congressional Constituent Service Inquiries

**Committee on Administration and Management**

**Proposed Recommendation for Plenary | June 13, 2024**

Since the country's earliest years, constituent services have been a cornerstone of the representational activities of members of Congress. Thousands of people each year contact their elected representatives for help accessing federal programs or navigating adjudicative and other similar administrative processes. Elected representatives and their staff often submit requests to federal agencies on behalf of their constituents in such situations. This Recommendation refers to such requests as constituent service, or "casework,"[1] requests. In most circumstances, the resolution of an individual's issue should not require the assistance of the individual's elected representative or his or her staff.[2] However, these casework requests often appear to be helpful in ensuring appropriate agency action. For agencies, congressional casework requests may reveal broader, systemic problems with their policies and procedures. For Congress, casework requests may also play an important role in oversight of executive-branch agencies, allowing members of Congress to gain greater awareness of the operation and performance of the programs Congress authorizes and funds.

Today, every member of Congress employs "caseworkers," both in Washington, D.C., and in local offices, who help constituents with requests ranging from the simple, such as assistance with government forms, to the complex, such as correcting errors in veterans' service records. While nearly all agencies receive congressional casework requests, the agencies most

[1] This Recommendation and the best practices it identifies are intended to assist agencies with improving their management and resolution of congressional casework requests. Agency management of congressional requests directed towards programmatic or policy oversight is beyond the scope of this Recommendation.

[2] Many agencies provide avenues for members of the public to seek assistance or redress of grievances directly from the agency, such as through agency ombuds. *See* Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94316 (Dec. 23, 2016).

**DRAFT June 10, 2024**

**Commented [AMC1]:** Proposed Amendment from the Committee on Administration & Management:

The Committee voted to replace the original title of this Recommendation (*Congressional Constituent Service Inquiries*).

**Commented [CA2]:** Proposed Amendment from Council #1:

This proposed amendment would move the statement that agencies "provide avenues for members to seek assistance or redress of grievances directly from the agency, such as through agency ombuds" from lines 28-29, where it does not appear to belong, to a new footnote following the statement that "resolution of an individual's issue should not require the assistance of the individual's elected representative or his staff."

frequently contacted include the Department of Veterans Affairs, Internal Revenue Service, Social Security Administration, Department of State, and U.S. Citizenship and Immigration Services.[3]

Agencies~~, especially those that receive a large volume of casework requests,~~ have developed practices for receiving, processing, and responding to requests and interacting with congressional caseworkers. There is significant variation in these practices across a number of dimensions.

Organization~~ally, s~~ Some agencies assign responsibility for managing casework requests to a centralized congressional liaison office, while others assign that responsibility to regional offices and staff that are empowered to work directly with caseworkers located in members' state or district offices. ~~Still others provide additional avenues for members of the public to seek redress of grievances directly from the agency, such as through agency ombuds.[4]~~

Technolog~~ically, s~~ Some agencies continue to use ad hoc, legacy systems to receive, process, and respond to casework requests, while others employ new technologies like internal electronic case management systems[5] and public-facing, web-based portals[6] to receive, process, and respond to casework requests in a more accurate, efficient, transparent, and timely manner.

Procedures~~ally, m~~ Many agencies have developed standard operating procedures (SOPs) for managing casework requests and made them available to caseworkers and the public. These SOPs vary widely in their content, scope, and level of detail. Some agencies have also produced

**Commented [CA3]:** Proposed Amendment from Council #2:

This proposed amendment is intended solely to clarify that agencies—not just agencies that receive a large volume of casework requests—have developed the practices described here.

**Commented [CA4]:** Proposed Amendment from Council #1:

See corresponding edit and explanation at line 8.

[3] *See* Sean J. Kealy, Congressional Constituent Service Inquiries 20 (June 5, 2024) (report to the Admin. Conf. of the U.S.).

[4] ~~*Cf.* Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94316 (Dec. 23, 2016). *See also* Carol S. Houk *et al.*, A Reappraisal: The Nature and Value of Ombudsmen in Federal Agencies (Nov. 14, 2016) (report to the Admin. Conf. of the U.S.).~~

[5] *Cf.* Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

[6] *Cf.* Admin. Conf. of the U.S., Recommendation 2023-4, *Online Process in Agency Adjudication*, 88 Fed. Reg. 42,682 (July 3, 2023).

handbooks and other informational materials like flowcharts and plain-language summaries of their SOPs to educate and assist caseworkers.

Agencies are also subject to differing legal requirements that affect when, how, and what agency personnel can communicate to congressional caseworkers in responding to a casework request. These legal requirements, including the Privacy Act of 1974~~,~~ and the Health Insurance Portability and Accountability Act of 1996~~, and agency-specific rules and guidance,~~ typically bar agencies from sharing records or information that contain protected or personally identifiable information with congressional caseworkers unless the constituent provides an executed expression of consent.[7]

**Commented [CA5]:** Proposed Amendment from Council #3:

This proposed amendment would remove "agency-specific rules and guidance" since the "agency-specific rules and guidance" referenced here appear to refer only to agency-issued rules and guidance implementing generally applicable statutes such as the Privacy Act and HIPAA.

Recognizing the unique and important role that constituent services play in agency-congressional relations and congressional oversight of federal programs, this Recommendation offers best practices to help agencies receive, process, and respond to congressional casework requests in an accurate, efficient, transparent, and timely manner. Of course, agencies differ with respect to the volume of casework requests they receive, the communities they serve, their operational needs, their statutory requirements, and the resources available to them. This Recommendation recognizes that, when adopting or reviewing practices for receiving, processing, and responding to casework requests and interacting with congressional caseworkers, agencies may need to tailor these best practices to their unique circumstances.

## RECOMMENDATION

### Adopting Standard Operating Procedures

1. Agencies, especially those that receive a large volume of congressional casework requests, should develop standard operating procedures (SOPs) for tracking and managing such requests. Topics that SOPs should address include, as appropriate:

[7] *See* Kealy *supra* note **Error! Bookmark not defined.**, at 10.

a. The agency office(s) or title(s) of personnel responsible for receiving, processing, and responding to congressional casework requests and interacting with congressional caseworkers, and the responsibilities of such office(s) or personnel;

b. The procedure by which congressional caseworkers should submit casework requests to the agency, including ~~any~~ releases, waivers, or other documentation required by law;

c. The procedure by which agency personnel receive, process, and respond to requests, including: (i) ~~any~~ intra-agency assignments of responsibility for the preparation, review, and approval of draft responses; (ii) ~~any~~ constraints on agency personnel's ability to provide information in response to a casework request; (iii) ~~any~~ circumstances in which a casework request should be elevated for review by program or agency leadership; and (iv) the process by which agency personnel responsible for handling casework requests communicate with other agency personnel, including ombuds, when working to resolve a casework request, consistent with ex parte rules;

d. The agency's use of electronic case management or other systems employed for managing casework requests and status updates, including the use of a trackable unique identifier such as a docket number or case number (see Paragraph 6);

e. The agency's procedures for monitoring the progress of responses to each casework request (see Paragraphs 10–11);

f. The major legal requirements, if any, that may restrict the agency's ability to provide information to a congressional caseworker;

g. The types of communications that the agency provides to congressional caseworkers upon receiving a casework request (e.g., a notice acknowledging receipt), while processing a request (e.g., periodic status updates), and in responding to a request (e.g., a letter, email, or other communication that explains action taken by the agency to resolve the request);

h. ~~Common c~~Circumstances in which agency personnel will prioritize certain casework requests, including on a temporary basis to address emergencies, and

**Commented [CA6]:** Proposed Amendment from Council #4:

The proposed amendment is intended to clarify the "types of communications" that agencies might provide to congressional caseworkers in the course of receiving, processing, and responding to congressional casework requests.

~~why, as well as~~ how the agency's processing of prioritized requests differs from its handling of non-prioritized requests ~~and any temporary changes in prioritization or procedures that are adopted to address emergency circumstances~~;

i. The kinds of assistance or relief that the agency can and cannot provide in response to a casework request; and

j. Performance goals and measures for responding to casework requests (see Paragraph 9).

2. Agencies should make their SOPs on matters described in Paragraphs 1(a)–1(i) publicly available on their websites as a single, consolidated document along with plain-language materials that succinctly summarize them.

3. Agencies should provide regular training~~s~~ for both new and experienced agency personnel involved in receiving, processing, and responding to congressional casework requests to ensure their familiarity and compliance with agency SOPs.

**Managing Casework Requests**

4. Agencies should not automatically close out incoming casework requests that do not include information or documentation required for the request to be processed. Instead, agency personnel should notify congressional caseworkers that their submissions are incomplete and cooperate with the congressional caseworkers' efforts to remedy the deficiency.

5. When agencies complete a casework request, they should provide a written notice to the congressional caseworker or office, unless the caseworker or office has indicated that no written response is necessary.

**Using Technology to Streamline Request Management and Resolution**

6. Consistent with their resources, agencies that receive a large volume of congressional casework requests should adopt systems, such as electronic case management systems and web-based portals, to receive, process, and respond to requests in an accurate, efficient, transparent, and timely manner. Such systems should allow agency personnel to

receive, process, and respond to casework requests consistent with established SOPs and allow managers to monitor the status of requests and evaluate key performance goals and measures.

7. When considering adoption or development of an electronic case management system or web-based portal, agencies should consult with similarly situated agencies or units with particular expertise that may be able to share lessons learned during the adoption or development of similar systems.
8. In developing and modifying electronic case management systems and web-based portals, agencies should solicit feedback and suggestions for improvement from agency managers and personnel and, as appropriate, congressional caseworkers.

**Measuring Agency Performance**

9. Agencies should adopt performance goals for ~~the~~ processing ~~of~~ congressional casework requests and, for each goal, objective measures that use data collected consistent with Paragraph 10 to evaluate whether agency personnel are processing and responding to congressional casework requests successfully.
10. Agencies should collect data (to the extent possible, in a structured format) to allow managers to track and evaluate, as applicable:
    a. Processing times for casework requests;
    b. The congressional offices or caseworkers from which requests originate;
    ~~b. The nature, timing, and substance of communications between agency personnel and members of Congress and their caseworkers regarding specific casework requests;~~
    c. Agency actions taken in response to casework requests;
    d. The nature, timing, and substance of communications between agency personnel and members of Congress and their caseworkers regarding specific casework requests;
    ~~d.~~e. The frequency with which members of Congress and their caseworkers resubmit the same request, for example, because the agency prematurely closed

a previous request without fully responding to the caseworker's inquiry, and the reason(s) for the resubmission;

~~e.~~f. Training~~s~~ and other assistance that agency personnel provide to members of Congress and their caseworkers regarding casework generally;

~~f.~~g. ~~The congressional offices or caseworkers from which requests originate;~~

~~g.~~h. The identities and roles of agency personnel ~~that~~ who work on casework requests; and

~~h.~~i. Any other data the agency~~ies~~ determine~~s~~ to be helpful in assessing the performance of their processes for receiving, processing, and responding to casework requests.

11. Agencies should evaluate on an ongoing basis whether they are meeting performance goals for ~~the~~ processing ~~of~~ congressional casework requests and, as appropriate, identify internal or external factors affecting their performance, identify opportunities for improvement, and predict future resource needs.

12. Agencies ~~should~~ periodically should reassess performance goals~~,~~ and measures, and update them as needed, to ensure that they continue to serve as accurate indicators of good performance consistent with available resources, agency priorities, and congressional expectations. Additionally, agencies periodically should reassess their data collection practices, and update them as needed, to ensure managers can track and evaluate performance accurately over time.~~and associated data collection practices to ensure they continue to reflect operational realities, programmatic developments, and the expectations of agency leaders and members of Congress and their caseworkers.~~

13. Senior agency officials regularly should ~~regularly~~ consider whether issues raised in congressional casework requests ~~are indicators of~~ indicate broader policy issues or procedural hurdles facing members of the public that the agency should address.

