



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FY 2022 CONGRESSIONAL BUDGET JUSTIFICATION

May 28, 2021

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I. EXECUTIVE SUMMARY

The President's budget for FY 2022 requests \$3.4 million for the Administrative Conference of the United States (ACUS). ACUS submits this justification in support of the Administration's request. \$3.4 million will enable ACUS to undertake a full slate of projects aimed at promoting the values of the agency's enabling statute: "the efficiency, adequacy, and fairness of administrative procedure" (5 U.S.C. § 594) and will enable ACUS to continue working with the President, agencies, Congress, and the judiciary to implement its recommendations.

ACUS is a unique, executive-branch agency whose principal mission is to recommend improvements in agency rulemaking, adjudication, and other regulatory processes to the president, federal agencies, Congress, and the Judicial Conference of the United States. Congress has enacted a number of ACUS recommendations into law, and agencies and courts have adopted or relied upon many others.

ACUS also provides for the exchange of information among agencies, publishes sourcebooks of enormous value to both the government and public, produces reports designed to improve agency regulatory programs, and provides nonpartisan advice to agencies and Congress. As the former Chairman and Ranking Member of the House Judiciary Committee emphasized, "there is no other independent, non-partisan agency" on which "Congress can call ... to evaluate ways to improve the regulatory process."

ACUS has a demonstrated record, as no other agencies do, of improving the fairness and efficiency of administrative programs for the benefit of the American public. ACUS took substantial steps in calendar year 2020 to study and improve the fairness, accuracy, and efficiency of the procedures that agencies use to carry out federal programs. In addition to issuing six recommendations and one statement to improve federal administrative processes, ACUS helped:

- foster fair and transparent use of artificial intelligence in agency processes;
- promote fair, accurate, and transparent adjudication;
- support agencies during the COVID-19 pandemic;
- provide vital information to Congress about agency programs;
- encourage the public availability of significant agency materials;
- promote public participation in the rulemaking process; and
- ensure the integrity and effectiveness of federal programs.

As noted in the *Congressional Record*, ACUS's "excellent work" has ensured that "our Nation's federal administrative procedures are not only looked to as a standard around the world, but constantly in the course of additional improvement."

The requested budget of \$3.4 million will enable ACUS to undertake an active research and outreach program aimed at further improving federal administrative procedures and encouraging participation, collaboration, and innovation in the operation of federal programs.

II. ABOUT THE ADMINISTRATIVE CONFERENCE

A. HISTORY AND PURPOSE

Following bipartisan endorsement of the work of two temporary administrative conferences during the Eisenhower and Kennedy administrations, Congress enacted the Administrative Conference Act in 1964. The Act codified the structure of these conferences, which emphasized collaboration among a wide array of federal agencies, reliance on administrative law and regulatory experts from the private sector (including prominent academics), and the participation of public members representing diverse views. This collaborative effort is designed to produce consensus-based, nonpartisan recommendations for improving federal administrative processes, which affect every sector of our national economy and the lives of American citizens.

Since its establishment in 1968, ACUS has adopted hundreds of recommendations, each of them based on careful study and the informed deliberations of its members in an open process that encourages public input. Congress has enacted a number of ACUS recommendations into law, and agencies and courts have adopted or relied upon many others.

Recommendations are designed, in the words of the Administrative Conference Act, to help federal agencies “protect private rights,” carry out regulatory activities “expeditiously in the public interest,” “promote more effective participation and efficiency in the rulemaking process,” “reduce unnecessary litigation in the regulatory process,” “improve the use of science” in the regulatory process, and “improve the effectiveness of laws applicable” to that process (5 U.S.C. § 591). All recommendations are published in the Federal Register and online at www.acus.gov.

ACUS also provides for the exchange of information among agencies, publishes sourcebooks of enormous value to both the government and public, provides nonpartisan advice to agencies and Congress, and issues reports designed to improve agency regulatory programs. Agencies frequently consult and rely on these materials to improve their administrative processes.

ACUS’s oversight committees in Congress have expressed strong bipartisan support for its work. The Chairmen and Ranking Members of the House Judiciary Committee and its Subcommittee on Administrative Law recently noted in the *Congressional Record* that “there is no other independent, non-partisan agency” on which “Congress can call . . . to evaluate ways to improve the regulatory process”; that “[a]s a result of” ACUS’s “excellent work, our Nation’s federal administrative procedures are not only looked to as a standard around the world, but constantly in the course of additional improvement;” and that “in recognition of its many accomplishments” ACUS “has enjoyed broad bipartisan and bicameral support over the years.”

Several members of Congress acknowledged ACUS’s value and contributions during the floor debate preceding passage of the bipartisan Open Book on Equal Access to Justice Act. One

member characterized ACUS as “a highly respected nonpartisan agency” and noted the key role it “has historically played in helping Congress identify inefficiencies among the Federal agencies.”

Congress calls upon ACUS to conduct research on issues of great importance. The John D. Dingell, Jr. Conservation, Management, and Recreation Act requires ACUS to maintain an online database of attorney’s fees awarded in litigation against the federal government and submit an annual report to Congress on the amount of fees awarded during the preceding fiscal year. ACUS released its first report and data for FY 2019 in March 2020 and will continue to release new data and reports annually. The Strengthening Protections for Social Security Beneficiaries Act of 2018 required ACUS to prepare a report for the Social Security Administration with recommendations to improve the program under which SSA appoints legal representatives for beneficiaries who cannot manage their own finances. ACUS submitted its report to SSA in June 2020.

Members of the federal judiciary from diverse perspectives, too, have expressed strong support for ACUS. Both Justice Breyer and the late Justice Scalia testified before a congressional committee in 2010 in support of ACUS’s authorization. During his testimony, Justice Scalia called ACUS one of the federal government’s “best bargains for the buck.”

B. STRATEGIC PRIORITIES AND GOALS

Mission

ACUS brings together experts from the public and private sectors to advise the President, Congress, federal agencies, and the federal judiciary. These experts collaborate to design recommendations seeking to maximize fairness and efficiency in the administration of government programs.

Strategic Goals

Participation	ACUS will expand citizen participation in the regulatory process through increased use of interactive communications technologies and creative means of outreach, in order to provide essential information to government officials and to inform the public.
Collaboration	ACUS will study and promote the most responsive and efficient means of sharing authority and responsibility among the federal government, state and local governments, contractors, grantees, and citizens. This will include exploration of new models of collaborative governance as well as a more effective division of responsibility between government and the private sector.
Innovation	ACUS will seek new ideas that advance the core values of fairness and efficiency, and will study existing government programs to identify what

	works, what doesn't, and what's promising. Research will address the use of science, ensuring data quality, and performance evaluation.
Education	ACUS will bring together senior federal officials and outside experts to identify best practices and will advise agencies on revising their rulemaking and hearing processes, technology, and management systems to deliver better results. The Conference will be a central resource for agencies by compiling and publishing data and guidance on solving mutual problems.

Vision and Values

Under its statutory authorization, ACUS is responsible for studying “the *efficiency, adequacy, and fairness* of administrative procedure” (5 U.S.C. § 594). These three procedural values, which reflect legal and social science performance measures, guide ACUS’s work.

Efficiency	This value derives from economics and looks at how procedures employed by agencies achieve the public purposes the regulations are intended to serve. The question is whether the agency procedures and management techniques reflect optimum resource allocations, not whether the benefits of the underlying substantive regulations exceed their costs.
Adequacy	This value borrows from the disciplines of psychology and political science and looks at the effectiveness of regulatory techniques from the public’s perspective, including such factors as trust, transparency, and participation.
Fairness	This value derives from law and employs principles embedded in the Administrative Procedure Act and the Due Process Clause of the Constitution’s Fifth Amendment.

C. ORGANIZATION

ACUS carries out its mission through two components: (1) the *Assembly*, and (2) the *Office of the Chairman*.

The Assembly

The Assembly, made up of 101 representatives from the public and private sectors, makes recommendations to improve federal administrative processes. The Assembly typically meets semi-annually in plenary session to debate, amend, and formally adopt recommendations. Federal agencies, Congress, and the federal judiciary frequently rely on these recommendations to improve the administration of federal programs.

The Assembly consists of the *Chairman*, the *Council*, fifty *Government Members*, and forty *Public Members*. Other than the Chairman, none receive compensation for their services.

Chairman	<p>The ACUS Chairman is appointed for a five-year term by the President and confirmed by the Senate. The Chairman presides at meetings of the Council and at each ACUS plenary session, where he or she makes a full report concerning ACUS’s affairs since the previous plenary session. During the absence, incapacity, or vacancy of the office, the Vice Chairman serves as Chairman. The position of Chairman is vacant as of May 2021. The current Vice Chairman is Matthew L. Wiener.</p>										
Council	<p>The Council consists of the Chairman and up to ten members appointed by the President for three-year terms. Federal officials may constitute no more than one-half of the Council’s total membership. The Council is responsible for calling plenary sessions and approving their agendas, proposing bylaws and regulations for adoption by the Assembly, reviewing budgetary proposals, and approving the appointment of public members and the initiation of research studies. Council members as of May 2021 are:</p> <table data-bbox="634 1052 1338 1241"> <tr> <td>Ronald A. Cass</td> <td>Adrian Vermeule</td> </tr> <tr> <td>Jeffrey M. Harris</td> <td>Matthew L. Wiener</td> </tr> <tr> <td>Donald F. McGahn II</td> <td>Vacant</td> </tr> <tr> <td>Michael H. McGinley</td> <td>Vacant</td> </tr> <tr> <td>Matthew E. Morgan</td> <td>Vacant</td> </tr> </table>	Ronald A. Cass	Adrian Vermeule	Jeffrey M. Harris	Matthew L. Wiener	Donald F. McGahn II	Vacant	Michael H. McGinley	Vacant	Matthew E. Morgan	Vacant
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Matthew E. Morgan	Vacant										
Government Members	<p>Government members come from federal executive departments, agencies, and independent regulatory boards and commissions. Appendix B contains a roster of Government Members.</p>										
Public Members	<p>Public members come from the private sector, including academia, the practicing bar, industry, and public interest organizations. Appendix C contains a roster of Public Members.</p>										

ACUS bylaws permit the appointment of non-voting members—liaison representatives, senior fellows, and special counsels—who are not part of the Assembly but contribute immeasurably to ACUS’s activities. These individuals are afforded most privileges of membership except that they may not vote during plenary sessions. The Chairman appoints non-voting members with the approval of the Council. Appendix D contains a roster of non-voting members.

Liaison Representatives	The Chairman, with the approval of the Council, may enter into liaison arrangements with federal agencies, congressional committees, and other organizations that do not have voting members of the Conference. Agencies or organizations so designated appoint their liaison representative. ACUS maintains liaison relationships with several congressional committees.
Senior Fellows	Senior fellows include former ACUS Chairmen and former members who completed six years of service or served in the federal judiciary. The Chairman appoints senior fellows with the approval of the Council. They serve two-year terms and may be reappointed.
Special Counsels	Special Counsels advise the membership in the areas of their special expertise. The Chairman appoints them with the approval of the Council. They serve two-year terms and may be reappointed.

Office of the Chairman

The Office of the Chairman consists of the Chairman and a small professional staff. A roster of the ACUS staff is available at www.acus.gov/directory/staff.

In addition to supporting all activities of the Assembly and its committees, the Office of the Chairman collects information and statistics from agencies for analysis and dissemination; publishes reports, sourcebooks, and other materials useful for evaluating and improving administrative processes; prepares reports for Congress; provides technical advice to members of Congress, their staffs, and federal agencies, whether informally or through formal reports; facilitates interchange of information among departments and agencies on matters of administrative procedure; conducts training sessions for federal agencies; and holds public forums, sometimes with other entities, to address matters of public interest. These resources are of enormous value to both government officials and the public and often lead to the implementation of best practices at federal agencies.

III. RECENT ACCOMPLISHMENTS

A. HIGHLIGHTS

ACUS took substantial steps in calendar year 2020 to improve the efficiency, adequacy, and accuracy of the procedures that administrative agencies use to carry out federal programs.

Fostered Fair and Transparent Use of Artificial Intelligence in Agency Processes

As the ACUS Assembly recently observed, “artificial intelligence (AI) techniques are changing how government agencies do their work. Advances in AI hold out the promise of lowering the cost of completing government tasks and improving the quality, consistency, and predictability of agencies’ decisions. But agencies’ uses of AI also raise concerns about the full or partial displacement of human decision making and discretion.” To help agencies navigate these issues, ACUS:

- Approved a statement, *Agency Use of Artificial Intelligence*, that identifies issues agencies should consider when adopting, revamping, establishing policies and practices governing, and regularly monitoring AI systems. Among the topics it addresses are transparency, harmful biases, technical capacity, procurement, privacy, security, decisional authority, and oversight (see page - 14 -).
- Published a first-of-its-kind report, authored by leading scholars, that surveys 157 AI use cases across the federal government and analyzes how agencies are using AI to enforce federal law, adjudicate cases, make rules, and perform other regulatory tasks (see page - 18 -).
- Published a report by another leading scholar that examines the legal and practical hurdles to deploying AI in the regulatory process (see page - 18 -).
- Featured the perspectives of leading scholars and officials from the General Services Administration, Government Accountability Office, Health and Human Services Department, Securities and Exchange Commission, and Social Security Administration at the American Bar Association’s Administrative Law Conference in November 2019 and a virtual symposium in summer 2020 (see page - 21 -).

Promoted Fair, Accurate, and Transparent Adjudication

Federal agencies conduct millions of adjudications each year. ACUS is at the forefront of identifying and promoting best practices to encourage fair and transparent adjudication across the federal government. Building on its previous work on the subject, ACUS in calendar year 2020:

- Approved a recommendation, *Agency Appellate Systems*, that offers agencies best practices to improve administrative review of hearing-level adjudicative decisions with

respect to case selection, decision-making process and procedures, management oversight, and public disclosure and transparency (see page - 14 -).

