



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

June 2023

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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CASELOAD MANAGEMENT

[VA Recommendation: Clarify Program Requirements Regarding Examiners](#) (GAO, June 15). The Government Accountability Office recommended that the Department of Veterans Affairs formally assess its practice of temporarily authorizing certain medical examiners to give exams in states where they were not licensed.



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CONGRESS

Patent and Trial Appeal Board Reform Act (Congress, June 22). A bipartisan group of Senators introduced a bill to reform PTAB procedures. The bill includes a standing requirement for patent challenges and eliminates USPTO Director review of PTAB decisions.

Congressional Constituent Service Inquiries (ACUS). ACUS is examining how agencies receive, process, and respond to congressional inquiries made on behalf of constituents who need assistance accessing federal programs or navigating adjudicative and other similar administrative processes. The project will identify best practices for agencies to promote quality, efficiency, and timeliness in agency procedures for responding to such inquiries. Among other topics, the project will address the body of law governing agency responses to congressional constituent service inquiries; the extent to which agencies have developed procedures for receiving, processing, and responding to such inquiries; and the scope, content, internal dissemination, and public availability of these procedures where adopted. Sean Kealey (Boston University) is serving as a consultant.

CONSTITUTIONALITY

Jarkesy v. SEC (Supreme Court June 30). The Court granted certiorari to consider three questions: (1) whether statutory provisions that empower the Securities and Exchange Commission to initiate and adjudicative administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment, (2) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an administrative adjudication instead of filing a district court action violate the nondelegation doctrine, and (3) whether Congress has violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection. The Fifth Circuit answered all three questions in the affirmative in a May 2022 [opinion](#).

COVID-19

Modification of In-Person Hearing Policies (FMSHRC, June 15). The Federal Mine Safety and Health Review Commission made modifications to its policy providing for in-person hearings, including provisions for hybrid hearings and guidelines for considering the CDC COVID-19 hospital admissions levels.



MANAGEMENT AND OPERATIONS

Improving Timeliness in Agency Adjudication (ACUS). ACUS launched a project to survey strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address backlogs or delays in administrative adjudication. Based on this survey, it will identify best practices to help agencies devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency. The project will also consider potential legislative reforms, if warranted. Jeremy Graboyes and Jennifer Selin, both of ACUS, are serving as researchers.

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.

User Fees (ACUS). ACUS is undertaking a project that will recommend best practices for agencies—and Congress, if warranted—to consider in designing and implementing user fees in administrative programs (including application fees and filing fees in agency adjudications). It will examine, among other topics, how Congress and agencies determine when user fees are appropriate; how agencies determine fair and reasonable user fees for specific programs; how they engage with the public in determining user fees; and how often they review their user fee programs. Erika Lietzan (Missouri Law) is serving as a consultant.

PROCEDURAL RULES

Revisions to Rules of Practice (FTC, June 2). The Federal Trade Commission modified its Rules of Practice to provide, among other things, that an ALJ will issue a recommended (rather than an initial) decision after an administrative hearing, subject to automatic review by the Commission.

Best Practices for Adjudication Not Involving an Evidentiary Hearing (ACUS). ACUS launched a project to examine the wide range of procedures that agencies use when adjudicating cases in programs in which there is no legally required opportunity for an evidentiary hearing. It will offer a set of broadly



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applicable best practices that account for the diversity of matters that agencies decide through truly informal adjudication and promote fairness, accuracy, and efficiency. Michael Asimow (UCLA, Santa Clara) is serving as consultant.

Public Participation in Agency Adjudication (ACUS). ACUS launched a project to identify best practices for public participation in agency adjudicative proceedings. Among other topics, the project will address circumstances in which public participation may be appropriate; options for public participation (e.g., written comments, oral presentations, intervention, amicus briefing); methods for facilitating public participation (e.g., notice, managing oral and written comments, technology use); and agencies' use of information obtained through public engagement efforts.

PROGRAM INTEGRITY

Additional Review Team Findings on the Separation of Enforcement and Adjudicatory Functions (SEC, June 2). The Securities and Exchange Commission released additional findings, based on 250 interviews with current and former staff, related to the discovery that enforcement staff had access to adjudication memoranda.

REFERENCE GUIDES AND TRAINING

Industry Guidance for Administrative Proceedings (FDA, June 23). The Food and Drug Administration made available draft guidance that provides recommendations for industry and review staff on the dispute resolution and hearing procedures for resolving disputes between the Center for Drug Evaluation and Research and requestors and sponsors of drugs that are subject to a final administrative order under the Federal Food, Drug, and Cosmetic Act.

REPRESENTATION

Assisting Parties in Federal Administrative Adjudication (ACUS and LSC, June 27). ACUS and the Legal Services Corporation continue to host a series of virtual panel discussions examining ways to improve support for parties in federal administrative adjudication. The [third webinar](#), held June 27, addressed ways that agencies can assist self-represented parties. Panelists discussed strategies such as using navigators; developing self-help materials; training agency personnel to actively assist self-represented parties before, during, and after hearings; designing written materials and procedures so that parties can more effectively use them



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without the aid of a professional representative; using technologies to improve service to self-represented parties; and soliciting feedback from parties about areas for improvement. The [first webinar](#), held in December, examined ways to expand access to representation. The [second](#), held in May, examined ways to improve the effectiveness of representation.

[Model Rules of Representative Conduct \(ACUS\)](#). Following the adoption of [Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings](#), the Chair has convened a working group of public- and private-sector representatives to develop model rules of representative conduct. The model rules will help federal agencies amend or develop their own rules consistent with the best practices identified in Recommendation 2021-9.

TECHNOLOGY

[Electronic Notification for Benefit Claims and Appeals \(VA, June 2\)](#). The Department of Veterans Affairs published a proposed rule that would amend its regulations relating to notification of a claims decision specifically to permit electronic decision notification between claimants or beneficiaries and VA.

[Online Processes in Agency Adjudication \(ACUS, June 15\)](#). The ACUS Assembly adopted [Recommendation 2023-4](#), which identifies 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. The Assembly was informed by a [report](#) by ACUS Attorney Advisor Matthew Gluth.

TRANSPARENCY

[Proactive Disclosure of Agency Legal Materials \(ACUS, June 15\)](#). The ACUS Assembly adopted [Recommendation 2023-1](#), which recommends statutory reforms to provide clear standards as to what legal materials agencies must publish and where they must publish them. The objective of the recommended amendments will be to ensure that agencies provide ready public access to important legal materials in the most efficient way possible. The Assembly was informed by a [report](#) by Bernard Bell (Rutgers), Cary Coglianesse (University of Pennsylvania), Michael Herz (Yeshiva), Margaret Kwoka (Ohio State), and Orly Lobel (San Diego).