**Commented [CA7]:** Proposed Amendment from Council #5:

The proposed amendment is intended to clarify the meaning of paragraph 12.

**Commented [CA8]:** Proposed Amendment from Council #6

The proposed amendment is intended to clarify the meaning of paragraph 13.

**Communicating Effectively with Congress**

14. Agencies should foster strong working relationships with congressional caseworkers and maintain open lines of communication to provide information to and receive input from

caseworkers on agency procedures and facilitate efficient resolution of casework requests. Options for fostering such relationships include:

a. Providing a point of contact to whom caseworkers can direct questions about individual casework requests or casework generally;

b. Maintaining a centralized webpage on the agency's website, consistent with Paragraph 2, where caseworkers can access the agency's SOPs; any plain language materials that succinctly summarize the agency's SOPs; and any releases, waivers, or other documentation that caseworkers must submit with requests;

c. Providing training or other events, in an appropriate format and with appropriate frequency, to enable agency personnel to share information with congressional caseworkers about the agency's procedures for receiving, processing, and responding to casework requests and obtain feedback on the agency's performance from caseworkers~~Providing training or other events—in person in Washington, D.C., or regionally, or online in a live or pre-recorded format—through which agency personnel can share information with congressional caseworkers about the agency's procedures for receiving, processing, and responding to congressional casework requests (and, for agencies that frequently receive a high volume of casework requests, holding these events regularly and either in person or live online, to the extent practicable, in a manner that facilitates receipt of user experience feedback)~~;

d. Participating in trainings or other casework-focused events organized by other agencies and congressional offices, including the Office of the Chief Administrative Officer of the House of Representatives and the Senate's Office of Education and Training; and

e. Organizing periodic, informal meetings with congressional offices and caseworkers with whom the agency regularly interacts to answer questions~~ and solicit feedback~~.

**Commented [CA9]:** Proposed Amendment from Council #7:

This proposed amendment is intended to improve the clarity and readability of this paragraph.

**Commented [CA10]:** Proposed Amendment from Council #8

This proposed amendment is intended to remove the apparent redundancy between paragraph 14(e) and paragraph 15.

15. Agencies ~~should~~ periodically should solicit input and user experience-related feedback from congressional caseworkers on the timeliness and accuracy of agencies' responses to casework requests.
16. When communicating with congressional caseworkers in the course of receiving, processing, or responding to casework requests, agencies should ensure that each communication identifies, as appropriate, any applicable legal constraints on the agency's ability to provide the information or assistance requested.
17. Congress should consider directing its training or administrative offices, such as the Office of the Chief Administrative Officer of the House of Representatives and the Senate's Office of Education and Training, to create a webpage that consolidates links to agencies' SOPs in one place for ready access by congressional caseworkers. Agencies should cooperate with any such effort, including by alerting the designated offices to any changes to the webpage at which their SOPs may be accessed.

**DRAFT**

# MODEL RULES OF REPRESENTATIVE CONDUCT

Submission from the Working Group on Model Rules of Representative Conduct,
June 6, 2024

Prepared by
The Model Rules of Representative Conduct Working Group

Office of the Chair
Administrative Conference of the United States

# FOREWORD

In 2021, the Administrative Conference of the United States recommended that federal agencies "consider adopting rules governing the participation and conduct of representatives in adjudicative proceedings to promote the accessibility, fairness, integrity, and efficiency of adjudicative proceedings."[*] The Conference identified considerations that agencies should take into account in developing rules that are appropriate for the programs they administer. To help agencies develop and implement such rules, the Conference also encouraged the Office of the Chair to promulgate model rules of representative conduct.

In 2023, I convened a working group to develop the model rules. In convening the working group, I sought to carry out the Conference's recommendation that we "seek the input of a diverse array of agency officials and members of the public, including representatives who appear before agencies, and the American Bar Association."

The reporter's Preface to the rules explains the history and purpose of this endeavor, particularly the overarching goal of the model rules to create a transparent, easily accessible set of guidelines that will facilitate a wide range of representation in a broad array of agency proceedings. It falls to me, in this Foreword, only to add a few acknowledgments and issue a necessary disclaimer.

The Office of the Chair extends its profound gratitude to the members of the working group for giving so much of their time—always in the face of competing obligations—to this important initiative. Special thanks are owed to the group's chair, Erin M. Wirth, the Chief Administrative Law Judge for the Federal Maritime Commission, and the group's reporter, Louis J. Virelli, III, Professor of Law at Stetson University College of Law. Judge Wirth kept the project on a strict deadline and provided invaluable leadership throughout the group's substantive discussions, and Professor Virelli ensured that the drafting met his exacting standards. Throughout the project, they led the group with a sense of mission, an inclusivity of multiple perspectives, and, of course, professionalism, warmth, and good cheer.

The Office of the Chair also thanks the following agencies and organizations for lending some of their best experts to the working group: the American Bar Association (including the Section of Administrative Law and Regulatory Practice), Department of Justice (Executive Office for Immigration Review), Department of Labor (Office of Workers' Compensation Programs), Department of Veterans Affairs (Board of Veterans' Appeals), Legal Services Corporation, National Labor Relations Board, National Organization of Social Security Claimants' Representatives, National Organization of Veterans' Advocates, Social Security Administration, and University of Virginia School of Law.

The views reflected in these *Rules* and the comments accompanying them, however well-considered, reflect the views only of the working group and its reporter, not those of the

[*] Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, 87 Fed. Reg. 1721 (Jan. 12, 2022).

Conference. That said, the values and best practices identified by the Conference in Recommendation 2021-9 informed the drafting of these rules.

Andrew Fois
Chair

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[†] The Model Rules of Representative Conduct and their related comments do not necessarily represent the views of the members' organizations. In addition to the members and staff counsel listed here, the Chair thanks Nancy J. Griswold, Lea Robbins, and Anthony Scire for their contributions as former members of the working group, as well as Alexandra F. Scybo for her former work as staff counsel.

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# PREFACE

Louis J. Virelli III[‡]

The Office of the Chair of the Administrative Conference of the United States (ACUS) convened a Working Group on Model Rules of Representative Conduct to assist agencies in adopting "rules governing the participation and conduct of representatives in adjudicative proceedings." This working group was convened following the adoption of ACUS Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, on December 16, 2021. The working group was comprised of distinguished experts in the field of administrative adjudication, ranging from adjudicators and agency officials to private practitioners and academics. It first convened in February 2023 and met regularly throughout the following year to consider and ultimately approve a final draft of these model rules, which were presented to the 81st ACUS Plenary Session on June 13, 2024.

The overarching goal of the model rules is to create a transparent, easily accessible set of guidelines that facilitates a wide range of representation in a broad array of agency proceedings. Representation empowers participants to more thoroughly and effectively engage in agency proceedings and, as a result, promotes better outcomes in those proceedings. Such representation, however, must be guided by principles that help ensure the efficacy and integrity of that representation. These model rules codify those principles, which include protections against inadequate representation and corresponding remedies.

The model rules are organized into five sections:

- Scope of the Rules;
- Representative Qualifications;
- Representative Conduct;
- Enforcement; and
- Transparency

The section regarding the scope of the rules defines terms and addresses general questions such as to whom the model rules are intended to apply as well as how they should be interpreted. The section on representative qualifications focuses mostly on nonlawyer representatives, setting out factors for adjudicators to consider in determining whether a nonlawyer representative is qualified to act as a representative in a given proceeding. The section on representative conduct describes the standards of professional conduct expected of lawyer and nonlawyer representatives, from issues such as maintaining candor before the tribunal to avoiding conflicts of interest. The section on enforcement outlines the procedures and remedies

[‡] Reporter, ACUS Model Rules of Representative Conduct Working Group. I am grateful to Rylie Pennell for her excellent research assistance.

available to address violations of the model rules, including the different remedies available for lawyer versus nonlawyer representatives, and the section on transparency describes how agencies can ensure that participants and representatives are aware of and able to understand the model rules and how they function.

During its deliberations, the working group encountered several issues that transcended multiple rules and, in some cases, multiple sections of rules. The most prominent of these issues was the distinction between lawyer and nonlawyer representatives, including the use of the term nonlawyer to describe representatives who do not hold an active law license at the time of their representation.

The model rules are designed to regulate all representatives in adjudicative proceedings. There is an inevitable substantive distinction, however, between lawyer and nonlawyer representatives because lawyer representatives are regulated by existing statutory and other legal provisions. For example, lawyer representatives are governed by the Agency Practice Act, 5 U.S.C. § 500, which generally permits licensed lawyers to serve as representatives in agency proceedings, as well as by their licensing jurisdictions and various ethics codes. Moreover, consistent with Recommendation 2021-9 and American Bar Association (ABA) policy, these model rules regulate the conduct of lawyer representatives only in a particular adjudication, not with respect to practice before the agency generally. The model rules do not address the conduct of federal agency lawyers and other employees acting on behalf of their agencies because they are governed by federal ethics standards and other provisions, which include disciplinary proceedings and sanctions for violations of those provisions.

Agencies have far less external guidance, and thus more flexibility, regarding the qualifications and conduct of nonlawyers serving as representatives. The model rules offer agencies a new, comprehensive framework for identifying and regulating qualified nonlawyer representatives. The model rules regulate nonlawyer representatives more broadly in that they apply beyond a nonlawyer's role in a particular adjudication. They take into account the fact that representation by a nonlawyer may differ from that of a lawyer while also recognizing that nonlawyer representatives play a crucial role in providing effective representation, often for those who would otherwise not be represented. Model rules regulating nonlawyers' qualifications and conduct are therefore important in preserving the overall quality of agency adjudication. Providing agencies with guidelines for how to incorporate nonlawyer representatives into agency proceedings more easily and consistently allows for greater representation of participants without sacrificing the efficacy or integrity of that representation.

The substantive distinction between lawyer and nonlawyer representatives raises the question of how best to refer to each group. The working group agreed that the label lawyer representative, which borrows from the ABA Model Rules of Professional Conduct, is sufficiently clear to refer to representatives with an active license to practice law. The group also recognized that there is an ongoing discussion, particularly at the state level, about the best way to describe representatives who do not hold an active law license. After much discussion, the working group chose to refer to this group as nonlawyer representatives for two reasons. First, the group concluded, based on two prior ACUS recommendations and a 2023 report from the

Legal Aid Interagency Roundtable, that the term nonlawyer is currently an accepted way within the legal community to refer to representatives without an active law license. Moreover, the working group could not identify any word or phrase that it felt better captured the full range of individuals and responsibilities associated with representation by nonlawyers in adjudicative proceedings. The working group's decision to use the term nonlawyer is not meant to suggest any deficiencies in representation offered by such individuals, nor should it deter an individual agency from adopting a different term in its own regulations regarding representatives without an active law license. The working group encourages agencies to remain attentive to the ongoing discussion within the legal community about terminology in this area and to consider updating their rules accordingly.

Another recurring issue was the question of fees for representatives. The working group recognizes that some agencies have their own rules or other mechanisms for addressing fees and that those agencies may choose not to adopt the model rules addressing fees. For agencies without existing fee standards, the working group concluded that the model rules offer an approach to fees that could be helpful to such agencies despite differences among their proceedings.

