

# Notices

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Adoption of Recommendation

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Notice.

**SUMMARY:** The Assembly of the Administrative Conference of the United States adopted five recommendations at its virtual Seventy-sixth Plenary Session: (a) Public Access to Agency Adjudicative Proceedings, (b) Public Availability of Inoperative Agency Guidance Documents, (c) Technical Reform of the Congressional Review Act, (d) Regulation of Representatives in Agency Adjudicative Proceedings, and (e) Quality Assurance Systems in Agency Adjudication.

**FOR FURTHER INFORMATION CONTACT:** For Recommendation 2021–6, Jeremy Graboyes; for Recommendation 2021–7, Todd Rubin; for Recommendation 2021–8, Kazia Nowacki; for Recommendation 2021–9, Gavin Young; and for Recommendation 2021–10, Matthew A. Gluth. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

**SUPPLEMENTARY INFORMATION:** The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see [www.acus.gov](http://www.acus.gov).

The Assembly of the Conference met during its Seventy-sixth Plenary Session on December 16, 2021, to consider five proposed recommendations. All five were adopted.

Recommendation 2021–6, *Public Access to Agency Adjudicative Proceedings*. This recommendation identifies best practices regarding when and how federal agencies provide public access to adjudicative proceedings. Within the legal framework established by federal law, it identifies factors agencies should consider when determining whether to open or close particular proceedings. It also offers best practices to promote public access to proceedings that agencies open to the public and recommends that agencies make the policies governing public access readily available.

Recommendation 2021–7 *Public Availability of Inoperative Agency Guidance Documents*. This recommendation provides best practices for maintaining public access to agency guidance documents that are no longer in effect—that is, inoperative. It identifies factors agencies should consider in deciding whether to include certain types of inoperative guidance documents on their websites, outlines steps agencies can take to make it easier for the public to find inoperative guidance documents, and identifies ways that agencies can label and explain the significance of inoperative guidance documents.

Recommendation 2021–8 *Technical Reform of the Congressional Review Act*. This recommendation offers technical reforms of the Congressional Review Act (CRA) to clarify certain of its procedural aspects and reduce administrative burdens on executive-branch agencies and congressional offices. Specifically, it recommends (1) requiring electronic rather than paper submission of the materials agencies must transmit to Congress, (2) making it easier to ascertain key dates and time periods relevant to review of agency rules under the CRA, and (3) formalizing the procedure by which members of Congress initiate congressional review of rules that agencies conclude are not covered by the CRA.

Recommendation 2021–9, *Regulation of Representatives in Agency Adjudicative Proceedings*. This recommendation recommends that agencies consider adopting rules

governing attorney and non-attorney representatives in order to promote accessibility, fairness, integrity, and efficiency in agency adjudicative proceedings. It provides guidance on the topics that rules might cover and recommends that agencies consider whether greater harmonization of different bodies of rules is desirable and ensure that their rules are readily accessible on their websites.

Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication*. This recommendation identifies best practices for promoting fairness, accuracy, timeliness, and consistency in agency adjudications through the use of quality assurance systems. It provides guidance to agencies on the selection, role, and institutional placement of quality-assurance personnel. It also identifies specific considerations for the timing of and process for quality-assurance review; outlines different methodologies for identifying and correcting quality issues; and addresses how agencies might use electronic case management, data analytics, and artificial intelligence for quality-assurance purposes.

The Conference based its recommendations on research reports and prior history that are posted at: <https://www.acus.gov/meetings-and-events/event/76th-plenary-session-virtual>.

*Authority:* 5 U.S.C. 595.

*Dated:* January 7, 2022.

**Shawne C. McGibbon,**  
*General Counsel.*

### Appendix—Recommendation of the Administrative Conference of the United States

#### Administrative Conference Recommendation 2021–6

#### Public Access to Agency Adjudicative Proceedings

*Adopted December 16, 2021*

Agencies adjudicate millions of cases each year. The matters they adjudicate are diverse, as are the processes they use to do so. Some processes are trial-like; others are informal. Some are adversarial; others are non-adversarial. Agencies conduct many different types of proceedings in the course of adjudicating cases, such as investigatory hearings, prehearing and scheduling conferences, settlement conferences, evidentiary hearings, and appellate

arguments.<sup>1</sup> Members of the public—participants’ family and friends, media representatives, representatives of non-governmental organizations, researchers, and others—may seek to observe adjudicative proceedings for any number of reasons.

Agencies must determine whether and how to allow public access to the proceedings they conduct. Federal statutes govern how agencies manage public access in some contexts. The Government in the Sunshine Act<sup>2</sup> and certain statutes specific to particular programs and agencies require that agencies open or close adjudicative proceedings or certain portions thereof to public observation.<sup>3</sup> Agencies may need to transcribe or record certain adjudicative proceedings and may be required, under the Federal Advisory Committee Act<sup>4</sup> or other laws, to make such records publicly available.<sup>5</sup> Conversely, the Privacy Act<sup>6</sup> and other laws and executive-branch policies may require agencies to protect sensitive interests and information.

On top of these legal requirements, many agencies have adopted their own policies regarding public access to adjudicative proceedings.<sup>7</sup> Settling on a sound policy for determining which proceedings should be open to public observation can require balancing different, and sometimes conflicting, interests. Proceedings open to public observation promote transparency, public accountability, and public understanding of agency decision making. Openness encourages fair process for private

parties and promotes accurate and efficient decision making by subjecting arguments and evidence to public scrutiny. And many participants, especially self-represented parties, people with disabilities, and children, benefit from having a family member, friend, personal care attendant, case worker, or other supportive member of the public present at their proceedings.<sup>8</sup>

As with any legal proceeding, however, there can be drawbacks to opening adjudicative proceedings to the public. Many adjudications involve sensitive information that would be publicly disclosed in an open proceeding. Public disclosure of unverified information or unproven allegations may result in unwarranted reputational harm to private parties. Just as open proceedings allow family members and other supportive members of the public to accompany participants, they also allow in those who would intimidate or harass. Openness may also affect the dynamic of agency proceedings, leaving them vulnerable to disruption or leading them to become unduly adversarial or protracted. There can also be administrative costs associated with facilitating in-person or remote observation of adjudicative proceedings by members of the public, providing advance public notice of open proceedings, and providing access to transcripts and recordings of open proceedings. These costs may be warranted in some circumstances but not others.

This Recommendation recognizes that agency adjudicative proceedings vary widely in their purpose, complexity, and governing law and the degree of public interest they attract. It also recognizes that not all agencies can bring the same resources to bear in addressing public access to their adjudicative proceedings. In offering these best practices, the Administrative Conference encourages agencies to develop policies that, in addition to complying with all relevant legal requirements for public access, recognize the benefits of public access for members of the public, private parties, agencies, and other participants and account for countervailing interests, such as privacy and confidentiality.

## Recommendation

### Policies for Public Access to Agency Adjudicative Proceedings

1. Agencies should promulgate and publish procedural regulations governing public access to their adjudicative proceedings in the **Federal Register** and codify them in the *Code of Federal Regulations*. In formulating these regulations, agencies, in addition to adhering to any legal requirements for public access, should consider the benefits of public access and countervailing interests, such as privacy and confidentiality, as elaborated in Paragraph 6. These regulations should include the following:

<sup>8</sup> Although family members, friends, personal care attendants, care workers, or other supportive members of the public may wish to attend an adjudicative proceeding as a public observer, such individuals may, in some circumstances, assist or provide support for a party or other participant by serving, for example, as a legal guardian, representative, or interpreter. Individuals who serve in such a role are not considered public observers for purposes of this Recommendation.

a. A list of proceedings that should be categorically or presumptively open or closed, and standards for determining when adjudicators may or must depart from such presumption in individual cases (see Paragraphs 5–7);

b. The manners in which members of the public can observe open proceedings, for example by attending in person (*e.g.*, at an agency hearing room) or by remote means (*e.g.*, online or by telephone) (see Paragraphs 8–14);

c. Requirements, if any, for advance public notice of proceedings, whether open or closed (see Paragraphs 11–14); and

d. The public availability of and means of accessing transcripts and audio and video recordings of proceedings (see Paragraphs 15–17).

