



**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

GENERAL COUNSEL

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Washington, D.C. 20590

September 6, 2022

**MEMORANDUM FOR SECRETARIAL OFFICERS AND HEADS OF  
OPERATING ADMINISTRATIONS**

**From:** John E. Putnam  
General Counsel

A handwritten signature in blue ink, appearing to read "John E. Putnam", with a stylized flourish at the end.

**Subject:** Department of Transportation Enforcement Policies and Principles

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The Department of Transportation's enforcement programs provide essential support for the mission of the Department: To deliver the world's leading transportation system, serving the American people and economy through the safe, efficient, sustainable, and equitable movement of people and goods.

This memorandum rescinds and replaces the February 15, 2019, Memorandum titled "Procedural Requirements for DOT Enforcement Actions." The purpose of this memorandum is to provide a set of basic due process policies and principles applicable to administrative enforcement proceedings conducted by the Department of Transportation (DOT or Department) and its operating administrations.

**APPLICABILITY**

The policies and principles set forth in this memorandum apply to all enforcement actions taken by each DOT operating administration (OA) and each component of the Office of the Secretary of Transportation (OST) with enforcement authority.

**I. ENFORCEMENT ATTORNEY RESPONSIBILITIES**

All attorneys of OST and the OAs involved in enforcement activities are responsible for carrying out the policies set forth in this memorandum.

Supervising attorneys with responsibility over enforcement adjudications, administrative enforcement proceedings, and other enforcement actions are a key to the successful implementation of these practices and policies. The Office of Litigation and Enforcement (C-30) within the Office of the General Counsel (OGC) is delegated authority to interpret this memorandum and provide guidance on compliance with the policies contained herein. C-30 shall exercise this authority in coordination with the Chief Counsels of the OAs and subject to the direction and supervision of the General Counsel.

## II. DEFINITIONS

1. “*Administrative enforcement proceeding*” is to be interpreted broadly, consistent with applicable law and regulations, and includes, but is not limited to, administrative civil penalty proceedings; proceedings involving potential cease-and-desist or corrective action orders; preemption proceedings; safety rating appeals; pilot and mechanic revocation proceedings; actions to remedy violations of grant conditions; and similar enforcement-related proceedings.

2. “*Administrative law judges*” (ALJs) and “*Administrative judges*” (AJs) are inferior Officers of the United States appointed by the Secretary of Transportation to serve as triers of fact in formal and informal administrative enforcement proceedings and to issue recommended decisions in adjudications. ALJs are assigned to the Office of Hearings and are responsible for the conduct of all proceedings before the Office of Hearings. AJs are assigned to the FAA’s Office of Dispute Resolution and Adjudication and are responsible for handling cases that are assigned to that office.

3. “*Administrative Procedure Act*” (APA) is the Federal statute, codified in sections of chapters 5 and 7 of title 5, United States Code, that governs procedures for agency rulemaking and adjudication and provides for judicial review of final agency actions.<sup>1</sup>

4. “*Due process*” means procedural rights and protections afforded by the Government to affected parties to provide for a fair process in the enforcement of legal obligations, including in connection with agency actions determining a violation of law, assessing a civil penalty, requiring a party to take corrective action or to cease and desist from conduct, or otherwise depriving a party of a property or liberty interest. Due process always includes two essential elements

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<sup>1</sup> See 5 U.S.C. §§ 553 (rulemaking), 554 (adjudication), 556 (formal hearings), and 701-706 (judicial review).

for a party subject to an agency enforcement action: adequate notice of the proposed agency enforcement action and a meaningful opportunity to be heard by the agency decision maker.

5. “*Enabling act*” means the Federal statute that defines the scope of an agency’s authority and authorizes it to undertake an enforcement action.

6. “*Enforcement action*” means an action taken by the Department upon its own initiative or at the request of an affected party in furtherance of the Department’s statutory authority to execute and ensure compliance with applicable laws. Such actions include administrative enforcement proceedings, enforcement adjudications, and judicial enforcement proceedings.