The working group also spent considerable effort on the transparency and accessibility of the model rules. The working group drafted the model rules with the intent that they would be codified by adopting agencies. It also focused on less formal means of communication, such as online publication of selected information, to ensure that all potential participants and representatives, including nonlawyer representatives, would have easy access to the information required to participate fully in agency proceedings. The model rules include a provision that would require agencies publish adopted rules in the *Code of Federal Regulations* and the *Federal Register*. The working group recognizes that agencies may have their own rules and practices involving publication. Agencies should take those into account when deciding whether to adopt this model rule.

Throughout its deliberations, the working group focused on crafting model rules that, while designed to function together as a comprehensive and coherent set of guidelines for representatives in agency adjudications, also account for the significant variability in agency practice and procedure and offer flexibility to individual agencies to choose which rules best fit their proceedings. The working group encourages agencies to adopt the model rules in their entirety but in the alternative recommends that agencies consider adopting sections, individual rules, or parts of rules to meet their specific needs. As ACUS has recommended in Recommendation 2021-9, agencies should group such rules together and label them as "Rules of Conduct for Representatives."

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## GENERAL PROVISIONS

### 100. Definitions

(A) "Adjudication" means an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of parties.

(B) "Adjudicator" means one or more individuals who preside(s) at the presentation or oral argument in an adjudication. An adjudicator may be an Administrative Law Judge or any other presiding official or officials who are authorized to so act.

(C) "Agency" means an agency as defined in 5 U.S.C. § 551.

(D) "Knowingly" means done with actual knowledge of, or willful blindness to, the subject of the action.

(E) "Lawyer" means an individual who is licensed to practice law.

(F) "Nonlawyer" means an individual who is not licensed to practice law at the time of their representation, even if they previously held a law license.

(G) "Party" means a named person or entity required by law to participate in an adjudication.

(H) "Participant" means a party to an adjudication or an intervenor or other interested person allowed to participate in the adjudication.

(I) "Person" means an individual or entity other than the agency or an individual acting on the agency's behalf.

(J) "Presiding adjudicator" means the adjudicator responsible for conducting and resolving a specific agency proceeding.

(K) "Representation" refers to the acts of a representative on behalf of a participant in an adjudication.

(L) "Represented participant" means a participant on behalf of whom a representative appears in an adjudication.

(M) "Representative" means an individual appearing in an adjudication on behalf of a participant. A representative may be a lawyer or a nonlawyer but may not be a federal lawyer or other employee of the agency before whom they appear. See Comment 2 to Rule 101 for a discussion of exceptions under these rules for federal agency lawyers and other employees acting on behalf of their agencies.

(N) “Tribunal” means any agency adjudicative authority presiding over a proceeding, including over appeals of an agency adjudication by another agency adjudicator or adjudicators.

**101. Scope of Rules**

(A) These Model Rules of Representative Conduct ("rules") are applicable to the following representatives before [the Agency]:

(1) Lawyers covered by the Agency Practice Act, 5 U.S.C. § 500;

(2) Lawyers authorized to act as representatives by other applicable statute or agency rule; and

(3) Nonlawyers who meet the applicable qualifications prescribed in Rules 204–207.

(B) These rules are not applicable to the following types of individuals wishing to serve as representatives before [the Agency]:

(1) Federal agency lawyers when they appear on behalf of their agency; and

(2) Other employees of the agency when they appear on behalf of their agency.

(C) On any question not addressed by specific statute, specific agency regulation, or these rules, representation is guided so far as practicable by the ABA Model Rules of Professional Conduct.

*Official Comment*

1. (to subsection (A)): As defined in Rule 100, "lawyer" for purposes of these rules means an individual who is licensed to practice law.
2. (to subsection (B)): Federal ethics and other provisions govern the conduct of federal agency lawyers and other employees acting on behalf of their agencies, including disciplinary proceedings and sanctions for violations of those provisions. *See, e.g.*, 5 C.F.R. § 2365.101 et seq. ("Standards of Ethical Conduct for Employees of the Executive Branch").
3. (to subsection (B)): Former agency employees who are nonlawyers are not precluded from serving as representatives provided they meet the applicable qualifications in Rules 204–207. *See, e.g.*, 5 U.S.C. § 500(d)(3).

**102. Construction, Modification, or Waiver of Rules**

(A) These rules should be liberally construed to secure fair, expeditious, and accessible representation of participants in agency adjudications.

(B) These rules must be interpreted, to the extent permissible, to be consistent with the United States Constitution, the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the Agency Practice Act, 5 U.S.C. § 500, and other applicable law. To the extent that a rule is not consistent with any of the above, the applicable law controls.

(C) Except to the extent that waiver or modification would otherwise be contrary to law, the presiding adjudicator may, after adequate notice and explanation to all participants, modify or waive any of these rules upon a determination that no participant will be prejudiced and that the ends of justice will be served.

## REPRESENTATIVE QUALIFICATIONS

### 200. In General

In accordance with applicable law, including these rules, a participant in an adjudication may be represented by a representative.

**201. Consent**

(A) Unless otherwise prohibited by law, a participant must provide consent to representation to the presiding adjudicator, agency, or tribunal.

(B) A record of that consent must be included in the official record of the adjudication.

(C) [The Agency] may provide systematized methods of providing consent, such as:

(1) Standardized consent forms;

(2) Notices of appearance for representatives that indicate consent; or

(3) Other similar mechanisms that allow for reliable and uniform records of participant consent to representation.

(D) Consent may be withdrawn by the participant upon the participant providing notice of such withdrawal to the presiding adjudicator.

*Official Comment*

1. (to subsection (A)): The Agency Practice Act only requires lawyers who are "a member in good standing of the bar of the highest court of a State" to file a written declaration that they are qualified under the Act to serve as a representative. 5 U.S.C. § 500(b). Absent statutory authority to adopt consent requirements by regulation, the Agency Practice Act has been interpreted to "prohibit[] agencies from erecting their own supplemental admission requirements for duly admitted members of a state bar." Polydoroff v. ICC, 773 F.2d 372, 374 (D.C. Cir. 1985). This prohibition does not, however, translate to agency disciplinary actions against lawyer representatives or to consent requirements promulgated through valid agency regulation. Polydoroff v. ICC, 773 F.2d 372, 374 (D.C. Cir. 1985); Levine v. Saul, 2020 WL 5258690 (D.R.I. 2020).
2. (to subsection (A)): A participant's consent must identify the representative either individually or as part of an accredited organization as described in Rules 208–209. Consent may be provided verbally or in writing, including by electronic means.
3. (to subsection (A)): Limitations on the scope of representation are discussed in Rule 301.
4. (to subsection (D)): Notice of withdrawal of consent may be provided verbally or in writing to the presiding adjudicator and must be part of the official record in the adjudication. The adjudicator or any other responsible Agency official should freely grant withdrawal of consent and terminate the representation provided the participant's withdrawal of consent will not have a materially adverse impact on the proceeding or the participant's interest therein. In circumstances where consent was withdrawn and there was an existing fee arrangement between the participant and representative relating to the adjudication, the amount, if any, of fees owed to the representative shall be governed by applicable law, including the rules herein

regarding fees and scope of representation. *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2020); Rules 301, 308.

**202. Representation by Lawyers**

(A) Lawyers may serve as representatives in an agency adjudication:

(1) In accordance with the Agency Practice Act, 5 U.S.C. § 500, or other applicable statute; or

(2) In accordance with any [Agency] regulation authorized by statute.

(B) Lawyer representatives must affirm to [the designated agency official] that they are a member in good standing of [their licensing jurisdiction] and are not otherwise prohibited by law from acting as a representative.

*Official Comment*

1. (to subsection (A)): Some agency statutes specifically allow for additional credentialing of lawyer representatives. Consistent with its statute, the Department of Veterans Affairs (VA) has adopted a detailed accreditation process. *See* 38 U.S.C. § 5904(a)(2) (allowing the VA to establish accreditation standards beyond those contained in the Agency Practice Act). The VA process, however, still defers heavily to bar membership as evidence of a representative's qualifications. State bar membership in good standing creates a presumption that the lawyer representative meets the agency's character and fitness requirements for representatives upon submission of a "self-certification" by the representative to the Office of General Counsel of admission to practice "before any other court, bar, or State or Federal Agency." 38 C.F.R. § 14.629(b)(1)(i), (ii).
2. (to subsection (A)): Individual agencies may wish to specify which licensing jurisdictions may qualify a lawyer to serve as a representative. The Agency Practice Act makes clear that any lawyer "who is a member in good standing of the bar of the highest court of a State may represent a person before an agency." 5 U.S.C. § 500(b). Some agencies define the range of acceptable licensing jurisdictions more broadly. For instance, the Securities and Exchange Commission also permits lawyers admitted to practice before the Supreme Court of the United States or the courts of Puerto Rico or the Virgin Islands to serve as representatives in agency adjudications. *See* 17 C.F.R. § 201.102(b). The Social Security Administration permits lawyer representatives to practice before the agency provided they are licensed "to practice law before a court of a State, Territory, District, or island possession of the United States, or before the Supreme Court or a lower Federal court of the United States." 20 C.F.R. § 404.1705(a). For adjudications that regularly involve foreign parties, agencies may consider permitting lawyers who are licensed outside the United States to serve as representatives in those proceedings.
3. (to subsection (B)): Affirmation of good standing may be provided orally or in writing and must be included in the official record of the proceeding.

4. (to subsections (A), (B)): Agencies are encouraged to maintain records of lawyer representatives who are qualified to practice before them.

**203. Representation by Nonlawyers**

(A) Nonlawyers may serve as representatives in an agency adjudication if they are determined to have the necessary qualifications to serve in that role, unless prohibited by law.

(B) Nonlawyers granted limited permission to practice law by a State or other jurisdiction approved by [the Agency] to grant such permission are presumptively qualified to serve as representatives on matters within the scope of their limited permission to practice.

*Official Comment*

1. The term nonlawyer is used to describe individuals who are not licensed to practice law at the time of their representation, even if they previously held a law license. While this is not the only term or phrase that could be used to describe this group, it was chosen by the committee for use in these rules because it is consistent with references to the same group in two prior ACUS recommendations and a recent (2023) report from the Legal Aid Interagency Roundtable. *See* Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, 87 Fed. Reg. 1721 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 Fed. Reg. 25,641 (July 16, 1986); LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN FEDERAL ADMINISTRATIVE PROCEEDINGS: NONLAWYER ASSISTANCE AND OTHER STRATEGIES (2023).
2. (to subsection (A)): This Rule is designed to freely permit any nonlawyer consented to by the participant to act as a representative. It allows for disqualification of a chosen representative only in cases where there is some indication that the representative will not be willing or able to act in the best interests of the represented participant. Relevant factors in determining qualifications of nonlawyer representatives are provided in Rule 204.
3. (to subsection (A)): Former agency employees who are nonlawyers are not precluded from serving as representatives provided they are qualified to do so under Rule 204. 5 U.S.C. § 500(d)(3).
4. (to subsection (B)): For example, Alaska provides that "[a] person not admitted to the practice of law in this state may receive permission to provide legal assistance in a limited capacity" when supervised by Alaska Legal Services Corporation. ALASKA BAR R. 43.5 (Alaska 2022) ("Waiver to Engage in the Limited Practice of Law for Non-Lawyers Trained and Supervised by Alaska Legal Services Corporation"). Representation qualification based on limited permission to practice is in addition to qualification for nonlawyers based on a license, or due to individual accreditation through the agency, or membership in an accredited organization. *See* Rules 205, 207, 208.