2. In conjunction with such regulations, agencies should develop guidelines that set forth, in plain language, the following information for proceedings that are open to the public:

a. The manner in which agencies will communicate the schedule of upcoming proceedings to the public;

b. The location at and manner in which members of the public can observe proceedings;

c. The registration process, if any, required for members of the public to observe proceedings and how they should register;

d. The agency official whom members of the public should contact if they have questions about observing proceedings;

e. Any instructions for accessing agency or non-agency facilities where proceedings are held;

f. Any requirements for conduct by public observers (*e.g.*, regarding the possession and use of electronic devices);

g. Any protocols for facilitating media coverage; and

h. Any policies for managing proceedings that attract high levels of public interest.

3. Agencies should also consider whether presumptively closed proceedings may be open to select members of the public, such as family members or caregivers, and, if so, develop guidelines for such situations that address, as relevant, the information in Paragraph 2.

4. Agencies should provide access to the regulations described in Paragraph 1, the guidelines described in Paragraphs 2 and 3, and any other information about public access to adjudicative proceedings, in an appropriate location on their websites.

### Standards and Procedures for Determining Which Adjudicative Proceedings Are Open or Closed

5. Agencies ordinarily should presume that evidentiary hearings and appellate proceedings (including oral arguments) 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. Substantial justification may exist, for example, when the need to protect one or more of the following interests can reasonably be considered to outweigh the public interest in openness:

a. National security;

<sup>1</sup> This Recommendation applies however adjudicative proceedings are conducted, including virtually or by telephone or video teleconferencing.

<sup>2</sup> 5 U.S.C. 552b.

<sup>3</sup> Members of the public have, in some instances, asserted a right under the First Amendment to access certain agency adjudicative proceedings. See Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Proceedings 10–12 (Nov. 22, 2021). Courts have reached different conclusions on whether and in what circumstances such a right exists for administrative proceedings. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002), with *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 212–213 (3d Cir. 2002). Agencies should be aware of such opinions when establishing policies on public access and responding to requests for public access to adjudicative proceedings they conduct.

<sup>4</sup> 5 U.S.C. app. 2, 11. Although the Federal Advisory Committee Act principally governs the operation of advisory committees, section 11 of the Act requires agencies to “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” *Id.* § 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* § 11(b).

<sup>5</sup> The Administrative Conference has recommended that agencies consider providing access on their websites to supporting adjudicative materials issued and filed in adjudicative proceedings. Admin. Conf. of the U.S., Recommendation 2017–1, *Adjudication Materials on Agency Websites*, 82 FR 31039 (July 5, 2017). Online disclosure of transcripts and recordings of adjudicative proceedings and real-time broadcast of open proceedings can save staff time or money through a reduction in the volume of Freedom of Information Act (FOIA) requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests.

<sup>6</sup> 5 U.S.C. 552a.

<sup>7</sup> See Graboyes & Thomson, *supra* note 3.

- b. Law enforcement interests;
  - c. Confidentiality of business information;
  - d. Personal privacy interests;
  - e. The interests of minors and juveniles;
- and
- f. Other interests protected by statute or regulation.

6. Agencies should consider whether types of adjudicative proceedings other than evidentiary hearings and appellate proceedings (such as investigatory hearings and prehearing conferences), which are typically closed, should be open to public observation. In doing so, agencies, in addition to adhering to any legal requirements for public access, should consider the following:

- a. Whether public access would promote important policy objectives such as transparency, fairness to parties, accurate and efficient development of records for decision making, or public participation in agency decision making;

- b. Whether public access would impede important policy objectives such as encouraging candor, achieving consensus, deciding cases and resolving disputes in an efficient manner, preventing intimidation or harassment of participants, avoiding unwarranted reputational harm to participants, or protecting national security, law enforcement interests, confidentiality of business information, personal privacy interests, the interests of minors and juveniles, and other interests protected by statute or regulation;

- c. Whether such proceedings or the broader adjudication process of which the proceeding at issue is a part typically include opportunities for public access;

- d. Whether there is often public interest in observing such proceedings; and

- e. Whether matters to be discussed at such proceedings ordinarily involve issues of broad public interest or the interests of persons beyond the parties.

7. Agencies should adopt processes for departing from or considering requests to depart from a presumption of open or closed proceedings in particular cases. Agencies should consider addressing the following topics in the procedural regulations described in Paragraph 1:

- a. How parties to a case can request that proceedings that are presumptively open to public observation be closed or that proceedings that are presumptively closed to public observation be open to particular individuals or the general public;

- b. How non-parties to a case can request access, for themselves or the general public, to proceedings that are presumptively closed to public observation;

- c. How parties and non-parties can respond or object to requests regarding public access made in subparagraphs (a) or (b);

- d. Under what circumstances adjudicators or other agency officials can, on their own motion, close proceedings that are presumptively open to public observation or open proceedings that are presumptively closed to public observation;

- e. Whether and how adjudicators or other agency officials must document and notify participants about decisions regarding public access; and

- f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to whom, and how they may do so.

#### **Manner of Public Observation of Open Adjudicative Proceedings**

8. When adjudicators conduct open proceedings in public hearing rooms, members of the public should have the opportunity to observe the proceedings from the rooms in which they are conducted, subject to reasonable security protocols, resource and space constraints, and concerns about disruptions.

9. Agencies should provide all or select members of the public, such as family members or caregivers, the opportunity to observe open adjudicative proceedings remotely. Agencies should provide remote access in a way that is appropriate for a particular proceeding, such as by providing a dial-in number to select members of the public, such as family members or caregivers, on request, or by livestreaming audio or video of the proceedings to the general public online. Agencies should structure remote access in a way that avoids disruptions, such as by ensuring that public observers cannot unmute themselves or use chat, screen-sharing, document-annotation, and file-sharing functions common in internet-based videoconferencing software.

10. Agencies should consider whether interested members of the public are likely to encounter any barriers to accessing open adjudicative proceedings and, if so, take steps to remedy them. For example, measures may be needed to accommodate people with disabilities, people for whom it may be difficult to make arrangements to travel to locations where proceedings are conducted, and people who do not have access to electronic devices or private internet services necessary to observe proceedings remotely. Agencies may also need to adjust security protocols at the facilities where proceedings are conducted to facilitate in-person attendance while still accounting for reasonable security needs.

#### **Advance Public Notice of Adjudicative Proceedings**

11. Agencies should provide advance public notice of open adjudicative proceedings and consider whether to provide advance public notice of closed proceedings, so that the public is aware of such proceedings and can request access to them as specified in Paragraph 7(b). Agencies that determine that advance public notice would be beneficial should consider (a) the best places and publications for providing such notice, (b) the information provided in the notice, and (c) the timing of the notice. Agencies that regularly conduct open proceedings should also consider maintaining a schedule of and information about upcoming proceedings in an appropriate location on their websites.

12. To determine the best places and publications for providing advance public notice of adjudicative proceedings, agencies should consider their needs and available resources and the individuals, communities, and organizations that are likely to be interested in or affected by such proceedings.

