

Adrienne Naumann

Dear Sir or Madam:

I am an attorney who has practiced before U.S. federal agencies for over thirty years. I attended the November 13th evening hearing on the proposed regulation amendment captioned above. I testified that I could not make a recommendation, because there was a conflict between the opposers' factual representations and the agency's representation of these same facts during the hearing. Since then I have reviewed the agency's online red lined proposed changes for my final response which is as follows.

My review revealed that (i) ALL references to the Act were deleted from the proposed regulation, and (ii) an internal procedure mechanism outside the Act had been added.

Is there an express written exemption for this particular agency within the Act itself, another federal act, or federal regulations thereto? A federal appellate court decision?

If so this exemption should be posted upon the agency's website to provide fair notice and a legal basis for this particular proposed regulation change. Under federal administrative law, the agency cannot unilaterally exempt itself from the Act.

If there is no legal basis for removing the regulation from the scope of the federal Administrative Procedure Act, then the proposed regulation is clearly ultra vires the agency's authority. There also are some potential constitutional concerns. The same is true to any agency attempts to exempt its regulations from the federal Freedom of Information Act.

Respectfully submitted,
Adrienne B. Naumann, M.S., J.D.