- Approved a recommendation, *Publication of Policies Governing Agency Adjudicators*, that encourages agencies to disclose policies governing the appointment and oversight of adjudicators that bear on their impartiality and constitutional status (see page - 14 -).
- Established the Council on Federal Agency Adjudication as a forum for the heads of agency adjudication programs to exchange information about procedural innovations and best management practices (see page - 22 -).
- Organized a well-attended virtual symposium in August 2020, at which agency officials, leading scholars, and others discussed key constitutional, structural, procedural, and management questions surrounding federal agency adjudication (see page - 21 -).
- Released a report on administrative recusal rules in February 2020 (see page - 19 -). Forthcoming reports will address the adjudicative and enforcement functions of agency heads (see page - 26 -) and alternative means of dispute resolution (see page - 26 -).

Supported Agencies During the COVID-19 Pandemic

Agency adjudication offices have faced new operational challenges throughout the COVID-19 pandemic, including a switch to primarily remote operations and the need for secure, electronic tools to communicate with parties, process cases, and conduct hearings. To help agency adjudication offices continue serving the American public throughout the pandemic, ACUS:

- Maintains an online clearinghouse of agency policies and other statements that describe relevant developments in agency adjudicative processes (see page - 20 -).
- Released a new report to help agencies understand legal issues surrounding the use of remote hearings in agency adjudications (see page - 18 -).
- Launched a new project that is anticipated to result in recommended best practices for virtual hearings (see page - 25 -).
- Convened an Interagency Roundtable (see page - 23 -) in April 2020 at which more than 100 officials from across the federal government exchanged best practices on operating remotely, developing electronic processes, and conducting video and telephone hearings.
- Sponsored a panel on responding to challenges in adjudication during the pandemic at the American Bar Association's Administrative Law Conference in November 2020.

Separately, ACUS recently launched a companion webpage that tracks rulemaking adaptations during the COVID-19 pandemic. The page catalogs rulemakings in which agencies, citing the COVID-19 pandemic, invoke exceptions to the Administrative Procedure Act's rulemaking provisions, extend public comment periods, or modify in-person and paper processes to submit or review documents and hold public meetings (see page - 20 -).

Provided Vital Information to Congress About Agency Programs

Congress often calls upon ACUS to conduct research on issues of enormous importance, to ensure that federal programs continue to work effectively for those they are meant to help. In response to congressional mandates, ACUS:

- Submitted the first annual report of awards of attorney's fees to individuals and small businesses who prevail against the federal government under the Equal Access to Justice Act (see page 12) and established an accompanying searchable database of FY 2019 awards (see page 15).
- Released a report that provided recommendations to the Social Security Administration on how it can better prevent the fraudulent or inappropriate use of the approximately \$70 billion annually in benefit payments made to the more than 7.7 million beneficiaries who are assigned a representative payee (see page 12).

ACUS staff continue to provide technical advice in response to requests from House and Senate staff (see page - 16 -). The agency also submitted an October 2020 memorandum under its Statutory Review Program that compiled federal judicial and agency adjudicative decisions identifying technical problems in statutes governing administrative procedure (see page - 16 -).

B. PROGRAMMATIC IMPACT

In addition to its recent accomplishments, ACUS's work has consistently informed the actions of federal agencies, the President, Congress, and federal courts.

Encouraged the Public Availability of Significant Agency Materials

ACUS has encouraged agencies to make guidance documents, adjudication materials, and important descriptions of agency policies accessible to members of the public. As a result:

- Agencies across the federal government have established organized, fully-searchable portals to improve public access to guidance documents, consistent with Recommendation 2019-3, *Public Availability of Agency Guidance Documents*.

- The Office of the Federal Register and GAO have taken steps, relying on Recommendation 2011-5, *Incorporation by Reference*, to ensure that regulated parties and the public can access copyrighted private standards incorporated into federal regulations.
- The Unified Agenda of Regulatory and Deregulatory Actions now includes regulations that have been dormant for long periods, consistent with Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*.
- The Social Security Administration (SSA) pledged to consult Recommendation 2017-1, *Adjudication Materials on Agency Websites*, when it determines how it will make precedential decisions regarding the conduct of representatives available to the public.

Promoted Public Participation in the Rulemaking Process

An integral part of ACUS's statutory mission is to promote more effective public participation in the rulemaking process. ACUS has issued several recommendations urging agencies to adopt best practices that encourage the public's involvement in agency rulemakings. Many agencies have consulted or relied on those recommendations to promote public participation in the rulemaking process. For example:

- GAO relied on Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, to urge agencies to publicly disclose their policies regarding the treatment of materials submitted for consideration in the rulemaking process.
- The Commodity Futures Trading Commission implemented Recommendation 2014-6, *Petitions for Rulemaking*, by permitting members of the public to file petitions for rulemakings on the agency's website.

Improved the Fairness and Accuracy of Agency Adjudication

ACUS has consistently encouraged agencies to adopt procedures that promote fair, accurate, and efficient adjudication by federal agencies. Many agencies have consulted or relied on ACUS resources to make their adjudicative procedures fairer, more accurate, and more efficient. For example:

- Several agencies, including the Occupational Safety and Health Review Commission, have relied on ACUS's *Model Adjudication Rules*, updated most recently in 2018, to comprehensively revise their procedural rules.
- The Judicial Conference of the United States recently relied on Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*, in proposing rules that will improve federal-court review of the nearly 18,000 decisions appealed from the Social Security Administration (SSA) each year.

- SSA implemented Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*, to improve the accuracy of decisions that evaluate medical evidence in SSA’s multi-billion dollar per year disability benefits program.
- SSA also used an Office of the Chairman report, *SSA Disability Benefits Program: The Duty of Candor and Submission of All Evidence*, as a blueprint for a 2015 regulation requiring claimants to disclose all relevant evidence—not just, as under the previous rule, favorable evidence.

Ensured the Integrity and Effectiveness of Federal Programs

Consistent with its statutory mission to help ensure that private rights are fully protected and federal regulatory activities are carried out expeditiously in the public interest, ACUS has repeatedly recommended improvements to ensure that agency processes promote the effective administration of federal programs. In response, Congress and agencies have:

- The Bipartisan Budget Act of 2015 implemented Recommendation 2012-8, *Inflation Adjustment Act*, by adjusting civil penalties for regulatory violations. Revenues to the federal government will increase tens of millions of dollars annually as a result.
- The Social Security Advisory Board relied on an Office of the Chairman report, *The SSA Representative Payee Program*, in its January 2018 recommendations to eliminate abuse and fraud by representatives of elderly and disabled recipients of federal benefits. In April 2018, Congress passed the Strengthening Protections for Social Security Beneficiaries Act into law, which required ACUS to study the issue further. ACUS submitted its recommendations to the Social Security Administration in March 2020.
- The U.S. Senate Homeland Security and Governmental Affairs Committee relied on Recommendation 2014-5, *Retrospective Review of Agency Rules*, when it favorably reported legislation (S. 1420, 116th Cong.) that would require agencies to retrospectively review major regulations.

C. RECOMMENDATIONS

ACUS’s principal mission is to recommend improvements in agency rulemaking, adjudication, and other regulatory processes to the president, federal agencies, Congress, and the federal judiciary. The Assembly adopted six recommendations and one statement during calendar year 2020 to improve the fairness and efficiency of agency rulemaking, adjudication, and other regulatory processes:

- **Recommendation 2020-1 – Rules on Rulemakings.** This recommendation encourages agencies to consider issuing rules governing their rulemaking procedures. It identifies subjects that agencies should consider addressing in their rules on rulemakings—without

prescribing any particular procedures—and it urges agencies to solicit public input on these rules and make them publicly available.

- **Recommendation 2020-2 – *Protected Materials in Public Rulemaking Dockets.*** This recommendation offers agencies best practices for protecting sensitive personal and confidential commercial information in public rulemaking dockets. It identifies, in particular, best practices for agencies to use when redacting, summarizing, and aggregating comments that contain such information. It also encourages agencies to provide public notices that discourage commenters from submitting such information in the first place.
- **Recommendation 2020-3 – *Agency Appellate Systems.*** This recommendation offers agencies best practices to improve administrative review of hearing-level adjudicative decisions with respect to case selection, decision-making process and procedures, management oversight, and public disclosure and transparency. In doing so, it encourages agencies to identify the objectives of such review and structure their appellate systems to serve those objectives.
- **Recommendation 2020-4 – *Government Contract Bid Protests Before Agencies.*** This recommendation suggests improvements to the procedures governing agency-level procurement contract disputes—commonly called bid protests—under the Federal Acquisition Regulation and agency-specific regulations to make those procedures more simple, transparent, and predictable. It urges agencies to clarify what types of decisions can be the subjects of agency-level bid protests, what processes and deadlines will govern such protests, and who in the agency will decide such protests; make it easier for protesters to get information about the decisions they protest; and publish more data on agency-level protests.
- **Recommendation 2020-5 – *Publication of Policies Governing Agency Adjudicators.*** This recommendation encourages agencies to disclose policies governing the appointment and oversight of adjudicators that bear on their impartiality and constitutional status. It offers best practices on how to provide descriptions of, and access to, such policies on agency websites.
- **Recommendation 2020-6 – *Agency Litigation Webpages.*** This recommendation offers agencies best practices for making their federal court filings and relevant court opinions available to the public on their websites, with particular emphasis on materials from litigation dealing with agency regulatory programs. It provides guidance on the types of litigation materials that will be of greatest interest to the public and on how agencies can disseminate the materials in a way that makes them easy to find.
- **Statement #20 – *Agency Use of Artificial Intelligence.*** This statement identifies issues agencies should consider when adopting, revamping, establishing policies and practices

governing, and regularly monitoring artificial intelligence systems. Among the topics it addresses are transparency, harmful biases, technical capacity, procurement, privacy, security, decisional authority, and oversight.

A full listing of adopted ACUS recommendations and statements is included as Appendix E. All ACUS recommendations and statements, along with reports and other supporting materials, are available at www.acus.gov/recommendations/current-recommendations-2010-present.

D. ASSISTANCE TO CONGRESS

Congress calls on ACUS to conduct research, collect information, and publish reports of its findings or recommendations. ACUS published two such reports in calendar year 2020:

- ***Open Book on Equal Access to Justice.*** Pursuant to Section 4201 of the bipartisan “John D. Dingell, Jr. Conservation, Management, and Recreation Act,” in March 2020 ACUS submitted to Congress its first annual report on attorneys’ fees awards under the Equal Access to Justice Act (EAJA). ACUS released its second annual report in March 2021. Under EAJA, federal agencies must reimburse private litigants for their attorneys’ fees when they prevail against the federal government in judicial proceedings and certain adversary adjudications when the government’s position is not substantially justified. ACUS will continue to work with agencies to collect EAJA award information for subsequent years, submit annual reports to Congress, and update its online database of awards as additional information comes available. The report and database are available at www.acus.gov/eaja.
- ***Social Security Administration’s Representative Payee Program: Information Sharing with States.*** Pursuant to the unanimously passed “Strengthening Protections for Social Security Beneficiaries Act of 2018,” ACUS submitted a report in June 2020 on information sharing between SSA and state courts regarding individuals who receive and manage benefits on behalf of beneficiaries. The representative payee program protects some of the most vulnerable members of society by having SSA appoint representative payees to help manage their benefits. State courts often appoint guardians or conservators to help manage assets for the same group of people. Information sharing between SSA and the state courts about the individuals involved in both programs could improve outcomes for beneficiaries, but there are certain legal and practical barriers to doing so. This project examined the potential opportunities, barriers, and risks of sharing representative payees’ information.

ACUS also provides assistance to members of Congress and their staffs in other ways, including:

- **Congressional Trainings.** ACUS has offered trainings to congressional staff on of topics ranging from best practices recommended by the ACUS Assembly to legislative drafting involving delegation of power to administrative agencies.
- **Statutory Review Program.** ACUS staff transmit to Congress (through its legislative counsel offices) federal judicial opinions that identify technical and related problems in statutes dealing with administrative procedure. Its primary purpose is to provide legislative drafters with the information they need to ensure future statutes adequately reflect Congress’s intent. Opinions are selected by ACUS staff based on independent research and, most importantly, suggestions from federal agencies.
- **Individualized Advice.** Congressional staff of both chambers of Congress and of both political parties often request technical assistance from ACUS. The Office of the Chairman frequently provides background information, technical legislative drafting assistance, and other non-partisan, technical advice to Hill staff.

More information about ACUS resources for Congress is available online at www.acus.gov/resources-congress.

E. MODEL RULES

ACUS periodically convenes committees or working groups to develop model rules that agencies can use to design new procedures or update their existing procedures. Recent model rule initiatives include:

- **Revised Model Rules for Implementation of the Equal Access to Justice Act.** ACUS published the *Revised Model Rules for Implementation of the Equal Access to Justice Act* on its website and provided notice of their availability in the *Federal Register* (84 Fed. Reg. 38,934 (Aug. 8, 2019)). The updated Rules implement ACUS’s statutory charge to advise agencies in establishing “uniform procedures for the submission and consideration of applications for an award of fees and other expenses” under the Equal Access to Justice Act (EAJA) in light of amendments to EAJA made since 1986 and evolving adjudicative practices since that time. Acting on research by Office of the Chairman staff, an ad hoc committee of agency and administrative law experts developed the revised *Rules*, which were formally recommended for agencies’ consideration as Recommendation 2019-4 – *Revised Model Rules for Implementation of the Equal Access to Justice Act*.
- **Model Adjudication Rules.** In 2018, ACUS published the revised *Model Adjudication Rules* on its website and noticed them in the *Federal Register* (83 Fed. Reg. 49,530 (Oct. 2, 2018)). The *Rules* are intended for use by all federal agencies when designing new, and revising existing, procedural rules governing agency adjudications that involve a trial-type hearing that offers an opportunity for fact-finding before an adjudicator. A working group of esteemed experts from inside and outside the government revised an earlier version of the *Model Adjudication Rules*, which were first published in 1993, to reflect significant

changes in adjudicative practices and procedures. The working group relied on ACUS's extensive empirical research of adjudicative practices reflected in the *Federal Administrative Adjudication Database* and input from agency officials, academics, practitioners, and other stakeholders.

Many agencies have consulted or relied on these resources to improve their procedural rules, including, in recent years, the Consumer Financial Protection Bureau and Occupational Safety and Health Review Commission.

