The Agency Declaratory Judgment

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This Article identifies and examines an overlooked provision of the Administrative Procedure Act that extends to administrative agencies a device analogous to the declaratory judgment. This device—the declaratory order—enables agencies to provide case-specific, non-coercive, legally binding advice to regulated entities and the public, thereby reducing regulatory uncertainty and its attendant harms. Recent changes in how the courts interpret the Administrative Procedure Act have made the declaratory order more useful and accessible to agencies while simultaneously reducing the attractiveness of other forms of non-binding agency guidance. This Article fits the declaratory order among the various policymaking forms available to agencies and comprehensively analyzes current, limited agency use of the device. It argues that agencies should accept the courts' invitation to use declaratory orders more frequently and creatively to improve the administration of federal regulatory programs.

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This Article draws extensively from an October 2015 report that I prepared as an academic consultant to the Administrative Conference of the United States, which adopted Recommendation 2015-3, *Declaratory Orders*, based on the Report. *See* Adoption of Recommendations, 80 Fed. Reg. 78,161 (Dec. 16, 2015). As part of the project, I conducted in-depth interviews with agency officials at the Federal Communications Commission (FCC), Federal Energy Regulatory Commission (FERC), Federal Maritime Commission (FMC), Internal Revenue Service (IRS), and Surface Transportation Board (STB) (a successor to the Interstate Commerce Commission (ICC), which had perhaps the most robust declaratory order practice of any agency). Thank you to these agency officials for sharing with me their time, considerable expertise, and valuable feedback.

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INTRODUCTION

Providing clarity and certainty is an enduring challenge of administrative governance, particularly in the regulatory context. Faced with uncertainty about how an agency will regulate a project or transaction, businesses and individuals may be unable or unwilling to act. The consequences for the economy, society, and technological progress can be significant and harmful. Uncertainty can also make an agency's job more difficult and expensive by reducing compliance rates and increasing the need for the agency to actively monitor regulated entities and enforce regulatory requirements. To address these and related problems, agencies routinely provide advice about how they will interpret and apply statutes and regulations.[1]

Selecting the best policymaking tool for agency advice-giving is a deceptively challenging task. An agency generally has broad

[1] *See* Hoctor v. USDA, 82 F.3d 165, 167 (7th Cir. 1996); Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 699 (D.C. Cir. 1971); Sean Croston, *The Petition in Mightier than the Sword: Rediscovering an Old Weapon in the Battle Over "Regulation through Guidance"*, 63 ADMIN. L. REV. 381, 382-84 (2011); *cf.* Samel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010) (examining the benefits and limitations of preventive adjudication in the courts).

discretion to choose among the tools that Congress has given it, and each such tool has its own advantages and disadvantages.[2] A legislative rule may provide the most reliable information about regulatory requirements to the greatest number of affected entities because it is generally applicable and has the force and effect of law.[3] The rulemaking process, however, is frequently described as "ossified" and can be too expensive and time consuming for an agency to undertake.[4] Investing agency resources in rulemaking may be particularly inappropriate if the agency seeks to address a narrow issue or to provide clarity regarding the interpretation or application of an existing regulation.[5] Adjudication may offer a better procedural vehicle

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[2] *See, e.g.*, Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. CHI. L. REV. 481 (offering a game theoretic account of how administrative agencies should choose among the different policymaking forms available to them); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (exploring the various policymaking forms available to agencies and how courts indirectly review agency choices among those forms).

[3] Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979). Defining "legal force" and is more difficult than it appears. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 475. This is one reason why the courts have struggled to articulate a clear and definite test for distinguishing between legislative and nonlegislative rules. *See infra* at note 9 and accompanying text.

[4] Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1493 (2012); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 9 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); *but see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 144 (2012) (arguing that there is relatively weak empirical evidence to suggest that ossification is a real or pervasive problem). I speak here of the "informal" or "notice-and-comment" rulemaking process, as "formal," on-the-record rulemaking is nearly extinct. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. ___, at 34 (forthcoming 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848.

[5] The rulemaking process is not thought to be ossified for the "vast majority" of rules, which "are not particularly controversial or that do not have major economic consequences." Pierce, *supra* note 4, at 1497. Even for such matters, however, the costs of the process may exceed the benefits of providing guidance. Rulemaking is also unnecessary when an agency does not wish to repeal or change an existing regulation, but only to give advice as to its meaning or application. *See* 5 U.S.C. § 551(5).

for providing fact-specific or targeted advice, but it too may require a significant investment of agency resources, which may not be worthwhile if the agency needs only to clarify a legal interpretation or policy matter.

The most obvious alternative form of agency advice-giving is the nonlegislative rule, which is often referred to as "informal guidance" and may include a wide variety of agency materials.[6] Guidance is generally easy and inexpensive to produce, as it is unencumbered by the APA's procedural requirements and can be made readily available to the public online.[7] But guidance has no legal effect: an agency cannot enforce it against regulated parties, and a regulated party cannot use it to shield itself from an enforcement action if the agency later changes its view.[8] Courts, concerned that agencies are routinely evading rulemaking requirements by issuing guidance, have in recent decades shown a greater willingness to scrutinize an agency's classification and use of guidance.[9] In these cases, agencies are much less likely to receive *Chevron* deference or enjoy a substantial likelihood of prevailing, as they do on judicial review of a notice-and-comment rulemaking or formal adjudication.[10]

When it enacted the Administrative Procedure Act (APA) in 1946, Congress included a provision designed to address these various difficulties. In Section 5(d), codified at 5 U.S.C. § 554(e), it provided that an "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."[11] A

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[6] Note, Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 788 (2010).

[7] *See* Croston, *supra* note 1, at 383-84.

[8] Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 354 (2011).

[9] *See* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000); Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 495 (2012); Jill E. Family, *Administrative Law through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 575 (2012); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Peril of the Short Cut*, 120 YALE L.J. 276, 294-96 (2010).

[10] *See* Barnett & Walker, *supra* note 4, at 33-42.

[11] 5 U.S.C. § 554(e); *see generally* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 30-34 (1941)

declaratory order may be issued in response to a petition filed with the agency or on the agency's own motion. It is well tailored to provide just the level of certainty required to overcome the deficiency of more informal kinds of guidance. This is because it is non-coercive and yet legally binds the agency and the named party, but only on the facts assumed in the order, and the agency remains free to change its position with adequate explanation in a subsequent proceeding.[12] In short, it has some legal effect. The declaratory order is a device that affords substantial administrative discretion—the agency may decline a request to institute a declaratory proceeding or to issue a particular declaratory order. An agency's decision, be it a denial of a petition or the issuance of a declaratory order, is judicially reviewable. But the scope of review is limited, and the position an agency takes in a declaratory order is typically afforded deference, both on judicial review and when relevant to matters at issue in subsequent or parallel litigation.

Among the many policymaking forms available to federal agencies, the declaratory order has been largely overlooked. Despite its apparent usefulness, agencies have demonstrated a persistent reluctance to use it. A variety of explanations have been offered to explain this reluctance, but two bear special mention. First, for many decades, the prevailing view was that the placement of the APA's declaratory orders provision within Section 5, governing formal adjudication, limited the device to that context. Under this view, an agency could not issue a declaratory order through informal adjudication or use such an order to address a matter not subject by statute to adjudication under the APA. This considerably limited the availability of the device. Second, agencies have expressed a strong disinclination to legally bind themselves, preferring to offer advice through informal, non-binding guidance that was generally immune from

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[hereinafter AG'S REPORT] (urging Congress to include the declaratory orders provision in the APA).

[12] Courts have occasionally misapprehended the nature of the declaratory order and characterized it as a form of informal guidance. *See, e.g.*, Exelon Wind 1, L.L.C. v. Nelson, 766 F.3d 380, 391-92 (5th Cir. 2014) (stating, without any citation to or acknowledgement of 5 U.S.C. § 554(e), that "[w]hile this FERC-issued document is rather impressively called a Declaratory Order, it is actually akin to an informal guidance letter").

judicial review. Over the years, scholars and other experts offered solutions to these and other sources of agency reticence and consistently urged that the use of declaratory orders should be expanded.[13] Their efforts have been largely unsuccessful.

This Article places the declaratory order among the better known policymaking forms available to agencies, evaluates the current status of declaratory practice in administration and urges that the practice should be expanded.[14] Two fairly recent developments may improve the likelihood that this project can succeed where others have failed. First, over the last two decades, the courts have clearly held that a declaratory order may be properly issued through informal adjudication. This shift removes the most significant legal hurdle to expanded agency use of declaratory orders. Second, as previously mentioned, the courts have developed a greater willingness to review agency guidance and to scrutinize an agency's characterization of a document as non-binding.[15] This judicial trend may reduce for agencies the comparative appeal of informal, non-binding guidance. Beyond these developments, there may be new opportunities for agencies to use declaratory orders in creative ways to address modern needs. For example, agencies that

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[13] *See generally* Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 ADMIN. L. REV. 1097 (2004).

[14] Although the Administrative Conference studied declaratory orders in the early 1980s, it has not previously adopted any recommendation on the subject. The Conference's consultant on the previous project, Professor Burnele V. Powell (then of the University of North Carolina School of Law), published several articles based on his study. *See* Burnele V. Powell, *Regular Appellate Review, Direct Judicial Review, and the Role of Review of the Declaratory Order: Three Roads to Judicial Review*, 40 ADMIN. L. REV. 451 (1988) [hereinafter Powell, *Three Roads*]; Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L. REV. 277 (1986) [hereinafter Powell, *Administratively Declaring Order*]; Burnele V. Powell, *Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act*, 63 N.C. L. REV. 339 (1985) [hereinafter Powell, *Sinners*]. The Conference's most recent relevant work is Recommendation 2014-6, *Petitions for Rulemaking*. *See* 79 Fed. Reg. 75,114, 75,117 (Dec. 17, 2014) [hereinafter *Petitions for Rulemaking*]; *see also* Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Final Report to the Admin. Conf. of the U.S. (Nov. 5, 2014), *available at* https://www.acus.gov/report/petitions-rulemaking-final-report.

[15] *See supra* at note 9 and accompanying text.

adjudicate a large volume of similar claims and face substantial backlogs may be able to use declaratory orders to streamline their processes.[16]

The Article proceeds in three parts. Part I analyzes the declaratory order's essential attributes, argues that the device may be used in informal adjudication, and examines the history of agency use (and non-use) of declaratory orders. Part II explores legal issues that arise in connection with judicial review of declaratory orders. These issues shed further light on the nature of the device and may also bear on its usefulness to administrative agencies. Part III catalogs the proper uses of declaratory orders, considers analogous forms of agency advice-giving, and argues that agencies should use declaratory orders more frequently and creatively to improve agency policymaking and the administration of federal regulatory statutes.

I. UNDERSTANDING DECLARATORY ORDERS

A. Agency Choice of Policymaking Form

Agencies have a variety of policymaking forms to choose from to fulfill their statutory mandates. The two most prominent policymaking forms are legislative rulemaking and adjudication. A valid legislative rule legally binds regulated parties in the same manner as a statute. Through a non-legislative rule or guidance document, an agency can offer its views to regulated parties about how an existing legal requirement will be interpreted or applied.[17] Such documents may have significant influence on conduct in the regulated industry, but they are not legally binding. In adjudication, an agency typically brings an

[16] The use of aggregate procedures can help to promote due process, increase uniformity, and ensure the presentation of diversified interests in an administrative declaratory proceeding. *See* Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication, Final Report to the Administrative Conference 10, 61, 75 (Apr. 29, 2016), https://www.acus.gov/report/aggregate-agency-adjudication-final-report.

[17] The APA speaks of "interpretative rules" and "general statements of policy." *See* 5 U.S.C. § 553(b)(A). Such documents have also been referred to as "advanced rulings." *See* Givati, *supra* note 2; *see also infra* at note 26 (explaining further that "advanced rulings" appear to include guidance documents and not declaratory orders).

administrative enforcement action against an individual whom the agency believes has violated the law.[18] The resulting order binds the party or parties named and may also have precedential effect for others. A different but related approach, with much the same end result, is for an agency to bring a judicial enforcement action in the federal courts.[19] Finally, licensing and permitting are processes through which an agency grants a regulated party permission to undertake some project or action.[20]

As this brief summary suggests, each of the policymaking forms available to federal agencies has unique characteristics and offers distinct advantages and disadvantages. Scholars have identified five characteristics that can be used to describe and differentiate each policymaking form: (1) the procedure the agency follows; (2) the legal effect of the product that emerges from that process; (3) the availability and extent (i.e., scope) of judicial review of the agency's action; (4) the timing of the agency's action (i.e., before or after the targeted conduct has occurred) and who chooses that timing; and (5) whether the agency's policy is broad or narrowly tailored to the specific characteristics and circumstances of individual regulated parties.[21]

In considering the issue of agency choice of policymaking forms, courts and commentators have predominately focused on the choice between legislative rulemaking and adjudication.[22] The key cases, including the Supreme Court's seminal decision in *Chenery II*, address this foundational choice.[23] Scholarly treatment of the issue was, until recently, similarly so focused.[24]

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[18] *See* Magill, *supra* note 2, at 1384. "Typically" because this standard description leaves out declaratory orders, which are a product of adjudication that have different and unique characteristics. *See infra* at Part I.B.

[19] Although some agencies have authority to litigate in federal court, most agencies must rely on the Department of Justice to represent them in such actions.

[20] *See* Givati, *supra* note 2, at 507-08.

[21] *See* Magill, *supra* note 2, at 1384; Givati, *supra* note 2, at 486.

[22] *See, e.g.*, Givati, *supra* note 2, at 483 ("The administrative law literature has devoted much attention to the choice between rulemaking and adjudication.).

[23] *See* SEC v. Chenery Corp., 332 U.S. 194, 1579-81 (1947). This case is known as *Chenery II* because it was the second opinion issued by the Supreme Court in the same dispute. *See* SEC v. Chenery Corp., 318 U.S. 80 (1943)

In this traditional account, legislative rulemaking and adjudication are the two primary and mutually exclusive approaches agencies can use to develop policy that has the force and effect of law. And each of these policymaking forms serves distinct purposes. A legislative rule is created through an agency-initiated notice-and-comment process that allows a wide range of interested persons to share their views with the agency.[25] The resulting rule is prospective, legally binding, and broadly applicable to all regulated parties. Affected parties ordinarily can obtain pre-enforcement judicial review of the rule and, when a challenge is brought, the courts generally grant *Chevron* deference to the agency's statutory interpretation and policy choice. In contrast, an order is created through an adjudicatory process that allows the named party or parties substantial opportunity to present detailed information to the agency, while the participation of other interested or similarly situated parties is limited by rules of intervention. The resulting order addresses conduct that has already occurred and legally binds only on the named party or parties, although it may also have some precedential value for other regulated parties. The named party or parties generally may appeal the order, although a court's review of the agency's decision is generally deferential.

