



## Contractors in Rulemaking

### Committee on Rulemaking

#### Proposed Recommendation from Committee on Rulemaking | April 25, 2022

1            Agencies rely on private contractors to perform many kinds of services in support of their  
2 rulemaking activities. These services can occur at any stage of the rulemaking process. Functions  
3 that agencies assign to contractors include conducting research undergirding a rule; preparing  
4 regulatory impact analyses; facilitating meetings with interested persons; and tabulating,  
5 categorizing, or summarizing public comments the agency receives. As with other agency  
6 functions, contracting out specific rulemaking functions may help increase staffing flexibility to  
7 ease workloads, lower administrative costs, provide topic-specific expertise or access to  
8 technology that agencies do not possess internally, and provide alternative perspectives on  
9 particular issues.

10           Agencies' use of contractors, however, may also raise distinctive concerns in the  
11 rulemaking context.<sup>1</sup> Agencies must ensure that they comply with relevant legal obligations,  
12 including the prohibition on outsourcing "inherently governmental functions" (IGFs).<sup>2</sup> They also  
13 face a need to exercise their discretion in a way that avoids ethics violations, promotes  
14 efficiency, and ensures that agency officials exercise proper oversight of contractors. With  
15 respect to the prohibition on contracting out IGFs, the Office of Management and Budget's  
16 Circular A-76, *Performance of Commercial Activities*, and the Office of Federal Procurement  
17 Policy's Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*,

---

<sup>1</sup> Cf. Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, ¶ 6, 50 Fed. Reg. 28364, 28365 (July 12, 1985).

<sup>2</sup> 48 C.F.R. § 7.503; see also OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). Other relevant legal considerations may be presented under other sources of law.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

18 provide examples of certain IGFs that should not be contracted out.<sup>3</sup> Circular A-76 also describes  
19 activities that are “closely associated” with IGFs and for which agencies should exercise  
20 heightened caution when assigning such functions to contractors.<sup>4</sup>

21 Although neither Circular A-76 nor Policy Letter 11-01 describes contracting functions  
22 related to rulemaking activities in any detail, they generally provide that contractor functions  
23 should be limited to those that *support* the agency’s policymaking activities and do not supplant  
24 the agency’s decision-making role. The risk of contracting out an IGF, or even an activity closely  
25 associated with an IGF, is heightened when a contractor is drafting the text or preamble of a rule,  
26 performing analyses, or presenting strategy options to be used by agency employees in the  
27 rulemaking context. As a practical matter, these concerns may also be greater when agencies  
28 enter into contracts that span multiple years and cover multiple rulemaking functions.

29 Agencies must consider potential ethical issues when contracting out rulemaking  
30 functions. Although contractors are, with a few exceptions, generally not subject to the ethics  
31 laws governing federal employees, there are nevertheless potential ethics-related risks against  
32 which agencies must protect and which may not be addressed adequately under existing  
33 procurement regulations.<sup>5</sup> The risks of conflicts of interest (both organizational and personal)  
34 and misuse of confidential information may be especially salient when contractors support a  
35 policymaking function such as rulemaking.<sup>6</sup> Agencies can mitigate these concerns by  
36 establishing and internally disseminating policies and procedures governing the use and  
37 management of contractors in rulemaking, including any required disclosure related to their use.

---

<sup>3</sup> OMB CIRCULAR A-76, *supra* note 2; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Oct. 12, 2011).

<sup>4</sup> OFPP Policy Letter 11-01 defines “closely associated with IGF” in the context of policy and regulatory development as “support for policy development, such as drafting policy documents and regulations, performing analyses[ and] feasibility studies, and [developing] strategy options.” 76 Fed. Reg. at 56234.

<sup>5</sup> *E.g.*, 48 C.F.R. subparts 3.11 (*Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions*), 9.5 (*Organizational and Consultant Conflicts of Interest*).

<sup>6</sup> *See* Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48792 (Aug. 9, 2011).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

38 Agencies will need to consider the practical benefits and challenges of using contractors  
39 to perform functions in furtherance of agency rulemaking. Those considerations might include  
40 the effects of repeated reliance on agencies' in-house capacities, in particular their ability to  
41 maintain necessary career staff with appropriate skills. Agencies may also wish to consider  
42 alternative methods to contracting when they need to expand internal capacity in connection with  
43 rulemaking, such as by using executive branch rotations, fellowship programs, or federally  
44 funded research and development centers, or by making arrangements for assigning temporary  
45 employees under the Intergovernmental Personnel Act.<sup>7</sup>

46 This Recommendation provides guidance to agencies for when they are considering  
47 contracting out certain rulemaking-related functions. Recognizing that agencies' needs vary  
48 enormously, it addresses a range of legal, ethical, prudential, and practical considerations that  
49 agencies should take into account when using contractors.

