



## Updates in Federal Agency Adjudication

August 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](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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### ADJUDICATORS

[Administrative Law Judge Trends](#) (SSA OIG, Aug. 11). The Social Security Administration Office of the Inspector General issued an informational report on ALJ trends for fiscal years 2018 through 2022.

### ADMINISTRATIVE REVIEW

[Revised Rules for Administrative Appeals](#) (BIA, Aug. 9). The Department of the Interior finalized updates to the rules governing administrative appeals of decisions by officials at the Bureau of Indian Affairs, which take effect September 8.



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**Appeals Related Forms (MSPB, Aug. 9)**. The Merit Systems Protection Board issued a notice proposing to revise its Initial Appeal Form and add two new forms: (1) a law firm point-of-contact form for attorneys representing individuals filing an appeal with MSPB, and (2) a technical support form for individuals who experience technical issues with MSPB's [new e-Appeal system](#).

### CONGRESSIONAL AFFAIRS

**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 consultant.

### CONSTITUTIONALITY

**SEC v. Jarkesy (U.S. Supreme Court)**. Petitioner Securities and Exchange Commission, and several amici, filed briefs in *SEC v. Jarkesy*. The Court granted certiorari earlier this year to review a Fifth Circuit decision holding that the statutory provisions that authorize the SEC to adjudicate administrative enforcement proceedings violate the Seventh Amendment and the nondelegation doctrine, and that statutory removal protections for SEC ALJs violate Article II.

### COVID-19

**Special Post-Pandemic Processing Instructions for SSI Claims (Aug. 10, SSA)**. The Social Security Administration issued revised instructions for processing Supplemental Security Income claims in light of the end of the federal COVID-19 public health emergency (PHE) to provide new post-pandemic policies and procedures for applying income and resource exclusions. SSA also issued [revised guidance](#) on the effect of COVID-19-related financial assistance on SSI income and resource limits given the end of the PHE.



## JUDICIAL REVIEW

**Grayscale Investments, LLC v. SEC (D.C. Cir., Aug. 29).** The D.C. Circuit held that the SEC acted arbitrarily and capriciously when it denied a proposed bitcoin exchange-traded product and approved two materially similar investment products. The court explained that to “avoid arbitrariness and caprice, administrative adjudication must be consistent and predictable, following the basic principle that similar cases should be treated similarly.”

## 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 consultant.



## PROCEDURAL RULES

**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 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. Michael Sant'Ambrogio (MSU Law) is serving as consultant.

## REPRESENTATION

**Changes to the Duration of Attorney Recognition (USPTO, Aug. 10)**. The United States Patent and Trademark Office issued a notice seeking comments on changes to the trademark rule that would allow for continued recognition of attorneys as the representative on a pending application or registration until the applicant, registrant, or party to a proceeding revokes the power of attorney or the representative withdraws from representation. The notice also announced a public listening session on September 26, titled "Changes to Duration of Attorney Recognition" for further public input.

**Revised Representation Case Procedures (NLRB, Aug. 25)**. The National Labor Relations Board issued final rules substantially rescinding the amendments made by a rule promulgated in 2019 to reinstitute the representation case procedures that existed following the NLRB's promulgation of a rule in 2014.

**Model Rules of Representative Conduct (ACUS)**. Following the adoption of [Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings](#), Chair Fois has convened a working group of public- and private-sector representatives to develop model rules of representative conduct. The model rules



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will help federal agencies amend or develop their own rules consistent with the best practices identified in Recommendation 2021-9.

### TECHNOLOGY

**Permanent Use of Video Conference Hearings (SEC, Aug. 4).** The Securities and Exchange Commission issued a notice approving a proposed rule change to permanently allow for video conference hearings before the Office of Hearing Officers and the National Adjudicatory Council under specified conditions.

**New e-Appeal Online System (MSPB, Aug. 4).** The Merit System Protection Board announced the launch of a new, modernized version of its e-Appeal Online system that, among other things, will replace MSPB’s internal adjudication applications and allow external users to manage all cases and case materials in one place/dashboard. The new e-Appeal will go live on October 2 with planned downtimes starting on September 9 for the system transition.

**New Online SSI Application (SSA, Aug. 9).** The Social Security Administration issued a notice outlining its plan to implement the first phase of an online Supplemental Security Income application, “iSSI,” using the existing iClaim system, which is an online portal used by the public to apply for different types of Social Security benefits.

**Electronic Transmission of Hearing and Appellate Documents (EEOC, Aug. 24).** The Equal Employment Opportunity Commission issued a final rule revising its regulations to allow for the digital transmission of compliant files, hearing requests, appeals, EEOC hearing and appellate decisions, and related documents and to address various uses of the EEOC’s Electronic Public Portal.