If an agency wishes to develop policy that does not have the force and effect of law, it may use guidance. Guidance may be

(*Chenery I*). *See also* Ford Motor Co. v. FTC, 673 F.2d 1008 (1982); NLRB v. Bell Aerospace Co., 416 U.S. 1757 (1974); Patel v. INS, 638 F.2d 1199 (9th Cir. 1980); Morton v. Ruiz, 415 U.S. 1055 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, (1969).

[24] *See generally* Magill, *supra* note 2, at 1403-04 and n.69 (describing the "important, if now dated, literature focusing on agency choices between adjudication and rulemaking"). In a 2004 article, Professor Magill expanded the scholarly discussion to include judicial enforcement actions and guidance documents, and in a 2014 article, Professor Givati furthered the discussion to include licensing, which he characterizes as a form of guidance that regulated parties are required to seek and obtain from an agency. *See* Givati, *supra* note 2, at 483; Magill, *supra* note 2, at 1384.

[25] Interested persons may request that an agency initiate a rulemaking by filing a petition for rulemaking, but agencies generally have broad discretion as to whether to grant such requests. *See generally* Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Final Report to the Administrative Conference (Nov. 5, 2014), www.acus.gov/report/petitions-rulemaking-final-report; *see* 5 U.S.C. § 553(e).

created through any process of the agency's own design. This process may entail deliberation wholly internal to the agency, a notice-and-comment process, or anything in between. The process may be agency-initiated or initiated in response to a request from a regulated party. The resulting document is generally prospective, addressing conduct that has not yet occurred. In terms of breadth, it may be broadly applicable to all regulated entities or narrowly tailored to the circumstances of an individual person or entity. Guidance thus offers agencies wide discretion along multiple dimensions. The cost of this flexibility, however, is that the resulting document is not legally binding.

The table below summarizes the characteristics of these three policymaking forms—legislative rulemaking, adjudication, and guidance—to allow easy comparison.

Policymaking Form	**Process**	**Legal Effect**	**Judicial Review**	**Timing**	**Breadth**
Legislative Rulemaking	Notice and Comment	Binding	Reviewable; Deferential	Ex Ante; Generally Agency Initiated	Broad
Adjudication	Formal or Informal; Typically More Closed	Binding	Reviewable; Deferential	Ex Post; Generally Agency Initiated	Narrow
Guidance	Any	Non-Binding	Sometimes Reviewable; Less Deferential	Ex Ante; Agency Initiated or On Request	Broad or Narrow

In the discussion of policymaking forms, declaratory orders have escaped notice.[26] As the next section explains, a declaratory

[26] Yehonatan Givati discusses "advanced rulings" as one of the key policymaking tools available to agencies, but he does not cite 5 U.S.C. § 554(e), and all of the examples he provides appear to be what are more commonly referred to as forms of "guidance." *See* Givati, *supra* note 2, at 495, 502-08, and 511-12. The various forms of guidance the IRS provides to taxpayers, including letter rulings, are key among the examples he provides. *See id.* at 485, 511. In Part III.B., I analyze these vehicles as analogous to, but distinct from, declaratory orders.

order is a product of adjudication.[27] But analysis of the five characteristics discussed above reveals it to be a unique hybrid of rulemaking, adjudication, and guidance.

B. The Declaratory Order: A Hybrid Policymaking Form

Section 5(d) of the APA, which is codified at 5 U.S.C. § 554(e), provides that an "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."[28] Enacted in 1946 and inspired by the then-recent development of state and federal courts' being authorized to grant declaratory judgments,[29] Section 5(d) was intended to extend to administrative agencies an analogous method for issuing binding rulings capable of providing clear and certain guidance to regulated parties without requiring those parties to first act on peril of sanction.[30] As with many other aspects of administrative procedure, agency use of declaratory orders predated the APA.[31] But the practice was not widespread.[32] Congress had authorized only a few agencies to

[27] Although adjudication figures prominently in the cases and commentary on agency choice of forum, declaratory orders appear never to have been mentioned.

[28] 5 U.S.C. § 554(e).

[29] *See, e.g.*, AG'S REPORT, *supra* note 11, at 30 (discussing judicial declaratory judgments and stating that "[t]he time is ripe for introducing into administration itself an instrument similarly devised, to achieve similar results in the administrative field."); *cf.* John R. Reilly, *Declaratory Orders Under the APA – The Need for Legislation*, 52 IOWA L. REV. 657, 658 (1967) (describing the declaratory order as "the administrative counterpart of the declaratory judgment").

[30] *See, e.g.*, AG'S REPORT, *supra* note 11, at 6 (explaining that "in order to impart certainty to the administrative process, and to aid individual citizens seeking an authoritative statement of their rights and duties, the bill [that became the APA] proposes to authorize agencies to issue binding declaratory rulings").

[31] *See, e.g.*, Bernard B. Goldner, *Declaratory Actions*, 2 CATHOLIC U.L. REV. 1, 1 (1952) ("Since 1938, the Bureau of Internal Revenue has been empowered to consummate 'closing agreements,' a form of declaratory order, and other federal agencies have operated under statutes granting them power to issue advisory opinions and declaratory rulings.").

[32] *See, e.g.*, Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV.

issue declaratory rulings, and the prevailing view was that, in the absence of specific statutory authorization, an agency was "powerless to render a binding declaratory ruling."[33] The inclusion of Section 5(d) addressed this difficulty by providing a blanket authorization for adjudicating agencies to issue declaratory orders. In addition to the APA's cross-cutting authorization, Congress has occasionally granted to individual agencies more targeted statutory authority to issue declaratory orders, often to serve specified purposes.[34] In addition, courts have found support for the issuance of declaratory orders in statutes that confer broader authorities, such as that to direct "other appropriate relief."[35]

Declaratory orders (sometimes also called "declaratory rulings")[36] serve an important advice-giving function. This is evident in the APA's text, which describes declaratory orders as agency decisions that "terminate a controversy or remove uncertainty."[37] Courts have found these twin statutory purposes

193, 228 (1949) ("Federal agencies rarely issued declaratory orders before the APA was enacted, and then only pursuant to special statutory provisions.").

[33] AG'S REPORT, *supra* note 11, at 31; *see also* Herman Oliphant, *Declaratory Rulings*, 24 A.B.A. J. 7, 8 (1938) (discussing the Treasury's efforts to secure congressional approval to issue binding declarations to resolve uncertainty in taxation); *but see* Davis, *supra* note 32, at 228-29 (explaining a few qualifications necessary to the AG's assertion that agencies are generally powerless to issue declaratory orders).

[34] *See, e.g.*, Ashland Oil & Ref. Co. v. Fed. Power Comm'n, 421 F.2d 17, 20 (6th Cir. 1970) (noting that the Federal Power "Commission has statutory authority to issue declaratory orders," citing both 5 U.S.C. § 554(e) and 15 U.S.C. § 717(o)); *see generally* Roger W. Kapp & Robert N. Hart, *A Case Against Restraint: Declaratory Status Orders Under the Investment Company Act of 1940*, 61 CORNELL L. REV. 231 (1976) (examining the SEC's authority and responsibility to issue declaratory status orders under the Investment Company Act of 1940).

[35] *See Climax Molybdenum*, 703 F.2d at 452 (quoting 30 U.S.C. § 815(d)).

[36] *See* 47 C.F.R. § 1.2; *see also* Powell, *Sinners*, *supra* note 14, at 365 n. 112 ("The 'ruling' designation . . . is longstanding with the FCC.").

[37] 5 U.S.C. § 554(e); *see, e.g.*, British Caledonian Airways, Ltd. v. Civil Aeronautics Bd., 584 F.2d 982, 993 n.23 (1978) ("A declaratory order is any order issued by an agency or staff member at a sufficiently high level, that has sufficient formality, that does not coerce, and that has sufficient binding effect to be judicially reviewable."); Goldner, *supra* note 31, at 1 ("The declaratory ruling or order is the device whereby administrative agencies make decisions in advance of affirmative action so that rights and duties are declared, and affected persons can regulate their conduct and actions accordingly.").

essential to the definition of a valid declaratory order and have held (albeit in relatively rare instances) that an agency's decision is not properly characterized as a "declaratory order" if it does not serve at least one of these purposes.[38] An agency decision serves the first statutory purpose if it resolves "an actual controversy between" two parties.[39] More commonly, and as will be discussed in greater detail in Part III, agencies use declaratory orders to resolve various kinds of uncertainty regarding the application of existing statutes or regulations to new or different factual circumstances.[40] This is in accord with the expectations of the APA's supporters, as the Attorney General's final report to Congress explains:

> The perils of unanticipated sanctions and liabilities . . . should be reduced or eliminated. A major step in that direction would be the establishment of procedures by which an individual who proposed to pursue a course which might involve him in dispute with an administrative agency, might obtain from that agency, in the latter's discretion, a binding declaration concerning the consequences of the proposed action.[41]

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[38] *See* Hollister Ranch Owners' Ass'n v. FERC, 759 F.2d 898 (D.C. Cir. 1985).

[39] *See* W. Coast Truck Lines v. Am. Indus., Inc., 893 F.2d 229, 233 (9th Cir. 1990). Where the parties have come before the agency with a question that is at issue in state or federal litigation, the agency's decision may "resolve controversy" within the meaning of Section 554(e) even if it is not outcome-determinative before the courts. *See* City of Chicago v. FCC, 199 F.3d 424, 428-29 (7th Cir. 1999).

[40] *See infra* at Part. III.A; *see, e.g.*, *British Caledonian Airways*, 584 F.2d at 989 ("That some tariffs did not contain information on cancellation charges while others did, points to exactly that sort of 'uncertainty' in the interpretation of the law, by those subject to it, which declaratory orders are explicitly authorized to remove under the terms of 5 U.S.C. § 554(e).").

[41] AG'S REPORT, *supra* note 11, at 30-31.

In keeping with these intentions, agencies have used declaratory orders to clarify the regulatory status of proposed projects so as to facilitate the necessary (and often significant) financial investment to launch them,[42] to put regulated parties on notice that certain conduct will henceforth trigger sanctions or other enforcement action,[43] or to clarify the boundary between state and federal regulation.[44] As these varied purposes perhaps suggest, it is often difficult to draw a clear distinction between declaratory orders that remove uncertainty and those that terminate controversy. In many instances, the act of removing uncertainty necessarily terminates or prevents controversy.

The declaratory order is therefore best understood as a hybrid policymaking form that complements more familiar, legislative or informal approaches to agency advice giving (e.g., interpretative rules, policy statements, advisory opinions, and other forms of non-binding agency guidance).[45] The advisory opinion—an informal, non-binding form of agency guidance typically offered to help regulated parties understand how regulations will apply to them before they act—traditionally has been viewed as the immediate alternative to the declaratory order.[46] Advisory opinions are typically provided by agency staff, often orally (e.g., by phone), with little formality or delay.[47] More often than not, these opinions meet the immediate needs of both agencies and regulated parties, furnishing reliable guidance with little burden imposed upon the agency. The disadvantage of advisory opinions is that it they generally do not bind the

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[42] *See* FERC, Primary Power, LLC, Order on Petition for Declaratory Order and Related Determinations, 131 F.E.R.C. ¶ 61,015, P23 (April 13, 2010).

[43] *See* FCC v. Pacifica Found., 438 U.S. 726, 732-35 (1978).

[44] *See* State Corp. Comm'n v. FCC, 787 F.2d 1421, 1428 (10th Cir. 1986).

[45] *See, e.g.*, FERC, Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance, 123 F.E.R.C. ¶ 61,157, P19 & P20 (May 15, 2008), *available at* http://www.ferc.gov/whats-new/comm-meet/2008/051508/M-2.pdf [hereinafter FERC Interpretative Order on Guidance] (explaining how declaratory orders fit among the various mechanisms available for obtaining guidance from the Commission and its staff).

[46] *See* AG'S REPORT, *supra* note 11, at 31.

[47] *See, e.g.*, FERC Interpretative Order on Guidance, *supra* note 45, at P23, P25, P27, P28-P29, P34 (describing various, informal mechanisms available for obtaining non-binding guidance).

agency.[48] As a result, although advisory opinions can do much to resolve regulatory uncertainty, they cannot wholly or reliably eliminate it.[49]

In contrast to advisory opinions, the advantage and key characteristic of the declaratory order is that it has binding legal effect. This is grounded in APA's text, which provides that an agency may issue a declaratory order "with like effect as in the case of other orders."[50] The binding effect of a declaratory order is what allows it to offer the full measure of regulatory certainty that other forms of agency guidance cannot provide.[51]

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[48] *E.g.*, 18 C.F.R. § 388.104 (governing informal advice from Commission staff); *id.* § 385.1901(f)(6) (providing that FERC's General Counsel may provide written interpretations of the National Gas Policy Act or rules issued by the Commission thereunder, "[t]he interpretation of the General Counsel is not the interpretation of the Commission" and "is given without prejudice to the Commission's authority to consider the same or like question and to issue a declaratory order to take other action which has the effect of rescinding, revoking, or modifying the interpretation of the General Counsel"); *see also* AG'S REPORT, *supra* note 11, at 31 ("Advisory rulings are not an entirely satisfactory device, however, because they invariably carry an explicit or implicit warning that the agency is not bound by the opinion it has rendered."); Oliphant, *supra* note 33, at 8 (discussing the unfortunate fallout of an IRS decision not to adhere to the advisory opinion provided to a taxpayer in advance of a financial transaction); *but see* 42 U.S.C. § 1320a-7d(b)(4)(A) (In the context of federal anti-kickback statute, providing that "[e]ach advisory opinion issued by the Secretary [of the Department of Health and Human Services] shall be binding as to the Secretary and the party or parties requesting the opinion.").

[49] *See, e.g.*, AG'S REPORT, *supra* note 11, at 31 (explaining that, because they are not binding, "advisory rulings do not entirely eliminate, though they materially reduce, the element of uncertainty").

[50] 5 U.S.C. § 554(e); *see* Bernard Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U. L. REV. 1173, 1213 (1954). The APA defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). The APA's definition of an "adjudication" as an "agency process for the formulation of an order" is therefore a catchall category for non-rulemaking actions, including declaratory orders. *Id.* § 551(7). Finally, the APA describes "final opinions, including concurring and dissenting opinions," along with "orders," as products of adjudication. *Id.* § 552(a)(2)(A).

