



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

October 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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ACCESSIBILITY

[Expanded Website Language Accessibility](#) (NLRB, Oct. 13). The National Labor Relations Board launched a new series of pages on its website that features information on employee rights and employer responsibilities under the National Labor Relations Act in 17 languages.

APPOINTMENTS AND NOMINATIONS

[Committee Hearing to Consider SSA Commissioner Nomination](#) (Congress, Nov. 2). The Senate Finance Committee held a hearing to consider the nomination



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of former Maryland Governor Martin O'Malley for Commissioner of the Social Security Administration.

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

Revised Guidance for Evaluating “Close Proximity of Time” Standard (SSA, Oct. 19). SSA issued revised instructions for evaluating cases covered under the temporary final rule, “Extension of the Flexibility in Evaluating ‘Close Proximity of Time’ to Evaluate Changes in Healthcare Following the COVID-19 Public Health Emergency,” which provides flexibility in evaluating the “close proximity of time” standard in the Listing of Impairments for musculoskeletal disorders until May 11, 2025.



MANAGEMENT AND OPERATIONS

[Immigration Courts Management Challenges](#) (GAO, Oct. 18). The Government Accountability Office provided testimony before the Senate [Subcommittee on Immigration, Citizenship, and Border Safety](#) summarizing findings from two reports on the Executive Office for Immigration Review’s management of the immigration courts and describing actions needed to address challenges related to workforce planning, evaluation of the immigration judge performance appraisal program, and electronic filing system outages in order to improve court operations.

[Hearing on SSA Backlog](#) (Congress, Oct. 26). The House Subcommittee on Social Security held a hearing to examine SSA’s backlog of over one million pending disability claims and to improve the disability adjudication process and the timeliness and accuracy of disability decisions.

[Improving Timeliness in Agency Adjudication](#) (ACUS). A special Ad Hoc Committee of ACUS members held its [first meeting](#) to consider 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. The [second meeting](#) was held on November 2. The Committee is informed by a [draft report](#) by in-house researchers Jeremy Graboyes and Jennifer Selin, both of ACUS.

[Identifying and Reducing Burdens in Administrative Processes](#) (ACUS). ACUS’ Committee on Administration and Management is considering 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. The Committee held its [first](#) and [second](#) meetings in October and will hold a [third meeting](#) on November 6. The Committee is informed by a [draft report](#) by consultants Pamela Herd (Georgetown), Donald Moynihan (Georgetown), and Amy Widman (Rutgers).



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User Fees (ACUS). ACUS' Committee on Regulation held its first and second meetings in October to consider 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. The Committee drafted a Recommendation that will be considered by the ACUS Assembly at the [80th Plenary Session](#) on December 14. The Committee is informed by a [draft report](#) by consultant Erika Lietzan (Missouri Law).

PROCEDURAL RULES

Pre-Issuance Internal Circulation and Review of Decisions (USPTO, Oct. 6). The United States Patent and Trademark Office issued a notice of proposed rulemaking that would codify processes and standards that govern the internal pre-issuance circulation and review of decisions within the Patent Trial and Appeal Board (PTAB). Specifically, the proposed rule would prohibit PTAB management review of decisions prior to issuance by the panel (absent a request by a panel member); provide that, if the USPTO establishes procedures governing the internal circulation and review of decisions prior to issuance (such as Circulation Judge Pool (CJP) review), no management judge shall participate directly or indirectly in any such review; and specify that the group of reviewing non-management judges (e.g., CJP members) would be prohibited from discussing any reviewed decision with PTAB management prior to issuance.

Attorney General Review of ALJ Decisions (DOJ, Oct. 12). The Department of Justice issued an interim final rule implementing a review procedure for ALJ decisions in cases arising under section 274B of the Immigration and Nationality Act that provides the Attorney General with an opportunity to review all final decisions and orders of ALJs in the Office of the Chief Administrative Hearing Officer (OCAHO). The decision whether to review an OCAHO ALJ decision would be within the sole discretion of the Attorney General, and no party will have the right to seek or request such review. The Department requests comments on the interim final rule by December 11, 2023.

Proposed Flexibility in H-1B Program (USCIS, Oct. 23). The Department of Homeland Security through the U.S. Citizenship and Immigration Services issued a Notice of Proposed Rulemaking that would streamline certain requirements of the



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H-1B visa program and improve efficiency. Public comments are due December 22, 2023.

Best Practices for Adjudication not Involving an Evidentiary Hearing (ACUS). ACUS' Committee on Adjudication held its first and second meetings in October to consider 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. The Committee drafted a Recommendation that will be considered by the ACUS Assembly at the 80th Plenary Session on December 14. The Committee is informed by a [draft report](#) by consultant Michael Asimow (UCLA, Santa Clara).

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.

PROGRAM INTEGRITY

Overpayment Recovery Procedures (SSA, Oct. 4). The Acting Commissioner of Social Security announced that a team will be assembled to review SSA's overpayment policies and procedures.

Impact of SSA Overpayments (GAO, Oct. 18). The Government Accountability Office provided testimony before the House [Subcommittee on Social Security](#) describing the negative impact of overpayments on disability insurance beneficiaries; the financial burden overpayments can place on the agency and taxpayers; and SSA's challenges with preventing, detecting, and recovering improper payments. To prevent and reduce overpayments, GAO recommended that SSA implement two longstanding priority recommendations, which focus on preventing potential overpayments to individuals receiving concurrent federal workers' compensation benefits and pursuing additional recovery options for overpayments.



REPRESENTATION

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

TECHNOLOGY

VA Recommendation: Improvements Needed for VBA’s Claims Automation Project (VA OIG, Sept. 25). The Department of Veterans Affairs Office of Inspector General issued a report finding deficiencies with the Veterans Benefits Administration’s Automated Benefits Delivery project, which automates evidence-gathering tasks in claims processing for those seeking an increased evaluation for hypertension, and making specific recommendations to improve oversight of the project in order “to achieve the goals of supporting accurate and consistent decisions for veterans and improving claims processing timeliness, while minimizing manual processes.”

Virtual Assistant Available for Patent Applicants (USPTO, Oct. 10). The U.S. Patent and Trademark office expanded a virtual tool available for trademarks applicants to cover patents. Among other assistance, the tool will make it easier to find the status of a patent application.

Representative Availability Portal (SSA, Oct.13). The Social Security Administration issued a notice with information about its new web-based Representative Availability Portal, which will allow for the submission of an appointed representative’s availability for ALJ hearings online through the portal instead of via email.