F. SOURCEBOOKS

ACUS publishes sourcebooks of enormous value to executive-branch officials, members of Congress and their staffs, the federal courts, and the public. Recent sourcebooks include:

- ***Federal Administrative Adjudication Outside the Administrative Procedure Act.*** In September 2019, ACUS published this sourcebook examining federal administrative adjudication that is not subject to the adjudicatory provisions of the Administrative Procedure Act (i.e., non-APA adjudication). It provides a comprehensive overview and cross-cutting analysis of non-APA adjudication, and examines, among other things, the structure of the initial adjudication and any appeals; pre-hearing, hearing, and post-hearing procedures; the types of adjudicators used; and the caseloads at individual agencies. It relies in part on case studies to flesh out the overarching findings.
- ***Federal Administrative Procedure Sourcebook.*** In February 2019, ACUS launched a continuously updated electronic edition of the *Federal Administrative Procedure Sourcebook*. The *Sourcebook*, a joint initiative with the Section of Administrative Law and Regulatory Practice of the American Bar Association, is an annotated compilation of the key legal sources—including the Administrative Procedure Act, the Freedom of Information Act, the Congressional Review Act, and executive orders—governing nearly every aspect of administrative procedure. The electronic edition provides ready access to many of the valuable sources highlighted in the *Sourcebook* and is updated with significant developments, including statutory amendments and executive orders, and additional government documents, articles, and other sources as they become available.
- ***Sourcebook of United States Executive Agencies.*** In December 2018, ACUS published a second and substantially expanded edition of its *Sourcebook of United States Executive Agencies*. The *Sourcebook* examines the diverse characteristics of the departments, agencies, and other organizational entities that comprise the federal executive establishment and catalogs a comprehensive set of characteristics for each entity, including structure (e.g., commission or single-head agency, internal organization), personnel (e.g., number and types of appointed positions, limitations on removal), decision-making processes and requirements, political oversight, and sources of funding. Congress, federal agencies, and the federal courts have relied extensively on the *Sourcebook*.

G. REPORTS

Along with its longer sourcebooks, ACUS publishes reports on specific aspects of administrative procedure. Recent reports cover a range of topics, from agencies' use of artificial intelligence in the administrative process to administrative recusal rules to remote hearings, which agencies have increasingly used during the COVID-19 pandemic. Recent reports include:

- ***Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies.*** Released in early 2020, this first-of-its-kind report, commissioned by ACUS and authored by leading AI researchers and administrative law scholars at Stanford and New York University, examines the growing role that machine learning and other AI technologies are playing in federal agency adjudication, enforcement, and other regulatory activities. Based on a wide-ranging survey of federal agency activities and interviews with federal officials, the report maps current uses of AI technologies in federal agencies, highlights promising uses, and addresses challenges in assuring accountability, transparency, and non-discrimination in agency programs.
- ***A Framework for Governmental Use of Machine Learning.*** This report, authored by a leading administrative law scholar at the University of Pennsylvania, explores the contexts in which agencies might use machine learning and other forms of artificial intelligence (AI) to carry out regulatory functions. It examines the comparative strengths and weakness of human decision-making and AI, seeking to identify areas in which agencies should explore using AI, and consider legal and practical hurdles to deploying AI in the regulatory process.
- ***Legal Considerations for Remote Hearings in Agency Adjudications.*** Many adjudication offices have relied on remote hearings to continue to serve the public during the COVID-19 pandemic, with federal agencies experimenting with a variety of remote hearing types, including video and virtual hearings, telephone hearings, and written-only hearings. This June 2020 report provides an overview of the legal considerations that federal agencies may encounter as they develop and implement processes for remote hearings. It addresses potential due process and other constitutional questions, the requirements of generally applicable statutes including the Administrative Procedure Act and Rehabilitation Act, and concerns arising under agency-specific statutes and regulations. Building on this report, ACUS has initiated a new project on virtual hearings that is anticipated to result in recommendations in 2021 (see page - 25 -).
- ***Federal Court Review of SSA Disability Adjudication.*** SSA engaged ACUS to conduct an independent study of federal court review in Social Security Disability Insurance and Supplemental Security Income cases. Based on an extensive study of federal district court cases reviewing SSA's disability decisions and of SSA's internal quality control procedures, this report identifies causes for the high rates of remand or reversal by federal courts, offers recommendations to SSA for targeted reforms aimed at reducing the reversal rate, and recommends reforms to the Federal Rules of Civil Procedure to account for the

unique nature of SSA disability appeals in the district courts. This report led to *Special Procedural Rules for Social Security Litigation in District Court*, which urged the Judicial Conference to consider such reforms. As noted on page 6, the Judicial Conference has relied on ACUS's proposal in developing draft supplemental rules to implement such reforms. The Office of the Chairman also prepared a report for federal judges that explains recent SSA reform initiatives.

- ***Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators.*** This May 2020 report follows, and helps agencies implement, Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*. The report collects and analyzes a wide-ranging set of recusal standards and practices employed by more than 60 agencies across the federal government, highlighting their strengths and weaknesses and identifying features of adjudication programs that may affect agencies' approaches to recusal. Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication, and the report finds that a large majority of the agencies surveyed do not have rules that instruct adjudicators to explain their recusal decisions on the record even though there may be numerous benefits to be gained from such a requirement.
- ***Social Security Administration: Symptom Evaluation in Disability Determinations.*** At the request of SSA, ACUS's Office of the Chairman prepared an independent study that reviewed and analyzed SSA's laws, regulations, policies, and practices concerning evaluation of claimants' symptoms in the adjudication of social security disability claims. The report advises SSA on how to best articulate the scope of symptom evaluation in its adjudication process, improve consistency in disability determinations, reduce complaints of bias and misconduct against SSA adjudicators, and lessen the frequency of remands attributable to credibility evaluation. SSA adopted the report's recommendations when it issued Social Security Ruling 16-3p in March 2016.

The Office of the Chairman also publishes research reports for most recommendation projects that ACUS's committees and Assembly undertake. All reports are available on ACUS's website.

H. GUIDES AND HANDBOOKS

In addition to research-focused sourcebooks and reports, ACUS publishes a variety of resources to help agency officials understand applicable legal requirements and implement best practices recommended by the Assembly. Recent guides and handbooks include:

- ***Information Interchange Bulletins.*** ACUS regularly issues short, one-page Information Interchange Bulletins on discrete topics of administrative procedure. These Bulletins provide useful information for agency officials on legal issues they are likely to encounter as they carry out their work. The topics are often drawn from ACUS reports and recommendations, but they are intended solely to provide valuable information and do

not recommend reforms to agency practices. These Bulletins further ACUS's statutory mission of arranging for the exchange of information among agencies to help improve administrative procedure (5 U.S.C. § 594).

- ***Guide to Legal Issues Encountered in Public-Private Partnerships.*** ACUS convened senior federal officials from 21 agencies who actively work on public-private partnerships (P3s). The *Guide*, drafted collaboratively by the working group, centers on the major legal issues that agencies encounter as they participate in P3s. It also defines P3s; discusses a previous interagency effort on P3s; highlights activities that agencies often undertake as part of P3s; discusses issues that arise when agencies vetting of potential private partners; and provides examples of specific P3s. The State Department circulated the *Guide* to its Interagency Working Group on Public Private Partnerships in 2019.
- ***Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings.*** Building on ACUS's recommendations on best practices in video hearings, the *Handbook* provides guidance and advice through concrete and practical recommendations detailing how agencies may implement or improve their use of video teleconferencing in adjudicatory hearings. Acknowledging continuing development in this area, ACUS recently launched a new project to study best practices for virtual hearings in adjudication, which have become increasingly common during the COVID-19 pandemic (see page - 25 -).

I. DATABASES AND INFORMATION COLLECTIONS

ACUS compiles information on a variety of important subjects from agency and congressional source and makes them available on its website. Current databases and information collections include:

- ***Open Book on Equal Access to Justice.*** As noted under "Congressionally Mandated Reports" above, ACUS submitted to Congress its first annual report on attorneys' fees awards under the Equal Access to Justice Act (EAJA) in March 2020 and its second annual report in March 2021. The reports and database are available at www.acus.gov/eaja.
- ***Coronavirus (COVID-19) and Adjudication.*** ACUS maintains a webpage to help federal agency adjudication offices navigate challenges posed by the ongoing national emergency surrounding COVID-19. The webpage compiles relevant orders, policies, news releases, and other statements from dozens of adjudication offices across the federal government as well as reference materials prepared by ACUS.
- ***Coronavirus (COVID-19) and Rulemaking.*** ACUS maintains a webpage to track rulemaking adaptations during the COVID-19 pandemic. The page catalogs rulemakings in which agencies, citing the pandemic, invoke exceptions to the Administrative Procedure Act's rulemaking provisions, extend public comment periods, or modify in-person and paper processes to submit or review documents and hold public meetings.

- ***Federal Administrative Adjudication Database.*** With Stanford Law School, ACUS developed a database that catalogs federal administrative adjudication across the federal government. The database, which surveys 133 federal agencies and identifies 159 major adjudicatory schemes, provides an important resource for members of Congress and their staffs, agency officials, federal judges, and the public.
- ***Summary of Recent Administrative Law Reform Bills.*** Members of Congress have introduced a number of bills designed to amend or overhaul certain aspects of the federal administrative process. Given the significance of these proposals and the large number of bills introduced, the Office of the Chairman felt it would be useful to compile a list of bills introduced in the last several years. The Office of the Chairman updates this document periodically to add new bills and to reflect developments for existing bills.

J. FORUMS AND SYMPOSIUMS

ACUS regularly holds public forums and symposiums, sometimes with other entities, to address matters of public interest. These events are of enormous value to both government officials and the public and often lead to the implementation of best practices at federal agencies. Forums and symposiums in recent years include:

- ***Symposium on Federal Agency Adjudication (August 2020).*** ACUS cosponsored this forum with George Mason University’s C. Boyden Gray Center for the Study of the Administrative State and the Center for Progressive Reform. Through four virtual panels, leading scholars, practitioners, and agency officials examined issues related to the personnel, management, procedures, and design of federal administrative adjudication.
- ***Symposium on Artificial Intelligence in Federal Agencies (July – August 2020).*** Cosponsored with the Institute for Technology Law and Policy at Georgetown University Law Center, this symposium’s four virtual panels explored current and future agency uses of AI and their interplay with administrative and constitutional law doctrines.
- ***Forum on Nationwide Injunctions and Federal Regulatory Programs (February 2020).*** ACUS cosponsored this forum with the George Washington University Law School and American Bar Association’s Section of Administrative Law and Regulatory Practice. Deputy Attorney General Jeffrey Rosen provided the keynote address, and panelists—including a circuit court judge and assistant attorney general—discussed the arguments for and against nationwide injunctions, special issues that arise in challenges to federal regulations, and possible judicial and statutory reforms.
- ***Artificial Intelligence in Regulatory Enforcement and Artificial Intelligence in Administrative Adjudication (November 2019).*** ACUS sponsored two companion panels at the American Bar Association’s annual Administrative Law Conference that examined a wide array of legal and practical issues associated with agencies’ use of artificial

intelligence (AI) in regulatory enforcement and administrative adjudication. The panels largely drew upon an extensive report that a team of researchers at Stanford and New York University Law Schools prepared for ACUS. Panelists included several of the professors who prepared the report as well as agency officials whom they interviewed.

- ***Forum on Mass and Fake Comments in Agency Rulemaking (October 2018)***. ACUS cosponsored this forum with the *Administrative Law Review*. Dominic J. Mancini, Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA), provided the keynote address. The forum also included several panels consisting of leading academics and agency officials discussing how agencies address mass comments and how the rise of “fake” comments affects the rulemaking process.
- ***Forum on Federal Administrative Adjudication (September 2017)***. ACUS cosponsored a forum on federal administrative adjudication. The forum took place on Capitol Hill with many congressional staffers in attendance. Topics included technological innovations in adjudication and balancing fairness and efficiency in high-volume adjudication programs.
- ***Symposium on New Developments in Regulatory Benefit-Cost Analysis (September 2017)***. ACUS cosponsored a symposium on regulatory benefit-cost analysis with the George Washington University Regulatory Studies Center and the Society for Benefit-Cost Analysis. Former OIRA Administrators Susan Dudley and Sally Katzen appeared as featured speakers. The event included discussions of tools for evaluating regulatory and deregulatory impacts and on using regulatory analysis to implement new Presidential directives on regulatory review.
- ***Forum on Regulatory Capture (March 2016)***. ACUS sponsored a forum exploring special interest influence and the administrative state. The event, hosted on the Hill, featured remarks by Senators Mike Lee, Elizabeth Warren, and Sheldon Whitehouse. Topics discussed include whether certain types of regulations are less vulnerable to capture than others and whether deregulation is a solution to capture or is itself evidence of capture.

K. ASSISTANCE TO FEDERAL AGENCIES

ACUS regularly facilitates conversations among agencies, as well as between agency officials and outside experts, on matters of mutual interest. These events are of enormous value to government officials and often lead to the implementation of best practices at federal agencies. Current initiatives include:

- ***Council on Federal Agency Adjudication***. The Office of the Chairman convenes the Council on Federal Agency Adjudication. The Council provides a forum for the heads of agency adjudication programs to exchange information—about procedural innovations, best

management practices, and other subjects—that may be “useful in improving administrative procedure.”

- ***Council of Independent Regulatory Agencies.*** The Office of the Chairman convenes the Council of Independent Regulatory Agencies. A council for leaders in independent regulatory agencies, CIRA’s goal is to provide an ongoing forum to discuss issues common to these agencies.
- ***Interagency Roundtable.*** The Office of the Chairman convenes the Interagency Roundtable. Similar to CIRA (above), the purpose of the Roundtable is for all agencies (including independent and non-independent agencies) to discuss legal and policy issues with wide effect.
- ***State Innovations in Administrative Procedure.*** The states are laboratories of administrative law. Through this program, the Office of the Chairman solicits information about innovative state- and local-government practices that federal agencies may wish to consider and could feasibly adopt, identifies and shares relevant innovations with federal agencies, and convenes meetings on specific topics of interest to federal officials.