[51] *See, e.g.*, AG'S REPORT, *supra* note 11, at 31 ("Greater certainty [beyond that provided by advisory rulings] can be achieved only by attaching to the ruling the same binding effect upon the agency that is attributed to other

The binding effect of a declaratory order is naturally limited by the nature of the device. First, because declaratory orders "are only as effective as other adjudicatory orders, they are not binding upon nonparties."[52] Only the agency and the named party (or parties) are bound by the action.[53] While the named party is often an individual regulated person or entity who petitioned for the declaration, an agency may also issue an order that applies to all similarly situated regulated parties, provided that such breadth is reasonable within the context of the agency's statutory authority and the nature of the controversy or other issue the order is designed to address.[54] Second, whether directed towards one or more regulated parties, a declaratory order's binding effect is non-coercive.[55] That is, it provides a declaration that is legally binding without itself imposing a penalty, sanction, or other liability. The non-coercive character of the declaratory

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adjudications."); *but see Exelon Wind 1*, 766 F. 3d at 391 (mischaracterizing a declaratory order as merely informal guidance).

[52] New England Tel. & Tel. Co. v. Pub. Utils. Comm'n, 565 F. Supp. 949, 959 n.15 (D. Me. 1983) (internal citation omitted).

[53] *But see* Frederick F. Blachly & Miriam E. Oatman, 34 GEO. L.J. 407, 418 (1946) ("The determination made for one individual would in reality be a general determination, since the declaratory order is to have 'like effect as in the case of other orders,' that is, the force of law.").

[54] *See, e.g.*, Merchs. Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 916 (5th Cir. 1993) (upholding an ICC declaratory order that "applies to all shippers who can demonstrate that their shipping patterns match the general patterns assumed in the order"). If an agency is contemplating the issuance of a broadly applicable declaratory order, it may need to take steps to ensure that all interested parties have an opportunity to comment or otherwise participate in the proceedings. This can be accomplished through basic notice-and-comment procedures. *See* City of Arlington v. FCC, 668 F.3d 229, 242-43 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013).

[55] *See, e.g.*, Robert John Hickey, *Declaratory Orders and the National Labor Relations Board*, 45 NOTRE DAME LAW. 89, 89 (1969) (defining a declaratory order as "a noncoercive, definite, binding, and reviewable adjudication declaring actual, present, substantive rights of adverse parties on a question of law"); Note, *Administrative Declaratory Orders*, 13 STAN. L. REV. 307, 307 (1961) (explaining that declaratory orders "are noncoercive declarations of rights rather than orders imposing penalties or liabilities" (citing 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 at 268 (1958)); *see generally* 5 U.S.C. § 551(10) (defining "sanction"). As Professor Davis explained: "The only difference between declaratory orders or judgments and other orders and judgments is presence or absence of the element of coercion." 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 at 268 (1958)).

order is essential—without it, the device would not operate effectively as voluntary mechanism through which regulated parties may seek and obtain a binding declaration of the law without first acting *in peril of sanction*.[56] A third important limitation is that a declaratory order is binding only in the factual circumstances on which it is based.[57] A regulated party that has requested and received a declaratory order based on certain facts will not be able to use the order to shield itself in a subsequent state or federal enforcement proceeding based on different facts.[58] Finally, like judicial opinions, agency declaratory orders may have precedential value that exceeds their binding effect.[59] Agency personnel and regulated parties not subject to an order may nonetheless refer to it for reliable guidance. In some cases, courts may even rely upon an administrative declaratory order to

[56] *See* Walter Gellhorn, *Declaratory Rulings by Federal Agencies*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 155 (1942). An agency may, of course, issue a coercive order in a later proceeding on the authority of the previously issued declaratory order. This may occur if the party to the declaratory order is later found in noncompliance without having successfully challenged the declaration on appeal. Or the agency may rely on the declaratory order as precedent in a proceeding against a third party found in noncompliance. Another advantage of a declaratory order, in contrast to a coercive action such as a cease-and-desist order, is that it "may be either affirmative or negative, whereas the cease-and-desist order is necessarily negative." Davis, *supra* note 32, at 203. The advantage of a negative use of a declaratory order is that an agency may use it to disapprove of a party's proposed action before imposing a sanction or requiring the party to act in peril of sanction.

[57] *See* Texas v. United States, 866 F.2d 1546, 1551 (5th Cir. 1989); *see also* Central Freight Lines v. ICC, 899 F.2d 413, 417 (5th Cir. 1990) ("[T]he order in this case settles rights and removes uncertainty in that it allows [the named freight carrier] to rely on its interstate certificate as authorization for its actions so long as its operations conform to the facts it presented to the ICC and which the ICC assumed in the declaratory order.").

[58] *See, e.g.*, *Merchs. Fast Motor Lines, Inc.*, 5 F.3d at 918 ("The [declaratory] order would not insulate the [regulated parties] from a state regulatory proceeding if facts are presented which are different from those assumed in the declaratory order."); *Central Freight Lines*, 899 F.2d at 418 ("[T]he ICC's order in this case would not insulate the carrier from a state law regulatory proceeding if facts were proved that were different from those supposed by the order.").

[59] *See, e.g.*, Radiofone, Inc. v. FCC, 759 F.2d 936, 938 (D.C. Cir. 1985) (discussing the precedential value of a declaratory order).

resolve a dispute between private parties who were not party to the agency's adjudication.[60]

It bears emphasizing that the binding effect of a declaratory order does not prevent an agency from adopting a different interpretation or pursuing a different policy in a subsequent proceeding, including through another declaratory order or in an enforcement proceeding or other adjudication.[61] This is so even if the agency has successfully defended its first interpretation in the federal courts.[62] After all, as the D.C. Circuit has observed, "an ambiguous or broadly worded statute may admit of more than one interpretation that is reasonable and consistent with Congressional intent."[63] As in rulemaking, an agency is permitted to change its position on an issue so long as it explains the decision and the new interpretation is reasonable and permissible in light of the relevant statutory language.[64]

Finally, in the absence of any manifest injustice, a declaratory order may have retroactive effect. "The general principle is that when as an incident of its adjudicatory function an agency

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[60] *See, e.g.*, Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 87 F. Supp. 2d 820, 828-31 (S.D. Ohio 2000) (giving *Chevron* deference to an ICC declaratory order and relying on the precedential value of that order to resolve the case before it).

[61] *See* Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1076 (D.C. Cir. 1987) (en banc); *see also Central Freight Lines*, 899 F.2d at 417 (affirming an ICC declaratory order in which "[t]o reach [its] conclusion, the ICC found it necessary to overrule an earlier decision").

[62] *See, e.g.*, *Clark-Cowlitz*, 826 F.2d at 1080-81 ("[A]s to claim preclusion, FERC's successfully defending its position (at that time) in [an appeal from its previous declaratory order] does not bar it from asserting a different position in the current proceedings.").

[63] *Clark-Cowlitz*, 826 F.2d at 1081.

[64] *See, e.g.*, *Central Freight Lines*, 899 F.2d at 423-26 (upholding an agency declaratory order that adequately explained its decision to overrule prior agency precedent to establish a new interpretation of the agency's statute); *Clark-Cowlitz*, 826 F.2d at 1079-80 (affirming agency reversal of position that was reasonable and properly explained); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009) (holding that an agency's decision to reverse its position must be adequately explained, but is subject to no more searching review than was its initial decision); Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (holding that *Chevron* applies to an agency's interpretation of an ambiguous statutory term, even if a court has previously interpreted that term).

interprets a statute, it may apply the new interpretation in the proceeding before it."[65] This general principle applies so long as the retrospective application of the agency's new interpretation will work no manifest injustice. The D.C. Circuit has articulated "a non-exhaustive list of five factors" used to evaluate a claim of manifest injustice. These factors include:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[66]

Although the courts "have generally shown little or no deference to agencies' rejection of claims that retroactivity produced manifest injustice," they "have been quite deferential to decisions regarding the retroactive effect of agency action where retroactivity would not work a manifest injustice."[67] Moreover, the fact that an agency's decision resolves some uncertainty in the law (as declaratory orders often do) does not ordinarily suggest any manifest injustice in that decision's retroactive application.[68]

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[65] *Clark-Cowlitz*, 826 F.2d at 1081 (citing NLRB v. Wyman-Gordon, 394 U.S. 759, 765-66 (1969)); *but see Clark-Cowlitz*, 826 F.2d at 1093 (Mikva, J., dissenting) ("There is no such general principle under the law.").

[66] Retail, Wholesale & Dept. Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); *see also Clark-Cowlitz*, 826 F.2d at 1081-86 (using the *Retail, Wholesale* factors to evaluate (and ultimately reject) a claim that FERC's retrospective application of a new interpretation worked a manifest injustice).

[67] Qwest Servs. Corp. v. FCC, 509 F.3d 531, 539 (D.C. Cir. 2007).

[68] *Id.* at 540.

In sum, an administrative declaratory order may be defined as an agency (1) order, produced through adjudication, (2) that resolves uncertainty or terminates controversy (3) without imposing sanctions by (4) binding the agency and the named party or parties (5) on the facts stated (6) and with optional retroactive effect, in the absence of any manifest injustice, (7) providing guidance to agency personnel, other regulated parties, courts, and the public through its precedential effect.

C. Formal vs. Informal Adjudication

The text of the APA suggests another possible characteristic of the declaratory order: it is necessarily a creature of formal adjudication.[69] If so, two significant consequences might follow. First, agencies might only be able to issue declaratory orders to address matters that are required by statute to be conducted in accordance with the APA's formal adjudication provisions.[70] Second, an agency might be required to conduct a hearing on the record before it could issue a declaratory order.[71]

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[69] "Formal adjudication" is routinely used as a term of art to refer to adjudications conducted in accord with the APA's adjudication provisions, 5 U.S.C. §§ 554, 556, and 557. *See, e.g.*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES OFFICE OF THE CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 5 (Mar. 31, 2014) [hereinafter EEOC REPORT], *available at* https://www.acus.gov/research-projects/status-and-placement-agency-adjudicators. In contrast, "informal adjudications" are those not required by statute to be conducted in accord with these provisions of the APA. The terminology leaves something to be desired, because many so-called "informal" adjudications are voluntarily conducted using judicialized procedures that look much like those mandated by the APA. Some, including Professor Michael Asimow in his work for the Administrative Conference, accordingly eschew the usual terminology. *See* Admin. Conf. of the U.S., Federal Administrative Adjudication, https://www.acus.gov/research-projects/federal-administrative-adjudication. For the sake of simplicity, however, this report will use the terms "formal" and "informal" in their traditional senses.

[70] *See* 5 U.S.C. § 554(a)(1) (providing that Section 554 applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," with six enumerated exceptions).

[71] *See* Wilson v. A.H. Belo Corp., 87 F.3d 393, 397 (1996).

Historically, the dominant view held that the APA's declaratory orders provision applied only in the context of formal adjudications. The legislative history strongly suggests that the drafters intended to so limit the availability of the device.[72] Consistent with this suggestion, the AG's Manual, which was produced immediately after the APA's adoption, explained that the APA's "grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined 'on the record after opportunity for an agency hearing.'"[73] On this view, if no statute requires formal adjudication, or the matter is one exempted from the APA's formal adjudication provisions, Section 5(d)'s grant of authority to issue declaratory orders is unavailable to the agency.[74] As an example, the AG's Manual explained that the new provision did not authorize the SEC to issue declaratory orders in lieu of informal advisory opinions "as to whether particular securities must be registered under the Securities Act" because there was "no statutory agency hearing procedure in which this question can be determined."[75] For decades following the APA's adoption, scholars and experts generally also interpreted the statute to limit the issuance of declaratory orders to formal adjudications.[76]

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[72] *See, e.g.*, S. DOC. NO. 248, 79th Cong., 2d Sess. 204 (1946) (stating that declaratory orders under § 5(d) "may be issued only where the agency is empowered by statute to hold hearings and the subject is not expressly exempted by the introductory clauses of this section").

[73] Tom C. Clark, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 59 (1947), *available at* http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf [hereinafter AG'S MANUAL].

[74] *See id.*; *see also* 5 U.S.C. §§ 554(a)(1)-(6) (enumerating exceptions to the APA's formal adjudication requirements).

[75] AG'S MANUAL, *supra* note 73, at 59.

[76] *See* Powell, *Administratively Declaring Order*, *supra* note 14, at 279; Hickey, *supra* note 55, at 90; *Administrative Declaratory Orders*, *supra* note 55, at 311-12; TASK FORCE ON LEGAL SERVICES AND PROCEDURE OF THE HOOVER COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 189 (1955) [hereinafter HOOVER COMMISSION REPORT]; Goldner, *supra* note 31, at 8; *but see* Davis, *supra* note 32, at 230-32 (arguing that the apparent textual limitations on the use of declaratory orders "have little rational foundation and are probably

This historical view has since been abandoned. Courts have held that agencies may issue declaratory orders in informal adjudicatory proceedings, to address matters not subject to formal adjudication under the APA and without first conducting a hearing on the record.[77] The Supreme Court's decision in *Weinberger v. Hynson, Westcott & Dunning*[78] paved the way for this approach. In *Weinberger*, the Court rejected an argument that the Food and Drug Administration could not issue a declaratory order to address a matter that the parties argued was susceptible of resolution "only in a court proceeding where there is an adjudication 'on the record of [a] hearing.'"[79] Concluding that the APA "does not place administrative proceedings in that straitjacket," the Court reasoned that "paralysis would result if case-by-case battles in the courts were the only way [for an agency] to protect the public."[80] Subsequent courts have read *Weinberger* more expansively to mean that agencies may issue declaratory orders under 5 U.S.C. § 554(e) through informal adjudication.[81] Scholars who have addressed the issue in more recent times have similarly interpreted the APA.[82]

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the product of inadvertence" and concluding that an agency's authority to issue a declaratory order in informal adjudication "in spite of the introductory clause of § 5 is consistent with statutory language, is supported by legislative history, and is impelled by practical needs").

[77] Another way that agencies may lawfully streamline adjudication is by using summary decision procedures. *See* Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

[78] 412 U.S. 609 (1973).

[79] *Id.* at 625-26.

[80] *Id.* at 626. The Court further observed that "great inequities might well result" if the FDA was required to proceed individually as "competitors selling drugs in the same category would go scot-free until the tedious and laborious procedures of litigation reached them." *Id.*

[81] *See* Am. Airlines, Inc. v. DOT, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson*, 87 F.3d at 397; *Texas*, 866 F.2d at 1555. Some opinions, however, seem to still to imply (typically without analysis) that the APA's grant of authority to issue declaratory orders is limited to matters required by statute to be adjudicated in accord with the APA's formal adjudication provisions. *See, e.g.*, *Arctic Express*, 87 F. Supp. 2d at 828 n.11 (quoting 5 U.S.C. § 554(e) in conjunction with 5 U.S.C. § 554(a)).

[82] *See* Lubbers & Morant, *supra* note 13, at 1112-14.

