



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

November 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

Increasing Language Access. The [Department of Agriculture](#), [Department of Homeland Security](#), and [Equal Employment Opportunity Commission](#) issued language access plans in accordance with Executive Order 13,166, “Improving Access to Services for Persons with Limited English Proficiency,” which prioritizes translation of notices, forms, and other documents, including those frequently used in adjudication.



APPOINTMENTS AND NOMINATIONS

[SSA Commissioner Nomination Advances](#) (Congress, Nov. 28). The Senate Finance Committee voted, [17-10](#), to advance the nomination of former Maryland Governor Martin O'Malley for Commissioner of the Social Security Administration to the full Senate for final consideration.

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

[FTC Dismisses Administrative Enforcement Action Against Axon](#) (FTC, Oct. 6). Six months after the Supreme Court's decision in [Axon v. FTC](#), which allowed Axon Enterprise Inc. to advance its constitutional challenges to the Federal Trade Commission's adjudication process in federal district court, the FTC has dismissed its administrative antitrust complaint against Axon. In response, Axon filed a stipulation to dismiss its federal court claims challenging the constitutionality of the FTC's structure, [which was granted](#), bringing resolution to both the administrative and federal cases.

[SEC v. Jarkesy](#) (U.S. Supreme Court). Petitioner Securities and Exchange Commission filed a reply brief on November 13, and [oral arguments](#) were heard on November 29. 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.



ENFORCEMENT

Reports on Enforcement. The [Federal Energy Regulatory Commission](#) and [Securities and Exchange Commission](#) released annual reports on enforcement summarizing the status and resolution of enforcement and adjudicatory matters, as well as highlighting agency enforcement priorities.

JUDICIAL REVIEW

[Starbucks Corporation v. M. Kathleen McKinney, Regional Director of Region 15 of the NLRB \(U.S. Supreme Court\)](#). In October, Starbucks Corporation petitioned the Supreme Court for a writ of certiorari to review the judgment of the Sixth Circuit affirming a section 10(j) injunction for the National Labor Relations Board under a two-part “reasonable cause” test, used by five circuit courts, instead of a more stringent four-factor test traditionally applied when deciding whether to grant a request for a preliminary injunction, used by four circuit courts. Section 10(j) of the National Labor Relations Act authorizes federal district courts, while the NLRB adjudication remains pending, to grant preliminary injunctive relief at the NLRB’s request “as [the court] deems just and proper.” Several amici have filed briefs asking the Court to grant Petitioner’s writ of certiorari.

MANAGEMENT AND OPERATIONS

[Immigration Court Efficiency and Children's Court Act of 2023 \(Congress, Nov. 1\)](#) The Senate introduced a bill, S.3178, to establish the Children’s Court within the Executive Office for Immigration Review that would be assigned specialized children’s dockets for the adjudication of removal proceedings involving unaccompanied alien children.

[Improving Timeliness in Agency Adjudication \(ACUS\)](#). A special Ad Hoc Committee of ACUS members held its [second meeting](#) on November 2 to finish drafting a proposed Recommendation identifying best practices to help agencies devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency. The proposed Recommendation will be considered by the ACUS Assembly at the [80th Plenary Session](#) on December 14. The Committee was informed by a [draft report](#) by in-house researchers Jeremy Graboyes and Jennifer Selin that surveyed strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address backlogs or delays in administrative adjudication.



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Identifying and Reducing Burdens in Administrative Processes (ACUS).

ACUS' Committee on Administration and Management held its [third meeting](#) on November 6 and drafted a proposed Recommendation that identifies 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. The proposed Recommendation will be considered by the ACUS Assembly at the [80th Plenary Session](#) on December 14. The Committee was informed by a [draft report](#) by consultants Pamela Herd (Georgetown), Donald Moynihan (Georgetown), and Amy Widman (Rutgers).

User Fees (ACUS). ACUS' Committee on Regulation drafted a proposed Recommendation that will be considered by the ACUS Assembly at the [80th Plenary Session](#) on December 14 that recommends 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). The Committee was informed by a [report](#) by consultant Erika Lietzan (Missouri Law) that examines, 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.

PROCEDURAL RULES

In-Person and Electronic Filing Procedures (FLRA, Nov. 17). The Federal Labor Relations Authority issued a final rule specifying that if parties wish to file documents in person, they must schedule an appointment at least one day in advance. The rule also specifies the deadline for electronic filing.

Proposed Revisions to EEO Procedural Rules (GAO, Nov. 24). The Government Accountability Office Personnel Appeals Board proposed revisions to its procedural rules that would give the PAB General Counsel authority to process certain retaliation claims that have not first undergone GAO's Equal Employment Opportunity process and to hold certain nondiscrimination claims in abeyance if they are related to a claim pending in GAO's EEO process. Comments on these proposed rule changes are due January 23, 2024.



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Reevaluation of Claims for Dependency and Indemnity Compensation (VA, Nov. 24). The Department of Veterans Affairs revised its rules to allow certain claimants with previously denied claims for Dependency and Indemnity Compensation under section 204 of the PACT Act to elect to have their claims reevaluated pursuant to changes that establish or modify a presumption of service connection. Any award as a result of the reevaluation may be made retroactive as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. This rule is effective January 23, 2024.

Best Practices for Adjudication not Involving an Evidentiary Hearing (ACUS). ACUS' Committee on Adjudication drafted a proposed Recommendation that will be considered by the ACUS Assembly at the [80th Plenary Session](#) on December 14 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 offers 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 was 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

Gaps in VA Quality Assurance Process (GAO, Nov. 29). The Government Accountability Office provided testimony before the House [Subcommittee on Disability Assistance and Memorial Affairs](#) discussing its performance audit of the Department of Veterans Affairs' Board of Veterans' Appeals' quality assurance process. GAO identified gaps in BVA's efforts to build and use evidence—such as a lack of data and analysis—to assess its QA process and related activities. To address these gaps, GAO recommended that BVA develop policies for calculating its accuracy rate; develop and implement an evidence-based decision-making process for its QA efforts; and study decision-making consistency.



REPRESENTATION

New Design Patent Practitioner Bar (USPTO, Nov. 16). The United States Patent and Trademark Office amended its rules of practice in patent cases and the rules regarding the representation of others before the USPTO by creating a separate design patent practitioner bar in which admitted design patent practitioners practice in design patent proceedings only. The rule is effective January 2, 2024.

Nonlawyer Assistance and Representation (ACUS). ACUS is accepting proposals from individuals interested in serving as a consultant to study representation and other forms of assistance provided by nonlawyers to participants in federal agency adjudication. Submissions are due by December 31, 2023.

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.