7. “*Enforcement adjudication*” is the administrative process undertaken by the agency to resolve the legal rights and obligations of specific parties with regard to a particular enforcement issue pending before an agency.<sup>2</sup> The outcome of an enforcement adjudication is a formal or informal decision issued by an appropriate decision maker. Enforcement adjudications require the opportunity for participation by directly affected parties and the right to present a response to a decision maker, including relevant evidence and reasoned arguments.<sup>3</sup>

8. “*Formal enforcement adjudication*” means an adjudication required by statute to be conducted “on the record.”<sup>4</sup> The words “on the record” generally refer to a decision issued by an agency after a proceeding conducted before an ALJ (or the agency head sitting as judge or other presiding employee who is not an ALJ) using trial-type procedures. It is usually the agency’s enabling act, not the APA, that determines whether a formal hearing is required.<sup>5</sup>

9. “*Informal enforcement adjudication*” means an adjudication that is not required to be conducted “on the record” with trial-like procedures. The APA provides

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<sup>2</sup> 5 U.S.C. § 551(7).

<sup>3</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 354 (1978); ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1973), available at <https://archive.org/stream/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947#page/n0/mode/2up> (“[A]djudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.”).

<sup>4</sup> See 5 U.S.C. §§ 554, 556, and 557.

<sup>5</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950); see 5 U.S.C. § 554 (Adjudications).

agencies with a substantial degree of flexibility in establishing practices and procedures for the conduct of informal adjudications.<sup>6</sup>

10. “*Investigators, inspectors, and special agents*” refer to those agency employees or agents responsible for the investigation and review of an affected party’s compliance with the regulations and other legal requirements administered by the agency.

11. “*Judicial enforcement proceeding*” means a proceeding conducted in an Article III court in which the Department is seeking to enforce an applicable statute, regulation, or order.

12. “*Procedural regulations*” are agency regulations setting forth the procedures to be followed during adjudications consistent with the agency’s enabling act, the APA, and other applicable laws.<sup>7</sup>

### **III. ENFORCEMENT POLICY AND REQUIRED PROCEDURES**

1. *Enforcement Policy Generally.* It is the policy of the Department to provide affected parties appropriate due process in all enforcement actions. In the course of such actions and proceedings, the Department’s conduct should be fair and free of bias and should conclude with a decision as to violations alleged and any violations found to have been committed, the penalties or corrective actions to be imposed for such violations, and the steps needed to ensure future compliance.

2. *Investigative Functions.* DOT’s investigative powers should be used in a manner consistent with due process and basic fairness. Congress has granted the Secretary (and by delegation from the Secretary to the OAs) and the FAA Administrator broad investigative powers,<sup>8</sup> and it is an essential part of DOT’s safety and consumer protection mission to investigate compliance with the statutes and regulations administered by the Department, including through periodic inspections. The OAs and components of OST with enforcement authority are appropriately given broad discretion in determining whether and how to conduct investigations, periodic inspections, and other compliance reviews, and these

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<sup>6</sup> 5 U.S.C. §§ 555, 558.

<sup>7</sup> CHARLES ALAN WRIGHT & CHARLES H. KOCH, FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW § 8138.

<sup>8</sup> The Department’s investigative powers include, but are not limited to, the power to conduct inspections and other investigations or compliance reviews, to make reports and findings, to issue subpoenas, to conduct fact-finding hearings, to require production of records, and to take depositions and other sworn statements from witnesses. *See, e.g.*, 49 U.S.C. § 60117(a).

investigative functions are often performed by agency investigators or inspectors in the field.