Although it appears to be well settled, this modern interpretation of the APA is questionable. First, the Supreme Court's discussion in *Weinberger* is extremely brief and does not adequately explain why the historical interpretation of 5 U.S.C. § 554(e) ought to be abandoned. This may because the Court was principally concerned with the question of whether an agency may issue a declaratory order without first conducting a full hearing on the record, as required by statute.[83] And yet later courts have cited the case—also with minimal discussion—to support the rather different proposition that an agency may issue a declaratory order through informal adjudicatory procedures or to address a matter not subject to formal adjudication under the APA.[84] A second difficulty is that there is some indication in the caselaw that the courts, like most federal agencies, are unfamiliar with the declaratory order and have overlooked the provision of the APA that creates the device. For example, in granting *Chevron* deference to and upholding the FCC's declaratory ruling in in *National Cable & Telecommunications Association v. Brand X Internet Services*, the Court erroneously described the agency's action as a "rulemaking proceeding."[85] In the more recent decision of *City of Arlington v. FCC*, the Court demonstrated a similar inattentiveness to the nature of the declaratory ruling under review and the statutory authority under which it was issued.[86] Other courts have also demonstrated a lack of awareness and understanding of the declaratory order.[87]

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[83] *See Weinberger*, 412 U.S. at 625-26.

[84] *See* Am. Airlines, Inc. v. DOT, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson*, 87 F.3d at 397; *Texas*, 866 F.2d at 1555.

[85] 545 U.S. at 977. The opinions do not cite 5 U.S.C. § 554(e) and contain no indication that the justices understood that the FCC's action was taken under that provision.

[86] *See, e.g.*, 133 S. Ct. at 1874 ("It suffices to decide this case that the preconditions to deference under Chevron are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."). Once again, none of the opinions in the case cite 5 U.S.C. § 554(e). To its credit, the Fifth Circuit understood the nature of the FCC's action, although it questioned the propriety of the FCC's choice of policymaking form. *See City of Arlington*, 668 F.3d at 240-46.

[87] *See Exelon Wind*, 766 F.3d at 391-92 (5th Cir. 2014).

Nonetheless, the modern interpretation of 5 U.S.C. § 554(e) is in accord with prevailing background principles of administrative law that recognize substantial agency discretion over procedural matters.[88] One such principle holds that "[a]gencies have discretion to choose between adjudication and rulemaking as a means of setting policy."[89] At a more granular level, agencies also have substantial discretion to define the procedures they will use to conduct specific kinds of proceedings.[90] This discretion is limited only by the requirement that agencies observe the minimum (and minimal) requirements imposed by the APA and the Constitution's guarantee of due process. The broad scope of agency procedural discretion is especially impactful in informal adjudication, perhaps in part because the APA does not establish minimum procedural requirements for informal adjudication, as it does for informal rulemaking.[91] Here, the consequence of agency discretion is

[88] Whether this prevailing approach is consistent with the original convention reached upon the adoption of the APA is a question well worth of consideration, but beyond the scope of this article. *Cf. Thomas W. Merrill. & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

[89] *Am. Airlines*, 202 F.2d at 797 (citing NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 294 (1974)); *see also* Cent. Texas Tel. Coop., Inc. v. FCC, 402 F.3d 205, (D.C. Cir. 2005) (applying this principle to FCC's use of declaratory ruling); *British Caledonian Airways*, 584 F.2d at 987; British Caledonian Airways, Ltd. v. Civil Aeronautics Bd., 584 F.2d 982 (1978) (explaining that "[w]hile rulemaking might well be advisable, or even required, when mandating the filing of information not plainly within the comprehension of extant statutes and regulations, the Board was well within the bounds of procedural propriety in using a declaratory order" to clarify filing requirements (citing Yale Broad. Co. v. FCC, 478 F.2d 594, 599-601 (1973))).

[90] *E.g.*, Climax Molbdenum Co. v. Sec'y of Labor, 703 F.2d 447, 451 (10th Cir. 1983) ("[A]dministrative agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules." (citing Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970))).

[91] *Compare* 5 U.S.C. § 553 (establishing minimum procedures for informal rulemaking without requiring observance of the hearing requirements of §§ 556 and 557), *with id.* § 554 (establishing minimum procedures for adjudications formally conducted in accord with §§ 556 and 557; *see also, e.g.*, Occidental Petroleum Corp. v. Sec. & Exch. Comm'n, 873 F.2d 325, 337 (D.C. Cir. 1989) (explaining that "no provision of the APA contains specific procedures to govern an informal agency adjudication").

extraordinary diversity among the procedures employed in the many informal adjudication programs that exist throughout the federal government.[92] More importantly, according to this view, the APA's express grant to agencies of authority to issue declaratory orders in *formal* adjudications need not be read—and has not been read—to prevent agencies from using their otherwise broad procedural discretion to use declaratory orders in *informal* adjudications.[93] In keeping with this approach, the D.C. Circuit has implied that an agency's authority to issue a declaratory order in informal adjudication may be grounded in its own regulations, even if there is some doubt regarding the applicability of Section 5(d) to the proceeding at issue.[94]

D. History of Agency Use of Declaratory Orders

Although the APA's declaratory orders provision was intended to have a substantial effect on administrative practice, agencies historically have made little use of it.[95] Studies conducted in the 1950s revealed minimal use of the then-recent grant of authority.[96] In 1955, the Hoover Commission's Task Force on Legal Services and Procedure described agency use of declaratory orders as "negligible."[97] A contemporaneous study by the House Committee on Government Operations found that "[o]ut of 38 agencies engaged in adjudicative activities, only 7 acknowledged that they had issued declaratory orders under the APA."[98] By the early 1960s, only two agencies had adopted

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[92] *See* Federal Administrative Adjudication, *available at* https://www.acus.gov/research-projects/federal-administrative-adjudication (cataloging the diverse array of informal adjudicator procedures created and employed by agencies).

[93] *Cf.* EEOC REPORT, *supra* note 69, at 23-32 (arguing that the mandatory use of administrative law judges (ALJs) in formal adjudication implies no restriction on agency discretion to voluntarily appoint ALJs to preside in informal adjudications).

[94] *See Cent. Texas Tel. Coop.*, 402 F.3d at 210.

[95] *See* Schwartz, *supra* note 50, at 1212-13.

[96] *See* Goldner, *supra* note 31, at 10-15; *see also* Reilly, *supra* note 29, at 659 ("The history of the past twenty years demonstrates that the declaratory order has been largely ignored by our administrative agencies.").

[97] HOOVER COMMISSION REPORT, *supra* note 76, at 188-89 (1955).

[98] Reilly, *supra* note 29, at 659 (citing WALTER GELLHORN & CLARK BYSE, CASES ON ADMINISTRATIVE LAW 701-02 (4th ed. 1960)).

procedural regulations governing the issuance of declaratory orders.[99] As of the end of that same decade, one additional agency had followed suit.[100]

Limited agency use of declaratory orders persisted well beyond the APA's infancy. In 1968, an American Bar Association subcommittee reported that only two surveyed agencies (the Federal Power Commission (FPC) and the FMC) had adopted procedural rules for issuing "declaratory orders,"[101] while a third agency (the FCC) had adopted procedural rules for issuing "declaratory rulings."[102] The subcommittee concluded that, despite the apparent usefulness of declaratory orders, "neither the agencies nor the practicing bar are availing themselves of the declaratory order procedures presently available to the degree expected when the project was undertaken."[103] Only 43 petitions for declaratory order were filed with the FPC between 1946 and 1966, and "11 of these were filed in 1966."[104] The practice before the FMC was even more limited, with only four petitions for declaratory order docketed between 1961 and 1966.[105] The FCC's use of "declaratory rulings" was also limited to "only a dozen or so instances" in the 1950s and "a mere 'handful' in the early

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[99] Reilly, *supra* note 29, at 659 (citing DELMAS H. NELSON, ADMINISTRATIVE AGENCIES OF THE USA: THEIR DECISIONS AND AUTHORITY 76-77 (1964)).

[100] *See* Reilly, *supra* note 29, at 659-60

[101] *See* Comment, *Declaratory Orders – Uncertain Tools to Remove Uncertainty*, 21 ADMIN. L. REV. 257, 257, 258 (1969) [hereinafter *Uncertain Tools*]. The report, which was prepared by the Subcommittee on Declaratory Orders of the Administrative Process Committee of the American Bar Association's Administrative Law Section, surveyed the use of declaratory orders by the ICC, FPC, Federal Trade Commission, Securities and Exchange Commission, FCC, FMC, and Food and Drug Administration. *See id.* at 257.

[102] The report expressed skepticism about the accuracy of the FCC's position that "declaratory rulings" and "declaratory orders" are synonymous. *See id.* at 258 (noting that "a recent Court of Appeals decision has cast considerable doubt upon [the FCC's] attempted analogy"). It is interesting that this terminological issue created such controversy given that the FCC was not the first to refer to the "declaratory ruling." *See* AG'S REPORT, *supra* note 11, at 30. The FCC has continued to use the "declaratory ruling" terminology to the present day, and the courts have concluded that, despite the differing terminology, such rulings qualify as adjudicatory orders. *See City of Arlington*, 668 F.3d at 241.

[103] *Uncertain Tools*, *supra* note 101, at 263.

[104] *Id.* at 259.

[105] *Id.* at 260.

1960s."[106] More recent studies conducted since that time suggest ongoing and pervasive administrative indifference to declaratory orders.[107]

At least two of the explanations that have been offered to explain this indifference were grounded in interpretations of the APA that no longer prevail.[108] First, and as discussed in the previous section, the inclusion of the declaratory orders provision in the APA's formal adjudication provision was long viewed as a significant limitation on the availability of the device.[109] Although the courts began to move away from this interpretation in the 1970s, it appears to have continued to hold sway within the bar until at least the 1980s. More recently, however, the courts' position has become clearer, and expert opinion appears to have evolved accordingly.[110] As discussed in greater detail in Part III.A., below, the few agencies that have a robust declaratory orders practice often use these orders to address matters not subject to mandatory formal adjudication under the APA. Second, some have placed blame on the statute's language authorizing an agency "in its sound discretion" to issue a declaratory order,[111] which suggests the possibility of an agency exercising its discretion *not* to issue a declaratory order.[112] Initially, the courts held that such a negative exercise of discretion was unreviewable, a remedy that may have emboldened agencies in their disinclination to use declaratory

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[106] *Id.* at 260-61. The survey of the FCC was published separately and provides greater detail. *See* Arthur Stambler, *the Declaratory Order at the Federal Communications Commission*, 21 FED. COMM. B.J. 123 (1967).

[107] *See* Powell, *Sinners*, *supra* note 14, at 344, 372.

[108] *E.g.*, Reilly, *supra* note 29, at 660 ("Blame for the ineffectiveness of section 5(d) has, at times, been primarily assigned to the agencies intended to utilize its provisions. It is more accurate, however, to state that fault lies as heavily with the authors of the provision as it does with the agencies." (internal footnotes omitted)).

[109] *See supra* at Part. I.B.

[110] *See City of Arlington*, 668 F.3d at 241; Lubbers & Morant, *supra* note 13, at 1112.

[111] 5 U.S.C. § 554(e).

[112] *See, e.g.*, Schwartz, *supra* note 50, at 1213 ("arguing that the minimal use of declaratory orders 'has been due primarily to the fact that under Section 5(d) the question of whether a declaratory order should be issued in a particular case is left to the discretion of the agency concerned.'").

orders. As discussed below, however, this interpretation was short-lived and is no longer good law.[113]

Other explanations for the modest effect of Section 5(d) have been grounded not in law but in practical considerations. Although enthusiasm for declaratory orders appears to have been widespread over the years,[114] a minority of experts has been deeply skeptical of the usefulness of declaratory orders in the administrative context.[115] For example, two scholars at the Brookings Institution, writing just before the APA's enactment, argued that the declaratory order "seems inapplicable to all controversies settled by administrative action" and "would be fraught with many dangers."[116] A more commonly expressed concern has been that a more receptive attitude towards declaratory orders (and petitions therefor) might result in a flood of requests that would impose a significant burden on agencies and undermine their ability to establish their own priorities and determine how best to use limited available resources.[117] Perhaps out of a desire to discourage petitions for declaratory order, most agencies have not adopted procedures governing declaratory proceedings.[118] The private sector also apparently has been reluctant to request declaratory relief from administrative

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[113] *See infra* at Part II.A.

[114] *See, e.g.*, Gellhorn, *supra* note 56, at 155 ("There is a clear need for a [declaratory] device within the administrative process, which in many of its branches is even more dynamic and more comprehensive, and therefore a source of even more uncertainty, than the law of the judicial process."); *see also infra* at note 121 and accompanying text (discussing the substantial support over the years for expanded agency use of declaratory orders).

[115] *See* Blachly & Oatman, *supra* note 53, at 417-21; *see also* Powell, *Sinners*, *supra* note 14, at 345 (noting that some have objected to declaratory orders in administrative adjudication because of "the alleged lack of concreteness that would attend agency attempts to resolve disputes prior to the point at which the application of agency compliance sanctions would be appropriate").

[116] Blachly & Oatman, *supra* note 53, at 418.

[117] *See, e.g.*, *id.* at 419 (arguing that "administrative authorities might well be so beset with requests for declarations as to seriously interfere with their work"). This same concern arises in connection with petitions for rulemaking. *See* Schwartz & Revesz, *supra* note 14, at 61.

[118] *See, e.g.*, Powell, *Sinners*, *supra* note 14, at 372 ("The procedure is under-utilized as a result of the continuing failure of most federal agencies to adopt explicit implementing regulations.").

agencies.[119] Finally, it has been persuasively argued that the ability to provide regulatory guidance through non-binding documents not subject to judicial review has simply offered a comparatively more attractive alternative to the declaratory order.[120]

Scholars, government officials, and other experts have consistently argued that agencies should expand the use of declaratory orders, and some of the more formidable obstacles to achieving that goal have been removed over the years.[121] The courts have moved away from interpreting the APA to limit declaratory orders to formal adjudication and no longer deem absolute the agencies' discretion to refuse requests for declaratory relief.[122] In addition, in recent decades, courts have demonstrated a greater willingness to review other forms of non-binding regulatory guidance.[123] Concerned about agency avoidance of the increasingly ossified rulemaking process, courts are more likely now to scrutinize an agency's characterization of a document as guidance or an interpretative rule exempt from

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[119] *See, e.g.*, Goldner, *supra* note 31, at 10 (noting that "the businessmen and other individuals who should request the[] issuance" of declaratory orders "are slow to adopt this form of procedure"). It is hard to say why the private sector has historically given declaratory orders such a cold reception. One explanation may be reluctance to try a new, untested procedure in lieu of the established methods of conducting business with the agency. The agencies' general failure to adopt procedural regulations governing declaratory proceedings may have rendered the device obscure (and thus unnoticed by the private bar) or may have given regulated parties the impression that petitions for declaratory order would be unwelcome or ineffective and thus a waste of time and resources.