The Office of the Chairman also provides background information and other non-partisan, technical advice to agency officials on matters of administrative procedure.

IV. PROJECTS UNDERWAY

ACUS issues about 10–12 recommendations each year and at any one time has around 12 ongoing research projects. A listing and summary of projects actively under study and expected to lead to recommendations, reports, or publications in FY 2021 or FY 2022 follows. A full listing of active projects and related documents is available at www.acus.gov/current-projects.

A. PROJECTS ANTICIPATED TO RESULT IN RECOMMENDATIONS

- ***Automated Legal Guidance at Federal Agencies.*** This project identifies best practices for agencies to use when implementing automated tools—like interactive chatbots and virtual assistants—to provide legal guidance to members of the public. Among other topics, it explores the types of automated legal guidance agencies issue and the circumstances in which different types of automated legal guidance are most effective; how agencies oversee the programs providing such guidance to ensure that the information they provide is accurate and useful; and how agencies can ensure that recipients of such guidance understand its limitations and do not rely on it to their detriment.
- ***Clarifying Statutory Access to Judicial Review of Agency Action.*** This project considers whether Congress should enact a cross-cutting statute that addresses certain recurring technical problems in statutory provisions governing judicial review of agency action that may cause unfairness, inefficiency, or unnecessary litigation. It will also consider how any such statute should be drafted. The project draws in large part upon ACUS’s forthcoming *Sourcebook of Federal Judicial Review Statutes*, which analyzes the provisions in the U.S. Code governing judicial review of rules and adjudicative orders and identifies recurring drafting problems in them.
- ***Early Input on Regulatory Alternatives.*** This project addresses whether, when, and how, before issuing notices of proposed rulemaking, agencies should solicit public input on alternatives to rules under consideration. It seeks to identify targeted measures for obtaining public input, such as small meetings with groups of experts or regulated parties, that provide valuable information to agencies as they weigh alternatives, while minimizing the associated procedural burden.
- ***Mass, Computer-Generated, and Fraudulent Comments.*** This project seeks to identify agency best practices for handling mass, computer-generated, and fraudulent comments in rulemakings. Treating each type of comment separately, it examines both the legal and practical issues associated with processing and responding to such comments.
- ***Periodic Retrospective Review.*** This project seeks to identify best practices for agencies in undertaking periodic review of their existing regulations. Whereas past Conference studies on retrospective review have addressed the topic in the broad sense, this project focuses on the special hurdles agencies confront when they attempt to implement

regulatory review on a periodic and more regularized basis. The project seeks to identify the types of rules that lend themselves well to periodic retrospective review and offer best practices to agencies for designing programs to periodically reassess those rules.

- ***Public Availability of Inoperative Agency Guidance.*** This project identifies best practices for agencies for maintaining public access to agency guidance documents that are no longer in effect, which the project refers to as inoperative guidance documents. It addresses factors agencies should consider in deciding whether to include certain types of inoperative guidance documents on their websites; steps agencies can take to make it easier for people to find the inoperative guidance documents in which they are interested; and what labels and explanations agencies should use to ensure the public can readily understand the context and significance of particular inoperative guidance documents.
- ***Quality Assurance in Agency Adjudication.*** This project identifies best practices for agencies when devising and implementing systems to assess and improve the quality of decisions in high-volume adjudicative programs. It emphasizes cutting-edge techniques (including artificial intelligence) to structure the capture and analysis of data; the selection, role, and institutional placement of personnel; the use of performance metrics; efforts to ensure fairness, impartiality, efficiency, and other important institutional objectives; and the relationship between quality-assurance review and conventional appellate review.
- ***Regulation of Representatives in Agency Proceedings.*** This project explores how agencies regulate the conduct of attorneys and non-attorneys who represent parties and other interested persons in administrative proceedings. It addresses, among other things, why different agencies adopt different rules governing representatives' conduct; the ways in which different agencies' rules operate; how different rules, and inter-agency variation in those rules, affect agencies, representatives, and persons affected by agency actions; whether agencies should consider adopting rules on certain subjects and what those rules should provide; how agencies should formulate such rules; and where agencies should publish them. With respect to those subjects, the project seeks to identify best practices for agencies in developing and modifying their rules regulating representatives.
- ***Virtual Hearings in Agency Adjudication.*** This project explores the use of virtual hearings, in which one or more participants attend remotely using a personal computer or mobile device, in agency adjudications. Virtual hearings have become increasingly common in agency adjudications, especially during the COVID-19 pandemic, but they can pose unique logistical challenges and raise questions of accessibility, transparency, privacy, and data security. Recommendations will identify best practices for improving existing virtual-hearing programs and establishing new ones when appropriate.

B. FORTHCOMING PUBLICATIONS OF THE OFFICE OF THE CHAIRMAN

- ***Agency Head Enforcement and Adjudication Functions.*** This project studies the role and responsibilities of agency heads in agencies that perform both enforcement and adjudicatory functions. Though the APA bars investigatory or prosecutorial officials from later serving as or advising an adjudicator in the same case, it explicitly exempts agency heads. The project will study the legal and practical benefits and risks associated with agency heads' involvement in various enforcement and adjudicatory activities. It will also consider whether, in at least some cases, agencies should put in place mechanisms to segregate certain aspects of the agency heads' adjudicatory and investigatory/prosecutorial functions and, if so, what those mechanisms should be.
- ***Alternative Dispute Resolution in Agency Adjudication.*** This project studies how federal agencies use and might better use different types of alternative dispute resolution (ADR)—including conciliation, facilitation, factfinding, minitrials, arbitration, and mediation—to resolve agency adjudications related to their core statutory missions. It also addresses the use of ADR to resolve disputes before the initiation of a formal agency adjudicative proceeding or federal court case involving the agency's enforcement authority. The project considers topics such as the selection and implementation of the appropriate type of ADR and associated procedures; the qualifications, selection, and training of agency ADR personnel; ethics and confidentiality requirements for agency ADR personnel; ADR case management practices; and interagency mechanisms to facilitate ADR and support agency ADR personnel.
- ***Classification of Agency Guidance.*** This project is developing a classification system to catalog the wide array of guidance agencies issue, which can range from the relatively formal (e.g., policy manuals) to the very informal (e.g., phone calls). It identifies considerations and circumstances that lead agencies to use one type of guidance instead of another. The project is producing a guide that sets forth a classification scheme and examines how agencies use the many different forms of guidance available to them. The guide will help agencies, Congress, the courts, and the public better understand the role of agency guidance in the interpretation and administration of statutes and regulations.
- ***Handbook on Compiling Administrative Records.*** In Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ACUS offered best practices for preserving, compiling, and certifying records for judicial review of informal rulemaking. ACUS has convened a Working Group on Compiling Administrative Records, composed of representatives from the public and private sectors, which is developing materials addressing a wide range of legal, policy, technological, organizational, and personnel matters that agencies can easily adapt for their own needs when implementing Recommendation 2013-4.
- ***Sourcebook of Federal Judicial Review Statutes.*** This project catalogs all provisions in the United States Code that govern federal judicial review of agency action, and will result in a guide for use by Congress, the judiciary, agencies, and the public. Topics include the

availability of review, choice of court, administrative exhaustion, limitations periods, and the scope and standard of review.

V. BUDGET STATUS & REQUEST

A. PROPOSED APPROPRIATIONS LANGUAGE FOR FY 2022

Administrative Conference of the United States

Salaries and Expenses

For necessary expenses of the Administrative Conference of the United States, authorized by 5 U.S.C. §§ 591 et seq., \$3,400,000 to remain available until September 30, 2023, of which not to exceed \$1,000 is for official reception and representation expenses.

B. BUDGET AUTHORITY AND STAFFING BY ACTIVITY

Salaries and Expenses

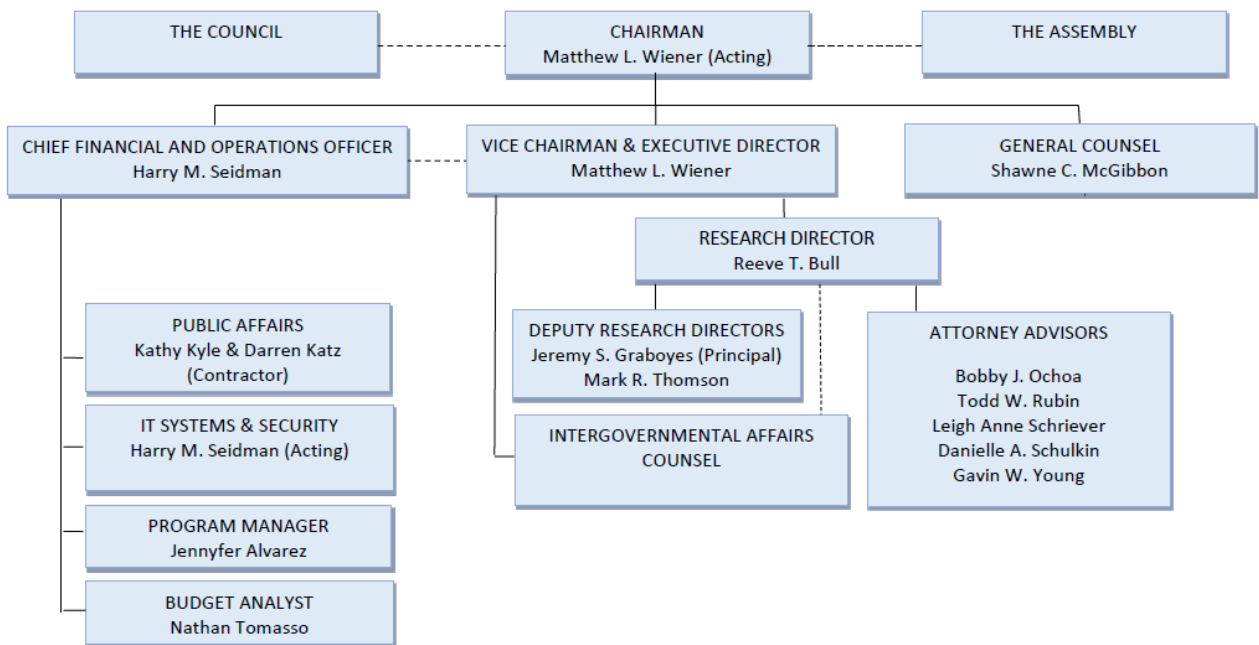
	FY 2018 Enacted	FY 2019 Enacted	FY 2020 Enacted	FY 2021 Enacted	FY 2022 Requested
Budget Authority	\$3,100,000*	\$3,100,000*	\$3,250,000	\$3,400,000	\$3,400,000
Authorized FTE	18	18	18	18	18
Filled FTE	15	15	15	16	16

*FY 2018-19 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

C. ACUS ORGANIZATION CHART
 Current as of May 2021



**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
 (ACUS)**



UPDATED March 2021

D. FINANCIAL SUMMARY

	FY 2020 Obligations Actual	FY 2021 Current Budget	FY 2022 Proposed Budget
Appropriation	\$ 3,250,000	\$ 3,400,000	\$ 3,400,000
Carry Forward	<u>\$ 87,127</u>	<u>\$ 113,801</u>	<u>\$ 0</u>
Net Appropriation	\$ 3,337,127	\$ 3,513,801	\$ 3,400,000
<i>Oligations/Expenses</i>			
Salaries - Full Time	\$ 1,459,991	\$ 1,650,000	\$ 1,666,500
Benefits	<u>\$ 497,036</u>	<u>\$ 482,000</u>	<u>\$ 480,000</u>
<i>Subtotals: Salaries and Benefits</i>	\$ 1,957,027	\$ 2,132,000	\$ 2,146,500
Member/Staff Travel	\$ 12,783	\$ 20,000	\$ 20,000
Rent & Utilities	\$ 459,034	\$ 495,000	\$ 470,000
Communications/IT	\$ 26,465	\$ 55,000	\$ 40,000
Printing/Reproduction	\$ 20,504	\$ 20,000	\$ 28,500
Contract Office Personnel	\$ 130,764	\$ 151,801	\$ 130,000
Consultant Contracts (Research & Projects)	\$ 256,757	\$ 300,000	\$ 300,000
Administrative Contracts	\$ 155,242	\$ 170,000	\$ 150,000
Supplies	\$ 17,692	\$ 20,000	\$ 15,000
EAJA Database (Congressional Mandate)	\$ 147,053	\$ 150,000	\$ 100,000
Legal Settlements	\$ 40,000	\$ 0	\$ 0
Equipment	<u>\$ 0</u>	<u>\$ 0</u>	<u>\$ 0</u>
<i>Subtotal: Operating Expenses</i>	<u>\$ 1,266,295</u>	<u>\$ 1,381,801</u>	<u>\$ 1,253,500</u>
Total Obligations/Expenses	\$ 3,223,322	\$ 3,513,801	\$ 3,400,000
Unexpended Prior Year Funds	<u>\$ 4</u>	<u>\$ 0</u>	<u>\$ 0</u>
Unobligated Balance Brought Forward	\$113,801	\$0	\$0

E. RECENT APPROPRIATIONS HISTORY

<u>Salaries and Expense Account</u> (Amounts in thousands of dollars)	
<u>Fiscal Year</u>	<u>Budget Authority</u>
2018	3,100*
2019	3,100*
2020	3,250
2021	3,400
2022	3,400 (President's FY '22 Budget)

*FY 2018-19 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

ACUS requests \$3.4 million, including two-year spending authority, to support a full year of agency operations during FY 2022. The FY 2022 request is level-funding with FY 2021. In fact, FY 2021 was the only instance that ACUS requested an appropriation increase in the past 11 fiscal years. Tight control of agency expenditures and effective use of two-year spending authority permitted ACUS to operate on the same baseline budget from FY 2010 through FY 2020. However, organic growth in overhead expenses necessitated a small increase in appropriation. These include administrative support contracts, annual cost-of-living (COLA) increases for federal employees, added costs for IT and communications systems to comply with the Federal Information Security Management Act (FISMA), and additional agency mandates assigned by Congress, such as the recently enacted Equal Access to Justice Act (EAJA). The request of \$3.4 million in FY 2022 would permit ACUS to carry out its statutorily mandated work and to fulfill the agency's mission.