When performing departmental functions, all DOT employees should identify themselves as employees of the Department, including the OA or component of OST in which they work; they should show official identification if the contact is made in person; and they should state the nature of their business and the reasons for the contact. In appropriate circumstances, where the success of an investigation requires that the inspector or investigator remain anonymous, then DOT employees need not identify themselves and may take other steps necessary to preserve the effectiveness of the DOT employees' investigative efforts. Such matters might include, for example, DOT efforts to observe and determine how consumers or passengers are treated by airlines, bus operators or passenger railroads.

Enforcement attorneys within the relevant OA or component of OST can provide necessary support for the conduct of the Department's investigative functions by providing effective legal guidance to investigators and inspectors on the policies set forth in this memorandum and in their agencies' regulatory schemes.

3. *Statutory Authority for Enforcement Actions.* DOT administrative enforcement actions undertaken for violations of a statute or regulation should be founded on a grant of statutory authority. Unless the terms of a statute expressly authorize the OA or component of OST to enforce the relevant statute or regulation through an administrative enforcement proceeding, the proper forum for the enforcement action is Federal court.

4. *Exercise of Prosecutorial and Enforcement Discretion.* The Department's attorneys and policy makers have broad discretion in deciding whether to initiate an enforcement action. Decisions by DOT to prosecute or not to prosecute an enforcement action should be based upon a reasonable interpretation of the law about which the public has received notice and should be made with due regard for the facts and evidence adduced through an appropriate investigation, inspection, or compliance review, the availability of scarce resources, the administrative needs of the responsible OA or OST component, Administration policy, and the importance of the issues involved to the fulfillment of the Department's statutory responsibilities.

5. *Notice.* Adequate notice to a regulated party receiving an enforcement action is a due process requirement. All documents initiating an enforcement action should

ensure notice reasonably calculated to inform the regulated party of the nature of the action being taken and offer an opportunity to challenge the action. The notice should include legal authorities, statutes, or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to the party to challenge the agency action, including appropriate procedure for seeking administrative and judicial review.

6. *Separation of Functions.* For those OAs or OST components whose regulations provide for a separation of functions from any agency personnel who have taken an active part in investigating, prosecuting, or advocating in the enforcement action, those agency personnel should not serve as decision makers and should not advise or assist the decision maker in that same or a related case. In such proceedings, those personnel should not furnish *ex parte* advice or factual materials to the decisionmaker. When and as necessary, agency employees involved in enforcement actions should consult legal counsel and applicable regulations and ethical standards for further guidance on these requirements.

7. *Avoiding Bias.* Consistent with all applicable laws and ethical standards relating to recusals and disqualifications, no Federal employee or contractor may participate in a DOT enforcement action in any capacity if that person has (1) a financial or other personal interest that would be affected by the outcome of the enforcement action; (2) personal animus against a party to the action or against a group to which a party belongs; (3) prejudgment of the adjudicative facts at issue in the proceeding; or (4) any other prohibited conflict of interest.

8. *Formal Enforcement Adjudications.* When a case is referred by the decision maker to the Office of Hearings or another designated hearing officer for formal adjudication (an "on the record" hearing), the assigned ALJ or hearing officer should use trial-type procedures consistent with applicable legal provisions. In formal adjudication, the APA requires findings and reasons on all material issues of fact, law, or discretion.<sup>9</sup>

9. *Informal Enforcement Adjudications.* Even though informal adjudications do not require trial-type procedures, the responsible OA or component of OST should afford the applicant or the regulated entity that is the subject of the adjudication (as the case may be), as well as other directly affected parties (if any), adequate notice and an opportunity to be heard on the matter under review, either through an oral

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<sup>9</sup> 5 U.S.C. § 557(c).

presentation or through a written submission; an oral hearing is not necessary unless required by statute or regulation. The notice should be in plain language and, when appropriate, contain basic information about the applicable adjudicatory process.<sup>10</sup>

10. *The Hearing Record.* In formal hearings, the agency shall comply with the APA and include in the record the testimony, exhibits, papers, and requests that were filed, in addition to the ALJ's or hearing officer's decision or the decision on appeal.<sup>11</sup> For informal hearings, the record compiled by the agency in a docketed proceeding or otherwise shall include the information that the agency considered "at the time it reached the decision" and its contemporaneous findings.<sup>12</sup> The administrative record does not include privileged documents, such as attorney-client communications, or deliberative or draft documents.