[120] *See* Powell, *Sinners*, *supra* note 14, at 353-56; *cf* Goldner, *supra* note 31, at 15 ("The underlying, recurrent theme of the letters received by the author [from federal agencies] is that the agencies who determine private rights are loath to issue a ruling which binds them conclusively.").

[121] *See, e.g.*, Lubbers & Morant, *supra* note 13, at 1100 (urging increased agency use of declaratory orders); HOOVER COMMISSION REPORT, *supra* note 76, at 187 ("Agencies should make greater use of declaratory orders, advisory opinions, and other shortened procedures."); Gellhorn, *supra* note 56, at 159 (arguing that inclusion of the declaratory orders provision in the APA "should prove extremely valuable").

[122] *See supra* at Part I.B.

[123] *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that an EPA guidance document was final agency action subject to judicial review).

the APA's notice-and-comment requirements.[124] The question of how to distinguish between legislative rules and non-legislative rules or other non-binding guidance is exceptionally difficult and a matter subject to much debate.[125] The Supreme Court recently declined an opportunity to provide some clarity on this matter.[126]

Despite all this, modern administrative practice has changed little: declaratory orders remain underused. As Part III details, there are still relatively few agencies that issue declaratory orders or have regulations establishing procedures for conducting declaratory proceedings.[127] Before turning to that discussion, however, some consideration of the issues that arise in connection with judicial review of administrative declaratory orders is in order.

II. JUDICIAL REVIEW AND RELATED LEGAL CONSIDERATIONS

This part examines the legal issues that arise in connection with judicial review of declaratory orders. Rather than providing an exhaustive analysis of judicial precedent, it focuses on the issues that may be most relevant from the perspective of an agency that is considering whether, how, and in what circumstances to use declaratory orders. The first section begins by discussing the judicial reviewability of declaratory orders and agency refusals to institute declaratory order proceedings, including by addressing the limitations on collateral challenges to declaratory orders.[128] The second section explains that, although the case and controversy requirement of Article III does not restrict an agency's authority to issue a declaratory order, it

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[124] *See, e.g.*, *id.* at 1020 (expressing concern that agencies are increasingly shifting to the use of guidance documents as a way of avoiding the rulemaking process and evading judicial review); *see generally* Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

[125] *See generally* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004); Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000).

[126] *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

[127] *See infra* at Part III.

[128] *See infra* at Part II.A.

may impede a court's ability to judicially review the order.[129] This section also considers conceptually related issues that may affect (legally or prudentially) an agency's issuance of a declaratory order. The third and final section concludes by surveying the substantially deferential standards that courts apply in judicial review of declaratory orders.[130]

A. Direct Review and Collateral Challenge

Generally speaking, declaratory orders are final agency action subject to judicial review.[131] As the Supreme Court explained in *Bennett v. Spear*, two conditions must be met in order for agency action to qualify as "final" and subject to judicial review.[132] First, the action "must not be of a merely tentative or interlocutory nature,"[133] but rather "must mark the 'consummation' of the agency's decisionmaking process."[134] Second, the agency's "action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[135] As the case law demonstrates, this test is usually satisfied by an agency's issuance of a declaratory order.[136] That result is consistent with the intentions of the APA's supporters, who viewed the availability of judicial review as a necessary corollary of the binding legal effect of a declaratory order.[137]

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[129] *See infra* at Part II.B.

[130] *See infra* at Part II.C.

[131] *See* 5 U.S.C. § 704; *see, e.g.*, *Weinberger*, 412 U.S. at 627 (holding that a declaratory order is judicially reviewable under the APA (citing Frozen Foods Express v. United States, 351 U.S. 40 (1956))).

[132] 520 U.S. 154 (1997).

[133] *Bennett*, 520 U.S. at 178; *see also* Intercity Transp. Co. v. United States, 737 F.2d 103, 106 (D.C. Cir. 1984) (holding that an ICC declaratory order was final agency action subject to judicial review).

[134] *Bennett*, 520 U.S. at 177-78 (quoting Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 113 (1948)).

[135] *Bennett*, 520 U.S. at 178 (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

[136] *See, e.g.*, *Central Freight Lines*, 899 F.2d at 418 ("[B]ecause the ICC's order both settles rights and touches vital interests of carriers, this court has jurisdiction to review the order."); *W. Coast Truck Lines*, 893 F.2d at 233-234 (holding that an ICC declaratory order was final agency action subject to judicial review). There have been rare instances in which courts have held declaratory orders unreviewable. *See infra* at Part II.B.

[137] *See* AG'S REPORT, *supra* note 11, at 33.

An agency's denial of a petition for a declaratory order or other refusal to institute a declaratory proceeding also typically qualifies as final agency action subject to judicial review.[138] This principle, now well established, was initially questioned because 5 U.S.C. § 554(e) authorizes agencies to issue declaratory orders in their "sound discretion."[139] When first presented with the question, courts interpreted this language to mean that the decision whether to issue a declaratory order was committed to agency discretion by law and was therefore unreviewable.[140] That approach, however, was much criticized and did not survive.[141] Today, courts read the statute's reference to "*sound* discretion" as an indication that an agency's refusal to issue a declaratory order is, at least to some extent, reviewable.[142]

Declaratory orders may also come before the courts collaterally, when a court is called upon to interpret or apply an agency's statute or regulation to resolve a dispute between two private parties or review a state or local regulator's enforcement action.[143] In some cases, a declaratory order may become relevant to matters at issue in later litigation between private parties, in which case the order may have preclusive effect.[144] In other instances, a declaratory order may offer a useful procedural vehicle for an agency to answer a question that first arises in litigation and is then referred to the agency by the court. Such referrals are typically made under the doctrine of primary

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[138] *See Intercity*, 737 F.2d at 106-107.

[139] 5 U.S.C. § 554(e).

[140] *See* United Gas Pipeline Co. v. Fed. Power Comm'n, 203 F.2d 78 (5th Cir. 1953); *see also* 5 U.S.C. § 701(a)(2) (exempting from judicial review "agency action [that] is committed to agency discretion by law").

[141] *See Intercity*, 737 F.2d at 106-07; *see, e.g.*, Schwartz, *supra* note 50, at 1248-49 (describing the holding of *United Gas Pipeline* as "doubtful" and arguing that the phrase "sound discretion" "affects the question of the scope, not that of the availability, of review"); *Administrative Declaratory Orders*, *supra* note 55, at 318-19 (expressing skepticism that "Congress intended 'sound discretion' to mean absolute discretion'" and arguing that "[a]gency refusal to issue a declaratory order should be reviewable to determine whether it transgresses the realm of 'sound discretion'").

[142] 5 U.S.C. § 554(e) (emphasis added); *see Intercity*, 737 F.2d at 106-08; *see also id.* at 106 n.4 (discussing the legislative history). The scope of review is discussed below. *See* Part II.C.

[143] *See, e.g.*, *Arctic Express*, 87 F. Supp. 2d at 828; *see also infra* at Part III.A.

[144] *See* B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015).

jurisdiction, a prudential doctrine that allows a court to stay litigation and order the parties to seek resolution of an issue from an administrative agency that has been vested with "special competence" to address it.[145] If a party is aggrieved by a declaratory order issued in response to such a judicial referral, that party must file for direct judicial review within the applicable deadline for appeal. If it fails to so challenge the order, the referring court will ordinarily refuse to entertain a collateral challenge to the agency's decision.[146] To put it another way, the parties to a declaratory order, as well as a court called upon to adjudicate related claims, is bound by an agency's declaratory order once the time for direct appeal of that order has expired.[147]

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[145] S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 750 (10th Cir. 2005) (quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)); *see generally* Note, Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707 (2007) (discussing the development, contours, and application of the primary jurisdiction doctrine). As Mr. Lockwood explains, "[b]ecause it is applied infrequently, the shape of this doctrine is not fully defined. The circuit courts employ differing conceptions of primary jurisdiction, utilize different factors in their analysis, and apply different standards of review." Lockwood, 64 WASH. & LEE L. REV. at 708. In the caselaw related to declaratory orders, the courts loosely refer to an agency's "primary jurisdiction" without making any referral, often as a way of explaining why it was appropriate for an agency to address a particular issue through a previously issued declaratory order. *See, e.g.*, Ill. Terminal R.R. Co. v. ICC, 671 F.2d 1214, 1216 (8th Cir. 1982) (explaining that "[t]he ICC acted properly" in issuing the declaratory order appealed from because "courts have long recognized that interpretation of terms of art is within the special province or primary jurisdiction of the ICC and therefore should, in the first instance, be decided by the ICC"). This appears particularly common in cases involving the ICC, perhaps because the primary jurisdiction "doctrine arises from a series of Supreme Court cases addressing the [ICC]." Lockwood, 64 WASH. & LEE L. REV. at 710.

[146] *See* Boston & Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257, 261-62 (D. Mass. 2002), *reversed on other grounds*, Boston & Maine Corp. v. Town of Ayer, 330 F.3d 12 (1st Cir. 2003); *but see* Frozen Food Express v. United States, 351 U.S. 40 (1956) (holding that an ICC declaratory order was judicially reviewable in district court action filed by a plaintiff "who was not party to the administrative proceeding").

[147] *See, e.g.*, *W. Coast Truck Lines*, 893 F.2d at 234 (holding that until a declaratory order "was reviewed by an appellate court, the parties were bound by the [agency's] determination" and since the parties "did not file a notice of appeal from the [agency's] order . . . this court is barred from reviewing [its] merits"); *Boston & Maine*, 191 F. Supp. 2d at 261-62 ("'If the

B. Barriers to Judicial Review of Declaratory Orders

Although it is well established that the case and controversy requirement of Article III does not apply to administrative agencies, this constitutional limitation on the judicial power occasionally prevents judicial review of declaratory orders or agency refusals to grant requests for declaratory relief.[148] Most of these barriers arise because the scope of agency authority under 5 U.S.C. § 554(e) is broader than the scope of the courts' authority under Article III. The difficulty is grounded in the APA's grant of authority to agencies to issue declaratory orders to "resolve uncertainty" in the absence of an actual controversy between adverse parties.[149] Indeed, the core purpose of the administrative declaratory order—to provide binding guidance to regulated parties *before* they have acted in peril of regulatory sanction—may be in some circumstances at odds with the Constitution's prohibition on the courts' issuing advisory opinions.[150] In other

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aggrieved party fails to challenge the [agency] decision within the statutory period, the [agency] decision becomes final and binding upon the referring court.'" (quoting Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc., 430 F.2d 334, 341 (1st Cir. 1970))).

[148] *E.g.*, *Central Freight Lines*, 899 F.2d at 420-21 ("It is . . . well established that the case or controversy requirement of Article III 'does not restrict an agency's authority to issue declaratory rulings.'" (quoting *Texas*, 866 F.2d at 1551)); *see also* Tennessee Gas Pipeline Co. v. Fed. Power Comm'n, 606 F.2d 1373, 1380 (D.C. Cir. 1979) ("The subject matter of agencies' jurisdiction naturally is not confined to cases or controversies inasmuch as agencies are creatures of article I."). The sponsors of section 5(d) of the APA noted that agencies would "be as free to act irrespective of the technical rules of case or controversy as courts are." McCarran, *Administrative Procedure Act—Legislative History*, S. DOC. NO. 248, 79th Cong., 2d Sess. 204 (1946).

[149] 5 U.S.C. § 554(e); *see also* Coal. for a Healthy California v. FCC, 87 F.3d 383, 386 (9th Cir. 1996) ("[W]hile the FCC might properly issue such a general declaration which does not settle an actual controversy between adverse parties, this court cannot."); Hickey, *supra* note 55, at 91 n.7 (noting that "the constitutional limitation to 'case and controversy' . . . is not strictly imposed upon an administrative agency" and "[a]s a matter of statutory interpretation, the only possible meaning that can be given to the words 'remove uncertainty' is that Congress intended to expand the availability of declaratory relief beyond its application to orthodox controversies").

[150] *Compare* AG'S REPORT, *supra* note 11, at 30 (discussing advisory function of declaratory orders); *Pacifica Found.*, 438 U.S. at 734-35 ("However appropriate it may be for an administrative agency to write broadly in an

words, as the cases discussed below reveal, administrative agencies have greater flexibility to issue declaratory orders in circumstances in which the Article III requirements of justiciability would not be satisfied.

Miller v. FCC provides a good example of how the disconnect between administrative and judicial power may thwart judicial review of an administrative declaratory order. In *Miller*, the Eleventh Circuit was called upon to review an FCC declaratory ruling addressing the preemptive effect of Section 315(b) of the Communications Act of 1934. Section 315(b) establishes the "lowest unit charge," a limitation on the amount that a political candidate may be charged for the broadcast of campaign advertisements.[151] In 1991, the FCC issued a declaratory ruling stating that "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act . . . is preempted by federal law," and that "[t]he sole forum for adjudicating such matters shall be this Commission."[152] The FCC issued this declaratory ruling on its own motion and not in response to any petition or other request for resolution of a specific controversy.[153] On a petition for review, the court held the case nonjusticiable because "[b]y asking this court to decide what another court should do in a future case, petitioners are posing a hypothetical question, the answer to which would be an advisory opinion" prohibited by Article III.[154] The court characterized the agency's decision as an unreviewable "agency opinion," thereby suggesting that the justiciability problem was created by the agency's

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adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions."). In the Declaratory Judgment Act, Congress appears to have recognized this potential disconnect, by expressly limiting a federal court to granting declaratory relief "[i]n a case of actual controversy within its jurisdiction." *See* 28 U.S.C. § 2201(a); *see also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 325 (1936) (upholding the constitutionality of the Declaratory Judgement Act because, by its terms, "it does not attempt to change the essential requisites for the exercise of judicial power.").

[151] Miller v. FCC, 66 F.3d 1140, 1141 (11th Cir. 1995).

[152] *Id.* at 1143 (quoting 6 F.C.C.R. 7511 (1991)).

[153] *Id.* at 1143, 1144.

[154] *Id.* at 1145; *see also id.* at 1146 ("Consequently, we are prohibited from determining the propriety of the FCC's declaratory ruling given the abstract circumstances in which this issue is presented.").

mischaracterization of its own action.[155] The true source of the difficulty, however, was that the scope of the FCC's authority to issue the declaratory order was broader than the scope of the court's authority to review that action. This became evident when, in parallel litigation in which the FCC's declaratory ruling was relevant but not subject to direct review, the Ninth Circuit rejected the *Miller* court's characterization and held that the agency's decision was a properly issued declaratory order with binding legal effect.[156] Perhaps the most interesting point is that both courts were right—this particular agency decision was *both* an unreviewable advisory opinion (from the perspective of the reviewing court) *and* a binding declaratory order (from the perspective of the court called upon to apply agency precedent in parallel litigation).