**204. Qualifications for Nonlawyer Representatives**

(A) Among the factors that may be considered in determining if a nonlawyer representative has the necessary qualifications to serve are:

(1) The representative's relationship to the represented participant;

(2) The representative's knowledge of the relevant subject matter;

(3) The representative's experience, if any, relating to the subject matter of the adjudication;

(4) The representative's education or training in matters relevant to the adjudication;

(5) The representative's expertise or skills in relation to the adjudication;

(6) Whether there is any indication that the representative will not be willing or able to act in the best interests of the represented participant;

(7) Whether the representative has a pending charge or has been convicted of a crime that reflects adversely on the representative's fitness to serve as a representative before the agency; and

(8) Whether the representative has knowingly disobeyed or attempted to disobey agency rules or adjudicator directions, or has assisted others in doing so.

(B) A nonlawyer representative will be presumed, subject to rebuttal, to lack the necessary qualifications to serve if the representative was previously disqualified or suspended from acting as a representative in the same or similar proceeding within the agency.

*Official Comment*

1. (to subsection (A)): The factors listed are designed to ensure only that a chosen nonlawyer representative is willing and able to act in the best interests of the represented participant. They are not meant to be exclusive. Determinations regarding a nonlawyer representative's qualifications under this Rule should be made with deference to the participant's choice of representative.
2. (to subsection (A)): Determinations as to whether a nonlawyer is qualified under these rules may be made by the presiding adjudicator with respect to the representative's qualifications to participate in a specific proceeding or by the designated agency official in cases where a representative's qualifications have been established under Rules 205–208. Relevant knowledge can include access to support that can provide the applicable expertise, skills, etc. if proper training (and other factors) are present.
3. (to subsection (A)): The first four factors to be considered in determining whether representation by a nonlawyer would be detrimental to the represented participant are

derived from existing standards set by the Social Security Administration and the Department of Labor. 20 C.F.R. § 404.1705(a); 29 C.F.R. § 18.22(b)(2). Factors (7) and (8) are derived from ACUS Recommendation 2021-9. Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, ¶ 3, 87 Fed. Reg. 1721, 1722 (Jan. 12, 2022).

4. (to subsection (A)): If the presiding adjudicator believes there is an additional reason why a nonlawyer does or does not have the requisite qualifications to serve as a representative in a specific proceeding, the adjudicator may consider that reason in their analysis. For example, a lawyer who was, but is no longer, licensed to practice law shall be treated under these rules as a nonlawyer representative. The circumstances under which the individual ceased to be licensed will be relevant to their qualifications under Rule 204. A former lawyer who allowed their license to expire in retirement, for instance, may have very strong qualifications under Rule 204 based on their relevant experience and expertise, while an equally experienced individual who was disbarred for unethical conduct may have insufficient qualifications to serve as a nonlawyer representative.
5. (to subsection (A)): The reasonableness of a representative's fee under Rule 308 is relevant to whether a representative is willing or able to act in the best interests of the represented participant under subsection (A)(6) of this Rule.

**205. Nonlawyer Representatives with Licenses**

(A) Nonlawyers who retain [specific relevant professional licenses for the Agency] or other licenses relevant to the subject matter of the adjudication should be presumed to have the requisite qualifications to serve.

(B) The presumption of qualification for a licensed, nonlawyer representative described in subsection (A) depends on the representative being a member in good standing of their licensing jurisdiction at the time of the representation and not being otherwise prohibited by law from acting as a representative.

*Official Comment*

1. Lawyers who are retired or no longer licensed to practice law shall be treated as nonlawyers under these rules. *See* Comment 4 to Rule 204.
2. (to subsection (A)): For example, the Agency Practice Act expressly permits certified public accountants to act as representatives in adjudications before the Internal Revenue Service. 5 U.S.C. § 500(c).
3. (to subsection (A)): The question of whether a license is in a field relevant to the subject matter of the adjudication is a question for the designated Agency official but should be interpreted broadly to include any field that may provide the representative with experience, education, or training that may be useful in the adjudication.
4. (to subsection (A)): Relevant licenses may be broadly construed to include recognition by an established accreditation system of any of the qualification(s) in Rule 204.
5. (to subsection (B)): Being a member in good standing of a licensing jurisdiction includes not being under active suspension or disbarment by that jurisdiction from engaging in the licensed activity. *See, e.g.*, 38 C.F.R. § 14.633(c)(5) (VA).

**206. Law Students and Law Graduates as Representatives**

(A) In addition to qualifying as a nonlawyer representative under Rule 204, current law students and law graduates who have not yet been licensed to practice law should be presumed to have the requisite qualifications to serve provided they:

(1) Act under the supervision of a lawyer; and

(2) Are appearing without direct or indirect remuneration for their services from the participant they are representing.

(B) Law students or unlicensed law graduates who qualify to serve as representatives under subsection (A) must submit a statement certifying that they are under the supervision of a lawyer to the presiding adjudicator or any other official designated by the [Agency] for that purpose.

*Official Comment*

1. (to subsection (A)): The requirements for law students or unlicensed law graduates to serve as representatives do not apply to law students or law graduates who qualify as representatives because they are accredited nonlawyer representatives under Rule 207 or designated as representatives by accredited organizations under Rules 208 and 209.
2. (to subsection (A)): Current law students or law school graduates who are not yet licensed to practice law should be encouraged by agencies to serve as representatives under the supervision of a lawyer or an accredited representative or organization under these rules when they are otherwise qualified to serve as a nonlawyer representative. This would include students participating in supervised law school clinics, externships, or pro bono opportunities.
3. (to subsection (A)): Direct or indirect remuneration would not include a stipend but would include a salary or other compensation from a legal organization that was paid for services in connection with the representation.

**207. Accreditation of Nonlawyer Representatives**

(A) For nonlawyer representatives who do not hold other, relevant licenses under Rule 205, and as permitted by applicable law, the [Agency] may establish an accreditation system to ensure that such nonlawyer representatives have the necessary qualifications to serve.

(B) Any such accreditation system should include the criteria in Rule 204, as well as any additional criteria the [Agency] deems appropriate and relevant to establish a representative's qualifications.

(C) The Agency may decide that accreditation operates prospectively to establish a presumption of qualification for the representative in future proceedings, but not for more than three (3) years from the date of initial accreditation.

(D) If an accredited representative engages in conduct that is inconsistent with the accreditation requirements, their accreditation may be revoked by the [Agency].

(E) An accredited representative must report to the Agency any circumstances that may affect their accreditation status within thirty (30) days of the change.

*Official Comment*

1. (to subsection (A)): For an example of an accreditation process for nonlawyer representatives, see the system adopted by the Department of Veterans Affairs, 38 C.F.R. § 14.629(b). The United States Patent and Trademark Office also has a process for registering nonlawyer agents to serve as representatives in patent adjudications. *See* 37 C.F.R. §§ 11.6, 11.7.
2. (to subsection (B)): Such additional criteria may include evidence of specific educational or other technical qualifications relevant to the proceedings, as well as whether the representative is accepting compensation for their services. *See, e.g.*, 37 C.F.R. § 11.7 (USPTO); 38 C.F.R. § 14.630 (VA).
3. (to subsection (C)): The prospective nature of accreditation is designed as a benefit to representatives who are likely to appear before the agency in multiple proceedings during the applicable time frame. The agency may elect to require accredited representatives to complete specified requirements, such as continuing education courses, to maintain their accreditation during the designated period.
4. (to subsection (D)): Revocation shall be at the discretion of the presiding adjudicator in a given proceeding or a designated Agency official. Revocation should occur if at any time there exists evidence demonstrating that the representative engaged in conduct that would have prevented their accreditation in the first instance.
5. (to Subsection (E)): The agency may require the accredited representative to report the change in their status, including loss of accreditation, to all offices where they have pending proceedings.

**208. Accreditation of Organizations**

(A) The [Agency] may provide accreditation for organizations, which may in turn designate members of their organization as representatives in [Agency] adjudications.

(1) If the [Agency] decides on its own to pursue accreditation for an organization, it should require the organization to submit documentation to the [Agency] establishing that the organization meets the accreditation requirements of Rule 209.

(2) An organization may submit a request for accreditation to the [Agency]. Such requests for accreditation must be accompanied by documentation from the organization establishing that it meets the accreditation requirements of Rule 209.

*Official Comment*

1. (to subsection (A)): The Department of Justice Executive Office of Immigration Review (EOIR) defines an accredited representative as "[a]n individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired." 8 C.F.R. § 1292.1(a)(4). EOIR accredits representatives for both itself and the Department of Homeland Security and maintains a record of accredited representatives. *See* U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., ACCREDITED REPRESENTATIVES ROSTER.

**209. Requirements for Organizational Accreditation**

(A) Nonprofit religious, charitable, social service, or similar organizations established in the United States may be accredited by the [Agency] to designate representatives to participate in agency adjudications if those organizations:

(1) Have adequate experience, education, knowledge, and information to render the organization fit to identify qualified representatives; and

(2) Make only nominal charges and assess no excessive membership dues for accredited representatives.

(B) If an accredited organization in subsection (A) no longer satisfies the accreditation requirements, representatives designated by the organization shall no longer be permitted to represent parties in agency adjudications and the organization's accreditation shall be revoked until such time as the organization is able to come into compliance with those requirements. An accredited organization and representative must report to the Agency any circumstances that may affect their accreditation status within thirty (30) days of the change in circumstances.

(C) This Rule does not apply to legal licensing organizations such as state bar associations.

*Official Comment*

1. (to subsection (A)): The requirements in subsection (A) are derived from those set forth by the U.S. Department of Justice Executive Office for Immigration Review. 8 C.F.R. § 292.2(a). Some agencies prefer to only accredit organizations established in the United States, but this Rule does not preclude them from accrediting non-U.S. organizations.
2. (to subsection (B)): To the extent reasonably possible, presiding adjudicators should not permit nonlawyer representatives who were designated by unaccredited organizations or organizations that no longer meet accreditation requirements to participate in proceedings over which that adjudicator presides.
3. (to subsection (B)): The agency may require the accredited organization and representative to report the change in their status, including loss of accreditation, to all offices where they have pending proceedings.
4. (to subsection (C)): Members of legal licensing organizations would be governed by the rules pertaining to representation by lawyers in Rule 202.

## REPRESENTATIVE CONDUCT

### 300. In General

(A) Unless explicitly stated otherwise, these rules governing the conduct of representatives in agency adjudications apply equally to lawyer and nonlawyer representatives.

(B) Nothing in these rules should be construed to limit lawyer representatives' obligations under other applicable law or rules of conduct.

*Official Comment*

1. (to subsection (A)): The applicability of these rules to lawyer representatives is limited to the extent that it only "affect[s] such attorney's participation in a particular proceeding before it," rather than imposing some disciplinary or other remedial measures impacting a lawyer's ability to serve as a representative in a separate proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
2. (to subsection (B)): The phrase "other applicable . . . rules of conduct" includes the "applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice." 29 C.F.R. § 18.22(c).

**301. Scope of Representation and Allocation of Authority Between Participants and Representatives**

(A) A representative shall act in accordance with the represented participant's decisions concerning the objectives of the representation, including any decisions relating to resolution of the proceeding, such as settlement. A representative is not necessarily required to seek the participant's authorization with respect to technical or tactical matters pertaining to the proceeding about which the representative has relevant knowledge or expertise that the participant does not.

(B) A representative may take such action on behalf of the participant as the representative is explicitly or impliedly authorized to carry out in connection with the proceeding.

(C) Representation does not constitute an endorsement of the represented participant's political, economic, social, or moral views or activities.

(D) A representative shall not counsel or assist a represented participant to engage in conduct that the representative knows is criminal or fraudulent, but a representative may counsel or assist the participant in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(E) A representative shall not use false or deceiving information when soliciting a participant, nor shall they solicit a participant when the representative has received adequate notice from the participant that the participant does not want to receive further communications from the representative.