### RECOMMENDATION

#### Internal Management

- 50 1. Agencies that use contractors to perform rulemaking-related functions should adopt  
51 and publish written policies related to their use. These policies should cover matters  
52 such as:
- 53 a. The types of rulemaking functions considered to be inherently governmental  
54 functions (IGFs) or closely associated with IGFs;
  - 55 b. Internal procedures to ensure that agency employees do not contract out IGFs and  
56 to ensure increased scrutiny when contracting out functions that are closely  
57 associated with IGFs;
  - 58 c. Requirements for internal disclosure concerning functions contractors undertake  
59 with regard to specific rulemakings;

---

<sup>7</sup> 5 U.S.C. §§ 3371-3375; *see also* 5 C.F.R. part 334.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 60 d. Standards for when contractors should identify themselves as such in  
61 communications with the public in connection with rulemakings; and  
62 e. Ethical rules applicable to contractors.
- 63 2. To enhance their management of contractors, agencies should consider providing  
64 rulemaking-specific training for managers on agency policies and ethical restrictions  
65 applicable to contractors. Agencies should also consider designating an agency office  
66 or officer to answer questions about the use of contractors to perform rulemaking-  
67 related functions and be responsible for deciding whether an activity is an IGF.
- 68 3. When agencies rely on contractors in a rulemaking, they should ensure that agency  
69 employees can identify contractors and are aware of contractors' assigned functions.  
70 Agencies should specifically focus on whether contractors should work in the same  
71 space as agency employees, how and to what extent they may participate in meetings  
72 with agency leadership or other meetings at which substantive policy is decided, and  
73 whether they should be provided with their own agency email addresses.
- 74 4. Agencies should consider ways to share information about contractors in rulemaking  
75 within and across agencies. This might include using existing contracting databases or  
76 schedules to promote greater coordination and efficiency concerning existing  
77 rulemaking contracts, as well as informal sharing of practices for managing  
78 contractors.

### **Ethics**

- 79 5. When selecting and managing contractors for rulemaking-related functions, agencies  
80 should evaluate whether any firm under consideration to serve as a contractor may  
81 have an actual or perceived organizational conflict of interest in connection with any  
82 assigned function. When a potential organizational conflict exists or arises, agencies  
83 should either select another contractor or put in place appropriate protections to  
84 ensure that the contractor's outside interests do not undermine its ability to perform  
85 its assigned functions in a way that does not create an actual or perceived conflict of  
86 interest.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 87           6. When contracting out rulemaking-related functions for which there is a risk of a  
88           personal conflict of interest by a covered employee of the contractor, agencies should  
89           provide in the contract that the contractor will not assign functions to any employee  
90           who has an actual or perceived conflict of interest and, as appropriate, provide  
91           employee training on recognizing and disclosing personal conflicts. The contract  
92           should also provide that, in the event that an employee improperly performs a  
93           function despite the existence of a personal conflict of interest, the contractor will  
94           disclose the conflict to the agency and undertake appropriate remedial action.
- 95           7. When contracting out rulemaking-related functions for which there is a risk of misuse  
96           of confidential information, agencies should provide in the contract that the contractor  
97           will ensure that any employee handling such information has been appropriately  
98           trained on the necessary safeguards. The contract should also provide that the  
99           contractor will disclose any breach of this obligation to the agency and undertake  
100          appropriate remedial actions.

### **Transparency**

- 101          8. When an agency uses a contractor to perform an activity closely associated with an  
102          IGF in a specific rulemaking, the agency should consider disclosing the contractor's  
103          role in the rulemaking docket, the notice of proposed rulemaking, or the preamble to  
104          the final rule, including, if legally permissible, identifying the contractor.
- 105          9. Agencies should ensure that their agreements with contractors will allow the agencies  
106          to meet legal requirements for disclosure of information in connection with the  
107          rulemaking process and judicial review.

### **Intergovernmental Guidance**

- 108          10. The Office of Management and Budget should consider assessing whether current  
109          agency practices align with broader procurement best practices and providing  
110          guidance on contractor-performed functions associated with rulemaking processes.  
111          Among other things, this guidance might provide specific examples of rulemaking-



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

112 related functions that qualify as IGFs and should not be contracted out or that are  
113 closely associated with IGFs such that agencies should exercise heightened caution  
114 when contracting out those functions.