In other cases, the courts have perceived the problem as a lack of finality that undermines the agency's classification of its action as a declaratory order. For example, in *Miami v. Interstate Commerce Commission*, the Fifth Circuit declined to review an ICC order that was, in the court's view, merely "styled" as a declaratory order.[157] The underlying dispute involved the City of Miami's extended effort to acquire for use as a public park a thirty-three acre facility owned by the Florida East Coast Railway.[158] In condemnation proceedings in state court, the railroad argued that the property was a "line of railroad" that could be neither condemned nor abandoned "without ICC approval issued in the form of a certificate of public convenience and necessity."[159] The state court rejected this argument, characterizing the property as a "spur" not subject to the ICC's jurisdiction, and approved the taking.[160] The railroad responded by petitioning the ICC for a declaration that the terminal and tracks at issue were a "line of railroad."[161] After seeking input

[155] *Id.* at 1144.

[156] *See Wilson*, 87 F.3d at 397-98.

[157] 669 F.2d 219, 221 (5th Cir. 1982).

[158] *See id.* at 220.

[159] *Id.* at 220.

[160] *See id.*

[161] *See id.* The railroad did not, however, seek a certificate of public convenience and necessity from the ICC, perhaps to avoid issuance of the approval it had argued was a necessary pre-condition to condemnation. *See id.*

from the city, the ICC issued the requested declaration and "ordered its [administrative] proceedings 'discontinued.'"[162] On a petition for review filed by the city, the Fifth Circuit held that the ICC's declaratory order was nonfinal and unreviewable because it neither determined rights or obligations nor produced any legal consequences.[163] The ICC's order, explained the court, "neither permit[ted] nor prohibit[ed] the abandonment of the [railroad's] terminal."[164] The court therefore concluded that the order was "nothing more than an advisory ruling" not subject to judicial review.[165]

The problem may also present itself as one of mootness pending appellate review.[166] An example of one such case is *Radiofone, Inc. v. FCC*, which involved a petition for review of an FCC declaratory ruling that Auto Page, a company that provided radio paging services, was not a common carrier.[167] The Louisiana Public Service Commission (LPSC) had determined that Auto Page was a radio common carrier operating unlawfully without a certificate from the LPSC.[168] Auto Page sought an injunction against the LPSC's cease and desist order in federal district court, and the court referred the matter to the FCC on the grounds of primary jurisdiction.[169] The FCC issued notice and requested comments from interested parties before issuing a declaratory ruling in Auto Page's favor.[170] Although Auto Page (perhaps unsurprisingly) did not file for review of the order, several other commenters in the proceeding did.[171] While the

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[162] *Id.* at 221.

[163] *Id.* (quoting Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)) (first alteration added).

[164] *Miami*, 669 F.2d at 221

[165] *Id.* at 222.

[166] *E.g.*, *Tennessee Gas*, 606 F.2d at 1379 ("Judicial review of administrative action, like all exercises of the federal judicial power, is circumscribed by the requirement that there be an actual controversy. Accordingly, we have no jurisdiction over suits challenging administrative orders which are moot."); *see Hollister Ranch*, 759 F.2d at 902.

[167] *See* 759 F.2d 936, 937 (D.C. Cir. 1985).

[168] *See id.* at 937.

[169] *See id.* at 937.

[170] *See id.* 937-38.

[171] *See id.* at 938. It seems obvious that Auto Page would have had no reason to seek judicial review of the declaratory order that granted Auto Page

D.C. Circuit's decision was pending, Auto Page went out of business.[172] The court held that the case was moot as a result of this development, and it accordingly vacated the FCC's order.[173] Through vacatur, the court deprived the FCC's order of its value as administrative precedent.[174]

Finally, a more straightforward barrier to judicial review arises when a party that lacks standing under Article III petitions a court for review of a declaratory order. On this issue, *Radiofone* is again the primary judicial precedent. In that case, the judges were unanimous as to the proper result, and then-Judge Scalia authored the majority opinion. In a part of that opinion not joined by his two colleagues, Judge Scalia reasoned that Auto Page's demise had deprived the petitioners of standing to challenge the FCC's decision. To have standing, he explained, a petitioners' injury must "arise from the particular activity which the agency adjudication has approved (here, the operation of Auto Page as a private land mobile radio system) and not from the mere precedential effect of the agency's rationale."[175] A related barrier may arise when a party that would otherwise have standing to challenge the agency's action fails to exhaust its administrative remedies before seeking judicial review of a declaratory order.[176]

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the very relief it had requested. The identity of the litigants in this case is important because it reveals that, although a declaratory order may bind only the named party, other interested parties may still be able to seek judicial review of that order.

[172] *See id.* at 937.

[173] *See id.* at 938; *see also* Oregon v. FERC, 636 F.3d 1203 (9th Cir. 2011) ("In cases where intervening events moot a petition for review of an agency order, the proper course is to vacate the underlying order." (citing A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 330-31 (1961))).

[174] The only circumstances in which courts have vacated a declaratory order because of justiciability problems appear to involve disputes that have become moot pending judicial review. Interestingly, when other barriers to judicial review have been encountered (such as when a petitioner has failed to exhaust administrative remedies), courts have left the agency's declaratory order standing as precedent.

[175] *Radiofone*, 759 F.2d at 939.

[176] *See, e.g.*, Richman Bros. Records, Inc. v. FCC, 124 F.3d 1302, 1303 (D.C. Cir. 1997) (dismissing a petition for review of a declaratory order issued on delegated authority by the FCC's Common Carrier Bureau because the

C. Standards of Review

The scope of judicial review on appeal from a declaratory order is limited: courts will set aside an agency's action only if it is arbitrary and capricious, an abuse of discretion, or is based upon factual findings that are not supported by substantial evidence.[177]

The narrow scope of review applies to most aspects of a declaratory order, including the decision of whether to initiate the proceeding.[178] The courts may also enforce the APA's modest requirement that agencies provide a brief statement of the grounds for denying a petition for declaratory order.[179] An agency's considered and plainly stated "judgment that its limited resources are better allocated to other areas" has been held sufficient to meet the APA's minimal requirements.[180] It may similarly be reasonable for an agency to "withhold declaratory relief in anticipation of a clearer exposition of government

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petitioner did not exhaust administrative remedies by filing an application for review by the full Commission).

[177] *See* 5 U.S.C. § 706(2)(A); Loveday v. FCC, 707 F.2d 1443, 1447-48 (D.C. Cir. 1983); *see also Central Freight Lines*, 899 F.2d 413, 419 ("This court may set aside an agency's adjudicatory ruling, such as a declaratory order, only if the agency's findings and conclusions are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))).

[178] 5 U.S.C. § 706(2)(a); *Intercity*, 737 F.2d at 108; *see also* Aviators for Safe and Fairer Regulation, Inc. v. FAA, 221 F.3d 222, 231 (1st Cir. 2000) ("While the agency has discretion to refuse [a request for a declaratory] ruling, that refusal is reviewable for abuse of discretion."); *Central Freight Lines*, 899 F.2d at 418-19 (affirming an agency decision to institute declaratory order proceeding because that decision was neither arbitrary nor capricious). The D.C. Circuit has opined that "a policy of never instituting declaratory proceedings . . . could well constitute an abuse of discretion." *Intercity*, 737 F.2d at 110 n.12.

[179] *See* 5 U.S.C. § 555(e). The Administrative Conference recently addressed this requirement in connection with petitions for rulemaking. *See generally Petitions for Rulemaking*, *supra* note 5; *see also* Schwartz & Revesz, *supra* note 14, at 17-20. The APA also requires agencies to respond to petitions in a "reasonable time," *see* 5 U.S.C. § 555(b), and to give petitioners "prompt notice" when a petition is denied in whole or in part, *id.* 555(e).

[180] *Intercity*, 737 F.2d at 108-10 & n.12; *see also Climax Molybdenum*, 703 F.2d at 453 ("The Commission may reasonably choose to reserve its use of declaratory relief for special cases in order to conserve its administrative resources.").

policy" that is expected or planned to be forthcoming, or on the basis of the agency's judgment that the petitioner's circumstances demonstrate no "special need" for a declaratory order.[181] When a court affirms an agency's decision not to issue a declaratory order, it will not opine on what such an order should say if it were to be issued.[182]

Courts generally give substantial deference to the legal interpretations that an agency provides in a declaratory order.[183] Such deference has been extended to an agency's interpretation of any legal document within that agency's special competence, including: the statute the agency is responsible for administering,[184] the agency's own regulations,[185] the terms of art that are used within the agency's regulatory regime,[186] and certificates or other authorizations that the agency has itself issued.[187] In addition, courts generally defer to an agency's

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[181] *Climax Molybdenum*, 703 F.2d at 452, 453.

[182] *E.g.*, *Coal. for a Healthy California*, 87 F.3d at 385-86 (declining litigant's invitation to offer advisory opinion on appropriate content of declaratory order FCC declined to issue) ; *see also id.* at 385 n.3 ("Every reported case we have found which examined whether an agency improperly refused to issue a declaratory order only considered whether the order was improperly withheld, not what the order should have been.").

[183] *See Clark-Cowlitz*, 826 F.2d at 1086-92l.

[184] *See, e.g.*, *Central Freight Lines*, 899 F.2d at 423 (citing *Chevron* and noting that a court "must honor the [agency's] interpretation of its statute so long as that interpretation is a reasonable one").

[185] *See, e.g.*, *Loveday*, 707 F.2d at 1459 (affirming FCC declaratory ruling and holding that "[t]he Commission's interpretation of its own regulations as applied in this case is reasonable and consistent with section 317 of the Communications Act"). Some justices of the Supreme Court have recently expressed serious and increasing doubt about the propriety of judicial deference to an agency's interpretation of its own regulations. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia., J., concurring) ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.); Talk Am., Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (explaining why he has "become increasingly doubtful" of *Auer* deference). If these were to become majority views, the resulting doctrinal sea change would presumably apply to the declaratory orders context.

[186] *See, e.g.*, *Ill. Terminal R.R.*, 671 F.2d at 1217 ("We also note that courts should defer to ICC interpretation of technical terms.").

[187] *See, e.g.*, Middlewest Motor Freight Bureau v. ICC, 867 F.2d 458 (8th Cir. 1989) ("We hold the issue is clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation.").

jurisdictional determination.[188] Courts have afforded *Chevron* deference to declaratory orders issued through both formal and informal adjudications.[189] With respect to orders issued through informal proceedings, a basic petitioning process that includes notice and the opportunity for comment has been sufficient to warrant *Chevron* deference.[190]

Judicial review of an agency's application of controlling precedent, whether judicial or administrative, is similarly limited. A court's "task on review is not to decide whether [it] would construe the precedents as the [agency] did, but whether the [agency's] construction is reasonable and whether it has explained any departures from its past actions."[191] Thus, in one case, the Fifth Circuit upheld an ICC declaratory order because the agency "followed its prior cases in reaching [its] determination, and it did not unreasonably construe federal precedents. It reasonably distinguished cases that might suggest a different result."[192] An agency is generally not bound to give preclusive effect to an earlier federal or state court judgment if the issue arises out of a statute the agency is charged with administering.[193]

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[188] *See City of Arlington*, 133 S. Ct. at 1871 (2013); *see also, e.g.*, N. C. Utils. Comm'n v. FCC, 537 F.2d 787, 794 (4th Cir. 1976) (holding that the FCC's "declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the [Communications] Act").

[189] *See, e.g.*, *City of Arlington*, 133 S. Ct. at 1874-75(giving *Chevron* deference to a declaratory ruling issued by the FCC through informal adjudication); *Arctic Express*, 87 F. Supp. 2d at 828 ("This Court finds that the ICC . . . opinion, a formal adjudication, is entitled to *Chevron* deference.").

[190] *See City of Chicago*, 199 F.3d at 429. The court's discussion does not make clear whether the basic notice-and-comment procedures used by the FCC were *necessary*, only that they were *sufficient*. *See id.* Part IV, which explores in greater detail the procedures that agencies use in declaratory proceedings, suggests that most meet the minimum degree of formality needed to secure *Chevron* deference.

[191] *Central Freight*, 899 F.2d at 420-21 (citing *Texas*, 866 F.2d at 1556-57); *see also Merchs. Fast Motor Lines, Inc.*, 5 F.3d at 917 (same).

[192] *Central Freight*, 899 F.2d at 423; *see* Pa. Pub. Util. Comm'n v. United States, 812 F.2d 8 (D.C. Cir. 1987).

[193] *See Brand X*, 545 U.S. at 982-83; *see also Am. Airlines*, 202 F.2d at 799-801 (rejecting argument that the full faith and credit statute, 28 U.S.C. § 1738, or common law preclusion doctrines required a federal agency to give preclusive effect to a previously issued state court decision).

Judicial review of an agency's findings of fact is also limited. If the agency's declaratory order emerges from a formal adjudication and includes factual findings grounded in the record, a court will review those findings for substantial evidence.[194] If the declaratory order is a product of an informal adjudication, the court will review the agency's factual findings under the deferential arbitrary or capricious standard.[195] If the factual record is insufficient to support the agency's action, a court may vacate the declaratory order.[196] This appears to be a fairly rare occurrence, perhaps because most declaratory orders are based on uncontested or assumed facts.

III. AGENCY USE OF DECLARATORY ORDERS

As the discussion so far shown, the declaratory order is a hybrid of legislative rulemaking, adjudication, and guidance. This becomes evident upon consideration of the five characteristics that scholars have used to describe and differentiate the more commonly known policymaking forms available to federal agencies. The chart below demonstrates.

Policy-making Form	**Process**	**Legal Effect**	**Judicial Review**	**Timing**	**Breadth**
Legislative Rulemaking	Notice and Comment	Binding	Reviewable; Deferential	Ex Ante; Generally Agency Initiated	Broad
Adjudication	Formal or Informal; Typically More Closed	Binding	Reviewable; Deferential	Ex Post; Generally Agency Initiated	Narrow

[194] *See* 5 U.S.C. § 706(2)(E); *Ill. Terminal R.R.*, 671 F.2d at 1216-17.
[195] *See* 5 U.S.C. § 706(2)(A).
[196] *See Hollister Ranch*, 759 F.2d at 92.