Places and publications where agencies might provide public notice of proceedings include:

- a. The **Federal Register**;
- b. A press release, digest, newsletter, or blog post published by the agency;
- c. An agency events calendar;
- d. Social media;
- e. A newspaper or other media outlet that members of the public who may be interested in observing the proceeding are likely to monitor;

- f. A physical location that potentially interested members of the public are likely to see (e.g., a bulletin board at a jobsite or agency office);

- g. An email sent to persons who have subscribed to a mailing list or otherwise opted to receive updates about a particular adjudication; and

- h. A communication sent directly to members of the public, communities, and organizations who may be interested in observing the proceeding.

13. Agencies should include the following information in any public notice for an open adjudicative proceeding, as applicable:

- a. The name and docket number or other identifying information for the proceeding;

- b. The date and time of the proceeding;

- c. The ways that members of the public can observe the proceeding, along with the directions, if any, for registering or requesting access to the proceeding and, for in-person observers, instructions for accessing the facility where the proceeding will take place, including any security or public health protocols and disability accommodations;

- d. A brief summary of the proceeding's purpose; and

- e. Contact information for a person who can answer questions about the proceeding.

14. Agencies should determine the appropriate timing for providing and updating public notice of adjudicative proceedings given the nature of their programs and the proceeding at issue. More advance notice may be warranted, for example, if significant public interest in an open proceeding is likely and interested members of the public will need to travel to observe it in person.

#### **Public Access to Transcripts and Recordings of Adjudicative Proceedings**

15. Consistent with applicable legal requirements, agencies should consider how they make transcripts and recordings of adjudicative proceedings available to interested members of the public. In addition to providing public access to such materials on their websites, an agency might also, as appropriate:

- a. Make transcripts and recordings available for public inspection in a reading room, docket office, or other agency facility;

- b. Make transcripts and recordings available for public inspection on another public website, such as a public video sharing website; or

- c. Provide, or arrange for court reporters working under contract with the government to provide, copies of transcripts and recordings on request for a fee that is no more than the actual cost of duplication, though the agency may charge a reasonable, additional fee for expedited processing.

16. Agencies should take steps to redact any information that is protected by law or policy from public disclosure before providing public access to transcripts and recordings.

17. Agencies should ensure that transcripts and recordings of open proceedings are available for public inspection in a timely manner.

#### Administrative Conference Recommendation 2021–7

#### Public Availability of Inoperative Agency Guidance Documents

Adopted December 16, 2021

Agencies issue guidance documents to help explain their programs and policies, announce their interpretation of laws, and communicate other important information to regulated entities, regulatory beneficiaries, and the broader public.<sup>1</sup> The Administrative Conference has issued several recent recommendations regarding guidance documents.<sup>2</sup> Among them was Recommendation 2019–3, *Public Availability of Agency Guidance Documents*, which encourages agencies to facilitate public access to guidance documents on their websites.

Over time, a given guidance document may no longer reflect an agency's position. An agency may rescind the document in whole or in part by announcing that it no longer reflects the agency's position. Even without being rescinded in whole or in part, a guidance document may be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it may fall into disuse in whole or in part. The present Recommendation terms these documents "inoperative guidance documents."

Some inoperative guidance documents will be of interest to the public because they disclose how an agency's legal interpretations have changed<sup>3</sup> or how policies or programs have changed over time.<sup>4</sup> But if these documents are not posted on an agency's website, they will be either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case

of documents not published in the **Federal Register**, or not as accessible as they should be, in the case of documents that were noticed in the **Federal Register**.<sup>5</sup>

Three statutes require agencies to make some inoperative guidance documents publicly available. The Federal Records Act requires agencies to post on their websites materials that are of "general interest or use to the public."<sup>6</sup> FOIA calls upon agencies to publish notices in the **Federal Register** when they have rescinded or partially rescinded certain guidance documents that are addressed to the public generally rather than to specific individuals or organizations.<sup>7</sup> The E-Government Act requires agencies, in certain circumstances, to publish these rescission and partial rescission notices on their websites.<sup>8</sup> Many agencies have also issued regulations pertaining to the public availability of their inoperative guidance documents.

The Office of Management and Budget's 2007 *Final Bulletin for Agency Good Guidance Practices* imposes additional requirements on agencies relating to inoperative guidance documents. It directs all agencies other than independent regulatory agencies to maintain a list on their websites identifying significant guidance documents that have been revised or withdrawn in the past year. It also encourages agencies to stamp or otherwise prominently identify as "superseded" those significant guidance documents that have become inoperative but which remain available for historical purposes.<sup>9</sup>

Recommendation 2019–3, though concerned primarily with operative guidance documents, makes several recommendations relating to the posting of inoperative guidance documents. In summary, it recommends that agencies (1) mark posted guidance documents to indicate whether they are current or were withdrawn or rescinded and (2) in the case of rescinded or withdrawn documents, note their rescission or withdrawal date and provide links to any successor documents.

Recommendation 2019–3 reserved the question, however, of which inoperative guidance documents agencies should publish online. This Recommendation takes up that issue, building on the principles Recommendation 2019–3 set forth for operative documents by extending them, as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop written procedures for publishing inoperative guidance documents, devise effective strategies for labeling and organizing these documents on their websites, and deploy other means of disseminating information about these

documents.<sup>10</sup> The Recommendation also encourages agencies to provide clear cross-references or links between inoperative guidance documents and any operative guidance documents replacing or modifying them.

This Recommendation, like Recommendation 2019–3, accounts for differences across agencies in terms of the number of guidance documents they issue, how they use guidance documents, and their resources and capacities for managing online access to these documents.<sup>11</sup> Accordingly, although it is likely that agencies following this Recommendation will make some of their inoperative guidance documents more readily available to the public, this Recommendation should not be understood as necessarily advising agencies to post the full universe of their inoperative guidance documents online.

This Recommendation is limited to guidance documents that agencies determine are inoperative after the date of this Recommendation. Agencies may, of course, choose to apply it retroactively to existing inoperative guidance documents.

#### Recommendation

#### Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents

1. Each agency should develop and publish on its website written procedures governing the public availability of inoperative guidance documents and should consider doing the following in its procedures:

a. Explaining what it considers to be inoperative guidance documents for purposes of its procedures instituted under this Recommendation;

b. Identifying which one or more of the following kinds of inoperative guidance documents are covered by its procedures: Rescinded guidance documents, partially rescinded guidance documents, superseded guidance documents, partially superseded guidance documents, or guidance documents that have fallen into disuse in whole or in part;

c. Identifying, within the kinds of inoperative guidance documents covered by its procedures, which categories of inoperative guidance documents will be published on its website and otherwise made publicly available, taking into consideration the categories articulated in Paragraph 2 below;

d. Explaining how it will include links or cross-references between any related inoperative and operative guidance documents;

<sup>10</sup> Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019–3 to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019–3, ¶ 1; Paragraph 3 with Recommendation 2019–3, ¶¶ 4, 7, 9; Paragraph 4 with Recommendation 2019–3, ¶ 8; and Paragraph 6 with Recommendation 2019–3, ¶ 11.

<sup>11</sup> See Todd Rubin, *Public Availability of Inoperative Agency Guidance Documents* (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.); Cary Coglianese, *Public Availability of Agency Guidance Documents* (May 15, 2019) (report to the Admin. Conf. of the U.S.).

<sup>1</sup> Guidance documents include what the Administrative Procedure Act calls "interpretive rules" and "general statements of policy." 5 U.S.C. 553(b). They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies. See Admin. Conf. of the U.S., Recommendation 2019–3, *Public Availability of Agency Guidance Documents*, 84 FR 38931, 38931 (Aug. 8, 2019).

<sup>2</sup> See, e.g., Recommendation 2019–3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019–1, *Agency Guidance Through Interpretive Rules*, 84 FR 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017–5, *Agency Guidance Through Policy Statements*, 82 FR 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014–3, *Guidance in the Rulemaking Process*, 79 FR 35992 (June 25, 2014).