Two-year spending authority remains crucial for efficiently sustaining agency operations, and Congress has consistently given ACUS two-year funding authority. Tight control of agency expenditures has allowed ACUS to utilize its two-year funding authority to carryover small balances from one fiscal year to the next. This authority is necessary to maintain optimal spending efficiency given the nature of ACUS's work and the agency's small size.

ACUS's recent budgetary history is as follows:

For FY 2018, the President's budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2018 (Public Law 115-141) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2019, the President's budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2019 (Public Law 116-6) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2020, the President’s budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2020 (Public Law 116-93) funded ACUS at \$3.25 million and provided two-year spending authority.

For FY 2021, The President’s budget requested \$3.5 million to support a full year of agency operations. The Consolidated Appropriations Act of 2021 (Public Law 116-260) funded ACUS at \$3.4 million and provided two-year spending authority.

ACUS ended FY 2020, the most recently closed fiscal year, with a carryover balance of \$113,801. The carryover balance is entirely due to the agency Chairman position remaining vacant throughout FY 2020. A filled Chairman position would have eliminated any carryover and, likely, would have required additional personnel reductions to remain within budget. An appropriation of \$3.4 million would fund ACUS at the level required to cover operating and personnel costs at the current reduced staffing level and support an agency Chairman.

F. FY 2022 REQUEST

A \$3.4 million FY 2022 appropriation will fund ACUS at the level required to cover operating and personnel costs.

<u>Program</u>	<u>OC</u>	<u>Amt</u>
Personnel Salaries	11	\$1,666,500
Personnel Benefits	12	\$480,000
Travel	21	\$20,000
Rent, Comm. & Utilities	23	\$510,000
Printing	24	\$28,500
Contractual Services	25	\$580,000
EAJA (Congressional Mandate)	11 & 25	\$100,000
Supplies	26	\$15,000
		\$3,400,000

**AGENCY PERSONNEL
(Object Classes 11 and 12)**

Personnel costs are by far the largest agency expenditure. While this is the case for many federal agencies, ACUS personnel costs also reflect the agency’s need to employ highly credentialed, specialized, and experienced lawyers to fulfill its mission and mandate. It should be noted that all but one of the agency’s filled FTE positions are lawyers (classified as *Attorney Advisors* by OPM). Therefore, ACUS personnel tend to have higher GS grades—and related salary and benefits costs—relative to other federal agencies where the aggregate distribution of personnel is more evenly distributed on the pay scale.

For FY 2022, ACUS anticipates a staff of 14 filled FTEs, two filled contract FTEs, and two vacant but authorized FTEs. This includes the Chairman and 13 permanent employees included under Object Class 11. In some past years, ACUS has filled 1-2 of its allotted FTE positions under the Intergovernmental Personnel Act or other reimbursable arrangements. ACUS may opt to use these hiring mechanisms for personnel in FY22, contingent upon agency needs and the availability of funding.

The ACUS staff supports the 101 voting ACUS members as well as the approximately 150 other ACUS members who serve in a non-voting capacity.

Agency Management

The ACUS Chairman is appointed for a five-year term by the President with the advice and consent of the Senate. Among his or her duties, the Chairman appoints Public Members (with the consent of the Council), initiates and oversees research studies designed to result in ACUS recommendations, and presides at meetings of the Council and plenary sessions. The Chairman also oversees the staff of ACUS and, together with the staff, constitutes the Office of the Chairman. During a vacancy in the office, the Vice Chairman exercises the Chairman's powers. Currently, Matthew L. Wiener serves as ACUS Vice Chairman and acting agency head. The President has not yet nominated a Chairman this Congress.

The Executive Director provides executive leadership, planning, direction, and coordination for all ACUS operations, including recruiting and managing the ACUS legal staff. The Executive Director provides managerial expertise and staff support to the ACUS Chairman and Council in developing the agency's strategic planning and direction and implementing activities essential to ensuring that ACUS continues to meet its statutory mission. The Executive Director assesses the overall effectiveness, efficiency, and productivity of ACUS operations.

The Chief Financial and Operations Officer is responsible for oversight of the agency's budget as well as management of daily operations and management of the agency's administrative and support staff. The position also oversees contracts for external administrative and operational support services such as payroll, human resources, and accounts payable. The position develops performance standards, financial and organizational staffing plans, and is responsible for the preparation of annual budgetary and administrative reports to Congress and OMB in accordance with applicable legislation and regulations. The Chief Financial and Operations Officer reviews and comments on proposed legislation and may respond to congressional inquiries and requests to ACUS.

The General Counsel serves as the chief legal, ethics, and EEO officer for ACUS and provides legal advice and counsel to the agency and its staff on a wide variety of legal matters. The General Counsel is responsible for ensuring that ACUS meets all federal legal and regulatory requirements, including compliance with the Administrative Conference Act and the Federal Advisory Committee Act (FACA), as well as all other federal statutes governing the operation of

executive branch agencies. The General Counsel also oversees the agency's records management program.

The Research Director is a Senior Attorney responsible for directing the activities of attorney advisors in developing new research projects and managing existing projects. This includes working in conjunction with agency leadership in developing the agency's policy recommendations, keeping abreast of issues and developments in administrative law and practice, and identifying and prioritizing issues to be studied.

Legal Staff

Attorney Advisors comprise the bulk of the agency's professional staff. Among other things, they are responsible for managing the work of committees in their development of recommendations for consideration by the full membership of ACUS. This includes reviewing research studies for projects assigned to the committees, assisting the committees in drafting proposed recommendations, responding to requests for information about committee activities, reviewing and summarizing public comments, and generally providing procedural and legal oversight for the work of the committees. Staff attorneys also serve as in-house researchers on select projects in lieu of outside consultants, research and draft reports of the Office of the Chairman, and participate in the implementation of ACUS recommendations.

Administrative and Support Staff

The ACUS staff includes an Information Technology Specialist to support both internal and external communications, including technical support, website development and maintenance, network management, and IT security. This position is also responsible for preparation and submission of IT-related reporting requirements, such as FISMA compliance.

The Communications Director is responsible for developing and managing the agency's strategic communications program, which includes media relations, digital outreach, marketing, and special events. The Communications Director also creates communications materials about the agency's work that are comprehensible to journalists, Congressional members and staff, and other stakeholders. In recent years, ACUS has experimented with this functional area to determine if communications-related objectives can be delivered at lower cost to the agency. Results were encouraging, and, at present, the agency has opted to leave this FTE vacant. The duties of this position are now vested with the Chief Financial and Operations Officer with discrete portions, such as social media management, contracted out to a third-party vendor.

Finally, a Program Manager and a Budget Analyst provide administrative support for the ACUS staff and membership. Both positions are currently filled by contracted personnel.

ACUS's FY 2022 budget request leaves vacant two allotted FTEs for additional legal and administrative support. As in previous budget requests, these vacancies reduce the agency's total FTE count below the allotted 18. During FY 2022, ACUS anticipates 16 total FTEs. Consistent with

OMB directive, salary and benefits expense will be held to 1% above the FY 2021 baseline cost per filled FTE. This will be accomplished by backfilling naturally occurring senior-level vacancies (GS 13/14/15) with more junior-level attorneys (GS 9/11/12). Historically, this approach has worked well in controlling agency personnel costs while providing much-needed capacity for in-house research and project management. Use of personnel contracts rather than permanent staff to fill up to two of the 16 total FTE positions will generate additional savings and staffing-level flexibility.

Therefore, the FY2022 budget maintains the salary and benefits cost per filled FTE at approximately 1% above the FY 2021 baseline while anticipating a total 16 filled FTE positions. A portion of one Attorney Advisor position will be utilized to discharge the agency's Congressional mandate under the Equal Access to Justice Act (EAJA), as discussed in more detail later in this justification.

For FY 2022, ACUS requests a budget of **\$1,666,500** for salary expenses associated with full-time employees (Object Class 11). This amount represents the projected cost for a total of 16 full-time positions, including annual civil service cost-of-living salary increases and grade/step increases.

A total of **\$480,000** is budgeted for personnel benefits during FY 2022 (Object Class 12). Personnel benefits are a direct function of the amount of budgeted salary/wages and inclusive of transit subsidy.

RESEARCH, CONSULTING, AND PROFESSIONAL SERVICES (Object Class 25)

As discussed in the introductory section above, the research and policy work of ACUS is most frequently pursued through contracts with academics in law, public administration, or other related fields. ACUS's research activities are at the core of the agency's ability to analyze issues and develop proposed recommendations through the ACUS committee consensus process. ACUS uses acquisition procedures that provide high value and low risk to the government. ACUS research contracts are generally competitive, fixed-price contracts with recognized experts in their respective fields.

The typical research contract awarded by ACUS, including expenses for research assistance and consultant travel, is approximately \$25,000. These modest contracts allow the federal government to enlist the expertise of scholars in academia and the private bar, many of whom would receive research grants or bill private clients at several multiples of the effective hourly rates the government is paying.

In FY 2022, ACUS is requesting **\$300,000** in funding for research contracts (Object Class 25). This funding will allow ACUS to maintain a research program of new projects directed toward ACUS's statutory mission to study and cooperatively seek solutions to issues and problems arising in the administration of federal agency programs. The number of projects is dependent on the

funding level, which enables ACUS to pursue the projects described in the performance section above, including projects undertaken at the request of Congress.

To minimize contracting costs, ACUS staff attorneys sometimes conduct in-house research in addition to serving as legal counsel for ACUS committee projects and staffing the numerous projects undertaken by the Office of the Chairman described in this justification. In-house research initiatives have resulted in several ACUS recommendations and significant Office of the Chairman projects for agencies such as SSA, EEOC, CMS, and DHHS. In-house staff research projects and other outreach initiatives, including inter-agency workshops, are included within ACUS's salary and administrative overhead expenses.

In addition to funding for research contracts, ACUS requests **\$150,000** for administrative support contracts. As a small agency, ACUS is required by law and policy to contract with multiple agencies or private vendors for many of the administrative functions typically performed in-house at larger agencies. These contracts cover items such as human resources (GSA), payroll (GSA), accounting (USDA), website hosting (GSA), security credentialing (GSA/ DHS), and mandated financial auditing. ACUS is also required to pay the Federal Protective Service (FPS) a monthly fee for security services due to its leased office space in a non-government owned building.

For FY 2022, ACUS requests \$150,000 for external administrative support, including the mandated annual agency financial audit (\$29,000). The requested increase for administrative support contracts is due to substantial increases in the rates set by the service providing agencies. ACUS has little room to negotiate these rates and limited ability to change service providers due to the Congressionally mandated consolidation of federal shared service providers during the 2010s. In most cases, there is no alternative provider for these administrative functions, and it is not cost-effective or, in some cases, legal to bring the functions in-house. The projected service provider-driven increases follow several years of declining overhead costs due to tight controls by ACUS. As a result, ACUS projects its FY 2022 costs will be approximately the same as when the agency was stood up in FY 2010 even after the projected rate hikes by providing agencies. ACUS will continue assessing strategies for contracting administrative support, including using reimbursable services offered by other federal agencies, GSA schedules, and Cloud computing solutions, to find the most cost-effective ways to provide these required and, in some cases, mandated services.

As discussed above in the section on personnel, ACUS has utilized contract positions in past years instead of full-time permanent employees to give the agency flexibility to match expertise with current projects and to rotate experts from academia, nonprofits, or other federal agencies to provide fresh and innovative thinking to ACUS. In FY 2022, ACUS anticipates filling as many as two FTE positions with contract personnel. Any contract positions would utilize resources that would otherwise be expended from other sections of the agency budget, principally object classes 11 and 12. ACUS estimates contract personnel costs of **\$130,000** in FY 2022.

SUPPORT AND INFRASTRUCTURE **(Object Classes 21, 23, 24 and 26)**

Travel by ACUS members and staff is budgeted at **\$20,000** for FY 2022 (Object Class 21). This is a reduction from previous budget requests, and reflects the agency's tight control of travel-related costs as well as uncertainty about future agency travel during the Covid-19 public health crisis. Through FY 2020, over 85% of agency travel expenses involved the travel of out-of-town ACUS members to Council, committee, and plenary session meetings. ACUS members, other than the Chairman, serve without pay and are only reimbursed for travel and per diem, pursuant to 5 U.S.C § 593(c) and 5 U.S.C § 5703. To the extent practicable, ACUS uses videoconferencing and other virtual hosting technologies to minimize travel expenses at the committee meetings. During the Covid-19 crisis, ACUS has transitioned to an entirely virtual meeting process to ensure the agency can continue to fulfill its mission. However, in-person biennial plenary sessions are desirable for ensuring robust debate and effective exchange of ideas. Therefore, ACUS hopes to return to some in-person events by FY 2022. In addition, some staff members will travel to conduct research or, as required, participate in various professional meetings and conferences.

ACUS has negotiated a lease to occupy office space at 1120 20th Street, NW, Suite 706 South, Washington, D.C. 20036. Leasing arrangements are coordinated for ACUS through the Public Building Services Division of the General Services Administration (GSA). During FY 2022 ACUS will be responsible for **\$470,000** in rental payments and related fees to GSA, as estimated in the Occupancy Agreement with GSA (Object Class 23). ACUS successfully re-negotiated a new 15-year lease of its existing office space, effective August 2020. The requested amount for rent expense is, therefore, lower than prior fiscal years.

ACUS's budget includes an estimated **\$40,000** for electronic communications expenses, including telephone service and website hosting during FY 2022 (Object Class 23). This estimate is based on ACUS's historical usage as well as compliance costs related to mandated security and accessibility requirements for federal government-owned websites, such as Section 508 compliance, and other government-wide IT security mandates such as FISMA compliance. This estimate also accounts for the natural growth in ACUS's electronic records and online presence that will require incremental scaling-up of data storage and processing capacity.

The requested \$40,000 for electronic communications expenses recognizes the additional need for virtual and telephonic meetings during the Covid-19 public health crisis. As of this submission, it remains unclear to what extent ACUS will be able to host in-person events in FY 2022. The requested amount, therefore, provisions the projected cost of conference calls and virtual meeting platforms for Council, committee, plenary, and other meetings.