Guidance	Any	Non-Binding	Sometimes Reviewable; Less Deferential	Ex Ante; Agency Initiated or On Request	Broad or Narrow
Declaratory Order	Formal or Informal[197]	Limited Binding	Reviewable; Deferential	Ex Ante; Agency Initiated or On Request	Generally Narrow, but may be Broader

Despite the unique characteristics and apparent usefulness of the declaratory order, the historically minimal usage of the device by administrative agencies continues today.[198] Only five agencies have adopted procedural regulations governing declaratory order proceedings: the FCC, the FERC, the FMC, the Maritime Administration, and the National Labor Relations Board (NLRB). Of these, the FERC and the FCC appear to have the most robust declaratory practices, while the FMC, the NLRB, and the Maritime Administration issue declaratory orders relatively rarely. The STB also regularly uses declaratory orders, although it has not adopted procedural regulations governing the practice. Finally, there are a handful of other agencies that have occasionally issued declaratory orders without having adopted procedural regulations governing declaratory proceedings.[199] Drawing on this experience, this Part considers how agencies can best use declaratory orders to improve their adjudicative and regulatory programs.

A. Defining the Scope of Declaratory Practice

How should agencies use declaratory orders—in what circumstances and to address what kinds of issues? The

[197] Additional discussion of agency procedures for declaratory proceedings is including in Part IV.

[198] *See supra* at Part. I.C.

[199] *See, e.g.*, Food and Drug Admin., Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34,650, 34,656 (June 17, 2015) ("This final determination is a 5 U.S.C. 554(e) declaratory order regarding the status of [Partially Hydrogenated Oils]."); Special Opportunities Fund, Inc.; Notice of Application, 78 Fed. Reg. 49,555, 49,555 (Aug. 14, 2013) ("Absent a request for a hearing that is granted by the [Securities and Exchange] Commission, the Commission intends to issue an order under Section 554(e) of the APA declaring that applicant's proxy voting procedure does not satisfy Section 12(d)(1)(F) of the Act.").

appropriate use of the declaratory order, as articulated in the text of the APA and fleshed out through judicial precedent, agency experience, and scholarly evaluation, provides a natural starting point. It provides the foundational principle that an agency should use a declaratory order when it is necessary to provide binding, non-coercive guidance to regulated parties in order to terminate an actual or emerging controversy or to resolve uncertainty in the application of existing legal requirements. What this general principle will mean to an individual agency depends on that agency's unique mission and context, including its statutory framework, the particular needs of its adjudicative or regulatory regime, and the culture of the industry it regulates or the community it serves. At the most basic level, the agency's substantive statutory authority will necessarily define the range of issues that it may address through a declaratory order.[200] The case law demonstrates, however, that there is a wide variety of purposes for which an agency may properly use a declaratory order, including to: (1) interpret the agency's governing statute or own regulations; (2) define terms of art; (3) clarify whether a matter falls within federal regulatory authority; or (4) address questions of preemption.[201] The device also offers a way for an agency to provide regulated parties with advance notice of how the agency will apply existing regulations to new or novel circumstances.[202] Even in the absence of novelty, an agency can

[200] *See, e.g.*, *Ill. Terminal R.R.*, 671 F.2d at 1216 ("Of course, § 554(e) does not allow an agency to issue a declaratory order on any subject matter; there must be some underlying authority."); *accord* 5 U.S.C. § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.").

[201] *See Ill. Terminal R.R.*, 671 F.2d at 1216; New York State Comm'n on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982); *N. C. Utils. Comm'n*, 537 F.2d at 794; *Ashland Oil*, 421 F.2d at 18. In Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*, the Administrative Conference urged agencies to consider procedural reforms designed to improve agency compliance with Executive Order 13132, which requires consultation with state and local governments in potentially preemptive rulemakings. *See* 76 Fed. Reg. 81 (Jan. 3, 2011). Subject to the limitations imposed by the ex parte rules that apply in administrative adjudications, *see* 5 U.S.C. § 554(d), this consultation may be easier in a declaratory order proceeding, because the narrow and known factual context makes clear the identity of any affected state or local authorities or interests.

[202] *See Aviators for Safe and Fairer Regulation*, 221 F.3d at 231.

provide targeted guidance to regulated parties by declaring how existing regulatory requirements apply to a defined factual context.[203]

Looking beyond the agencies' independent needs, the declaratory order is also an excellent device for agencies to use to assist state or federal courts by answering questions that are within an agency's special competence but arise in litigation in which the agency is not a party.[204] In some cases, parties may seek a declaratory order from an administrative agency at a court's express direction or referral.[205] In other cases, parties may ask an agency to issue a declaratory order in contemplation of or during the course of litigation, but without being so directed by a court.[206] Courts have perceived no legal impediment to such parallel administrative proceedings[207] and may even stay a proceeding pending the agency's decision.[208] Regardless of how an issue is raised before the agency, its opinion may be very important to the litigation, even if it is not sufficient to determine the outcome before the courts.[209] If an agency finds that the meaning of its governing statute, regulations, or other legal documents (such as permits or licenses) is commonly at issue in litigation to which it is not a party, the agency should consider

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[203] *See Pacifica Found.*, 438 U.S. at 733-34.

[204] *See supra* notes 143-147 and accompanying text.

[205] *See Richman Bros. Records*, 124 F.3d at 1303; *see also Boston & Maine*, 330 F.2d at 14, 15-17. By statute, Congress has expressly allowed for the courts to refer questions or issues to certain agencies, *see, e.g.*, 28 U.S.C. § 1336(b) (governing judicial referral to the STB), but because such referral may have "significant procedural consequences, a district court's stay of an action to allow a parallel [agency] action to proceed will not be treated as a referral . . . unless the district court clearly implies or explicitly states that it is referring the case to the" agency, *W. Coast Truck Lines*, 893 F.2d at 231.

[206] *See, e.g.*, *Am. Airlines*, 202 F.3d at 795 ("At the urging of several of the parties, and while both the federal and state actions were pending, DOT initiated the interpretative proceeding that is the subject of this petition for review."); *Ashland Oil*, 421 F.2d at 19 ("On November 15, 1967, after the initiation of the action in the District Court, Phillips filed a petition with the Commission for a declaratory order.").

[207] *See Ashland Oil*, 421 F.2d at 21.

[208] *See, e.g.*, E. W. Resort Transp., LLC v. Sopkin, 371 F. Supp. 2d 1253 (D. Colo. 2005) (staying litigation pending STB's conclusion of declaratory proceeding on issue within agency's primary jurisdiction).

[209] *See City of Chicago*, 199 F.3d at 428-29.

creating a declaratory order procedure through which litigants can seek the agency's considered views. By doing so explicitly by regulation or through written guidance, the agency can make clear to its regulated industry the circumstances in which it will look favorably upon such petitions for declaratory order.

An agency can and should use its regulations to communicate and enforce its preferred uses of declaratory orders. This may be especially effective if the agency's declaratory practice is focused on a petition-initiated process.[210] In its regulations, the agency can allow or even require regulated parties to request a declaratory order as a means of obtaining particular types of guidance from the agency.[211] This guidance need not be confined to the agency's procedural regulation(s), but can rather be integrated into the appropriate provisions of the agency's substantive regulations. This approach helps regulated parties understand how the agency prefers to use declaratory orders, and may thereby lend some order to the petitioning practice before the agency.[212]

The FERC is a good example of an agency that has a robust declaratory practice that is well defined and controlled by regulation and written policy. In the FERC's view, declaratory orders are generally not an appropriate vehicle for broad pronouncements on legal or policy issues, but are more typically used to address novel issues or provide needed regulatory certainty with respect to narrow legal questions on defined facts. From this perspective, a declaratory proceeding offers an early and more efficient route for regulated parties to either (1) obtain

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[210] As a purely descriptive matter, most of the agencies included in this study issue most if not all of their declaratory orders in response to petitions and not sua sponte. *See infra* at Part IV.B.

[211] *See, e.g.*, 18 C.F.R. § 284.502 (providing that certain FERC applicants "*must* file a request for declaratory order" (emphasis added)); 47 C.F.R. § 20.9(a)(14)(ii) ("Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service.").

[212] This effort can be further supported if the agency provides guidance in its regulations regarding how a petition should be filed and what information it should contain in order to ensure that the agency has all the information it needs to efficiently process the petition. These matters are addressed in the discussion of agency procedures in Part IV.

certainty before they invest significant resources in a project; and/or (2) pursue the potentially more expensive and involved route of a tariff filing or complaint before the agency.

The FERC clearly communicates these broad principles and agency preferences to its regulated industry in writing. For example, on the FERC's website, the agency defines a "Petition For Declaratory Order" as:

> [A] petition requesting the issuance of an order or ruling on jurisdictional issues where uncertainty, ambiguity, or controversy exists. The petition may seek an interpretation of a party's rights or obligations under contracts, statutes, rules, regulations, or orders. Pleadings filed in the form of petitions for declaratory orders which seek more than a mere interpretive ruling (particularly those involving alleged rate schedule violations) are treated, instead, as formal complaints.[213]

Building on this, the FERC's regulations provide essential detail by specifically identifying the declaratory order as an appropriate procedural vehicle to:

- Permit "[a] non-public utility [to] submit an open access transmission tariff and a request for declaratory order that its voluntary transmission tariff meets the requirements of Commission rulemaking proceedings promulgating and amending the *pro forma* tariff."[214]

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[213] FERC, Application/Petition Definitions, https://elibrary.ferc.gov/idmws/help/Definitions/Sub_Definitions/Submittal/Applicaiton_Petition_Definitions.htm.

[214] 18 C.F.R. § 35.28(e). "Any submittal and request for declaratory order submitted by a non-public utility will be provided an NJ (non-jurisdictional) docket designation." *Id.* § 35.28(e)(i).

- Evaluate proposals to create or participate in Regional Transmission Organizations.[215]

- Consider "[a] public utility's request for one or more incentive-based rate treatments" before that utility files for such treatments under section 205 of the Federal Power Act.[216]

- Resolve questions "concerning the Commission's jurisdiction over a hydropower project under the Federal Power Act."[217]

- Consider requests for waiver of or exemption from certain regulatory requirements,[218] or to evaluate the effect of a material change in facts on a previously granted waiver or exemption.[219]

- Receive declarations of intent under section 23(b) of the Federal Power Act.[220]

In addition, the FERC's regulations in some cases facilitate the use of declaratory orders to streamline subsequent, related proceedings by calling for certain such orders to affect the applicable burden of proof.[221] By explicitly integrating the

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[215] *See id.* § 35.34(d)(3).

[216] *Id.* § 35.35(d).

[217] *Id.* § 375.308(c)(5). More specifically, this provision delegates authority to the Director of the Office of Energy Projects (or the Director's designee) to "[t]ake appropriate action" on such petitions. *Id.*

[218] *See id.* §§ 292.203(d)(2), 366.3(d), 366.4(b)(3), 366.4(c)(2), 366.5(b), 366.5(c), 366.7(b). Other agencies, such as the FMC, do not use declaratory orders for this purpose, but instead have a separate process especially designed for considering requests for regulatory exemptions. *See* 46 C.F.R. § 502.74.

[219] *See* 18 C.F.R. §§ 366.4(d)(1)(i), 366.4(d)(2)(ii), 366.7(c)(1).

[220] *See id.* § 385.207(b).

[221] The FERC's rules provide when a non-public utility successfully secures a declaratory order finding its open access transmission tariff acceptable under the Commission's rules, a "later applicant in a Federal Power Act (FPA) section 211 or 211A proceeding against the non-public utility shall have the burden of proof to show why service under the open access

declaratory device into its regulatory regime, the FERC has cultivated a well-defined, manageable declaratory practice that appears to benefit both the agency and the regulated industry.[222]

The FCC is another agency that has defined by regulation the purposes for which it uses declaratory proceedings. For example, the FCC's regulations structure the International Bureau's use of declaratory rulings to approve foreign ownership in common carriers under Section 310 of the Communications Act of 1934.[223] The regulations also specify in detail the required contents of petitions filed for this purpose[224] and identify routine terms and conditions to which the resulting rulings are subject.[225] The International Bureau also uses declaratory rulings to respond to requests for authorization to provide service in the U.S. using non-U.S. licensed satellites,[226] while the Consumer and Governmental Affairs Bureau uses them to evaluate the validity of various restrictions on the reception of certain signals or services.[227] The FCC's regulations thus help to shape the agency's

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transmission tariff is not sufficient and why a section 211 or 211A order should be granted." *Id.* § 35.28(e)(ii).

[222] A quick survey of industry newsletters suggests that the FERC's declaratory orders are effective in communicating the agency's policy positions and providing guidance to regulated parties. *See, e.g.*, Troutman Sanders LLP, *2014 – A Big Year for FERC Orders Addressing LNG Jurisdiction*, http://www.troutmansanders.com/files/Uploads/Documents/LNG%20FERC%20Rulings.pdf; James F. Bowe, Jr., *FERC Decision Rejects Oil Pipeline's Petition for Declaratory Order Approving Contract Rates, Special Prorationing Methodologies and Priority Access for Excess Capacity*, King & Spalding Energy Newsletter (Apr. 2014), http://www.kslaw.com/library/newsletters/EnergyNewsletter/2014/April/article5.html.

[223] *See* 47 C.F.R. §§ 1.990(a)(1) & (2).

[224] *See id.* § 1.991.

[225] *See id.* § 1.994.

[226] *See id.* § 25.137.

[227] *See id.* § 1.4000(e). Other FCC regulations specify the declaratory ruling as the appropriate procedural vehicle for addressing other, specific kinds of issues. *E.g.*, *id.* § 20.9(a)(14)(ii) ("Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service."); *id.* § 51.232(b) ("Any party seeking designation of a technology as a known disturber should file a petition for declaratory ruling with the Commission seeking such designation, pursuant to § 1.2 of this chapter.").

declaratory practice by giving clear advice to the regulated industry regarding the circumstances in which the agency views a petition for declaratory ruling as the appropriate procedural vehicle.

An agency may also use its regulations or other written procedures and policies to make clear to its regulated industry the limits that it will impose on its declaratory practice. The FERC accomplishes this through its written guidance.[228] The FMC provides another good example. Its regulations establish declaratory order procedures, but state explicitly that those procedures "must be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view."[229] In its dispositions of petitions for declaratory order, the Commission has adhered to and elaborated upon this statement of principle.[230] The Commission has explained that, in its view, "'petitions for declaratory order, by their very nature concern potential violations of law. In fact . . . a potential legal peril must be demonstrated before the Commission will, under its rules, even entertain a petition for declaratory ruling.'"[231] Additionally, in practice, the FMC does not use declaratory orders to address matters that involve contested facts[232] or will be more appropriately resolved through

[228] *See* FERC Interpretative Order on Guidance, *supra* note 45.

[229] 46 C.F.R. § 502.75(b).

[230] *See, e.g.*, Petition of Olympus Growth Fund III, L.P. for Declaratory Order, Rulemaking or Other Relief, 31 S.R.R. 718, 723 (F.M.C. 2009) (explaining that a declaratory order "'is intended to provide guidance to persons who have not yet acted and who desire a legal ruling on a proposed future course of action'" (quoting Petition of Evergreen Marine Corp. (Taiwan), Ltd. & Worldwide Logistics, Inc. for Declaratory Order, 26 S.R.R. 605, 607 (F.M.C. 1991))).