<sup>3</sup> See Blake Emerson & Ronald Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* (May 28, 2019) (report to the Admin. Conf. of the U.S.).

<sup>4</sup> See Nicholas R. Parrillo, *Agency Guidance Through Policy Statements: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

<sup>5</sup> See Recommendation 2019–3, *supra* note 1.

<sup>6</sup> See 44 U.S.C. 3102(2).

<sup>7</sup> See 5 U.S.C. 552(a)(1); *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1375 (Fed. Cir. 2020).

<sup>8</sup> See E-Government Act of 2002 § 206, 44 U.S.C. 3501 note (Federal Management and Promotion of Electronic Government Services).

<sup>9</sup> See Office of Mgmt. & Budget, Exec. Office of the President, OMB Bull. No. 07–02, *Final Bulletin for Agency Good Guidance Practices* (2007).

- e. Specifying how long inoperative guidance documents will be retained on its website;
- f. Specifying whether some types of previously unpublished operative guidance documents will be posted on its website and otherwise made publicly available when they become inoperative and, if so, under what circumstances;
- g. Providing for how inoperative guidance documents will be organized on its website to facilitate searching and public access;
- h. Identifying, as provided in Paragraph 4 below, what labels and explanations it will use to communicate clearly the inoperative status of guidance documents; and
- i. Indicating whether any of the procedures should be applied retroactively.

#### **Determining Which Categories of Inoperative Guidance Documents To Publish Online and Otherwise Make Publicly Available**

2. Each agency should consider publishing on its website and otherwise making publicly available one or more of the following categories of inoperative guidance documents:

- a. Inoperative guidance documents whose operative versions it made publicly available;
- b. Inoperative guidance documents that, if they were operative, would be made publicly available under its current policies;
- c. Inoperative guidance documents that have been replaced or amended by currently operative guidance documents;
- d. Inoperative guidance documents that expressed policies or legal interpretations that remain relevant to understanding current law or policy;
- e. Inoperative guidance documents that generated reliance interests when they were operative;
- f. Inoperative guidance documents that generate—or, when they were operative, generated—numerous unique inquiries from the public;
- g. Inoperative guidance documents that are—or, when operative, were—the subject of attention in the general media or specialized publications relevant to the agency, or have been cited frequently in other agency documents, such as permits, licenses, grants, loans, contracts, or briefs;
- h. Inoperative guidance documents that, when originally being formulated, generated a high level of public participation; and
- i. Inoperative guidance documents that, when operative or originally being formulated, had been published in the *Unified Agenda of Federal Regulatory and Deregulatory Actions* or were considered “significant guidance documents” under the Office of Management and Budget’s *Final Bulletin for Agency Good Guidance Practices*.

#### **Organizing and Labeling Inoperative Guidance Documents Available Online**

3. Each agency should organize its inoperative guidance documents on its website to make it easy for members of the public to find them and relate them to any successor guidance documents. The agency should consider one or more of the following approaches:

- a. Assigning a unique guidance identification number to each inoperative

guidance document, if this number had not already been assigned when the document was operative;

- b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to displaying entries for inoperative guidance documents, with links to these documents;
- c. Providing a search function that enables retrieval of inoperative guidance documents;
- d. Using a method, such as a pull-down menu, that allows the public to view inoperative guidance documents and see that they are inoperative; and

e. Including links or notations within inoperative guidance documents, pointing to any successor operative guidance documents.

4. Each agency should label inoperative guidance documents on its website to ensure that the public can readily understand the inoperative status of those guidance documents. The agency should consider adopting one or more of the following methods for publicly labeling its guidance documents as inoperative and then using the selected method or methods consistently:

- a. Including a watermark that displays “rescinded,” “partially rescinded,” “superseded,” “partially superseded,” “not in use,” or similar terminology as appropriate across each page of an inoperative guidance document;
- b. Including words such as “rescinded,” “partially rescinded,” “superseded,” “partially superseded,” “not in use,” or similar terminology as appropriate within a table in which links to inoperative guidance documents appear;
- c. Using an appropriate method, including redline versions or lists of changes, to communicate changes made to a guidance document that has been partially rescinded or superseded;
- d. Including a prominent stamp at the top of an inoperative guidance document noting that the document is inoperative and indicating the date it became inoperative;
- e. Providing cross-references, using links or notations, from an inoperative guidance document to any successor versions of the guidance document, and vice versa; and
- f. Publishing a notice of rescission or partial rescission of a guidance document on the agency’s website and providing links to this notice in the inoperative guidance document.

#### **Using Means in Addition to Agency Websites To Notify the Public When a Guidance Document Has Become Inoperative**

5. At a minimum, each agency should notify the public that a guidance document has become inoperative in the same way that it notified the public that the operative version of the guidance document was issued or in the same way it would notify the public that an operative version of the guidance document has been issued under the agency’s current policies.

6. Each agency should consider using one or more of the following methods to notify the public when a guidance document has become inoperative:

- a. Publishing this notification in the **Federal Register** even when not required to do so by law;

b. Sending this notification over an agency listserv or to a similar mailing list to which the public can subscribe;

c. Providing this notification during virtual meetings, in-person meetings, or webinars involving the public; and

d. Publishing this notification in a press release.

7. In disseminating notifications as indicated in Paragraph 6, each agency should consider including cross-references to any successor guidance documents.

#### **Administrative Conference Recommendation 2021–8**

##### **Technical Reform of the Congressional Review Act**

*Adopted December 16, 2021*

The Congressional Review Act (CRA)<sup>1</sup> allows Congress to enact joint resolutions overturning rules issued by federal agencies. It also establishes special, fast-track procedures governing such resolutions. This Recommendation aims to address certain technical flaws in the Act and how it is presently administered.

##### **The Hand-Delivery Requirement**

The CRA provides that, before a rule can take effect, an agency must submit a report (an 801(a) report) to each house of Congress and the Comptroller General, who heads the Government Accountability Office (GAO). Receipt of the 801(a) report by each house of Congress and the Comptroller General also triggers the CRA’s special, fast-track procedures.

The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the Comptroller General. Congressional rules, however, currently require that 801(a) reports be hand-delivered to both chambers of Congress. Although the House allows members to electronically submit certain legislative documents and the Comptroller General permits agencies to electronically submit 801(a) reports, electronic submission is not generally regarded by Congress as an acceptable means of submitting 801(a) reports to Congress.

The hand-delivery requirement has been the subject of persistent criticism on the grounds that it is inefficient and outdated and results in exorbitant costs to federal agencies. Recent events have also shown that it is sometimes impracticable. For example, staffing disruptions related to the COVID–19 pandemic have, in some instances, meant that agencies had difficulty delivering 801(a) reports by hand and congressional officials have not been present in the Capitol to receive 801(a) reports via hand-delivery.

##### **Time Periods for Introducing and Acting on Resolutions Under the CRA**

Another source of persistent criticism of the CRA concerns the time periods during which members of Congress may introduce and act on joint resolutions overturning agencies’ rules. Under the CRA, Congress’s receipt of an 801(a) report begins a period of 60 days, excluding days when either chamber adjourns for more than three days, during

<sup>1</sup> 5 U.S.C. 801–08.

which any member of either chamber may introduce a joint resolution disapproving the rule.<sup>2</sup> Only rules submitted during this period, sometimes called the “introduction period,” are eligible for the CRA’s special, fast-track procedures.

