



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Updates in Federal Agency Adjudication

September 2021

ACUS is an independent federal agency within the executive branch that develops recommendations to improve administrative processes, including adjudication, and arranges for the interchange of information to carry out its mission. The ACUS Office of the Chairman issues monthly *Updates* to share adjudication-related developments with agencies, Congress, and the public. For additional resources, visit [www.acus.gov/adjudication](http://www.acus.gov/adjudication).

This resource is for informational purposes only. Except as noted, these updates do not represent the position of ACUS or the federal government. Feedback and corrections are welcome at [info@acus.gov](mailto:info@acus.gov).

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### ACCESS TO JUSTICE

**[Immigrant Visas](#), 86 Fed. Reg. 51643 (State Dept., Sep. 16).** The State Department is requesting public input to identify “existing barriers that impede access to, and fair, efficient adjudication of, immigrant visas,” and provide “recommendations on actions the Department could take to improve access to adjudication of immigrant visas.” This request for comments carries out [Executive Order 14012](#), which tasked agencies with identifying barriers that impede access to and adjudication of immigration benefits. U.S. Citizenship and Immigration Services issued a similar request in April ([86 Fed. Reg. 20398](#)).

**[Underserved Communities and the Regulatory Process \(ACUS\)](#).** ACUS announced it will hold a multi-day, virtual forum this fall to address participation by underserved communities in the administrative processes, including adjudication, by which agencies make regulatory policies. This forum furthers



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[Executive Order 13985](#), *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, which requires that federal agencies “pursue a comprehensive approach to advancing equity for all,” including communities “that have been historically undeserved, marginalized, and adversely affected by persistent poverty and inequality.”

### ADMINISTRATIVE REVIEW

[Quality Assurance Systems in Agency Adjudication](#) (ACUS). This project seeks to identify 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 AI) 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.

### ALTERNATIVE DISPUTE RESOLUTION

[Alternative Dispute Resolution in Agency Adjudication](#) (ACUS). This project studies how federal agencies use and might better use different types of ADR—including conciliation, facilitation, factfinding, minitrials, arbitration, the use of ombuds, and mediation—to resolve agency adjudications to resolve agency adjudications related to their core statutory authorities. 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.

### APPOINTMENT AND REMOVAL

[Piano Factory Gp. v. Schiedmayer Celesta GmbH](#), No. 2020-1196 (Fed. Cir., Sep. 1). The U.S. Court of Appeals for the Federal Circuit held that, even before the Trademark Modernization Act of 2020, administrative trademark judges were constitutionally appointed consistent with the Supreme Court’s recent opinion in [U.S. v. Arthrex](#) (2021). In *Arthrex*, the Supreme Court found that administrative patent judges were unconstitutionally appointed principal officers because no



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Senate-confirmed official had authority to review their decisions. In contrast, the Director of the Patent and Trademark Office, who is Senate-confirmed, had authority even before the 2020 statutory changes to review and reverse the decisions of administrative trademark judges.

### PROCEDURAL RULES

#### **[Paycheck Protection Program Appeals](#), 86 Fed. Reg. 51589 (SBA, Sep. 16).**

The Small Business Administration adopted, with some changes, portions of an interim final rule published in August 2020. The final rule sets forth procedures for appeals of SBA loan review decisions under the Paycheck Protection Program.

**[Patent Trial and Appeal Board Motion to Amend Pilot Program](#), 86 Fed. Reg. 51656 (USPTO, Sep. 16).** The Patent and Trademark Office extended the Motion to Amend (MTA) Pilot Program through September 16, 2022. The MTA Pilot Program provides patent owners an opportunity to request preliminary guidance on their MTAs from the Patent Trial and Appeal Board.

**[Copyright Claims Board: Initiation of Proceedings and Related Procedures](#), 86 Fed. Reg. 53897 (Copyright Office, Sep. 29).** The U.S. Copyright Office proposed rules that would establish procedures for the initial stages of a proceeding before the new Copyright Claims Board. The CCB, the creation of which was directed by the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020, is a voluntary, alternative forum to federal court for parties to seek resolution of copyright disputes that have a low economic value.

### PUBLIC ACCESS

**[Public Access to Agency Adjudicative Proceedings](#) (ACUS).** This project seeks to identify best practices regarding when and how federal agencies provide public access to adjudicative proceedings. It examines factors, including constitutional and statutory requirements, that agencies should consider when determining whether to open or close particular proceedings; logistical considerations relevant to facilitating public access to proceedings that agencies open to the public; and the form and public availability of agency policies governing public access to adjudicative proceedings.



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### REPRESENTATION

**Regulation of Representatives in Agency Proceedings (ACUS)**. This project explores how agencies regulate the conduct of attorneys and non-attorneys who represent parties and others in administrative proceedings. Among other things, it examines why agencies adopt different rules governing representatives' conduct; the ways in which different agencies' rules operate; how different rules, and 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. The project seeks to identify best practices for agencies in developing and modifying their rules regulating representatives.

### TECHNOLOGY

**Standardizing Filing Procedures for Administrative Appeals, 86 Fed. Reg. 52829 (Ed. Dept., Sep. 23)**. The Department published final rules requiring electronic filing in certain cases before the Office of Hearings and Appeals and in appeals of OHA decisions to the Office of the Secretary.