



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Updates in Federal Agency Adjudication

October 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 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 will also recommend 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.

### ADMINISTRATIVE REVIEW

**Expanded Ombuds Role in Appeals (FDIC, Oct. 21).** The Federal Deposit Insurance Corporation issued a notice and request for comment proposing to add



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the agency's Ombudsman to the Supervision Appeals Review Committee as a nonvoting member. Comments are due by November 21, 2022.

**Precedential Decision Making in Agency Adjudication (ACUS)**. The ACUS Committee on Adjudication met to develop [proposed recommendations](#) regarding the use of precedential decision in agency adjudication. The ACUS Assembly is expected to consider the committee's proposed recommendations in December.

### CONSTITUTIONALITY

**Jarkesy v. SEC (5th Cir., Oct. 21)**. The Fifth Circuit denied a petition for panel rehearing. The court had previously held that the SEC's in-house adjudication of an enforcement action for securities fraud violated the defendant's Seventh Amendment right to a jury trial, that Congress unconstitutionally delegated legislative power to the SEC when it gave the agency authority to bring enforcement actions before an ALJ or in federal district court, and that statutory removal restrictions on SEC ALJs violated the separation-of-powers.

**Texas v. U.S. (5th Cir., Oct. 5)**. The Fifth Circuit affirmed in part a district court's judgment that the Deferred Action for Childhood Arrivals memorandum violated procedural and substantive requirements of the Administrative Procedure Act.

### PROCEDURAL RULES

**ALJ Review of Sanctions Under Horseracing Integrity and Safety Act (FTC, Oct. 4)**. The FTC issued a final rule to establish procedures for the review by an administrative law judge of final civil sanctions issued by the Horseracing Integrity and Safety Authority.

**Patent and Trademark Office Extends Pilot Programs (USPTO, Oct. 4)**. The U.S. Patent and Trademark Office extended the [Fast-Track Appeals Pilot Program](#) through July 2, 2024, and the [Motion to Amend \(MTA\) Pilot Program](#) through September 16, 2024. The Fast-Track Appeals Pilot Program permits appellants with a docketed ex parte appeal before the Patent Trial and Appeal Board to file a petition to expedite the review of the appeal. The MTA Pilot Program provides patent owners an opportunity to request preliminary guidance on their MTAs from the Patent Trial and Appeal Board.

**Time Period for Filing Appeals of Inspection Decisions (USDA, Oct. 19)**. The Food Safety and Inspection Service issued a final rule to establish a uniform time



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period requirement for the filing of appeals of certain inspection decisions or actions.

### REPRESENTATION

**[Expanding Opportunities to Appear Before the Patent Trial and Appeal Board \(USPTO, Oct. 18\)](#)**. The U.S. Patent and Trademark Office is seeking public input on the requirements to practice before PTAB, with the goal to expand admission criteria so more people, including those from traditionally under-represented and under-resourced communities, can participate. Comments are due by January 17, 2023.

### TECHNOLOGY

**[Online Processes 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.