11. *Contacts with the Public.* After the initiation of an enforcement adjudication, DOT's "Guidance on Communication with Parties outside of the Federal Executive Branch (*Ex Parte* Communications)", issued on April 19, 2022, is applicable and should be consulted for guidance on any *ex parte* communication issues or questions that arise in connection with such proceedings.  
<https://www.transportation.gov/regulations/guidance-ex-parte-communications>.

11. *Alternative Dispute Resolution (ADR).* The OAs and the components of OST with enforcement authority are encouraged to use ADR to resolve enforcement cases where appropriate. The Department's ADR policy describes a variety of problem-solving processes that can be used in lieu of litigation or other adversarial proceedings to resolve disputes over compliance.<sup>13</sup>

12. *Prompt Initiation and Adjudication of Administrative Proceedings.* Consistent with the need to adequately investigate and prepare administrative enforcement actions, agency attorneys should promptly initiate proceedings or prosecute matters referred to them. In addition, cases should not be allowed to linger unduly after the adjudicatory process has begun.

13. *Agency Decisions.* Agency counsel may be used in the conduct of informal hearings and to prepare initial recommended decisions for the agency decision

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<sup>10</sup> 5 U.S.C. § 554(b)-(c).

<sup>11</sup> 5 U.S.C. § 556(e).

<sup>12</sup> *Camp v. Pitts*, 411 U.S. 138 (1973).

<sup>13</sup> See Statement of Policy on Alternative Dispute Resolution, 67 Fed. Reg. 40,367 (June 12, 2002).

maker. The agency must notify the directly affected parties of its decision, and the decision must reasonably inform the parties in a timely manner of any additional procedural rights available to them.

14. *Settlements.* Settlement conferences may be handled by appropriate agency counsel without the involvement of the agency's decision maker. Once a matter is settled by compromise, that agreement should be reviewed and accepted by an appropriate supervisor. The responsible OA or component of OST should issue an order adopting the terms of the settlement agreement as the final agency decision, where and as authorized by statute or regulation. Unless required by law, settlement agreements are not confidential and are subject to public disclosure.

15. *OGC Approval Required for Certain Settlement Terms.* Whenever a proposed settlement agreement, consent order, or consent decree would impose commitments or obligations on a regulated entity that impose novel or unprecedented requirements beyond those contemplated in relevant statutes and regulations, the responsible OA or OST component should obtain the approval of OGC before finalizing the settlement agreement, consent order, or consent decree.

16. *Basis for Civil Penalties and Disclosures Thereof.* No civil penalties should be sought in any DOT enforcement action except when authorized by statute and supported by sufficient factual evidence or findings of fact. Where applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any aggravating and/or mitigating factors (such as whether the violator is a small business). In setting and utilizing civil penalties, each OA and OST component should consider a number of factors including, but not limited to, whether the penalty will have a deterrent effect and offset any financial gains that resulted from the violations. More generally, OAs and OST components should seek to avoid imposing civil penalties that may be viewed only as a cost of doing business by regulated entities. Rather, civil penalties actions should be intended to further the general purpose of appropriately addressing violations of agency regulations and encouraging future compliance by regulated entities. The assessment of proposed or final penalties in a DOT enforcement action shall be communicated in writing to the subject of the action, along with an explanation of the basis for the calculation of asserted penalties. In addition, the agency may, in its discretion, voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials that sheds light on the way penalties are calculated. Each OA and OST component is encouraged to develop penalty policies, to keep those policies current, and, to the



extent feasible, incorporate them into the standard operating procedures of the OA or OST component.