ACUS has budgeted **\$28,500** in FY 2022 for printing costs (Object Class 24). The majority of this expense, approximately \$28,500, is the cost of printing notices in *The Federal Register* as mandated by the Federal Advisory Committee Act (FACA). The remaining balance funds annual

and interim reports to Congress and the President, inter-agency reporting requirements, outreach to ACUS members and key stakeholders, and other mandated reports and publications.

ACUS's budget includes **\$15,000** for the purchase of supplies, materials, and legal publications during FY 2022 (Object Class 26). The amount includes supplies for mailing, copying, and ordinary office supplies such as paper, pens, and printer cartridges. Also budgeted are funds for the purchase of computer software, mandated anti-virus protection for the agency's IT network, library materials, and for subscriptions to relevant technical, and policy-oriented publications and online services such as Westlaw.

NEW STATUTORY MANDATE (Object Classes 11, 12, 25)

S. 47, the Natural Resources Management Act, was signed into law on March 12, 2019. The act assigned to ACUS a new statutory responsibility to report and maintain a database on attorneys' fees awards paid out government-wide under the *Equal Access to Justice Act* (EAJA). The Congressional Budget Office (CBO) scored the cost of new personnel and IT infrastructure necessary to comply with the new mandate at \$500,000 to \$1 million in the initial start-up fiscal year and \$500,000 or less annually thereafter. However, ACUS intends to fully comply with the new mandate at a much lower cost of approximately \$200,000 per annum. ACUS will apportion \$100,000 in salary and benefits (from OC 11 and 12) to support a portion of a GS-13 grade Attorney Advisor necessary to carry out this mandate.

ACUS further requests **\$100,000** (OC 25) to operate and maintain the database and public-facing website for disseminating EAJA award data, as mandated by *S. 47*. Again, CBO's estimate for building out and maintaining the required IT infrastructure is significantly higher than this request as ACUS estimates that annual costs of \$200,000 are achievable following the initial ramp-up phase that was completed in 2020. Beginning in FY 2021, ACUS estimates that \$200,000, combined with two-year budget authority, will permit ACUS to fully comply with this mandate at much lower cost than CBO's scoring estimate.

VI. CONCLUSION

For FY 2022, ACUS submits a budget request of \$3.4 million. This level of funding will allow ACUS to pursue a full program of research projects and other programs aimed at discharging the agency's mission and statutory responsibilities. This level of funding will also allow ACUS to pursue a robust research program that will help improve and reform government procedures. Such reforms will be designed to enhance fairness, efficiency, expedition, and public participation in the work of federal executive branch agencies, given their substantial impact on all sectors of the national economy and on the lives of all citizens.

Appendix A: Council Members

Current as of May 2021

Matthew L. Wiener (Vice Chairman)

Matthew Lee Wiener is the Vice Chairman and Executive Director of the Administrative Conference of the United States. Before affiliating with the Conference, he was general counsel to U.S. Senator Arlen Specter, counsel to the U.S. House of Representatives Committee on the Judiciary, a partner at Dechert LLP, and special counsel to Cuneo Gilbert & LaDuca. Mr. Wiener is an elected member of the American Law Institute, a fellow of the American Bar Foundation, a lecturer in law at the University of Pennsylvania Law School, and the co-chair of the Adjudication Committee of the American Bar Association's Section of Administrative Law and Regulatory Practice.

Ronald A. Cass

Ronald A. Cass has been the President of Cass & Associates since 2004. He is also Dean Emeritus of Boston University School of Law where he served as Dean from 1990-2004. Cass was a law professor at the University of Virginia School of Law from 1976-1981 and at Boston University from 1981-2004. Outside of his professional activities, he has also served as Vice Chairman of the U.S. International Trade Commission (1988-1990), U.S. Representative to the World Bank Panel of Conciliators (2009-Present), advisor to the American Law Institute, Chairman of the Federalist Society Practice Group on Administrative Law, Past Chair of the American Bar Association Administrative Law Section, and President of the American Law Deans Association.

Jeffrey M. Harris

Mr. Harris is an experienced litigator who focuses on constitutional, appellate, and regulatory matters. In 2015, he was named to the Legal Times list of "D.C.'s Rising Stars," which identified "some of the most accomplished young attorneys in the D.C. area." Mr. Harris previously served as Associate Administrator of the Office of Information and Regulatory Affairs (OIRA). In that role, he was second in charge of the 50-person office within the Executive Office of the President that reviews all significant federal regulatory actions and coordinates regulatory policy across the federal government.

Donald F. McGahn II

Donald F. McGahn II is the U.S. Practice Leader of global law firm Jones Day's Government Regulation Practice in Washington D.C. focused on representing clients before government agencies in enforcement matters and in court disputes arising from government regulation or action. Immediately prior to joining Jones Day, Mr. McGahn served as White House Counsel, advising the President of the United States on all policy, legislative, and regulatory matters.

Michael H. McGinley

Michael H. McGinley focuses his practice on litigation, specifically appellate and complex commercial matters. Mr. McGinley has experience representing clients at every level of the federal judiciary, as well as in numerous federal agencies and state courts. He has litigated a wide range of issues, including federal jurisdiction, foreign sovereign immunity, Chevron deference, federalism, preemption, arbitration, labor law, tort law, securities and corporate law, contract rights, voting rights, free speech, religious freedom and many other constitutional issues. Mr. McGinley also regularly advises individual, corporate and government clients on strategic and regulatory matters.

Matthew E. Morgan

Matthew E. Morgan is a Partner at Elections, LLC where he counsels clients on all aspects of law related to the political process and elections. He advises candidates, political committees, corporations, and nonprofits on regulatory and political law issues, including federal and state campaign finance and election administration laws, ethics and gift rules, pay-to-play laws, and lobbying laws. Previously, Mr. Morgan served as the Deputy Chief of Staff and Chief Counsel to the Vice President of the United States where he provided advice to the Vice President and his staff on constitutional, regulatory, national security and related policy issues, led the Office's response to congressional oversight and litigation, and represented the Office in the inter-agency process with respect to federal regulations.

Adrian Vermeule

Adrian Vermeule is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School. He is the author or co-author of ten books, most recently Law and Leviathan: Redeeming the Administrative State (2020) (with Cass R. Sunstein), and Law's Abnegation: From Law's Empire to the Administrative State (2017). He was elected to the American Academy of Arts and Sciences in 2012. His research focuses on administrative law, the administrative state, the design of institutions, and constitutional theory.

Appendix B: Government Members

The following were government members as of May 10, 2021:

James L. Anderson	Federal Deposit Insurance Corporation
David J. Apol	Office of Government Ethics
Gregory R. Baker	Federal Election Commission
Eric S. Benderson	U.S. Small Business Administration
Krystal J. Brumfield	U.S. General Services Administration
Paige Bullard	Federal Energy Regulatory Commission
Michael J. Cole	Federal Mine Safety and Health Review Commission
Peter J. Constantine	U.S. Department of Labor
Anika S. Cooper	Surface Transportation Board
Elizabeth H. Dickinson	U.S. Food & Drug Administration
Jonathan Dols	U.S. Department of Transportation
Robert J. Girouard	U.S. Office of Personnel Management
Gina K. Grippando	U.S. International Trade Commission
Richard J. Hipolit	U.S. Department of Veterans Affairs
Janice L. Hoffman	Centers for Medicare & Medicaid Services
Kevin R. Jones	U.S. Department of Justice
Paul S. Koffsky	U.S. Department of Defense
Alice M. Kottmyer	U.S. Department of State
Tristan L. Leavitt	U.S. Merit Systems Protection Board
Hilary Malawer	U.S. Department of Education
Nadine N. Mancini	Occupational Safety & Health Review Commission
Christina E. McDonald	U.S. Department of Homeland Security
Mary E. McLeod	Consumer Financial Protection Bureau
Patrick R. Nagle	Social Security Administration
Mitchell E. Plave	Office of the Comptroller of the Currency
Connor N. Raso	U.S. Securities and Exchange Commission
Carrie F. Ricci	U.S. Department of Agriculture
Roxanne L. Rothschild	National Labor Relations Board
Jay R. Schwarz	Board of Governors of the Federal Reserve System
William H. Shakely	Federal Maritime Commission
Robert F. Stone	Occupational Safety and Health Administration
Stephanie J. Tatham	Office of Management and Budget
Drita Tonuzi	Internal Revenue Service
David A. Trissell	Postal Regulatory Commission
Miriam Vincent	National Archives and Records Administration
Kenny A. Wright	Federal Trade Commission

Chin Yoo	Federal Communications Commission
Marian L. Zobler	U.S. Nuclear Regulatory Commission
Vacant	U.S. Consumer Product Safety Commission
Vacant	U.S. Commodity Futures Trading Commission
Vacant	U.S. Department of Commerce
Vacant	U.S. Department of Energy
Vacant	U.S. Department of Health & Human Services
Vacant	U.S. Department of Housing and Urban Development
Vacant	U.S. Department of the Interior
Vacant	U.S. Department of the Treasury
Vacant	U.S. Environmental Protection Agency
Vacant	Federal Housing Finance Agency
Vacant	Office of Science and Technology Policy

Appendix C: Public Members

The following were public members as May 10, 2021:

Kent H. Barnett	University of Georgia School of Law
Jack M. Beermann	Boston University School of Law
Susan G. Braden	The Office of Judge Susan G. Braden (Ret.) LLC
Emily S. Bremer	University of Notre Dame Law School
Cary Coglianese	University of Pennsylvania Law School
Ilona R. Cohen	Aledade, Inc.
Christopher C. DeMuth	Hudson Institute
John F. Duffy	University of Virginia School of Law
David Freeman Engstrom	Stanford Law School
Claire J. Evans	Wiley Rein LLP
Chai R. Feldblum	Morgan Lewis & Bockius LLP
Emily Hammond	The George Washington University Law School
Erin M. Hawley	University of Missouri Kinder Institute of Constitutional Democracy; Kirkland & Ellis LLP
Kristin E. Hickman	University of Minnesota Law School
Allyson N. Ho	Gibson Dunn & Crutcher LLP
Renée M. Landers	Suffolk University Law School
Elliott P. Laws	Crowell & Moring LLP
Stephen P. Lehotsky	U.S. Chamber Litigation Center
Erika Lietzan	University of Missouri School of Law
Elbert Lin	Hunton Andrews Kurth LLP

Michael A. Livermore	University of Virginia School of Law
Aaron L. Nielson	Brigham Young University J. Reuben Clark Law School
Jennifer Nou	The University of Chicago Law School
Victoria F. Nourse	Georgetown University Law Center
Jesse Panuccio	Boies Schiller Flexner LLP
Elizabeth P. Papez	Gibson Dunn & Crutcher LLP
Nicholas R. Parrillo	Yale Law School
Eloise Pasachoff	Georgetown University Law Center
Bertrall L. Ross II	University of California Berkeley School of Law
Sidney A. Shapiro	Wake Forest University School of Law
Anna Williams Shavers	University of Nebraska-Lincoln College of Law
Kate A. Shaw	Yeshiva University Benjamin N. Cardozo School of Law
Jonathan R. Siegel	The George Washington University Law School
Ganesh Sitaraman	Vanderbilt Law School
Kevin M. Stack	Vanderbilt Law School
Christopher J. Walker	The Ohio State University Michael E. Moritz College of Law
Russell R. Wheeler	The Brookings Institution
Adam J. White	The C. Boyden Gray Center for the Study of the Administrative State, George Mason University Antonin Scalia Law School
Jonathan B. Wiener	Duke University Law School
Vacant	

Appendix D: Liaison Representatives, Senior Fellows, and Special Counsels

The following were liaison representatives as of May 10, 2021:

Thomas H. Armstrong	Government Accountability Office
Casey Q. Blaine	National Transportation Safety Board
Emily Burns	U.S. House of Representative Committee on Oversight and Reform
Lena C. Chang	U.S. Senate Committee on Homeland Security & Governmental Affairs
Tobias A. Dorsey	Executive Office of the President, Office of Administration
Ronald S. Flagg	Legal Services Corporation
Daniel M. Flores	U.S. House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law
William Funk	Lewis & Clark Law School; ABA Section of Administrative Law & Regulatory Practice

Claire Green	Social Security Advisory Board
Kristen L. Gustafson	National Oceanic and Atmospheric Administration
Eileen Barkas Hoffman	Federal Mediation & Conciliation Service
Nathan Kaczmarek	The Federalist Society
Allison Lerner	Council of the Inspectors General on Integrity and Efficiency
Daniel S. Liebman	Pension Benefit Guaranty Corporation
Eric R. LoPresti	Office of the National Taxpayer Advocate Service
Randolph M. Lyon	National Academy of Public Administration
H. Alexander Manuel	ABA National Conference of the Administrative Law Judiciary
Charles A. Maresca	U.S. Small Business Administration Office of Advocacy
Thomas P. McCarthy	Federal Administrative Law Judges Conference
Melissa J. McIntosh	Association of Administrative Law Judges
Mary C. McQueen	National Center for State Courts
Stephanie A. Middleton	The American Law Institute
Jeffrey P. Minear	Judicial Conference of the U.S.
Randolph D. Moss	U.S. District Court for the District of Columbia
Amanda H. Neely	U.S. Senate Homeland Security & Governmental Affairs Committee
Rebecca D. Orban	U.S. Coast Guard
Debra Perlin	American Constitution Society
Cornelia T.L. Pillard	U.S. Court of Appeals for the District of Columbia Circuit
Katy Rother	U.S. House Committee on Oversight and Reform
Eleni M. Roumel	U.S. Court of Federal Claims
Max Stier	Partnership for Public Service
Sheryl L. Walter	Administrative Office of the U.S. Courts
David L. Welch	U.S. Federal Labor Relations Authority
Sara Zdeb	U.S. Senate Committee on the Judiciary (Minority)
Vacant	Council on Environmental Quality
Vacant	Federal Aviation Administration
Vacant	National Aeronautics and Space Administration
Vacant	National Highway Traffic Safety Administration
Vacant	Office of the Director of National Intelligence
Vacant	Office of the Federal Register
Vacant	Office of the U.S. Trade Representative
Vacant	U.S. Citizenship and Immigration Services
Vacant	U.S. Department of Justice Executive Office for Immigration Review

