



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

September 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.

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.

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ACCESSIBILITY

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

ACUS is undertaking a project to recommend best practices, such as public engagement and data analysis, that agencies can use to identify unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes, including adjudication. It also recommends strategies agencies can use to reduce unnecessary burdens, such as streamlining processes and digitizing services. Pamela Herd (Georgetown), Donald Moynihan (Georgetown), and Amy Widman (Rutgers) are serving as consultants.

ADJUDICATORS

[Removal Protections for ALJs: Constitutional Scrutiny and Considerations for Congress](#) (CRS, Sept. 21). While the Supreme Court's opinion in *Lucia v. SEC*



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addressed constitutional questions about the appointment of administrative law judges, much subsequent litigation has focused on constitutional questions surrounding their removal. This *Legal Sidebar* provides an overview of the history of statutory removal protections for ALJs and analyzes recent case law evaluating their constitutionality and possible effects on federal agencies.

ADMINISTRATIVE REVIEW

[Notice of Proposed Regulations Relating to Independent Office of Appeals \(IRS, Sept. 13\)](#). The Internal Revenue Service proposed changes to the rules governing its Independent Office of Appeals, which provides an administrative process to resolve tax disputes without litigation. The proposed changes would specify when Appeals consideration is and is not available. Public comments must be received by November 14, and a public hearing is planned for November 22.

[USPTO Extends Comment Period for Post-Arthrex Processes \(USPTO, Sept. 26\)](#). The Patent and Trademark Office is extending the period for public comment on proposed processes for USPTO Director review of Patent Trial and Appeal Board decisions, Precedential Opinion Panel review, and internal circulation and review of PTAB decisions until October 19. The proposed processes were developed in response to the Supreme Court's opinion in [United States v. Arthrex](#).

[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 (Michigan Law), Melissa Feeney Wasserman (Texas Law), and Matthew Wiener are serving as consultants.

ALTERNATIVE DISPUTE RESOLUTION

[Mediation Pilot Program Launched \(MSPB, Sept. 28\)](#). The Merit Systems Protection Board is launching a pilot program targeting certain petitions in which changed case law or other factors suggest a likely path for rapid mediation.

PROCEDURAL RULES

[Energy Department to Commence Administrative Adjudication of Civil Penalties \(DOE, Sept. 30\)](#). DOE provided notice that it will commence on-the-record hearings before administrative law judges in civil penalty cases involving alleged violations of conservation standards and certification requirements. The agency has also issued [procedures](#) for adjudicating civil penalty actions.



REPRESENTATION

[Assisting Pro Se Noncitizens With Immigration Proceedings](#) (EOIR, Sept. 14). The Executive Office for Immigration Review issued a final rule that permits practitioners to assist self-represented parties in immigration court proceedings by entering a limited appearance without becoming the practitioner of record or submitting motions to withdraw or substitute.

[Changes to Rules Regarding Representation](#) (USPTO, Sept. 8). The USPTO has proposed amending the rules of practice regarding representation, in particular with regard to issues of minor misconduct, reciprocal recognition of foreign attorneys, and fee sharing between practitioners and nonpractitioners. Public comments must be received by November 7.

TECHNOLOGY

[Electronic Transmission of Adjudicative Documents](#) (EEOC, Sept. 27). Rules proposed by the Equal Employment Opportunity Commission would explicitly authorize the agency to transmit hearing and appellate decisions and other documents to registered complainants through its Electronic Public Portal.

[Online Process in Agency Adjudication](#) (ACUS). ACUS is undertaking a project to identify best practices for developing online processes by which participants in agency adjudications, including private parties and representatives can file forms, evidence, and briefs; view case materials and status information; receive notices and orders; and perform other common tasks required for participation in adjudication. ACUS Attorney Advisor Matthew Gluth is conducting research for this project.