Calculating the introduction period can be confusing because it runs only on “days of continuous session”—that is, on every calendar day *except* those falling in periods when, pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a practical matter, there is seldom a difference between 60 days of continuous session and 60 calendar days because recent Congresses have made regular use of *pro forma* sessions to avoid adjournments of more than three days. Nevertheless, having to calculate the introduction period according to days of continuous session rather than calendar days can mislead people unfamiliar with the concept of days of continuous session or with recent Congresses’ uses of *pro forma* sessions. Moreover, because modern Congresses invoke *pro forma* sessions in a way that negates almost any practical difference between days of continuous session and calendar days, the CRA’s use of days of continuous session to calculate the introduction period accomplishes little beyond complicating the process of ascertaining the period’s end date.

The introduction period is not the only complicated timing provision in the CRA. Another—sometimes called the “lookback period”—provides that if, within 60 days of session in the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns its annual session *sine die* (i.e., for an indefinite period), the periods to submit and act on a disapproval resolution “reset” in their entirety in the next session of Congress.<sup>3</sup> In that next session, the reset period begins on the 15th day of the session in the Senate and the 15th legislative day in the House. The lookback period thus ensures that Congress has the full periods contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a session of Congress.

The lookback period is anomalous and difficult to ascertain for several reasons. Whereas most of the time periods set forth in the CRA are calculated in calendar days, the lookback period is calculated using Senate session days and House legislative days—terms of art with which most people are unfamiliar.<sup>4</sup> The lookback period is also unpredictable because House legislative and Senate session days do not always correspond to each other, and the chambers regularly modify their anticipated calendar of session or legislative days, often with little

advance notice. In addition, using legislative and session days to calculate the lookback period means interested members of Congress can strategically lengthen or shorten the period, either by having legislative or session days extend for multiple calendar days or cramming several legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most time periods under the CRA are calculated prospectively—that is, by counting forward from an established starting date—the lookback period is calculated retrospectively—that is, by counting backward from an end date that is not known until Congress adjourns *sine die*. The lookback period’s retrospective quality makes it effectively impossible to calculate in real time because the date on which the lookback period begins is only knowable once the period has closed. For those and other reasons, the public, members of Congress, congressional staff, and agencies sometimes struggle to anticipate when the CRA’s lookback period will commence, or determine when it did commence, during a given session of Congress.<sup>5</sup>

Complicating matters still further, the CRA’s key dates do not necessarily align in ways that make sense. For instance, the CRA expressly provides that the introduction and lookback periods commence when an 801(a) report is submitted to Congress. But other, related CRA time periods—such as the periods for discharging a joint resolution from committee (the discharge period) and for fast-tracking a rule through the Senate (the Senate action period)—commence running only after Congress receives the report *and* the rule is published in the **Federal Register**. This can lead to anomalous situations. Members of Congress might, for instance, timely introduce joint resolutions of disapproval under the CRA and yet be unable to avail themselves of the CRA’s fast-track procedures.

At present, problems with synchronizing related CRA time windows are addressed primarily through interpretations from the Senate and House Parliamentarians. For example, the Senate Parliamentarian has interpreted the lookback and introduction periods to commence only after the 801(a) report has been submitted to Congress *and* the rule has been published in the **Federal Register**, thereby harmonizing the starting dates for those periods with the starting dates for the discharge and Senate action periods.

But relying on the Parliamentarians’ interpretations creates its own problems. Chief among them is that the interpretations are not always easily accessible by the public. Although some of the

Parliamentarians’ interpretations are publicly available, many are not. Indeed, the formal rulings of the Senate Parliamentarian have not been published in decades. In the case of the interpretations that are collected and published, moreover, most members of the public are either unaware of the interpretations’ existence or unsure how to access them.

### Initiating CRA Review of Actions for Which Agencies Do Not Submit 801(a) Reports

Still another criticism of the CRA concerns what Congress should do to enable CRA review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does not say what to do in those situations, even though studies show they arise frequently.

Absent statutory text addressing the subject, Congress has adopted a process through which it initiates review of such agency actions by requesting an opinion from the GAO. That process begins when members of Congress or committees request a GAO opinion on whether an agency action qualifies as a “rule” under the CRA. If GAO concludes that it does, a member or a committee provides for publication of the GAO opinion in the *Congressional Record*. Publication in the *Congressional Record* is then deemed to be the date that triggers the time periods for CRA review of the agency action.

Although that process has worked tolerably well as a response to the problem of unreported rules, it lacks a clear basis in the CRA’s text. There are also aspects of it that warrant revisiting. For example, there is no time limit for using the current, de facto procedure, meaning Congress might use it to subject a decades-old action to CRA review.<sup>6</sup>

\* \* \* \* \*

This Recommendation provides targeted, technical reforms to address many of the criticisms just identified—including criticisms of the hand-delivery requirement, criticisms prompted by the confusion surrounding key dates under CRA, and criticisms of the process for initiating CRA review of agency actions for which agencies do not submit 801(a) reports.

### Recommendation

#### Requiring Electronic Submission of Reports Required by 5 U.S.C. 801(a)(1)(A)

1. Congress should amend 5 U.S.C. 801(a)(1)(A) to provide that the reports required by that provision (801(a) reports) be submitted to Congress and the Government Accountability Office (GAO) electronically rather than by hard copy.

2. In the event Congress does not enact the amendment described in Paragraph 1, both houses of Congress should modify their rules or policies to require electronic submission of 801(a) reports.

3. In the event that Congress, in some manner, mandates electronic submission of

<sup>2</sup> *Id.* 802(a).

<sup>3</sup> *Id.* 801(d)(1).

<sup>4</sup> A Senate session day is “[a] calendar day on which [the Senate] convenes and then adjourns or recesses until a later calendar day,” while a House legislative day commences when the House convenes and continues until the House adjourns. See Richard S. Beth & Valerie Heitshusen, Cong. Rsch. Serv., R42977, Sessions, Adjournments, and Recesses of Congress 2, 6 (2016), available at <https://crsreports.congress.gov/product/pdf/R/R42977>.

<sup>5</sup> In recent years, the lookback period has tended to commence between mid-July and early August, with the precise date varying from year to year. See Jesse M. Cross, Technical Reform of the Congressional Review Act 35 (Oct. 8, 2021) (draft report to the Admin. Conf. of the U.S.). In setting a commencement date for the lookback period, Congress may wish to consider the relationship between the CRA and what are sometimes called midnight rules (that is, rules published in the final months of an administration). See Admin. Conf. of the U.S., Recommendation 2012–2, *Midnight Rules*, 77 FR 47802 (Aug. 10, 2012).

<sup>6</sup> The role proposed for GAO in Paragraph 7 is applicable solely for purposes of triggering the expedited congressional review procedures under 5 U.S.C. 802; it does not have any impact on when a rule is effectuated under 5 U.S.C. 801. Cf. *Bowsher v. Synar*, 478 U.S. 714 (1986).

801(a) reports, it should establish procedures governing how agencies may electronically submit 801(a) reports.

#### **Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5 U.S.C. 801 and 802**

4. Congress should simplify 5 U.S.C. 801(d)(1) by setting a fixed month and day after which, each year, rules submitted to Congress under the Congressional Review Act (CRA) will be subject to the CRA's review process during the following session of Congress.

5. Congress should amend 5 U.S.C. 802(a), which establishes the period during which joint resolutions of disapproval under the CRA may be introduced, to either:

a. Eliminate the requirement that joint resolutions be introduced during a particular period;

b. Align the dates on which the period commences and ends with the period during which the Senate may act on a proposed joint resolution of disapproval submitted under the CRA; or

c. Align the date on which the period commences with the period during which the Senate may so act and provide that such period ends a fixed number of calendar days from such commencement.