Vacant	U.S. House Committee on the Judiciary
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The following were senior fellows as of May 10, 2021:

Gary D. Bass	The Bauman Foundation
Warren Belmar	Capitol Counsel Group LLC
Jodie Z. Bernstein	Kelley Drye & Warren LLP
Boris Bershteyn	Skadden Arps Slate Meagher & Flom LLP
Marshall J. Breger	The Catholic University Columbus School of Law
Stephen G. Breyer	Supreme Court of the U.S.
Amy P. Bunk	U.S. Department of Homeland Security
James Ming Chen	Michigan State University College of Law
Betty Jo Christian	Steptoe & Johnson LLP
H. Clayton Cook, Jr.	Cook Maritime Finance
John F. Cooney	
Steven P. Croley	Latham & Watkins LLP
Bridget C.E. Dooling	The George Washington University Regulatory Studies Center
Susan E. Dudley	The George Washington University Regulatory Studies Center; The George Washington University Tractenberg School of Public Policy & Public Administration
Neil R. Eisner	
E. Donald Elliott	Covington & Burling LLP; Yale Law School
Cynthia R. Farina	Cornell Law School
Fred F. Fielding	Morgan Lewis & Bockius LLP
Michael A. Fitzpatrick	Google
David C. Frederick	Kellogg Hansen Todd Figel & Frederick PLLC
H. Russell Frisby, Jr.	Stinson LLP
Brian C. Griffin	Clean Energy Systems, Inc.
Susan Tsui Grundmann	U.S. Congress Office of Compliance
Michael E. Herz	Yeshiva University Benjamin N. Cardozo School of Law
Elena Kagan	Supreme Court of the U.S.
Paul D. Kamenar	
John M. Kamensky	IBM Center for The Business of Government
Sally Katzen	New York University School of Law
Robert A. Katzmann	U.S. Court of Appeals for the Second Circuit
Richard J. Leighton	
Robert J. Lesnick	
Ronald M. Levin	Washington University in St. Louis School of Law
Daniel R. Levinson	
Jerry L. Mashaw	Yale Law School
Randolph J. May	The Free State Foundation
Nina A. Mendelson	The University of Michigan Law School

Gillian E. Metzger	Columbia Law School
David M. Michaels, PhD	The George Washington University Milkin Institute School of Public Health
James C. Miller III	King & Spalding LLP
Alan B. Morrison	The George Washington University Law School
David W. Ogden	Wilmer Cutler Pickering Hale and Dorr LLP
Nina E. Olson	Center for Taxpayer Rights
Theodore B. Olson	Gibson Dunn & Crutcher LLP
Lee Liberman Otis	The Federalist Society
Sallyanne Payton	The University of Michigan Law School
Richard J. Pierce, Jr.	The George Washington University Law School
S. Jay Plager	U.S. Court of Appeals for the Federal Circuit
Edith Ramirez	Hogan Lovells LLP
Neomi Rao	U.S. Court of Appeals for the District of Columbia Circuit
Richard L. Revesz	New York University School of Law
Jonathan Rose	Arizona State University Sandra Day O'Connor College of Law
Teresa Wynn Roseborough	The Home Depot
Eugene Scalia	U.S. Department of Labor
Robert F. Schiff	
Catherine M. Sharkey	New York University School of Law
Jane C. Sherburne	Sherburne PLLC
David C. Shonka	Redgrave LLP
Lon B. Smith	
Loren A. Smith	U.S. Court of Federal Claims
Kenneth W. Starr	The Lanier Law Firm
Peter L. Strauss	Columbia Law School
Thomas M. Susman	American Bar Association
James J. Tozzi	The Center for Regulatory Effectiveness
Paul R. Verkuil	National Academy of Public Administration
John M. Vittone	
David C. Vladeck	Georgetown University Law Center
John M. Walker, Jr.	U.S. Court of Appeals for the Second Circuit
Geovette E. Washington	University of Pittsburgh
William H. Webster	Milbank LLP
Edward L. Weidenfeld	The Weidenfeld Law Firm, PC
Richard E. Wiley	Wiley Rein LLP
Allison M. Zieve	Public Citizen Litigation Group

The following were special counsel as of May 10, 2021:

Blake Emerson	UCLA School of Law
Andrew Emery	The Regulatory Group

Jeffrey Lubbers	American University Washington College of Law
David Pritzker	

Appendix E: Recommendations and Statements Adopted 2010 – 2020

- **Recommendation 2020-1, *Rules on Rulemakings*** encourages agencies to consider issuing rules governing their rulemaking procedures. It identifies subjects that agencies should consider addressing in their rules on rulemakings—without prescribing any particular procedures—and it urges agencies to solicit public input on these rules and make them publicly available.
- **Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*** offers agencies best practices for protecting sensitive personal and confidential commercial information in public rulemaking dockets. It identifies, in particular, best practices for agencies to use when redacting, summarizing, and aggregating comments that contain such information. It also encourages agencies to provide public notices that discourage commenters from submitting such information in the first place.
- **Recommendation 2020-3, *Agency Appellate Systems*** offers agencies best practices to improve administrative review of hearing-level adjudicative decisions with respect to case selection, decision-making process and procedures, management oversight, and public disclosure and transparency. In doing so, it encourages agencies to identify the objectives of such review and structure their appellate systems to serve those objectives.
- **Recommendation 2020-4, *Government Contract Bid Protests*** Before Agencies suggests improvements to the procedures governing agency-level procurement contract disputes—commonly called bid protests—under the Federal Acquisition Regulation and agency-specific regulations to make those procedures more simple, transparent, and predictable. It urges agencies to clarify what types of decisions can be the subjects of agency-level bid protests, what processes and deadlines will govern such protests, and who in the agency will decide such protests; make it easier for protesters to get information about the decisions they protest; and publish more data on agency-level protests.
- **Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*** encourages agencies to disclose policies governing the appointment and oversight of adjudicators that bear on their impartiality and constitutional status. It offers best practices on how to provide descriptions of, and access to, such policies on agency websites.
- **Recommendation 2020-6, *Agency Litigation Webpages*** offers agencies best practices for making their federal court filings and relevant court opinions available to the public on their websites, with particular emphasis on materials from litigation dealing with agency regulatory programs. It provides guidance on the types of litigation materials that will be of greatest interest to the public and on how agencies can disseminate the materials in a way that makes them easy to find.

- **Statement # 20, *Agency Use of Artificial Intelligence*** identifies issues agencies should consider when adopting, revamping, establishing policies and practices governing, and regularly monitoring artificial intelligence systems. Among the topics it addresses are transparency, harmful biases, technical capacity, procurement, privacy, security, decisional authority, and oversight.
- **Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*** identifies ways agencies can offer the public the opportunity to propose alternative approaches to those presented in an interpretive rule and to encourage, when appropriate, public participation in the adoption or modification of interpretive rules. It largely extends the best practices for statements of policy adopted in Recommendation 2017-5, *Agency Guidance Through Policy Statements*, to interpretive rules, with appropriate modifications to account for differences between interpretive rules and policy statements.
- **Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*** addresses the processes and procedures agencies should establish for exercising their authority under Executive Order 13,843 (2018) to hire administrative law judges (ALJs). It encourages agencies to advertise ALJ positions in order to reach a wide pool of applicants, to publish minimum qualifications and selection criteria for ALJ hiring, and to develop policies for the review of ALJ applications.
- **Recommendation 2019-3, *Public Availability of Agency Guidance Documents*** offers best practices for promoting widespread availability of guidance documents on agency websites. It urges agencies to develop and disseminate internal policies for publishing, tracking, and obtaining input on guidance documents; post guidance documents online in a manner that facilitates public access; and undertake affirmative outreach to notify members of the public of new or updated guidance documents.
- **Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*** revises the Conference’s 1986 model agency procedural rules for addressing claims under the Act, which provides for the award of attorney fees to individuals and small businesses that prevail against the government in certain agency adjudications. The revisions reflect, among other things, changes in law and agency practice since 1986.
- **Recommendation 2019-5, *Agency Economists*** addresses the placement of economists within rule-writing agencies (e.g., centralized versus dispersed throughout the agency) and describes methods for promoting high-quality economic analysis within each of the potential organizational structures. Each potential structure has strengths and weaknesses that can affect the flow of information between economists and decision makers. The recommendation does not endorse any one organizational structure over another, but identifies steps agencies can take to remove structural barriers that can impede the communication of objective, consistent, and high-quality economic analysis to decision-makers during the rulemaking process.

- **Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*** addresses agency adjudicators’ increasing reliance on their own factual research—especially internet research—when conducting hearings and deciding cases. Though such independent research can be an efficient means to acquire facts, it can also raise concerns regarding the accuracy of information uncovered and fairness to the litigants. The recommendation encourages agencies to develop publicly available policies on independent research that identify sources of information that are reliable in all cases, set forth standards for adjudicators to apply when assessing the reliability of other sources, and ensure that litigants have ready access to all sources.
- **Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*** offers agencies best practices for promoting greater transparency and compliance with the Federal Vacancies Reform Act of 1998 when a Senate-confirmed position sits vacant. It also addresses the use of delegations of authority in response to staffing vacancies. It urges agencies to determine whether they are subject to the Vacancies Act and, if so, establish compliance processes; improve transparency by disclosing on their websites information about acting officials and delegations of authority; and provide additional support and training to agency officials responsible for Vacancies Act compliance.
- **Recommendation 2019-8, *Public Identification of Agency Officials*** promotes the public availability of real-time information about high-level officials leading federal agencies. It encourages agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials. It also recommends that the Office of Personnel Management regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.
- **Recommendation 2019-9, *Recruiting and Hiring Agency Attorneys*** urges agencies to avail themselves of the flexibilities available to them when hiring attorneys and offers best practices for structuring their hiring processes. First, it suggests that the Office of Personnel Management offer training for agencies on the alternative processes and flexibilities available to them when they hire attorneys. Then, among other suggestions, it advises agencies to post and disseminate vacancy announcements widely when seeking broad applicant pools, draft announcements clearly and concisely, communicate to applicants any limitations on the number of applicants they will consider, and establish policies for reviewing applications and interviewing candidates.
- **Recommendation 2018-1, *Paperwork Reduction Act Efficiencies*** encourages collaboration between the Office of Information and Regulatory Affairs and federal agencies to maximize opportunities for making the information collection clearance process under the Paperwork Reduction Act more efficient, while still maintaining its integrity. The recommendation encourages using generic clearances and common forms more frequently, providing more training to agencies, and improving several other aspects of the information collection clearance process.

- **Recommendation 2018-2: *Severability in Agency Rulemaking*** encourages federal agencies that anticipate litigation over their rules to consider early in the rulemaking process whether a rule is severable—that is, divisible into portions that can and should function independently. It also identifies steps agencies should take if they intend that portions of a rule should continue in effect even though other portions have been held unlawful on judicial review. In addition, it encourages courts reviewing an agency rule to solicit the parties’ views on the issue of severability in appropriate circumstances.
- **Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*** offers guidance for agencies considering whether and how to implement an electronic case management system. It provides factors for agencies to consider in weighing the costs and benefits of an electronic case management system; sets forth measures an agency should take to ensure privacy, transparency, and security; and describes ways an electronic case management system may improve adjudicatory processes.
- **Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*** urges agencies to issue procedural regulations governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. It encourages agencies to adopt procedures by which parties can seek the recusal of adjudicators assigned to their cases and to provide written explanations for recusal decisions.
- **Recommendation 2018-5, *Public Availability of Adjudication Rules*** offers best practices to optimize agencies’ online presentations of procedural rules governing adjudications. It encourages agencies to make procedural rules for adjudications and related guidance documents available on their websites and to organize those materials in a way that allows both parties appearing before the agencies and members of the public to easily access the documents and understand their legal significance.
- **Recommendation 2018-6, *Improving Access to Regulations.gov’s Rulemaking Docket*** offers suggested improvements to Regulations.gov, the website that allows the public to comment on many federal agencies’ rulemaking proposals. It provides recommendations to the governing body of Regulations.gov, called the eRulemaking Program, and to agencies that participate in Regulations.gov for ensuring that rulemaking materials on Regulations.gov are easily searchable and categorized consistently and clearly. These recommendations include using one electronic docket per rulemaking, promoting interoperability among key websites (e.g., Federalregister.gov and Reginfo.gov), and making rulemaking materials available to search engines.
- **Recommendation 2018-7, *Public Engagement in Rulemaking*** offers strategies for agencies to enhance public engagement prior to and during informal rulemaking. It encourages agencies to invest resources in a way that maximizes the probability that rulewriters obtain high quality public information as early in the process as possible. It recommends expanding the use of requests for information and advance notices of proposed rulemaking, targeting outreach to individuals who might otherwise be unlikely

to participate, and taking advantage of in-person engagement opportunities to solicit stakeholder input and support future informed participation.

- **Recommendation 2018-8, *Public-Private Partnerships*** offers agencies guidance on legal and other considerations for participating in public-private partnerships. It commends to agencies a *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level*, which provides guidance on the key legal questions agencies encounter in the operation of public-private partnerships, and proposes mechanisms that would allow agencies to share resources and best practices with one another when creating and administering such partnerships.
- **Recommendation 2017-1, *Adjudication Materials on Agency Websites*** provides guidance regarding the online dissemination of administrative adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives.
- **Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*** offers best practices to agencies for choosing among several possible methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success.
- **Recommendation 2017-3, *Plain Language in Regulatory Drafting*** identifies tools and techniques agencies have used successfully to write regulatory documents (including rulemaking preambles and guidance documents) using plain language, proposes best practices for agencies in structuring their internal drafting processes, and suggests ways agencies can best use trainings and other informational resources.
- **Recommendation 2017-4, *Marketable Permits*** provides best practices for structuring, administering, and overseeing marketable permitting programs for any agency that has decided to implement such a program.
- **Recommendation 2017-5, *Agency Guidance Through Policy Statements*** provides best practices to agencies on the formulation and use of policy statements. It lists steps that agencies can take to remain flexible in their use of policy statements and to encourage, when appropriate, public participation in the adoption or modification of policy statements.
- **Recommendation 2017-6, *Learning from Regulatory Experience*** offers advice to agencies on learning from different regulatory approaches. It encourages agencies to collect data, conduct analysis at all stages of the rulemaking lifecycle (from pre-rule analysis to retrospective review), and solicit public input at appropriate points in the process.

