



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Updates in Federal Agency Adjudication

June 2022

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. New developments, feedback, and corrections are welcome at [info@acus.gov](mailto:info@acus.gov).

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### ACCESSIBILITY

#### **[Identifying and Reducing Burdens in Administrative Processes](#) (ACUS).**

ACUS is undertaking a project to identify best practices for identifying and reducing unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes. ACUS is currently [seeking](#) consultants for the project; proposals are due by August 5.

**[Improving Notice of Regulatory Changes](#) (ACUS, June 16).** At its 77th Plenary Session, ACUS adopted a recommendation identifying best practices for agencies to ensure that members of the public receive effective notice of regulatory changes, including those announced in adjudicative decisions. The recommendation emphasizes the needs of people potentially affected by regulatory changes who have limited resources to monitor agency actions.



## ADMINISTRATIVE REVIEW

**[Precedential Decision Making in Agency Adjudication](#) (ACUS).** ACUS is undertaking a project to identify best practices on the use of precedential decisions in agency adjudication. Christopher Walker (University of Michigan Law School), Melissa Feeney Wasserman (Texas Law), and Matthew Wiener (ACUS) are serving as consultants.

**[Updates to Interim Director Review Process](#) (USPTO, June 21).** The U.S. Patent and Trademark Office updated guidance it provided last month on the interim process for seeking review by the PTO Director of Patent Trial and Appeal Board decisions. The updated guidance specifies that parties should identify issues of first impression when requesting Director review.

## CONSTITUTIONALITY

**[Calcutt v. FDIC](#) (6th Cir., June 10).** The Sixth Circuit held that the subject of an Federal Deposit Insurance Corporation enforcement action did not forfeit his claim that the FDIC Board is unconstitutionally insulated from removal, even though he did not make that claim during administrative proceedings before the agency. The court did not reach the merits of the constitutional claim, however, finding that removal restrictions did not result in any harm to the party in the adjudication. The court, for the same reasons, declined to rule on whether removal protections for FDIC administrative law judges violate the separation of powers. The court also held that a hearing before a second ALJ satisfied the mandate for a “new hearing” under [Lucia v. SEC](#) (2018), explaining that a judicial decision invalidating ALJ appointments did not require that “all adjudications must start from zero.”

## JUDICIAL REVIEW

**[Sourcebook of Federal Judicial Review Statutes](#) (ACUS).** ACUS announced the publication of the *Sourcebook of Federal Judicial Review Statutes*, by Jonathan Siegel (GW Law). The *Sourcebook* analyzes more than 650 statutory provisions that govern how courts review agency actions, including final adjudicative orders.

## PROCEDURAL RULES

**[Small Claims Patent Court Study](#) (ACUS).** ACUS is gathering information on issues associated with and options for designing a small claims patent court as part



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of an [ongoing study](#) for USPTO. Comments were initially due by July 5, but ACUS extended the comment period for 45 days.

**[Trademark Trial and Appeal Board Manual Updated \(USPTO\)](#)**. The TTAB recently updated its *Manual of Procedure* to incorporate statutory changes and relevant case law issued since February 2021.

**[NOAA Enforcement Procedures \(June 30\)](#)**. The National Oceanic and Atmospheric Administration issued a final rule amending procedures governing its civil administrative enforcement proceedings. Among other things, the rule clarifies when and how the Administrator exercises discretionary review authority, revises the process by which a party can request that another party admit the truth of a matter, sets forth revised directions for electronic service, simplifies the use of electronic signatures, and allows depositions by videoconference.

### TECHNOLOGY

**[Automated Legal Guidance \(ACUS, June 16\)](#)**. At its 77th Plenary Session, the ACUS Assembly adopted a recommendation identifying 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.

**[Online Process in Agency Adjudication \(ACUS\)](#)**. ACUS is undertaking a project to identify best practices for developing online processes by which private parties, representatives, and other participants in agency adjudications can file forms, evidence, and briefs; view case materials and status information; receive notices and orders; and perform other common adjudicative tasks.

**[In-Person PTAB Hearings to Resume \(USPTO, June 17\)](#)**. The Patent Trial and Appeal Board plans to reestablish the option of in-person hearings by mid-July at the Alexandria, Virginia, headquarters as well as at regional offices.

### TRANSPARENCY

**[Disclosure of Agency Legal Materials \(ACUS, May 19\)](#)**. ACUS is requesting public input on what legal materials, including adjudicative decisions, agencies should make publicly available and how they ought to do so. The request is part of a [project](#) that will consider whether the main statutes governing disclosure of agency legal materials should be amended. Comments are due by July 18.