6. Congress should review and, where appropriate, enact Parliamentary interpretations that bear on calculating deadlines under the CRA, either as statutory law or as formal rules of the houses. If Congress does not enact those interpretations into statutory law, it should ensure that they are published in a manner that is accessible to the public.

#### **Initiating Review of Agency Actions for Which Agencies Do Not Submit 801(a) Reports**

7. If Congress continues the practice of requesting an opinion from the GAO on whether an agency action, for which the agency did not submit an 801(a) report, qualifies as a "rule" under the CRA to initiate the expedited process for congressional review outlined in 5 U.S.C. 802, it should provide a transparent mechanism for doing so. To that end, Congress should amend Chapter 8 of title 5 of the *United States Code* to enact the process it currently relies on to initiate CRA review (while clarifying that such amendment is solely for purposes of implementing 5 U.S.C. 802). Under such process:

a. Any member of Congress or committee may request the opinion of the GAO on whether an agency action qualifies as a "rule" under the CRA;

b. After soliciting views from the agency, GAO responds by issuing an opinion as to whether the agency action in question qualifies as a "rule";

c. If GAO concludes that the action amounts to a rule under the CRA, any member of Congress or committee may provide for publication of the GAO opinion in the *Congressional Record*; and

d. Publication of the GAO opinion in the *Congressional Record* is the date that triggers the time periods for CRA review of the agency rule.

8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should impose time limits within which the steps in Paragraph 7 must be taken.

#### **Administrative Conference Recommendation 2021-9**

##### **Regulation of Representatives in Agency Adjudicative Proceedings**

*Adopted December 16, 2021*

Many agencies have adopted rules governing the participation and conduct of attorneys and non-attorneys who represent parties in adjudicative proceedings. These rules may address a wide array of topics, including who can represent parties in adjudications, how representatives must conduct themselves, and how the agency enforces rules of conduct.<sup>1</sup> Some agencies have drafted their own rules. Others have adopted rules developed by state bar associations or the American Bar Association's (ABA) *Model Rules of Professional Conduct*. Agencies provide public access to their rules in different ways, including publishing them in the **Federal Register** and *Code of Federal Regulations* and posting them on their websites. Some agencies have provided explanatory materials to help representatives, parties, and the public understand how the rules operate.

Agency authority to set qualifications for who may serve as a representative depends on whether the potential representative is an attorney or non-attorney. For attorneys, the generally applicable Agency Practice Act provides, with some exceptions, that "any individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency,"<sup>2</sup> though some statutes authorize agencies to impose additional qualification requirements. Agencies generally have greater discretion under the Administrative Procedure Act and agency- or program-specific statutes to determine whether persons who are not attorneys may act as representatives and, if they may, to establish the qualifications for doing so.

As a general matter, agencies have legal authority to establish rules governing the conduct of representatives and to take actions against representatives found to have violated such rules.<sup>3</sup> Courts have consistently found such authority inherent in agencies' general rulemaking power or their power to protect the integrity of their processes.<sup>4</sup> Agencies' disciplinary authority is not limitless, however, and agencies must determine what their governing statutes allow.

Agencies that adopt rules governing representatives will need to make a number

of decisions as they decide the type of rules to adopt and how they will apply those rules. They must determine whether the rules will apply only to attorney representatives or will also apply to other representatives. They must decide whether to borrow language from rules drafted by other entities (state bars, ABA) or to draft their own rules. They must determine the particular conduct that the rules will regulate and whether to apply the same rules to attorneys and non-attorneys. And if they decide to adopt rules governing who may practice before the agency, they must ensure that they comply with the Agency Practice Act for rules applied to attorneys and determine the qualification standards, if any, they will establish for non-attorneys.

Once agencies have decided to adopt rules, they also must determine how to enforce those rules. Agencies may enforce rules in various ways, ranging from reminders or warnings to more serious actions, including disqualifying a representative from appearing in the current adjudication or future adjudications or imposing a monetary penalty. Agencies must determine that they have the legal authority to undertake any such actions. Agencies also must determine whether to implement a program for reciprocal discipline, which involves imposing discipline on a representative found to have engaged in misconduct by another jurisdiction, or for referral procedures, which involve reporting attorneys' misconduct to another jurisdiction for purposes of taking possible disciplinary action.

Agencies that have adopted rules must ensure that representatives, parties, and the public can easily access the rules. Agencies also must decide whether to provide additional explanatory materials and, if so, ensure that those are also easily accessible.

This Recommendation recognizes that agency adjudicative proceedings vary widely in their purpose, complexity, and governing law. Some processes are trial-like; others are informal. Some are adversarial; others are non-adversarial. Given the extensive variation in agencies' needs and available resources, this Recommendation focuses primarily on setting forth the various options agencies should consider in deciding whether to adopt rules and deciding on the content of those rules. It takes no position on whether agencies should allow non-attorney representatives. For agencies that decide to adopt rules for attorneys and, if they elect to do so, for non-attorneys, the Recommendation offers best practices for seeking to ensure that those rules are disseminated widely and that representatives, parties, and the public can understand the rules and how agencies go about enforcing them.

Although the Recommendation does not endorse harmonization of rules for its own sake, it does urge agencies to consider whether achieving greater uniformity among different adjudicative components within the agency or even across adjudicative components of multiple agencies might prove valuable for representatives who practice before a variety of components or agencies. It also recommends that the Administrative

<sup>1</sup> See George M. Cohen, Regulation of Representatives in Agency Adjudicative Proceedings (Dec. 3, 2021) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> 5 U.S.C. 500(b).

<sup>3</sup> See, e.g., 5 U.S.C. 301.

<sup>4</sup> See, e.g., *Checkovsky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986); *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580-82 (2d Cir. 1979); *Koden v. U.S. DOJ*, 564 F.2d 228, 233 (7th Cir. 1977).

Conference's Office of the Chairman consider preparing model rules that agencies can use when drafting their own rules.

### Recommendation

#### Adoption of Rules Governing Participation and Conduct

1. For federal agency adjudication systems in which parties are represented—either by attorneys or non-attorney representatives—agencies should consider adopting rules governing the participation and conduct of representatives in adjudicative proceedings to promote the accessibility, fairness, integrity, and efficiency of adjudicative proceedings.

#### Rules of Conduct

2. Agencies should consider whether to adopt or reference rules promulgated by other authorities or professional organizations or instead draft their own rules. Agencies should ensure that the rules are appropriate for the adjudicative proceedings they conduct and consider whether any modifications to adopted rules should be included. Agencies should consider whether any rules applicable to attorneys should be applied to non-attorneys and whether they should be modified before doing so.

3. Possible topics that agencies might consider in their rules include representatives' actions that are likely to occur during a particular adjudication and actions that might occur outside a particular adjudication but that might still adversely affect the conduct of agency adjudications. Topics agencies might consider include the following:

- a. Engaging in conduct that disrupts or is intended to disrupt an adjudication;
- b. Making unauthorized ex parte contacts with agency officials;
- c. Engaging in representation of a client that conflicts with other interests, including representation of another client, or the attorney's personal interests;
- d. Filing frivolous claims or asserting frivolous defenses;
- e. Engaging in conduct that is prejudicial to the administration of justice, including conduct not limited to that occurring during an adjudication;
- f. Failing to provide competent representation;
- g. Improperly withdrawing from client representation;
- h. Unreasonably delaying the conduct of an adjudication;
- i. Making a material intentional false statement;
- j. Improperly seeking to influence the conduct of a judge or official;
- k. Being convicted of a crime or being subject to an official finding of a civil violation that reflects adversely on the attorney's fitness to represent clients before the agency; and

l. Knowingly disobeying or attempting to disobey agency rules (including conduct rules) or adjudicators' directions, or knowingly assisting others in doing so.