17. *Use of Non-Monetary Penalty Remedies to Achieve Regulatory Compliance.* Many DOT enforcement programs authorize the use of non-monetary remedies, both administrative and judicial, to achieve compliance with DOT statutes and regulations when a violation is found through inspection, investigation or some other means. These remedies can include cease and desist letters and orders, corrective action notices, out-of-service and imminent hazard orders, and other forms of emergency and non-emergency relief, depending on the nature and severity of the enforcement issues and potential danger to public health and safety. Operating administrations are encouraged to consider, on a broader basis, utilizing non-monetary remedies in lieu of civil penalties when their use may achieve compliance objectives and reduce potential harms from regulatory violations more rapidly than a civil penalty proceeding and provide a greater inducement for achieving long-term compliance.

18. *Publication of Decisions.* The agency's decisions in informal adjudications are not required to be published under the APA.<sup>14</sup> However, where the agency intends to rely on its opinions in future cases, those opinions must generally be made available on agency websites or in agency reading rooms (publication on Westlaw, Lexis, or similar legal services is also highly recommended).<sup>15</sup> The APA has been read to require that opinions in formal adjudications must be made "available for public inspection and copying."<sup>16</sup> Agencies are strongly encouraged to publish all formal decisions on Westlaw, Lexis, or similar legal services.

19. *Coordination with the Office of Inspector General on Criminal Matters.* All Department employees must comply with DOT Order 8000.8A, which covers referrals of potential criminal matters to the Office of Inspector General (OIG). Each operating administration is also required to adopt procedures for criminal referrals that are consistent with the requirements of DOT Order 8000.8A.

20. *Standard Operating Procedures.* All legal offices that participate in or render advice in connection with enforcement actions should, to the extent practicable, operate under standard operating procedures. Such offices include, but are not limited to, those that oversee investigatory matters and serve as adversarial

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<sup>14</sup> 5 U.S.C. § 552(a)(2)(A).

<sup>15</sup> WRIGHT & KOCH § 8242.

<sup>16</sup> *Id.*

personnel in the agency's enforcement matters. These standard operating procedures, which can be contained in manuals, can be used to outline step-by-step requirements for attorney actions in the investigative stage and the prosecution stage; the role of an attorney as counselor, adjudicator, or litigator; the rulemaking process; and the process for issuance of guidance documents, letters of interpretation, preemption decisions, legislative guidance, and a variety of other legal functions performed in the legal office.

21. *Referral of Matters for Judicial Enforcement.* In considering whether to refer a matter for judicial enforcement by the Department of Justice, DOT attorneys should consult the applicable procedures set forth by the General Counsel, including in the document entitled "Partnering for Excellence: Coordination of Legal Work Within the U.S. Department of Transportation," and any update or supplement to such document issued hereafter by the General Counsel. The specific procedures for initiating an affirmative litigation request are currently found in the coordination document at Section II.B.1., "Affirmative Litigation Requests to the Department of Justice." In most instances, requests to commence affirmative litigation must be reviewed by OGC, with such reviews coordinated through the Office of Litigation and Enforcement (C-30).

22. *Small Business Regulatory Enforcement Fairness Act Compliance (SBREFA).* The Department shall comply with the terms of SBREFA when conducting administrative inspections and adjudications, including section 223 of SBREFA (reduction or waivers of civil penalties, where appropriate). The Department will also cooperate with the Small Business Administration (SBA) when a small business files a comment or complaint related to DOT's inspection authority and when requested to answer SBREFA compliance requests.

23. *No Third-Party Rights or Benefits.* This memorandum is intended to improve the internal management of the Department. As such, it is for the use of DOT personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies, officers, or any person.

Any questions concerning the implementation of this memorandum should be directed to C-30's Assistant General Counsel for Litigation and Enforcement.

cc: Chief Counsels, Acting Chief Counsels, and Assistant General Counsels