*Official Comment*

1. (to subsection (A)): The participant may, at the outset of or during the proceeding, authorize their representative in advance to take specific action, and the representative may rely on that authorization absent a material change in the circumstances surrounding the action. Conversely, the participant may revoke an advance authorization at any time. Such revocation precludes the representative from relying on the advance authorization.
2. (to subsection (A)): In the case of lawyer representatives, or in some cases nonlawyer representatives with specific technical expertise or a relevant license under Rule 205, this will likely include procedural and other tactical decisions pertaining to the conduct of the proceeding. Other nonlawyer representatives should consult with the represented participant to ensure that the participant is informed and able to retain the desired measure of control over the proceeding.
3. (to subsection (B)): Implied authorization is determined in the context of the representative's relationship with the participant and the representative's role in the proceeding. Representatives without relevant experience or expertise should consult

with the participant more frequently and on a wider range of issues that arise during the proceeding, absent an advance authorization described in Comment 1 to this Rule.

4. (to subsection (D)): Whether a representative knows that a participant's conduct is unlawful refers both to the representative's actual knowledge of such conduct as well as to any willful blindness on the part of the representative to the existence and nature of the participant's conduct.

**302. Competence**

(A) A representative must provide competent representation to a represented participant.

(B) Competent representation requires the relevant knowledge, skills, preparation, and thoroughness to reasonably represent the participant in the proceeding.

(C) A clear lack of competence on behalf of a representative may be grounds for removal of that representative from the proceeding by the presiding adjudicator [or any other responsible Agency official].

*Official Comment*

1. (to subsection (B)): Preparation and thoroughness include understanding the relevant legal issues and evidence and investigating the relevant facts and law. Sufficiency of the preparation may depend upon the status or role of the representative. For example, a family-member representative might be held to a different expectation than a lawyer representative.
2. (to subsection (C)): Removal of a representative by the responsible Agency official for lack of competence should be reserved for situations where the responsible Agency official determines that the representative no longer exhibits sufficient qualifications under Rule 204. In such instances, the responsible Agency official should consult with the represented participant before rendering a decision.
3. (to subsection (C)): Termination of a representative by the represented participant is governed by Rule 307. A lack of competence is presumed valid grounds for termination under Rule 307.

**303. Diligence**

(A) A representative should act promptly and diligently in representing a participant.

(B) Diligent representation requires that the representative not undertake the responsibility of serving as a representative if the representative does not have adequate time and resources to do so competently.

(C) Promptness requires a representative to meet all filing and other deadlines associated with the proceeding, including deadlines for responses to requests for information. It is not a violation of a representative's duty to act promptly to request reasonable extensions of applicable deadlines from the presiding adjudicator [or any other responsible Agency official].

(D) Diligence requires a representative to carry through to completion all tasks pertaining to the representation, including an appeal of an adverse decision if the represented participant so decides.

(E) If the represented participant demonstrates diminished capacity to make considered decisions on their own behalf, the representative should, as far as reasonably possible, maintain a normal participant-representative relationship with the participant and continue to represent the participant's interest in the proceeding. If the representative cannot adequately represent the participant's interest and believes the participant is at risk of substantial harm due to the participant's diminished capacity, the representative may take protective action.

*Official Comment*

1. (to subsection (B)): The term "competently" refers to Rule 302.
2. (to subsection (D)): This is true unless the representative has withdrawn or the representative has been terminated under Rule 307 or the participant has withdrawn their consent to the representation under Rule 201.
3. (to subsection (E)): "Protective action" may include consulting with individuals with the ability to protect the participant, such as family members or professional services. It could also include employing surrogate decision-making tools like durable powers of attorney or consulting appropriate resources, such as agencies for aging, long-term care, or adult protection. In all cases, protective action should be taken in the participant's best interest.

**304. Communication**

A representative must reasonably communicate with their represented participant to ensure that the participant is able to make informed decisions pertaining to the objectives of the representation.

*Official Comment*

1. Communication from a representative to their represented participant should be done using terms and in language that the participant is able to understand. *See, e.g.*, 8 C.F.R. § 1003.102(r) (DHS).
2. Communication should be ongoing throughout the course of the proceeding. Matters pertaining to the objectives of representation include status updates, significant developments affecting the timing or the substance of the representation, and requests for information. *See, e.g.*, 8 C.F.R. § 1003.102(r) (DHS).

**305. Organization as a Participant**

A representative representing an organization as a participant in a proceeding represents the organization acting through the organization's duly authorized constituents. The representative's obligations with respect to an organization participant are the same as those for an individual participant.

*Official Comment*

"Duly authorized constituents" refers to individuals within the organization who have decision-making authority on behalf of the organization for purposes of the proceeding.

**306. Confidentiality**

(A) Except as permitted by subsection (B), a representative shall not reveal information relating to the representation of a participant unless the participant gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation.

(B) A representative may disclose information relating to the representation of a participant in a proceeding if such disclosure is necessary to:

(1) Prevent death or substantial bodily harm;

(2) Prevent the participant from engaging in criminal activity or committing fraud or to prevent, rectify, or mitigate substantial injury resulting from such criminal activity or fraud;

(3) Enable a representative to respond to an accusation of wrongdoing by the represented participant against the representative in the proceeding;

(4) Detect and resolve conflicts of interest on behalf of the representative in the proceeding;

(5) Comply with the representative's duty of candor with the tribunal in Rule 310; or

(6) Comply with applicable law.

(C) A representative shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a participant.

*Official Comment*

1. (to subsection (A)): *See, e.g.*, 37 C.F.R. § 11.106 (USPTO).
2. (to subsection (A)): This subsection is designed to encourage the participant to communicate fully and frankly with the representative, but it is not limited to matters communicated in confidence by the participant. It applies to all information relating to the representation, whatever its source.

**307. Withdrawal or Termination of Representation**

(A) A representative must withdraw from representing a participant if:

1. The participant seeks to use or uses the representative's services to commit or further a crime or fraud;

2. The representation will result in violation of any of the qualification requirements under these rules or any of the rules governing representative conduct; or

3. The representative's physical or mental condition materially impairs the representative's ability to represent the participant.

(B) The adjudicator [or any other responsible Agency official] may permit a representative to withdraw from representing a participant if the representative can show good cause for the withdrawal or the withdrawal will not adversely impact either the proceeding or the participant's interest in the proceeding.

(C) A representative must submit a written request to withdraw under subsections (A) or (B) to the adjudicator [or any other responsible Agency official]. The written request must be included in the official record of the proceeding and be served on the participant.

(D) Withdrawal will also be allowed based on the participant's written consent and the approval of the adjudicator [or any other responsible Agency official].

(E) A participant may terminate the representation subject to the approval of the adjudicator [or any other responsible Agency official].

*Official Comment*

1. (to subsection (A)): The rules governing representative conduct are Rules 300–319.
2. (to subsection (B)): Examples of good cause for withdrawal include: the participant's insistence on initiating improper proceedings or engaging in other illegal conduct (*see* Rule 313); the participant's refusal to meet its obligations to the representative, including payment of fees or expenses despite notice that failure to do so could result in withdrawal (*see* Rule 308); the participant's insistence on pursuing an objective that the representative considers repugnant or imprudent; or the representative's inability to continue to provide competent representation to the participant. *See, e.g.*, 49 C.F.R. § 1103.18 (STB); 37 C.F.R. § 11.116(b) (USPTO); 32 C.F.R. § 776.35 (JAG).
3. (to subsection (B)): The impact of the representative's withdrawal may be mitigated by another representative agreeing to represent the participant. The withdrawing representative should take steps to protect the participant's interest in the proceeding, including providing adequate notice and, where possible, sufficient opportunity for the participant to find new representation. *See, e.g.*, 20 C.F.R. § 404.1740(b)(3)(iv)

(SSA). A withdrawing representative must return any of the participant's personal property and all relevant information about the representation. Confidentiality rules do not hinder the transfer of information relevant to the proceeding from one representative to another or from the withdrawing representative to the participant in a single proceeding.

4. (to subsection (D)): A participant's consent must be given on the record in the proceeding to the adjudicator or any other responsible Agency official and may be oral or in writing, including by electronic means.
5. (to subsection (E)): Termination of a representative is akin to withdrawal of consent by the participant under Rule 201 and should not impact the efficient conduct of the proceeding. The adjudicator or any other responsible Agency official should freely grant withdrawal or termination upon the participant's consent, provided the withdrawal or termination will not have a materially adverse impact on the proceeding or the participant's interest therein.

**308. Fees**

(A) Representatives may not charge unreasonable or excessive fees. [When contested by the represented participant, the reasonableness of a fee shall be determined by the adjudicator [or any other responsible Agency official].] Some factors to be considered in determining whether a fee is reasonable include:

(1) The time and labor required;

(2) The novelty and difficulty of the questions involved;

(3) The skill required to properly represent the participant;

(4) The fee customarily charged in the locality for similar services;

(5) The amount involved and the results obtained;

(6) The time limitations imposed by the participant or by the circumstances;

(7) The nature and length of the representative's professional relationship with the participant; and

(8) The experience, reputation, and ability of the representative.

(B) Contingent fees are allowed where otherwise permissible by law.

(C) A fee request by a representative must be provided to the participant in advance and in writing and must be agreed to by the participant in writing before any fees are accrued.

(D) Reasonable costs and expenses may be reimbursed by the participant provided the costs and expenses are directly related to the representation provided in the participant's proceeding and they are disclosed to, and agreed upon by, the participant in writing in advance of their accrual.

*Official Comment*

1. (to subsection (A)): Reasonableness may also be impacted by a participant's ability to pay. A participant with a high ability to pay may not be charged more due to their ability, but a participant with less ability to pay may require a lower fee in order for it to be reasonable. *See, e.g.*, 49 C.F.R. § 1103.20(a) (STB).
2. (to subsection (A)): The agency may have separate rules governing fees. Consult those rules. These rules are not meant to replace those. *See, e.g.*, 8 C.F.R. § 1003.102(a)(1) (EOIR, DOJ); 38 C.F.R. § 14.636 (VA).
3. (to subsection (A)): The bracketed material reflects that only some agencies regulate fees. We leave to the agencies that do to decide whether to regulate fees for both lawyers and nonlawyer representatives, only nonlawyer representatives, or neither.

**309. Compliance with Agency Rules**

Representatives must comply with Agency rules governing adjudication, including [insert the relevant Agency rules].

*Official Comment*

1. *See, e.g.*, Polydoroff v. ICC, 773 F.2d 372, 374 (D.C. Cir. 1985) ("There can be little doubt that the Commission, like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it.").
2. Standards applying to a lawyer include, in addition to agency rules, the rules of professional conduct and ethics of the jurisdictions in which the lawyer is licensed to practice. *See* Rule 300(B); *see, e.g.*, 48 C.F.R. § 65101.35(a) (CBCA).

**310. Candor with the Tribunal**

(A) Representatives owe the tribunal a duty of candor.

(B) Candor before the tribunal means a representative may not:

(1) Knowingly make a false statement of fact or law or knowingly fail to correct a false statement of fact or law in the proceeding;

(2) Knowingly fail to disclose legal authority adverse to the represented participant's position to the tribunal; or

(3) Knowingly present false or misleading evidence in the proceeding.

(C) If a representative knows that a person has engaged in, or intends to engage in, criminal or fraudulent conduct related to the proceeding, the representative must take remedial measures, including if necessary disclosure to the tribunal.