4. Agencies should consider whether divergence among rules governing different types of adjudicative proceedings would create needless complexity in practicing

before the agency. This might entail harmonizing rules among different components of the agency. It might also involve harmonization of style or language across rules as well as cross-referencing of other rules of the agency. Agencies should also consider whether to harmonize rules across agencies, especially in cases in which the same representatives commonly appear before a group of agencies (e.g., financial agencies).

#### Agency Action in Response to Allegations of a Violation of Rules

5. Agencies should specify in their rules how they will respond to an allegation of a violation of their conduct rules, and they should publish these rules consistent with Paragraphs 9 through 12. Among other topics, agencies should address:

- a. Who can make a complaint and how to make it;
- b. How notice of a complaint should be provided to the representative who is the subject of the complaint;
- c. Who adjudicates the complaint;
- d. The procedure for adjudicating the complaint, including any rules governing the submission of evidence and the making of arguments;
- e. The manner in which a decision will be issued, including any applicable timeline for issuing a decision;
- f. Procedures for appealing a decision;
- g. Who is responsible for enforcing the decision within the agency and communicating the decision to other relevant authorities; and
- h. The process for identifying and dismissing complaints that are frivolous, repetitive, meant to harass, or meant primarily to delay agency action, including any consequences for persons filing such complaints.

#### Agency Action in Response to a Violation of Rules

6. Rules should address what actions an agency may take in the case of a violation of the rules consistent with their authority to do so, including informal warnings short of sanctions and the range of available sanctions.

7. For rules applicable to attorneys, agencies should consider whether to adopt any reciprocal disciplinary procedures or referral procedures.

#### Who Can Practice Before Agencies

8. Agencies should, in compliance with the Agency Practice Act (5 U.S.C. 500), only establish additional rules governing which attorney representatives can practice before the agencies if authorized to do so by separate statute. With respect to non-attorneys, agencies should determine what rules, if any, they will establish to govern who can practice before the agencies.

#### Transparency

9. Agencies should publish their rules governing representatives' conduct in the **Federal Register** and codify them in the *Code of Federal Regulations*.

10. When agencies adopt rules promulgated by another entity, which may in some instances be copyrighted, they should

ensure that the rules are reasonably available to the public such as by providing links on the agencies' websites or other mechanisms for easily accessing those rules.

11. Agencies should also publish their rules governing representatives' conduct on a single web page or in a single document on their websites and clearly label them using a term such as "Rules of Conduct for Representatives." The agency should indicate clearly whether the rules apply only to attorneys, non-attorneys, or both.

12. On the web page or in the document described in Paragraph 11, agencies should also publish information concerning qualifications for representatives (including for non-attorneys as applicable), how to file a complaint, and a summary of the disciplinary process.

13. On the web page or in the document described in Paragraph 11, agencies should consider providing comments, illustrations, and other explanatory materials to help clarify how the rules work in practice.

14. Agencies should consider publishing disciplinary actions, or summaries of them, on the web page or in the document described in Paragraph 11 so as to promote transparency regarding the types of conduct that lead to disciplinary action. When necessary to preserve recognized privacy interests, the agency may consider redacting information about particular cases or periodically providing summary reports describing the rules violated, the nature of the misconduct, and any actions taken.

#### Model Rules

15. ACUS's Office of the Chairman should consider promulgating model rules of conduct that would address the topics in this Recommendation. The model rules should account for variation in agency practice and afford agencies the flexibility to determine which rules apply to their adjudicative proceedings. In doing so, the Office of the Chairman should 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.

#### Administrative Conference Recommendation 2021-10

##### Quality Assurance Systems in Agency Adjudication

*Adopted December 16, 2021*

A quality assurance system is an internal review mechanism that agencies use to detect and remedy both problems in individual adjudications and systemic problems in agency adjudicative programs. Through well-designed and well-implemented quality assurance systems, agencies can proactively identify both problems in individual cases and systemic problems, including misapplied legal standards, inconsistent applications of the law by different adjudicators, procedural violations, and systemic barriers to participation in adjudicatory proceedings (such as denials of reasonable accommodation). Identifying such problems enables agencies to ensure adherence to their own policies and improve the fairness (and perception of fairness), accuracy, inter-



decisional consistency, timeliness, and efficiency of their adjudicative programs.<sup>1</sup>

In 1973, the Administrative Conference recommended the use of quality assurance systems to evaluate the accuracy, timeliness, and fairness of adjudication of claims for public benefits or compensation.<sup>2</sup> Since then, many agencies, including those that adjudicate other types of matters, have implemented or considered implementing quality assurance systems, often to supplement other internal review mechanisms such as agency appellate systems.<sup>3</sup> Unlike agencies' appellate systems, quality assurance systems are not primarily concerned with error correction in individual cases, and they may assess numerous adjudicatory characteristics that are not typically subject to appellate review, such as effective case management. Nor are they avenues for collateral attack on individual adjudicatory dispositions. Also, quality assurance systems are distinct from agencies' procedures that deal with allegation of judicial misconduct. This Recommendation accounts for these developments and provides further guidance for agencies that may wish to implement new or to improve existing quality assurance systems.

How agencies structure their quality assurance systems can have important consequences for their success. For example, quality assurance systems that overemphasize timeliness as a measure of quality may overlook problems of decisional accuracy. Quality assurance personnel must have the expertise and judgment necessary to accurately and impartially perform their responsibilities. Quality assurance personnel must use methods for selecting and reviewing cases that allow them to effectively identify case-specific and systemic problems. Agencies must determine how they will use information collected through quality assurance systems to correct problems that threaten the fairness (and perception of fairness), accuracy, inter-decisional consistency, timeliness, and efficiency of their adjudicative programs. Agencies also must design quality assurance systems to comply with all applicable requirements, such as the statutory prohibition against rating the job performance of or granting any monetary or honorary award to an administrative law judge.<sup>4</sup>

There are many methods of quality review that agencies can use, independently or in combination, depending upon the needs and goals of their adjudicative programs. For example, agencies can adopt a peer review process by which adjudicators review other adjudicators' decisions and provide feedback before decisions are issued. Agencies can prepare and circulate regular reports for

internal use that describe systemic trends identified by quality assurance personnel. Agencies can also use information from quality assurance systems to identify training needs and clarify or improve policies.

Agencies, particularly those with large caseloads, may also benefit from using data captured in electronic case management systems. Through advanced data analytics and artificial intelligence techniques (e.g., machine-learning algorithms), agencies can use such data to rapidly and efficiently identify anomalies and systemic trends.<sup>5</sup>

This Recommendation recognizes that agencies have different quality assurance needs and available resources. What works best for one agency may not work for another. What quality assurance techniques agencies may use may also be constrained by law. Agencies must take into account their own unique circumstances when implementing the best practices that follow.

## Recommendation

### Review and Development of Quality Assurance Standards

1. Agencies with adjudicative programs that do not have quality assurance systems—that is, practices for assessing and improving the quality of decisions in adjudicative programs—should consider developing such systems to promote fairness, the perception of fairness, accuracy, inter-decisional consistency, timeliness, efficiency, and other goals relevant to their adjudicative programs.

2. Agencies with adjudicative programs that have quality assurance systems should review them in light of the recommendations below.

3. Agencies' quality assurance systems should assess whether decisions and decision-making processes:

- a. Promote fairness and the appearance of fairness;
- b. Accurately determine the facts of the individual matters;
- c. Correctly apply the law to the facts of the individual matters;
- d. Comply with all applicable requirements;
- e. Are completed in a timely and efficient manner; and
- f. Are consistent across all adjudications of the same type.

4. Agencies should consider both reviews that address decisions' likely outcomes before reviewing tribunals, and reviews of adjudicators' decisional reasoning, which address policy compliance, consistency, and fairness.