- **Recommendation 2017-7, *Regulatory Waivers and Exemptions*** provides best practices to agencies in structuring their waiver and exemption procedures for regulatory requirements. It encourages transparency and public input by asking agencies to consider establishing standards and procedures for approval of waivers and exemptions and to seek public comments in developing standards and procedures and in approving individual waivers and exemptions.
- **Recommendation 2016-1, *Consumer Complaint Databases*** encourages agencies that make consumer complaints publicly available through online databases or downloadable data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions
- **Recommendation 2016-2, *Aggregate Agency Adjudication*** provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.
- **Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*** encourages the Judicial Conference of the United States to develop a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).
- **Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*** offers best practices to agencies for structuring evidentiary hearings that are not required by the Administrative Procedure Act. It suggests ways to ensure the integrity of the decision-making process; sets forth recommended pre-hearing, hearing, and post-hearing practices; and urges agencies to describe their practices in a publicly accessible document and seek periodic feedback on those practices.
- **Recommendation 2016-5, *the Use of Ombuds in Federal Agencies*** takes account of the broad array of federal agency ombuds offices that have been established since the time of Recommendation 90-2. The recommendation suggests that agencies and Congress consider creating additional ombuds offices where they may be of benefit. It also emphasizes the importance of adherence by ombuds to the three core standards of independence, confidentiality, and impartiality, and identifies best practices for the operation, staffing, and evaluation of federal agency ombuds offices.
- **Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*** offers best practices for agencies dealing with self-represented parties in administrative hearings. Recommendations include the use of triage and diagnostic tools, development of a continuum of services to aid parties, and re-evaluation and simplification of existing

hearing practices, where possible. The project builds on the activity of a working group on Self-Represented Parties in Administrative Hearings that is co-led by the Administrative Conference and the Department of Justice's Office for Access to Justice.

- **Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*** offers proposals for improving the accuracy and transparency of the Unified Agenda of Federal Regulatory and Deregulatory Actions. Among other things, it urges agencies to consider providing relevant updates between Agenda reporting periods, offers recommendations for ensuring that Agenda entries are properly categorized by projected issuance date and status, and encourages agencies to provide notice when entries are removed from the Agenda.
- **Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*** offers best practices for agencies when providing Congress with technical drafting assistance. It is intended to apply to situations in which Congress originates the draft legislation and asks an agency to review and provide expert technical feedback on the draft without necessarily taking an official substantive position.
- **Recommendation 2015-3, *Declaratory Orders*** identifies contexts in which agencies should consider the use of declaratory orders in administrative adjudications. It also highlights best practices relating to the use of declaratory orders.
- **Recommendation 2015-4, *Designing Federal Permitting Programs*** describes different types of permitting systems and provides factors for agencies to consider when designing or reviewing permitting programs. It encourages agencies that adopt permitting systems to design them so as to minimize burdens on the agency and regulated entities while maintaining required regulatory protections.
- **Statement #19, *Issue Exhaustion in Pre-Enforcement Judicial Review of Administrative Rulemaking*** examines judicial application of an issue exhaustion requirement in pre-enforcement review of administrative rulemaking.
- **Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*** addresses more effective use of alternative dispute resolution (ADR) approaches to help resolve disputes arising under the Freedom of Information Act (FOIA). The OPEN Government Act of 2007 created the Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, to assist in the resolution of FOIA disputes through use of mediation and other ADR techniques. The recommendation suggests ways that OGIS can maximize the effectiveness of its resources for this purpose. The recommendation also suggests steps agencies can take to prevent or resolve FOIA disputes, including cooperating with OGIS and making FOIA staff and requesters aware of OGIS services.
- **Recommendation 2014-2, *Government in the Sunshine Act*** highlights best practices designed to enhance transparency of decision making at multi-member boards and commissions subject to the Government in the Sunshine Act. The recommendation urges

covered agencies to provide a description of the primary mechanisms for conducting business, describe substantive business disposed of outside of open meetings subject to the Act (with appropriate protections for information made exempt from disclosure), and exploit new technologies to disseminate relevant information more broadly.

- **Recommendation 2014-3, *Guidance in the Rulemaking Process*** identifies best practices for agencies when providing guidance in preambles to final rules. It suggests ways that agencies can improve the drafting and presentation of these preambles, including making it easier to identify any guidance content. The recommendation also urges agencies to ensure that users of their websites can easily locate the required small entity compliance guides.
- **Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*** provides guidance and best practices to agencies for managing "ex parte" communications between agency personnel and nongovernmental interested persons regarding the substance of informal rulemaking proceedings conducted under 5 U.S.C. § 553.
- **Recommendation 2014-5, *Retrospective Review of Agency Rules*** examines agencies' procedures for reanalyzing and amending existing regulations and offers recommendations designed to promote a culture of retrospective review at agencies. Among other things, it urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews.
- **Recommendation 2014-6, *Petitions for Rulemaking*** identifies agency procedures and best practices for accepting, processing, and responding to petitions for rulemaking. It seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon ACUS's previous work on the subject, it provides additional guidance that may make the petitioning process more useful for agencies, petitioners, and the public.
- **Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*** offers practical guidance regarding how best to conduct video hearings, and addresses the following subjects: equipment and environment, training, financial considerations, procedural practices, fairness and satisfaction, and collaboration among agencies. It also provides for the development of a video hearings handbook by ACUS's Office of the Chairman.
- **Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*** identifies ways to improve the adjudication of Social Security disability benefits claims before administrative law judges and SSA's Appeals Council, suggests changes to the evaluation of opinion evidence from medical professionals, and encourages the SSA to enhance data capture and reporting. As announced in the Unified Agenda, the

Administration is working on proposed regulations that would implement much of this recommendation.

- **Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*** highlights a series of best practices directed at independent regulatory agencies in the preparation of benefit-cost analyses that accompany proposed and final rules.
- **Recommendation 2013-3, *Science in the Administrative Process*** promotes transparency in agencies' scientific decision making, including: articulation of questions to be informed by science information; attribution for agency personnel who contributed to scientific analyses; public access to underlying data and literature; and conflict of interest disclosures for privately funded research used by the agencies in licensing, rulemaking, or other administrative processes.
- **Recommendation 2013-4, *Administrative Record in Informal Rulemaking*** offers best practices for agencies in the compilation, preservation, and certification of records in informal rulemaking, and it supports the judicial presumption of regularity for agency administrative records except in certain limited circumstances.
- **Recommendation 2013-5, *Social Media in Rulemaking*** addresses the various policy and legal issues agencies face when using social media in rulemaking. The recommendation examines whether and when agencies should use social media to support rulemaking activities. It also seeks to identify relevant issues, define applicable legal and policy constraints on agency action, resolve legal uncertainty to the greatest extent possible, and encourage agencies to find appropriate and innovative ways to use social media to facilitate broader, more meaningful public participation in rulemaking activities.
- **Recommendation 2013-6, *Remand without Vacatur*** examines judicial remand of an agency decision for further consideration while allowing the decision to remain in place. It examines this remedy and equitable factors that may justify its application. The recommendation offers guidance for courts that remand agency actions and for agencies responding to judicial remands.
- **Recommendation 2013-7, *Review of GPRA Modernization Act of 2010*** examines the Act's requirements for cross-agency collaboration; identifies existing constraints to collaboration; highlights tools available to help agencies collaborate; and recommends potential new or enhanced avenues of collaboration.
- **Statement #18, *Improving the Timeliness of OIRA Regulatory Review*** highlights potential mechanisms for improving review times of rules under review by the Office of Information and Regulatory Affairs (OIRA), including promoting enhanced coordination between OIRA and agencies prior to the submission of rules, encouraging increased transparency concerning the reasons for delayed reviews, and ensuring that OIRA has adequate staffing to complete reviews in a timely manner.

- **Recommendation 2012-1, *Regulatory Analysis Requirements*** addresses the issue of agencies having to comply with numerous regulatory analysis requirements created by statute and executive orders. The recommendation is supported by an extensive report that includes an appendix charting all of the regulatory analysis requirements of the 100 major rules subject to OMB review in 2010. The goal of the recommendation is to ensure agencies fulfill the regulatory analysis requirements efficiently and to enhance the transparency of the process. Agencies, the Congress, the President, and OMB's OIRA are all encouraged to play a role in this effort.
- **Recommendation 2012-2, *Midnight Rules*** addresses several issues raised by the publication of rules in the final months of a presidential administration and offers proposals for limiting the practice by incumbent administrations and enhancing the powers of incoming administrations to review midnight rules.
- **Recommendation 2012-3, *Immigration Removal Adjudication*** addresses the problem of case backlogs in immigration removals and suggests ways to enhance efficiency and fairness in these cases. Much of the recommendation was incorporated into the bipartisan immigration legislation (S. 744) that passed the Senate in 2013.
- **Recommendation 2012-4, *Paperwork Reduction Act*** addresses a variety of issues that have arisen since the Act was last revised in 1995, including those arising from the emergence of new technologies. The proposal offers suggestions for improving public engagement in the review of information collection requests and for making the process more efficient for the agencies and OMB.
- **Recommendation 2012-5, *Improving Coordination of Related Agency Responsibility*** addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies. This recommendation proposes reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, and agency consultation provisions.
- **Recommendation 2012-6, *Reform of 28 U.S.C. § 1500*** urges Congress to repeal Section 1500, which divests the United States Court of Federal Claims of jurisdiction when a plaintiff has claims against the government based on substantially the same operative facts pending in another court, and replace it with a provision that would create a presumption that in such circumstances, later-filed actions would be stayed. In 2015, the House Judiciary Committee favorably reported a bill in accordance with this recommendation and a companion ABA resolution endorsing the recommendation.
- **Recommendation 2012-7, *Third-Party Programs to Assess Regulatory Compliance*** addresses issues that arise when agencies develop programs in which third parties assess whether regulated entities are in compliance with regulatory standards and other requirements. In some areas of regulation, Congress has directed agencies to develop a third-party program; in others, regulatory agencies have developed programs under

existing statutory authority. The recommendation sets forth guidance for federal agencies that are establishing, or considering establishing, such programs.

- **Recommendation 2012-8, *Inflation Adjustment for Civil Penalties*** addresses agency adjustments to civil monetary penalties under the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461 note). The recommendation urges Congress to change the current statutory framework by which agencies periodically adjust their penalties to address three provisions that result in penalty adjustments that may not track the actual rate of inflation. It also advises agencies to adjust their penalties for inflation as required by law. As urged by the Administration, Congress implemented the recommendation in the Bipartisan Budget Act of 2016. The inflation-adjustment provisions of that Act will increase general revenues to the government by \$1.3 billion over the next ten years.
- **Recommendation 2011-1, *Legal Considerations in e-Rulemaking*** addresses legal issues associated with e-rulemaking and recommends best practices in dealing with them. These include whether agencies can require electronic filing, how they should address copyright and privacy concerns, whether and under what framework they can solicit comments through social media, and whether any amendments to the Administrative Procedure Act would be appropriate to address such issues.
- **Recommendation 2011-2, *Rulemaking Comments*** addresses certain best practices for agencies to consider in conducting the “comment” aspect of traditional notice-and-comment rulemaking under the Administrative Procedure Act. The recommendation addresses a possible minimum period for comments, standards for extension of the comment period, availability of comments to the public and provision for reply comments, whether agency delays may require updated comment periods, and the circumstances warranting confidentiality of material filed in public comments.
- **Recommendation 2011-3, *Government Contractor Ethics*** addresses the increasing use of contractors in government and asks the Federal Acquisition Regulation Council to adopt revisions regarding compliance standards for government contractor employees relating to personal conflicts of interest and use of certain non-public information. In February 2013, the American Bar Association’s House of Delegates adopted a resolution—based on Recommendation 2011-3—urging federal action to minimize government contractor personal conflicts of interest.
- **Recommendation 2011-4, *Video Hearings*** addresses best practices for the use of video hearings by federal government agencies with high volume case loads as a means of reducing caseload backlog and conducting more efficient adjudication.
- **Recommendation 2011-5, *Incorporation by Reference*** addresses ways in which agencies publish rules that refer to standards or other materials that have been published elsewhere. The recommendation proposes ways to ensure that materials subject to incorporation by reference are reasonably available to the regulated community and other interested parties, to update regulations that incorporate by reference, and to navigate procedural requirements and drafting difficulties when incorporating by reference. The Office of the

Federal Register (OFR), among other agencies, has relied heavily on this recommendation in setting its regulatory policies. In late 2014, in fact, the OFR implemented the recommendation in a final rule modifying its long-standing requirements for incorporation by reference in all federal regulations.

- **Recommendation 2011-6, *International Regulatory Cooperation*** addresses how United States regulators can interact with foreign authorities to accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade. The project updates Administrative Conference Recommendation 91-1, *Federal Agency Cooperation with Foreign Government Regulators*. The recommendation includes proposals for enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges. The key features of this recommendation were incorporated into Executive Order 13,609.
- **Recommendation 2011-7, *FACA in the 21st Century*** addresses the administrative load imposed by Federal Advisory Committee Act (FACA) and offers proposals to Congress, the General Services Administration, and agencies that use advisory committees, to alleviate certain procedural burdens associated with the existing regime, clarify the scope of the Act, and enhance the transparency and objectivity of the advisory committee process.
- **Recommendation 2011-8, *Agency Innovations in e-Rulemaking*** addresses ways in which agency innovations and best practices can engage the public in rulemaking activities at low cost to the government.
- **Recommendation 2010-1, *Regulatory Preemption*** addresses agency procedures for determining whether to preempt state law. The recommendation presents best practices by federal agencies in implementing the requirements of Executive Order 13,132 and the President's May 2009 memorandum governing agency preemption of state law, including procedures for securing meaningful participation by state and local government officials in the process of considering questions of federal preemption.