



## Contractors in Rulemaking

### Committee on Rulemaking

#### Proposed Recommendation for Committee | April 25, 2022

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

10 Agencies' use of contractors, however, may also raise distinctive concerns in the  
11 rulemaking context.<sup>1</sup> Agencies must ensure that they comply with relevant legal obligations,  
12 including the prohibition on outsourcing "inherently governmental functions" (IGFs).<sup>2</sup> They  
13 should also exercise their discretion in a way that avoids ethics violations, promotes efficiency,  
14 and ensures that agency officials exercise proper oversight of contractors. With respect to the  
15 prohibition on contracting out IGFs, the Office of Management and Budget's Circular A-76,  
16 *Performance of Commercial Activities*, and the Office of Federal Procurement Policy's Policy  
17 Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, provide examples  
18 of certain IGFs that should not be contracted out.<sup>3</sup> Circular A-76 also describes activities that are

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

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

19 “closely associated” with IGFs and for which agencies should exercise heightened caution when  
20 assigning such functions to contractors.<sup>4</sup>

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

30 Agencies must consider potential ethical issues when contracting out rulemaking  
31 functions. Although contractors are, with a few exceptions, generally not subject to the ethics  
32 laws governing federal employees, there are nevertheless potential ethics-related risks against  
33 which agencies must protect and which may not be addressed adequately under existing  
34 procurement regulations.<sup>5</sup> The risks of conflicts of interest (both organizational and personal)  
35 and misuse of confidential information may be especially salient when contractors support a  
36 policymaking function such as rulemaking.<sup>6</sup> The establishment and dissemination of policies and  
37 procedures within the agency about the use ~~and~~ management of contractors in rulemaking, and  
38 any disclosure requirements for the disclosure of ~~contractors in rulemakingsuch use~~, could be  
39 one way for agencies to mitigate these concerns.

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

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

40 Agencies will need to consider the practical benefits and challenges of using a contractor  
41 to perform a function in furtherance of agency rulemaking. Agencies may also wish to consider  
42 alternative methods to contracting when they need to expand internal capacity in connection with  
43 rulemaking, such as by using executive branch rotations, fellowship programs, or Federally  
44 Funded Research and Development Centers, or by making arrangements under the  
45 Intergovernmental Personnel Act.

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

### RECOMMENDATION

#### Internal Management

- 50 1. Agencies should adopt and publish written policies relating to the use of contractors  
51 to perform rulemaking-related functions and covering matters, such as:
  - 52 a. The types of rulemaking functions that the agency considers to be inherently  
53 governmental functions (IGFs) or closely associated with IGFs;
  - 54 b. Internal procedures to ensure that agency personnel do not contract out IGFs and  
55 to ensure increased scrutiny when contracting out functions that are closely  
56 associated with IGFs;
  - 57 c. Requirements for internal disclosure concerning functions contractors undertake  
58 with regard to specific rulemakings;
  - 59 d. Standards for when contractors should identify themselves as such in  
60 communications with the public in connection with a rulemaking; and
  - 61 e. Ethical rules applicable to government contractors.
- 62 2. To enhance their management of contractors, agencies should consider providing  
63 rulemaking-specific training for managers on agency policies and ethical restrictions  
64 applicable to contractors. Agencies should also consider designating an agency office



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65 or officer ~~who can to~~ answer questions about the use of contractors to perform  
66 rulemaking-related functions and is responsible for deciding whether an activity is an  
67 IGF.

- 68 3. When agencies rely on contractors in a rulemaking, they should ensure that agency  
69 employees can identify contractors and are aware of contractors' assigned functions.  
70 Agencies may address whether contractors should work in the same space as agency  
71 employees, how and to what extent they may participate in meetings with agency  
72 leadership or other meetings at which substantive policy is decided, and whether they  
73 should be provided with agency email addresses.
- 74 4. Agencies should consider ways to share information about contractors in rulemaking  
75 within and across agencies. This might include using existing contracting databases or  
76 schedules to ~~encourage~~promote greater coordination and efficiency concerning  
77 existing rulemaking contracts, as well as informal sharing of practices for managing  
78 contractors.

### Ethics

- 79 5. When selecting and managing contractors for rulemaking-related functions, agencies  
80 should evaluate whether any organization under consideration to serve as a contractor  
81 may have an actual or perceived organizational conflict of interest in connection with  
82 any assigned function. When a potential organizational conflict exists or arises,  
83 agencies should either select another contractor or put in place appropriate protections  
84 to ensure that the contractor's outside interests do not undermine its ability to perform  
85 its assigned functions in a way that does not create an actual or perceived conflict of  
86 interest.
- 87 6. When contracting out rulemaking-related functions for which there is a risk of a  
88 personal conflict of interest by a covered employee, agencies should ~~include~~  
89 provisionsprovide in the contract that the contractor will not assign functions under  
90 the contract to any employee who has an actual or perceived conflict of interest and,  
91 as appropriate, provide employee training on recognizing and disclosing personal



92 conflicts. The clause should also provide that, in the event that an employee  
93 improperly performs a function despite the existence of a personal conflict of interest,  
94 the contractor will disclose the conflict to the agency and undertake appropriate  
95 remedial action.

96 7. When contracting out rulemaking-related functions for which there is a risk of misuse  
97 of confidential information, agencies should ~~include provisions~~provide in the contract  
98 that the contractor will ensure that any employee handling such information has been  
99 appropriately trained on the necessary safeguards. The clause should also provide that  
100 the contractor will disclose any breach of this obligation to the agency and undertake  
101 appropriate remedial actions.

**Transparency**

102 8. When an agency uses a contractor to perform an activity closely associated with an  
103 IGF in a specific rulemaking, the agency should consider disclosing the contractor’s  
104 role in the rulemaking docket, a notice of proposed rulemaking, or preamble to the  
105 final rule, including, if legally permissible, identifying the contractor.

106 9. Agencies should ensure their agreements with contractors will allow them to meet  
107 legal requirements for disclosure of information in connection with the rulemaking  
108 process and judicial review.

**Intergovernmental Guidance**

109 10. The Office of Management and Budget should consider assessing whether current  
110 agency practices align with broader procurement best practices and consider  
111 providing guidance on contractor-performed functions associated with rulemaking  
112 processes. Among other things, this guidance might provide specific examples of  
113 rulemaking-related functions that qualify as IGFs and should not be contracted out or  
114 that are closely associated with IGFs such that agencies should exercise heightened  
115 caution when contracting out such functions.