5. A quality assurance system should review the work of adjudicators and all related personnel who have important roles in the adjudication of cases, such as attorneys who assist in drafting decisions, interpreters who assist in hearings, and staff who assist in developing evidence.

6. Analyzing decisions of agency appellate and judicial review bodies may help quality

assurance personnel assess whether the adjudicatory process is meeting the goals outlined in Paragraph 3. But agencies should not rely solely on such decisions to set and assess standards of quality because appealed cases may not be representative of all adjudications.

### Quality Assurance Personnel

7. Agencies should ensure that quality assurance personnel can perform their functions in a manner that is, and is perceived as, impartial, including being able to perform such functions without pressure, interference, or expectation of employment consequences from the personnel whose work they review.

8. Agencies should ensure that quality assurance personnel understand all applicable substantive and procedural requirements and have the expertise necessary to review the work of all personnel who have important roles in adjudicating cases.

9. Agencies should ensure that quality assurance personnel have sufficient time to fully and fairly perform their assigned functions.

10. Agencies should consider whether quality assurance systems should be staffed by permanent or temporary personnel, or some combination of the two. Personnel who perform quality assurance functions on a permanent basis may gain more experience and institutional knowledge over time than will personnel who perform on a temporary basis. Personnel who perform quality assurance on a temporary basis, however, may be more likely to contribute different experiences and new perspectives.

### Timing of and Process for Quality Assurance Review

11. Agencies should consider at what points in the adjudication process quality assurance review should occur. In some cases, review that occurs before adjudicators issue their decisions, or during a period when agency appellate review is available, could allow errors to be corrected before decisions take effect. However, agencies should take care that pre-disposition review does not interfere with adjudicators' qualified decisional independence and comports with applicable restrictions governing ex parte communications, internal separation of decisional and adversarial personnel, and decision making based on an exclusive record.

12. Agencies should consider implementing peer review programs in which adjudicators can provide feedback to other adjudicators.

13. Agencies should consider a layered approach to quality assurance that employs more than one methodology. As resources allow, this may include formal quality assessments and informal peer review on an individual basis, sampling and targeted case selection on a systemic basis, and case management systems with automated adjudication support tools.

14. In selecting cases for quality assurance review, agencies should consider the following methods:

- a. Review of every case, which may be useful for agencies that adjudicate a small

<sup>1</sup> Daniel E. Ho, David Marcus & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication* (Nov. 30, 2021) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> Admin. Conf. of the U.S., Recommendation 73–3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 FR 16840 (June 27, 1973).

<sup>3</sup> Admin. Conf. of the U.S., Recommendation 2020–3, *Agency Appellate Systems*, 86 FR 6618 (Jan. 22, 2021).

<sup>4</sup> See, e.g., 5 U.S.C. 4301; 5 CFR 930.206.

<sup>5</sup> Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 FR 6616 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2018–3, *Electronic Case Management in Federal Administrative Adjudication*, 83 FR 30686 (June 29, 2018).

number of cases but impractical for agencies that adjudicate a high volume of cases;

b. Random sampling, which can be more efficient for agencies that decide a high volume of cases but may cause quality assurance personnel to spend too much time reviewing cases that are unlikely to present issues of concern;

c. Stratified random sampling, a type of random sampling that over-samples cases based on chosen characteristics, which may help quality assurance personnel focus on specific legal issues or factual circumstances associated with known problems, but may systematically miss certain types of problems; and

d. Targeted selection of cases, which allows agencies to directly select decisions that contain specific case characteristics and may help agencies study known problems but may miss identifying other possible problems.

#### Data Collection and Analysis

15. Agencies, particularly those with large caseloads, should consider what data would be useful and how data could be used for quality assurance purposes. Agencies should ensure that, for each case, an electronic case management or other system includes the following information:

a. The identities of adjudicators and any personnel who assisted in evaluating evidence, writing decisions, or performing other case-processing tasks;

b. The procedural history of the case, including any actions and outcomes on administrative or judicial review;

c. The issues presented in the case and how they were resolved; and

d. Any other data the agency determines to be helpful.

16. Agencies should regularly evaluate their electronic case management or other systems to ensure they are collecting the data necessary to assess and improve the quality of decisions in their programs.

17. Agencies, particularly those with large caseloads, should consider whether to use data analytics and artificial intelligence (AI) tools to help quality assurance personnel identify potential errors or other quality issues. Agencies should ensure that they have the technical capacity, expertise, and data infrastructure necessary to build and deploy such tools; that any data analytics or AI tools the agencies use support, but do not displace, evaluation and judgment by quality assurance personnel; and that such systems comply with legal requirements for privacy and security and do not create or exacerbate harmful biases.

#### Use of Quality Assurance Data and Findings

18. Agencies should not use information gathered through quality assurance systems in ways that could improperly influence decision making or personnel matters.

19. Agencies should provide, consistent with Paragraph 11, individualized feedback for adjudicators and other personnel who assist in evaluating evidence, writing decisions, or performing other case-processing tasks within a reasonable amount of time and include any relevant positive and negative feedback.

20. Agencies should establish regular communications mechanisms to facilitate the dissemination of various types of quality assurance information within the agency. Agencies should:

a. Communicate information about systemic recurring or emerging problems identified by quality assurance systems to all personnel who participate in the decision-making process and to training personnel;

b. Communicate, as appropriate, with agency rule-writers and operations support personnel to allow them to consider whether recurring problems identified by quality assurance systems should be addressed or clarified by rules, operational guidance, or decision support tools; and

c. Consider whether to communicate information to appellate adjudicators or other agency officials who are authorized to remedy problems identified by quality assurance systems in issued decisions.

#### Public Disclosure and Transparency

21. Agencies should provide access on their websites to all rules and any associated explanatory materials that apply to quality assurance systems, including standards for evaluating the quality of agency decisions and decision-making processes.

22. Agencies should consider whether to publicly disclose data in case management systems in a de-identified form (*i.e.*, with all personally identifiable information removed) to enable continued research by individuals outside of the agency.

#### Assessment and Oversight

23. Agencies with quality assurance systems should assess periodically whether those systems achieve the goals they were intended to accomplish, including by affirmatively soliciting feedback from the public, adjudicators, and other agency personnel concerning the functioning of their quality assurance systems.

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## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meetings of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meetings.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a meeting via videoconference on Tuesday, January 25, 2022, from 12:00 p.m. to 1:00 p.m. Mountain Time for the purpose of selecting the Committee's first project topic.

**DATES:** The meeting will be held on:

• Tuesday, January 25, 2022, from 12:00 p.m. to 1:00 p.m. MT.

*Public Registration Link:* <https://tinyurl.com/2p96f52c>.

#### FOR FURTHER INFORMATION CONTACT:

Brooke Peery, Designated Federal Officer (DFO), at [bpeery@usccr.gov](mailto:bpeery@usccr.gov) or (202) 701-1376.

**SUPPLEMENTARY INFORMATION:** Members of the public may listen to the discussion. This meeting is available to the public through the public registration link listed above. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit Office, U.S. Commission on Civil Rights, 300 N Los Angeles St., Suite 2010, Los Angeles, CA 90012 or emailed to Brooke Peery at [bpeery@usccr.gov](mailto:bpeery@usccr.gov).

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: <https://www.facadatabase.gov/FACA/FACA/PublicViewCommitteeDetails?id=a10t0000001gzlGAAQ>.

Please click on the "Meeting Details" and "Documents" links. Persons interested in the work of this Committee are also directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Unit office at the above email or street address.

#### Agenda

- I. Welcome & Roll Call
- II. Approval of Minutes
- III. Discussion
- IV. Public Comment
- V. Adjournment