[231] *Olympus Growth Fund*, 31 S.R.R. at 723 (quoting Indep. Action on Freight Forwarder Comp., 23 S.R.R. 390, 395 (F.M.C. 1985)).

[232] *See, e.g.*, Comp. of Indep. Ocean Freight Forwarders, 19 S.R.R. 1741, 1742 (F.M.C. 1980) ("For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present established facts.'" (quoting Ashcroft v. Mattis, 431 U.S. 171, 172 (F.M.C. 1977))). There is some tension between this aspect of the FMC's practice and the provision of its procedural regulations suggesting the possibility of permitting "discovery or an evidentiary hearing" on a petition. *See* 46 C.F.R. §§ 502.75(c) & (e).

other kinds of proceedings.[233] This latter limitation is evident in the FMC's regulations, which provide that "[c]ontroversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease-and-desist orders are sought are not proper subjects of petitions" for declaratory order.[234] Perhaps as a consequence of these clearly articulated policies, the FMC receives relatively few petitions for declaratory order, and it denies many of the petitions that it does receive.[235]

B. Agency Decisions Analogous to Declaratory Orders

Some consideration of agency decisions that appear to be analogous to declaratory orders or rulings may help to elucidate the circumstances in which agencies may be able to make more productive use of the declaratory device.[236] The somewhat recent judicial approval of the issuance of declaratory orders through informal adjudicative processes also raises the possibility that some agencies may already be issuing decisions that are, in essence, declaratory orders, but which are called by some other name. One example is the "declaratory ruling" used by the FCC.

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[233] *See, e.g.*, Phillip R. Consolo v. Flota Mercante Granco-Combiana, 7 F.M.C. 635, 640 (1963), *available at* http://www.fmc.gov/assets/1/Page/vol07-Part4.pdf (explaining that an agency need not issue a declaratory order where it appears the questions involved be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding that will be more appropriate or effective under the circumstances); *see also* AG'S MANUAL, *supra* note 73, at 60 (explaining that "an agency need not issue [declaratory] orders where it appears that the questions involved will be determined in a pending administrative or judicial proceeding or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances").

[234] 46 C.F.R. § 502.75(b).

[235] In the petitioning context, a "denial" is an agency decision not to institute a declaratory proceeding or issue a declaratory order. In contrast, an agency "grants" (in whole or in part) a petition when it responds by issuing a declaratory order, even if the content or conclusion of the order is different from that which the petitioner requested.

[236] *See Uncertain Tools*, *supra* note 101, at 261. *See* Admin. Conf. of the U.S., Recommendation 70-2, *SEC No-Action Letters Under Section 4 of the Securities Act of 1933*, https://www.acus.gov/sites/default/files/ documents/70-2-ss.no-FR.pdf.

For many years, there was substantial disagreement over whether these rulings were properly considered to be "declaratory orders."[237] The courts' acceptance of them as such has, however, terminated that controversy, allowing other agencies and scholars to draw from the FCC's declaratory practice in understanding the possibilities and limitations of declaratory orders in administrative adjudication. The FCC's experience also highlights the need for agencies to pay careful attention to determining and observing minimum procedural requirements when issuing declaratory orders through informal adjudication. In *City of Arlington*, the Fifth Circuit clearly signaled that it would have invalidated the FCC's declaratory order if the agency had not used basic notice-and-comment procedures.[238]

A possibly analogous device may be found among the various forms of guidance that the IRS offers to taxpayers.[239] The IRS has a sophisticated and somewhat complex system of guidance that uses a number of different, complementary vehicles to explain to taxpayers how the agency interprets and applies the U.S. tax code. A complete description and analysis of this system is well beyond the scope of this study, but it may be valuable to consider three of the primary guidance vehicles used by the agency: regulations, revenue rulings, and letter rulings. The most formal of these are regulations, which may be legislative or interpretative, but are in either event legally binding statements of agency policy and legal interpretation that taxpayers may rely upon.[240] At the other end of the spectrum is the private letter ruling, the purpose of which is "to provide taxpayers with definite and reliable determinations as to the tax treatment of future transactions."[241] A "letter ruling" is defined

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[237] *See supra* at notes 36, 102.

[238] *See City of Arlington*, 668 F.3d at 243-44.

[239] *See generally* Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (describing the various forms of guidance provided by the IRS to taxpayers).

[240] *See id.* at 326-30.

[241] *Id.* at 346. Although it is not entirely clear, the letter ruling program may be what the General Counsel of the Treasury Department proposed to create in 1938. *See generally* Oliphant, *supra* note 33. Another device the IRS uses to provide certainty to taxpayers is the closing agreement, which is conceived as more in the nature of a settlement, which is generally reached

as "a written statement issued to a taxpayer by an Associate Chief Counsel Office of the Office of Chief Counsel or by the Tax Exempt and Government Entities Division that interprets and applies the tax laws to a specific set of facts" generally involving "transactions that have not been consummated."[242] A letter ruling is not binding on the taxpayer, but it is generally reliable because the retroactive effect of any revocation is strictly limited.[243] By statute, letter rulings must be publicly available (with personally identifying information redacted), but generally have no precedential value.[244] Finally, revenue rulings are "official interpretations by the Service, prepared in the Associate Chief Counsel Offices and published in the Internal Revenue Bulletin" that "represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling."[245] The facts used in revenue rulings are often drawn from letter rulings, but are stated in a generalized way. Although revenue rulings "do not have the force and effect of" regulations, those published "may be used as precedents."[246] In this respect, "[t]he revenue ruling program is centered upon uniformity of interpretation, rather than on the problem of the individual taxpayer."[247]

Although letter rulings and revenue rulings each share many of the characteristics of declaratory orders, neither is wholly analogous. For its part, the letter ruling is like a declaratory order in that it is typically issued in response to an individual request

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after a transaction has been consummated and problems have been identified during examination. *See* Rogovin & Korb, *supra* note 239, at 349-50; *see also* 26 U.S.C. § 7121.

[242] Rogovin & Korb, *supra* note 239, at 343.

[243] *Id.* at 348.

[244] *See* 26 U.S.C. § 6110(k)(3); Rogovin & Korb, *supra* note 239, at 347-48. A letter ruling will have precedential effect only if the Secretary so provides by regulation, *id.*, but "[t]he only regulations that come close to allowing reliance are the penalty regulations under section 6662," *id.* at 348. In 1976, out of concern that private letter rulings were creating a body of secret law not available to all taxpayers, Congress required the IRS to make the rulings available to the public. *See id.* at 347; 26 U.S.C. § 6110(h)(1). This history is fascinating in its own right.

[245] Rogovin & Korb, *supra* note 239, at 330.

[246] Internal Revenue Bulletin, Bulletin No. 2015-1, Introduction (Jan. 2, 2015), http://www.irs.gov/pub/irs-irbs/irb15-01.pdf.

[247] Rogovin & Korb, *supra* note 239, at 331.

for guidance from a taxpayer, provides a generally reliable sense of how the agency will apply the law to proffered facts, serves the purpose of addressing the taxpayer's uncertainty, and is made publicly available. But it is not legally binding, has no precedential effect, and is not subject to judicial review. The revenue ruling is more closely analogous to a declaratory order—it is more formal, may generate greater certainty, and has precedential effect. But it is based on facts that are generalized, it binds no individual taxpayer, and although "courts will often hold the Service to the position expressed in the revenue ruling," they do not consistently defer to them.[248]

Another device that appears to be even more similar to a declaratory order is the "advisory opinion" that Section 205 of the Health Insurance Portability and Accountability Act of 1996 authorizes the Department of Health and Human Services (HHS), in consultation with the Department of Justice, to issue.[249] Although the nomenclature used to describe this device suggests it is merely a form of non-binding guidance, closer inspection reveals it to be more. The HHS advisory opinion power is used to provide healthcare providers with case-specific exceptions to the anti-kickback laws that prevent fraud and corruption in federal healthcare entitlement programs.[250] Generally speaking, agency decisions that provide exceptions or safe harbors to otherwise applicable regulatory requirements are viewed as necessarily legislative (i.e., legally binding) rules.[251] In keeping with this general principle, HIPAA expressly provides that an HHS advisory opinion on anti-kickback liability "shall be binding as to the Secretary and the party or parties requesting the opinion."[252] This binding effect, although limited, gives healthcare providers the certainty necessary to move forward with innovative

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[248] *Id.* at 336.

[249] *See* 42 U.S.C. § 130a-7d(b); Issuance of Advisory Opinions by the OIG, 63 Fed. Reg. 38,311, 38,313 (July 16, 1998) (codified at 42 C.F.R. pt. 1008); *see generally* Christopher J. Climo, *A Laboratory of Regulation: The Untapped Potential of the HHS Advisory Opinion Power*, 68 VAND. L. REV. 1761 (2015) (examining HHS's statutory power to grant "advisory opinions").

[250] *See* Climo, *supra* note 249, at 1763.

[251] *See* Emily S. Bremer, *American and European Perspectives on Private Standards in Public Law*, 91 TUL. L. REV. 325, 365 & n.182 (2016)

[252] 42 U.S.C. § 1320a-7d(b)(4)(A).

business arrangements that can benefit the public by reducing costs and improving access to healthcare.[253] The HHS advisory opinion thus has the core characteristics of a declaratory order and offers the same benefits.

C. Expanding the Use of Declaratory Orders

The declaratory order is a unique procedural device that offers valuable benefits to both agencies and regulated parties. Although agencies may be understandably reluctant to legally bind themselves, doing so may in some instances be the only way to achieve the level of clarity and certainty that is necessary for a program to run smoothly and effectively. The adjudicatory nature of the declaratory order offers a valuable compromise here: it allows the agency to bind itself and regulated parties, but that binding effect is limited by the facts stated in the order, and the agency is not prevented from changing its legal conclusion or policy in a subsequent order. By providing definitive guidance through a document of easily ascertainable legal effect, declaratory orders may reduce or eliminate litigation.[254] By using declaratory orders to address narrow questions raised by specific and uncontested facts, an agency can precisely define the legal issues it addresses and reserve related issues for future resolution, thereby facilitating an incremental approach to the provision of regulatory guidance. The resulting body of agency precedent will not only be useful to regulated and other interested parties, but may also prove invaluable to the agency when it later decides to conduct a rulemaking or other proceeding for formulating policy on a broader scale. Other uses may be possible as well. For example, an agency that conducts mass adjudication could use the declaratory order to promote uniformity by giving its own adjudicators practical and detailed guidance regarding the proper application of the law to commonly encountered factual circumstances.[255]

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[253] *See* Climo, *supra* note 249, at 1765-66.

[254] *Cf.* Rogovin & Korb, *supra* note 239, at 331.

[255] To the author's knowledge, no agency currently uses declaratory orders in this manner. But the method appears to be wholly consistent with the law governing the appropriate confines of administrative declarations.

Three developments may encourage agencies to overcome their traditional reluctance to use declaratory orders. First, it is now reasonably clear that agencies may issue declaratory orders in informal adjudication. This development expands the availability of the device and also reduces the cost and procedural burden of using declaratory orders. Second, courts today are more willing to review guidance documents and to question an agency's characterization of its action as non-binding. The legal concepts underlying this development are difficult and contested, and the relevant judicial precedent is inconsistent and often unclear. Agencies may be able to avoid some of the attendant litigation risk by using declaratory orders—a binding, but targeted form of guidance—in lieu of other forms of non-binding, legislative guidance. Finally, new programs and new challenges facing old programs may create opportunities to beneficially expand the use of declaratory orders. For example, and as previously suggested, the device may be particularly well suited to streamlining overwhelmed adjudicatory programs by providing definitive guidance on the resolution of common issues.

In light of the unique advantages of declaratory orders and these recent developments, agencies should use declaratory orders more frequently. It may be particularly appropriate for an agency to use a declaratory order when regulated parties request or otherwise appear to require concrete guidance as to how the agency would apply existing regulatory requirements to proposed or contemplated activities or to emerging or concrete disputes among regulated parties or between a regulated party and state or local government. Ordinarily, the facts regarding these activities should be susceptible of accurate description, uncontested, and unlikely to change.[256] Beyond these most basic

[256] *See, e.g.*, CHARLES H. KOCH, 2 ADMINISTRATIVE LAW AND PRACTICE § 5:17, at 40 (3d ed.) ("Ordinarily declaratory orders should be issued only where critical facts are clear and cannot be altered by subsequent events."); AG'S REPORT, *supra* note 11, at 32 (stating that declaratory orders should "be employed only in situations where the critical facts can be explicitly stated, without possibility that subsequent events will alter them"); Gellhorn, *supra* note 56, at 157 (arguing that "declaratory rulings should be reserved for cases which reflect a real need for administrative guidance" and "are appropriate

considerations, however, agencies should experiment with innovative uses of declaratory orders to improve regulatory programs by providing binding and reliable guidance.

CONCLUSION

The declaratory order is an overlooked and valuable tool that agencies historically have underused. A product of adjudication, this procedural device allows an agency to dispel uncertainty and to develop administrative policy incrementally through targeted, legally binding, non-coercive guidance to regulated parties. It thus offers a unique combination of the characteristics of the more widely known and commonly used policymaking forms of rulemaking, adjudication, and guidance.

The historical underuse of the device may be attributed to a variety of factors, among which two are key. First, for many decades after the APA's passage, the prevailing view was that a declaratory order could be used to address only those relatively few matters that are subject by statute to formal adjudication. This view sharply limited the usefulness of the device—but the courts have more recently discarded it. Second, agencies have consistently exhibited a preference for informal, non-binding forms of guidance that are more shielded from judicial review than are declaratory orders. In recent decades, however, courts have demonstrated a greater willingness to scrutinize an agency's characterization of a document as non-binding and to review informal guidance. This development may have reduced the declaratory order's apparent comparative disadvantage.

In light of these developments, it appears that the time is ripe for agencies to integrate the declaratory order more fully into their procedural arsenal. The experiences of the relatively few agencies that have a robust declaratory practices suggests that, when used appropriately, the declaratory order can improve the administration of both regulatory and adjudicatory programs. It can allow an agency to save significant resources by staying abreast of emerging developments, addressing issues before they become problems, and preemptively adjudicating matters that

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only when the fact situations to which they relate can be described accurately and unequivocally").

might otherwise have to be resolved through more costly enforcement mechanisms. Building on previous experience, agencies should not hesitate to identify innovative new ways to use declaratory orders. An agency that has been charged with administering a new program, or which faces new challenges in an existing program, may be particularly well positioned to innovate.