*Official Comment*

1. (to subsection (B)): A "statement" in subsection (B)(1) includes oral and written representations.
2. (to subsection (B)): The requirement that representatives act "knowingly" in order to violate their duty of candor reflects concerns about chilling zealous representation through over-enforcement of the candor requirement. Remedies for good-faith errors or even negligent statements could cause representatives to hesitate in making creative or novel arguments sometimes required by zealous advocacy. This is especially true for nonlawyer representatives, who may have less experience presenting evidence and arguments before a tribunal than lawyer representatives.
3. (to subsection (B)): The prohibition on knowingly false statements does not preclude a representative from refraining from presenting evidence if that representative reasonably suspects or believes it to be false.

**311. Delay**

A representative shall not delay the proceeding without good cause.

*Official Comment*

Avoiding delay is related to, but distinct from, the promptness requirement in Rule 303. Promptness requires representatives to adhere to deadlines and other scheduling obligations, and failing to do so could also constitute delay in violation of this Rule. The requirement to avoid delay includes the entirety of the representative's conduct relating to the proceeding, including issues like the timing, scope, and nature of discovery requests, scheduling hearings and filing deadlines, and the engagement of alternative forms of dispute resolution, in addition to adhering to established deadlines.

**312. Fairness**

(A) A representative must act in a manner that furthers the efficient, fair, and orderly conduct of the proceeding.

(B) A representative may not falsify or unlawfully destroy, alter, or conceal from the tribunal or another participant in the proceeding material with potential evidentiary value.

(C) A representative may not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a valid discovery request.

(D) A representative shall treat witnesses fairly and with due consideration. A representative shall not seek to conceal a potential witness, corruptly influence a witness, or otherwise interfere with a witness' ability to give accurate testimony.

*Official Comment*

1. (to subsection (A)): Candor, diligence, and promptness are all factors in the efficient, fair, and orderly conduct of the proceeding. *See* Rules 303, 311, and 312.
2. (to subsection (D)): The language of this subsection was derived from a regulation of the Surface Transportation Board. *See* 49 C.F.R. § 1103.25(a)–(b).
3. (to subsection (D)): For example, a representative may not counsel or assist a witness to testify falsely. *See* MODEL RULES OF PRO. CONDUCT r. 3.4(b) (AM. BAR ASS'N 2020).

**313. Improper Initiation of Proceedings**

(A) A representative may not initiate a proceeding that the representative knows or reasonably should know is false, fictitious, or fraudulent.

(B) A representative may not initiate a proceeding that the representative knows or reasonably should know lacks an arguable basis in law or in fact, or is made for an improper purpose, such as to harass or to cause unnecessary delay.

(C) A representative's signature on any document initiating a proceeding shall constitute certification that the representative has complied with subsections (A) and (B) of this section.

*Official Comment*

1. (to subsection (A)): False, fictitious, or fraudulent proceedings include proceedings in which a material fact is asserted that is false, fictitious, or fraudulent or a material fact is omitted and the proceeding is rendered false, fictitious, or fraudulent as a result of such omission. *See, e.g.*, 40 C.F.R. § 27.3(a) (EPA).
2. (to subsection (A)): This subsection also applies to claims in enforcement proceedings under Rule 401.
3. (to subsection (B)): Proceedings have an arguable basis in fact if they have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. 19 C.F.R. § 210.4(c) (ITC).
4. (to subsection (B)): A proceeding does not lack an adequate basis in law if it is based on a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. *See, e.g.*, 19 C.F.R. § 210.4(c)(2) (ITC).
5. (to subsection (B)): Use of boilerplate language without any reference to the specific circumstances of the proceeding may constitute a lack of an adequate basis in law or fact. *See, e.g.*, 8 C.F.R. § 1003.102(u) (EOIR, DOJ).
6. (to subsection (C)): A signature should comply with the agency's rules regarding the qualifications and requirements for a valid signature.

**314. Disruptive Conduct**

(A) A representative must refrain from engaging in conduct that interferes with the efficient, fair, or orderly conduct of the proceeding.

(B) A representative must refrain from engaging in disruptive, offensive, or otherwise obnoxious conduct in a proceeding.

(C) A representative may not engage in an act or omission related to a proceeding that wrongfully causes another participant involved in that proceeding to experience material and substantive injury, including, but not limited to, incurring expenses (such as lawyer's fees) or experiencing prejudicial delay.

*Official Comment*

1. (to subsection (A)): *See, e.g.*, 7 C.F.R. § 1.328(a)(3) (USDA). This includes failure to act in a timely way or failure to follow the presiding adjudicator's instructions.
2. (to subsection (B)): Disruptive, offensive, or otherwise obnoxious conduct includes, but is not limited to, conduct that would constitute contempt of court in a judicial proceeding, as well as directing threatening or intimidating language, gestures, or actions at the presiding adjudicator or anyone else involved in the proceeding. *See, e.g.*, 8 C.F.R. § 1003.102(g) (EOIR, DOJ); 20 C.F.R. § 404.1740(c)(7)(ii)(A) (SSA).
3. (to subsection (C)): *See, e.g.*, 12 C.F.R. § 1209.74(a)(2) (FHFA); 10 C.F.R. § 2.314(c)(1) (NRC).

**315. Obstruction of Justice**

A representative may not engage in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct prohibited by this subsection generally includes any act or omission that seriously impairs or interferes with the adjudicative process when the representative knew or reasonably should have known to avoid such conduct, including:

(1) Providing misleading or false information to the presiding adjudicator, tribunal, or another participant in the proceeding;

(2) Interfering or attempting to interfere with any lawful effort by the presiding adjudicator or the other participants in the proceeding to obtain any record or information relevant to the proceeding; and

(3) Attempting to corruptly influence witnesses or potential witnesses in the proceeding.

*Official Comment*

*See, e.g.*, 8 C.F.R. § 1003.102(n) (EOIR, DOJ); 20 C.F.R. § 404.1740(c)(7) (SSA); 31 C.F.R. § 10.20(b) (IRS); 49 C.F.R. § 1103.25(b) (STB); 12 C.F.R. § 308.6(b) (FDIC).

**316. Ex Parte Contacts**

(A) Except as provided in subsection (B) of this rule, no representative or represented participant shall knowingly make or knowingly cause to be made to the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding an ex parte communication relevant to the merits of the proceeding.

(B) An adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding may discuss the merits of the proceeding with a representative or represented participant only if all participants in the proceeding or their representatives have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the official record of the proceeding.

(C) If the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding receives an ex parte communication in violation of this Rule, the adjudicator shall place in the official record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses thereto.

(D) Upon receipt or knowledge of a communication knowingly made or knowingly caused to be made by a representative or represented participant in violation of this section, the presiding adjudicator may, to the extent consistent with the interests of justice and applicable statutes, require the representative or represented participant to show cause why the represented participant's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(E) For purposes of this section ex parte communication means an oral or written communication with an adjudicator, tribunal, or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding that is part of the official record of the proceeding and does not include all participants and representatives in the proceeding.

(F) A communication that does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding or communication concerning the agency's administrative functions or procedures, does not constitute an impermissible ex parte communication.

*Official Comment*

1. Individuals who are or may reasonably be expected to be involved in the decisional process in a proceeding include, but are not limited to, members of an adjudicator's staff or other agency employees who may be assigned to hear or to participate in the decision of a particular matter. *See, e.g.*, 17 C.F.R. § 10.10(a)(1) (CFTC).
2. (to subsection (A)): *See, e.g.*, 7 C.F.R. § 1.151 (USDA). Ex parte communications are prohibited from the time the representative or represented participant has knowledge that the matter will be considered by the adjudicator or anyone who is or may reasonably be expected to be involved in the decisional process in the proceeding until a final decision in the proceeding is rendered. *See, e.g.*, 4 C.F.R. § 28.147 (GAO).
3. (to subsection (F)): *See, e.g.*, 12 C.F.R. § 1209.14(a)(2) (FHFA); 39 C.F.R. § 955.33 (USPS). Administrative functions or procedures include, but are not limited to, filing and discovery deadlines and requirements, intra-agency review procedures, and adjudicator assignments.

**317. Bias and Conflicts of Interest**

(A) A representative shall not represent a participant if the representative is biased against that participant and that bias will prevent the representative from engaging in good faith representation of the participant's interests in the proceeding.

(B) A representative shall not represent a participant if the representation involves a concurrent conflict of interest. Conflicts exist in proceedings where one or more of the following will be compromised:

(1) Preserving confidentiality between the representative and the represented participant;

(2) Maintaining independence of judgment; and

(3) Avoiding positions adverse to a represented participant.

(C) A representative with a conflict of interest as described in subsection (B) of this Rule may still represent a participant if:

(1) The representative reasonably believes that the representative will be able to provide competent and diligent representation to each affected participant;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one participant against another participant represented by the representative in the same proceeding; and

(4) Each affected participant gives informed consent.

(D) No former employee of the agency, including former agency adjudicators, shall be permitted to represent any participant in a proceeding before the agency which, by reason of employment with the agency, the former employee participated personally and substantially or acquired personal knowledge of.

(E) No member of a firm of which a former agency employee, including a former agency adjudicator, is a member may represent or knowingly assist a participant in an agency proceeding if the restrictions of subsection (D) of this Rule apply to the former agency employee in that particular proceeding, unless the firm isolates the former agency employee in such a way as to ensure that the former agency employee cannot in any way assist in the representation.

(F) No close family member of a current or former employee of an agency may represent anyone in any proceeding administered by the agency in which the current or former agency employee participates or has participated personally and substantially as an agency employee, or which is or was the subject of that employee's official responsibility.

*Official Comment*

1. (to subsection (A)): Bias refers to personal animosity between the representative and the represented participant or a financial interest on behalf of the representative that is inconsistent with the best interests of the participant. Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 23 (Nov. 25, 2016) (report to the Admin. Conf. of the U.S.).
2. (to subsection (B)): *See, e.g.*, 32 C.F.R. § 776.29(b)(2) (JAG). Maintaining independent judgment allows a representative to consider, recommend, and carry out any appropriate course of action for a represented participant without regard to the representative's personal interests or the interests of another. 32 C.F.R. § 776.29(b)(5) (JAG).
3. (to subsection (B)): A concurrent conflict of interest exists for a representative if (a) their representation of one participant in the proceeding is directly adverse to their representation of another participant in the same or similar proceeding, or (b) there is a significant risk that their representation of one or more participants will be materially limited by their responsibilities to another participant or former represented participant or by a personal interest of the representative. *See, e.g.*, 37 C.F.R. § 11.107(a) (USPTO).
4. (to subsection (C)): *See, e.g.*, 37 C.F.R. § 11.107(b) (USPTO).
5. (to subsection (D)): *See, e.g.*, 7 C.F.R. § 1.26(b)(3) (USDA); 31 C.F.R. § 8.37(b) (BATF).
6. (to subsection (E)): *See, e.g.*, 31 C.F.R. § 10.25(c)(1) (IRS).
7. (to subsection (F)): *See, e.g.*, 31 C.F.R. § 8.36 (BATF). Close family member refers to members of a current or former employee's immediate family, including parents, spouse, and children.

**318. Improper Influence**

(A) A representative may not attempt to influence the judgment of the tribunal, adjudicator, or anyone who is or may reasonably be expected to be involved in the decisional process in a proceeding through:

(1) Threats of political or personal reprisal;

(2) False accusations, duress, or coercion;

(3) Offering something of monetary value, such as a loan, gift, entertainment, or unusual hospitality;

(4) Intimidation, physical or otherwise;

(5) Deception;

(6) Public media pressure; and

(7) Any other means prohibited by law.

(B) If a representative does attempt to influence an adjudicator in violation of subsection (A) of this Rule, the presiding adjudicator may, to the extent consistent with the interests of justice and applicable statutes, require the representative or represented participant to show cause why the represented participant's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

*Official Comment*

1. (to subsection (A)): Comment 1 to Rule 316, involving ex parte contacts, defines "[i]ndividuals who are or may reasonably be expected to be involved in the decisional process in a proceeding."
2. (to subsection (A)): *See, e.g.*, 31 C.F.R. § 8.52(f) (BATF); 20 C.F.R. § 404.1740(c)(6) (SSA); 49 C.F.R. § 1103.13 (unusual hospitality); 29 C.F.R. § 18.22(d)(1) (DOL) (intimidation); 38 C.F.R. § 18b.91 (VA) (media pressure).

**319. Criminal Acts**

A representative may be subjected to disciplinary sanctions if the representative has been found guilty of, or pleaded guilty or nolo contendere to, a felony or any lesser crime that reflects adversely on the representative's honesty, trustworthiness, or fitness as a representative in other respects.

*Official Comment*

1. A nonlawyer representative's prior criminal conduct is also a factor in their qualification to serve, as noted in Rule 204(a)(7). That reference to prior criminal conduct is not limited to felonies and crimes that reflect on a representative's honesty and trustworthiness. It represents a broader inquiry into a representative's past conduct as one factor in the larger question of the representative's qualifications.
2. Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
3. *See, e.g.*, 37 C.F.R. §11.804(b) (USPTO). Examples of crimes that reflect adversely on a representative's honesty, trustworthiness, or fitness as a representative are those that involve interference with the administration of justice, misrepresentation, fraud, willful failure to file income tax returns, deceit, dishonesty, bribery, extortion, misappropriation, or theft. Attempt or conspiracy to commit such crimes is also grounds for disciplinary action. 8 C.F.R. § 1003.102(h) (EOIR, DOJ).

## ENFORCEMENT AND DISCIPLINE

### 400. In General

(A) A lawyer representative in an [agency] proceeding is subject to the disciplinary authority of the [agency] with respect to that proceeding.

(B) A nonlawyer representative is subject to the disciplinary authority of the agency generally.

(C) Any violation of these rules by a representative may be grounds for an enforcement proceeding and, if applicable, sanctions against the representative.

*Official Comment*

(to subsection (A)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication). The limitation of disciplinary authority in these rules to the particular proceeding does not limit whatever authority the agency may have to impose discipline on lawyer representatives beyond the scope of these rules.

**401. Initiating Enforcement Proceedings**

(A) If the alleged violation occurred during, or within the conduct of, a specific proceeding:

(1) The presiding adjudicator may initiate and resolve an enforcement proceeding regarding that alleged violation. To initiate an enforcement proceeding, the presiding adjudicator shall provide the subject of the alleged violation, as well as any other participants in the proceeding and their representatives, with a description of the conduct or circumstances giving rise to the alleged violation and of the rule or rules that were violated. The presiding adjudicator's description shall be part of the record in that proceeding.

(2) A representative or participant in the proceeding may initiate an enforcement proceeding by making an oral or written complaint to the presiding adjudicator. The complaint shall be part of the record in that proceeding.

(B) If the alleged violation does not occur within the conduct of a specific proceeding, proceedings to enforce a violation of one or more of these rules may be initiated by the submission of a written complaint to the [agency official designated to received such complaints] by:

(1) The Agency;

(2) An agency official designated to submit such complaints;

(3) A participant or representative in a proceeding; or

(4) A presiding adjudicator in a proceeding.

(C) Any complaint submitted under this Rule must identify the rule or rules alleged to be violated, as well as provide an account of the conduct or circumstances giving rise to the alleged violation.

*Official Comment*

1. In general, in an adjudication in which one of the parties is the government (or an agency), any complaints with respect to the agency's representative should be made to that representative's office.
2. In general, Rule 402 governs the conduct of an enforcement hearing, including in cases in which the presiding adjudicator initiates an enforcement proceeding. 29 C.F.R. § 102.177(b) (NLRB) ("[T]he Administrative Law Judge . . . has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.").
3. (to subsection (A)): A violation "within the conduct of" a proceeding means a violation involving the conduct of a representative acting in their capacity as a representative in that proceeding.

4. (to subsection (A)): References to "proceeding" or "specific proceeding" in this Rule mean the underlying proceeding in which the representative committed the alleged rule violation. Only references to an "enforcement proceeding" refer to the proceeding addressing the substance of the alleged violation.
5. (to subsection (A)): A presiding adjudicator's "description" of an alleged violation under this subsection is synonymous with the oral or written complaint of a participant or their representative described elsewhere in this Rule.
6. (to subsection (A)): In adversarial proceedings where [the agency] is represented, disciplinary matters may be diverted to a hearing before an adjudicator other than the presiding adjudicator. *See* Comment 3 to Rule 402 (describing "an official presiding over the enforcement hearing" as including "the presiding adjudicator; another agency official, including another agency adjudicator, not involved in the initial proceeding; or anyone else designated by agency rule or other legal provision").
7. (to subsection (B)): A complaint submitted by the Agency or the designated agency official may be based on a referral of disciplinary violations from a state disciplinary authority or other federal or state agency with jurisdiction over the representative's professional conduct.
8. (to subsection (C)): A complaint may be accompanied by any additional evidence or information pertaining to the alleged violation.
9. (to subsection (C)): The "agency official designated to receive such complaints" may be the agency head, an agency adjudicator with supervisory responsibilities over other agency adjudicators, an agency adjudicator not involved in the specific proceeding in which the alleged violation took place, the presiding adjudicator, or a member of the agency's counsel's office, among other options. *See, e.g.*, 29 C.F.R. § 102.177(b) (NLRB) ("[T]he Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing."); 38 C.F.R. § 14.633(b) (VA) (empowering the general counsel to cancel a representative's accreditation for failure to comply with regulatory requirements); 8 C.F.R. § 292.3(d)(1) (DHS) ("Complaints of criminal, unethical, or unprofessional conduct . . . by a practitioner before DHS must be filed with the DHS disciplinary counsel.").
10. (to subsection (C)): A written complaint may be submitted electronically or in hard copy.

**402. Enforcement Hearings**

(A) The representative alleged to have violated one or more of these rules in accordance with Rule 401 shall be entitled to a hearing prior to any sanctions or other discipline being imposed upon them under Rule 404.

(B) A hearing under subsection (A) shall be conducted on the record and shall include opportunities for presentation of oral and written evidence by the alleged violator and anyone else who the official presiding over the enforcement hearing determines to have relevant information.

(C) Any allegation of violation of the rules must be demonstrated by a preponderance of the evidence.

(D) Violations must be supported by [a preponderance of the] evidence in order to justify discipline under Rules 404, 405, and 407.

*Official Comment*

1. (to subsection (A)): Nothing in this Rule shall be construed to limit an adjudicator's inherent power to manage the proceedings over which they preside. The presiding adjudicator may issue oral warnings or other corrections of a representative's conduct on the record of the original proceeding without holding a hearing under this Rule if the adjudicator's actions with respect to the representative's conduct do not rise to the level of a sanction under Rule 404.
2. (to subsection (B)): Reference to an enforcement hearing being conducted "on the record" does not mean that enforcement hearings under this Rule are subject to the adjudication provisions of §§ 554, 556 and 557 of the Administrative Procedure Act.
3. (to subsection (B)): "The official presiding over the enforcement hearing" can include the presiding adjudicator; another agency official, including another agency adjudicator, not involved in the initial proceeding; or anyone else designated by agency rule or other legal provision.
4. (to subsection (B)): Enforcement hearings should be conducted in accordance with relevant law, including existing agency rules, governing agency hearings in similar adjudications. *See* Rule 100(A) (defining "adjudication" for purposes of these rules as "an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of parties"). If the agency does not already have procedural rules in place to govern adjudications as defined in these rules, it should consider consulting the ACUS Model Rules of Agency Adjudication for guidance on best practices for conducting such adjudications. *See* Admin. Conf. of the U.S., Model Adjudication Rules § 100 et seq. (2018).

5. (to subsection (B)): If the agency is not the complainant, the agency may also offer evidence at the hearing.
6. (to subsection (C)): The agency or designated agency official responsible for submitting a complaint under Rule 401 should engage in an investigation of the allegations in that complaint prior to submitting the complaint in order to confirm that the allegations are supported by the evidence reasonably available at the time the complaint is submitted. *See, e.g.*, 29 C.F.R. § 102.177(d) (NLRB) (authorizing "Investigating Officer," who is "head of the Division of Operations-Management," to conduct an investigation of alleged violations and make a recommendation regarding enforcement to the general counsel). Failure to perform such an investigation may be grounds for the dismissal of the complaint with prejudice.
7. (to subsection (C)): As explained in Rule 401, an enforcement hearing can be initiated by the agency acting as an adverse party, a nonagency adverse party, or by the presiding adjudicator in the proceeding. Adverse parties carry the burden of proof as proponents of any order resulting from the enforcement hearing. A presiding adjudicator who initiates an enforcement hearing has a responsibility to ensure that any order resulting from that hearing is supported by a preponderance of the evidence.
8. (to subsection (D)): 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").
9. (to subsection (D)): *See, e.g.*, 38 C.F.R. § 14.633(b) (VA); *see also* 29 C.F.R. § 18.23(a)(2) (DOL regulation requiring proof by "reliable, probative, and substantial evidence of record").

**403. Orders**

(A) The agency official presiding over an enforcement hearing under Rule 402 shall issue an order resolving the allegations in the complaint. In the case of an enforcement proceeding initiated in a specific proceeding under Rule 401(A), the presiding adjudicator shall issue an order in compliance with the requirements of this Rule.

(B) The order described in subsection (A) shall be in writing and shall be based on the official record of the enforcement proceeding. The order shall include the allegations and an explanation of its conclusions, including any relevant findings of fact or conclusions of law.

*Official Comment*

1. (to subsection (A)): See Comment 2 to Rule 401 (requiring presiding adjudicator to put allegations of rule violations on the record of an enforcement proceeding initiated by that adjudicator).
2. (to subsection (B)): *See, e.g.*, 5 U.S.C. § 556(e) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision."); 20 C.F.R. § 404.1770(1) (SSA) ("After the close of the hearing, the hearing officer will issue a decision or certify the case to the Appeals Council. The decision must be in writing, will contain findings of fact and conclusions of law, and be based upon the evidence of record.").

**404. Sanctions**

(A) A representative found to have violated these rules in an order issued pursuant to Rule 403 may be subject to the following sanctions:

(1) Reprimand or censure on the record in the proceeding;

(2) Suspension from further participation in the proceeding;

(3) Suspension of a nonlawyer representative from future agency proceedings, including being permanently barred from serving as a representative before the agency; and

(4) [Such other sanctions as the agency may deem appropriate].

(B) In imposing a sanction, the agency official presiding over the enforcement proceeding may consider the following factors:

(1) Whether the representative has violated a duty owed to the represented participant or compromised the integrity of the proceeding;

(2) Whether the representative acted intentionally, knowingly, or negligently;

(3) The amount of the actual or potential injury caused by the representative's misconduct;

(4) The existence of any aggravating or mitigating factors; and

(5) Such other factors as the agency official may deem appropriate.

*Official Comment*

1. (to subsection (A)): The represented participant shall not be sanctioned for the conduct of their representative. 10 C.F.R. § 2.314(C)(1) (NRC).
2. (To subsection (A)): These rules apply to sanctions and should not be construed to limit the presiding adjudicator's ability to manage the proceeding based on the conduct of a representative. Examples include limiting motions, changing dates and times of proceedings, or excluding evidence.
3. (to subsection (A)): Reprimand and censure are similar sanctions, with reprimand traditionally being viewed as the less severe of the two. Both involve a formal statement by a designated agency official disapproving of misconduct by the sanctioned party. *See, e.g.*, 47 C.F.R. § 1.24(a) (FCC) (empowering the Commission to "censure, suspend, or disbar any person" who engages in specified misconduct under that section); 43 C.F.R. § 1.6(b) (DOI) (permitting hearing officer to reprimand individual acting as representative in agency proceeding); MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 10(A)(4) (permitting reprimand of lawyers by the relevant disciplinary authority).

4. (to subsection (A)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
5. (to subsection (A)): The working group does not opine to what extent an agency may wish to apply limitations to sanctions to nonlawyer representations.
6. (to subsection (B)): MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 10(C) (AM. BAR ASS'N 2002).

**405. Reciprocal Discipline**

(A) Representatives who have been publicly disciplined by a state disciplinary authority or other state or federal agency with authority over the representative's professional conduct shall report that disciplinary action to the presiding adjudicator in an ongoing proceeding or to [the designated agency official] prior to serving as a representative in a future proceeding.

(B) Discipline under subsection (A) may be grounds for sanction under Rule 404, including suspension or disqualification.

*Official Comment*

1. (to subsection (A)): *See, e.g.*, 29 C.F.R. § 18.22(b)(1)(iii) (DOL) ("An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law."); 20 C.F.R. § 404.1740(b)(7)–(9) (SSA).
2. (to subsection (A)): This subsection's disclosure requirement is focused on current disciplinary actions, meaning disciplinary actions that are in effect at the time that the representative is serving in that capacity in an agency proceeding. More structured reporting requirements, for instance with fixed cutoff dates for disclosure of past disciplinary actions, may also be useful.
3. (to subsection (B)): *See, e.g.*, 12 C.F.R. § 263.94(d) (FRB) (authorizing reciprocal censure, suspension and disbarment); 12 C.F.R. § 308.109(b)(1) (FDIC).
4. (to subsection (B)): Lawyer representatives shall only be subject to suspension or disqualification from an ongoing agency proceeding. *See* Jill E. Family, Am. Bar Ass'n Section of Admin. L. & Regul. Prac., *Report to the House of Delegates: Revised Resolution 500*, Report 500 at 2 n.2 (Feb. 2023) (reaffirming 1982 policy regarding federal agencies adopting standards of practice governing lawyer representatives in agency adjudication).
5. (to subsection (B)): When determining whether to disqualify a nonlawyer representative based on suspension or disqualification, an agency should consider how the circumstances of the suspension or disqualification impact the nonlawyer representative's ability to serve as a representative in the agency proceeding based on the qualifications in Rule 204.
6. (to subsection (B)): A resolution in favor of the representative in response to a petition for review under Rule 406 may result in the representative being free from reciprocal discipline under this section.

**406. Petitions for Review**

(A) A representative may petition for review of an order under Rules 403 and 404.

(B) The petition for review shall be submitted to the [designated reviewing official] within 14 days of the order finding a violation. It shall include all issues of fact or law from the presiding adjudicator's order under Rule 403 that the representative wishes to be reviewed by the [designated reviewing official].

(C) The [designated reviewing official] shall review findings of fact for support by substantial record evidence and any conclusions of law de novo.

(D) The [designated reviewing official] shall issue an order resolving the issues raised in the petition for review. The order shall be issued promptly, in writing, and as part of the official record of the proceeding.

(E) The underlying proceeding should not be stayed pending a petition for review.

*Official Comment*

1. (to subsection (A)): An order finding no rules violation by the representative shall be treated as final and not subject to review. All other determinations shall be subject to judicial review as prescribed by applicable law.
2. (to subsection (A)): This subsection does not require a representative to exhaust administrative remedies in seeking review of an order under Rule 403.
3. (to subsection (B)): The scope of review sought may include the issuance of a sanction under Rule 404.
4. (to subsection (B)): Any relevant issues of fact or law not included in a petition for review should be deemed waived and ineligible for inclusion in a future petition, provided those issues of fact or law were reasonably ascertainable by the representative at the time of their initial petition.
5. (to subsection (C)): Petitions for review should be conducted in accordance with relevant law, including existing agency rules governing agency hearings in similar adjudications. *See* Rule 100(A) (defining "adjudication" for purposes of these rules as "an agency proceeding—whether conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., other statutes, or agency regulations or practice—involving at least some presentation or oral argument resulting in some determination by an adjudicator that affects the rights or interests of parties"). If the agency does not already have procedural rules in place to govern adjudications as defined in these rules, it should consider consulting the ACUS Model Rules of Agency Adjudication for guidance on best practices for conducting such adjudications. *See* Admin. Conf. of the U.S., Model Adjudication Rules § 100 et seq. (2018).
6. (to subsection (C)): 5 U.S.C. § 706(2)(e) (substantial evidence); 5 U.S.C. § 557(b) (de novo review of legal conclusions).

**407. Referrals to a Disciplinary Authority**

(A) An agency official presiding over an enforcement hearing shall refer an order concluding that a representative violated one or more of these rules to any state disciplinary authority or other state or federal agency with jurisdiction over the representative's professional conduct.

(B) An agency official presiding over an enforcement proceeding may refer a complaint under Rule 401 alleging a violation of one or more of these rules to any state disciplinary authority or other state or federal agency with jurisdiction over the representatives' professional conduct.

(C) Referrals pursuant to the above subsections may be pursued independent of any agency decision regarding sanctions under Rule 404.

*Official Comment*

1. (to subsection (A)): *See, e.g.*, 29 C.F.R. § 18.23(b) (DOL) (mandating referral for representative disqualifications).
2. (to subsections (A) and (B)): "State disciplinary authority . . . with jurisdiction" includes all state professional licensing organizations and accrediting entities. These referral rules should not be read to limit or otherwise interfere with any other ethical obligations to report violations. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2020) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer . . . shall inform the appropriate professional authority.").

## TRANSPARENCY AND REPORTING

### 500. In General

[The agency] will take all reasonable measures to ensure that these rules are publicly available and accessible, including by publishing them in the *Federal Register* and the *Code of Federal Regulations*.

*Official Comment*

"Publicly available and accessible" means publicly available in a way that is clear, logical, and comprehensive. Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 2, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019). The information must be easily recognized by lawyer and nonlawyer representatives as well as participants in agency adjudication.

**501. Online Publication of Rules**

(A) In addition to publishing these rules in the *Federal Register* and *Code of Federal Regulations* in accordance with Rule 500, [the agency] will publish these rules on [the agency's] website.

(B) [The agency] will also publish on its website the following information pertaining to these rules:

(1) The qualifications to serve as a representative, including as a nonlawyer representative;

(2) The disciplinary process for alleged violations of these rules, including the filing of a complaint for a violation of these rules by a representative;

(3) Any guidance documents related to these rules, such as practice manuals or fact sheets for representatives that summarize or otherwise explain the rules in ways easily digestible by participants and representatives, especially nonlawyer representatives;

(4) Any adjudicator-specific procedural rules, such as standing orders; and

(5) Any documents that provide an overview of agency precedent applying these rules.

*Official Comment*

1. (to subsection (A)): Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019). Rules will be labeled in plain language and prominent typeface through either headings or hyperlinks on [the agency's] website. The rules or the hyperlink thereto will be clearly marked as "Rules of Conduct for Representatives" or something substantially similar. The full text of the rules or a hyperlink to a single document containing the rules will be published on a single webpage and shall state clearly that the rules apply to both lawyer and nonlawyer representatives.
2. (to subsection (B)): For examples of practice manuals, see, e.g., *Manuals*, NAT'L, LAB. RELS. BD., https://www.nlrb.gov/guidance/key-reference-materials/manuals-and-guides (last visited June 6, 2024), and *EOIR Policy Manual*, U.S DEP'T OF JUST. EXEC. OFF. OF IMMIGR. REV., https://www.justice.gov/eoir/eoir-policy-manual (last visited June 6, 2024). For a sample fact sheet, see *Office of General Counsel*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/ogc/ (last visited June 6, 2024). The decision to issue guidance documents should take into account the likely need for clarification of a given rule or set of rules in order to make them easily accessible to nonlawyer participants and representatives, as well as the agency resources required and the likelihood the documents will alleviate any confusion about the text of a specific rule or rules.

3. (to subsection (B)): *See* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 1, 84 Fed. Reg. 2142, 2142 (Feb. 6, 2019) (recommending publication of adjudicator-specific procedural rules).
4. (to subsection (B)): *See* Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, ¶ 5, 84 Fed. Reg. 2142, 2143 (Feb. 6, 2019) (recommending publication on agency websites of "explanatory materials aimed at providing an overview of relevant agency precedents").

**502. Online Publication of Disciplinary Actions**

(A) If a disciplinary action resulted in a written order, the full text of the order or a hyperlink to a single document containing the order will be published on [the agency's] website. The order will be made available as one easily searchable file.

(B) [The agency] will also publish a summary of all disciplinary actions that resulted in a written order on [the agency's] website.

(C) The summary of disciplinary actions in subsection (B) will include the following information:

(1) The name of any representative who was a subject of the disciplinary action;

(2) The date of the disciplinary action;

(3) The rule(s) that were violated;

(4) A brief description of the conduct constituting the violation;

(5) The nature of the discipline imposed; and

(6) Whether the disciplined representative remains in good standing to act as a representative in future adjudications or, if known, when that representative is eligible to regain such standing.

(D) Information in the summary and published order, other than the name of the representative subject to the disciplinary action, will be redacted to preserve recognized privacy interests such as personally identifiable information, medical information, employment information, proprietary business information, and trade secrets.

(E) The names of all representatives who have been a subject of disciplinary action by [the agency] and the number of disciplinary actions against that representative will be accessible in a single searchable file on [the agency's] website.

*Official Comment*

1. (to subsection (A)): *See* 8 C.F.R. § 292.3(h)(3) (explaining that DHS "may . . . disclose to the public" disciplinary actions).
2. (to subsection (B)): *See* 8 C.F.R. § 1003.106(c) (allowing for publication of disciplinary sanctions by DHS); *Attorney Discipline Program*, U.S. DEP'T OF JUST. EXEC. OFF. OF IMMIGR. REV., http://www.justice.gov/eoir/attorney-discipline-program (last visited June 6, 2024) (providing links to a list of disciplined representatives, including all of the information in subsection B other than a description of the specific rules that were violated or the conduct constituting the violation).
3. (to subsection (D)): 5 U.S.C. § 552(b)(4), (6); *see also FOIA Exemptions and Exclusions*, U.S. DEP'T OF THE INTERIOR, OFF. OF INSPECTOR GEN.,

https://www.doioig.gov/complaints-requests/foia/foia-exemptions-and-exclusions (last visited June 6, 2024).

4. (to subsection (D)): A representative whose name is subject to disclosure under subsection (D) may file a petition for review under Rule 406 seeking to remove their name from the published list of representatives who have been subject to disciplinary action for violating these rules.
5. (to subsection (E)): "Accessible" has the same meaning in this context as "publicly available and accessible." *See* Comment to Rule 500.
6. (to subsection (E)): Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, ¶ 14, 87 Fed. Reg. 1721, 1722 (Jan. 12, 2022).
7. (to subsection (E)): *See, e.g.*, *OGC's Sanctioned Reps*, SOC. SEC. ADMIN. OFF. OF THE GEN. COUNS., https://www.ssa.gov/foia/OGC_SanctionedReps_current.pdf (last visited June 6, 2024); 19 C.F.R. § 351.313 (ITA) ("The Department will maintain a public register of attorneys and representatives suspended or barred from practice."). Although a representative subject to disciplinary action may have a privacy interest in nondisclosure of their name in connection with that action, the agency has determined that the public interest in disclosure outweighs the privacy interest of the representative in this regard.

# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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