



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

December 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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ADMINISTRATIVE REVIEW

[Forest Service Administrative Appeals \(USDA, Dec. 6\)](#). The United States Department of Agriculture, Forest Service made technical, clarifying revisions to its existing regulations that govern administrative appeals of certain written decisions pertaining to written authorizations for occupancy or use of National Forest System lands and resources. The revisions update citations and enhance consistency of the existing regulations with governing statutes.

[Bureau of Safety and Environmental Enforcement Appeal Criteria \(DOI, Dec. 13\)](#). The Department of the Interior issued a proposed rule to clarify that the Bureau of Safety and Environmental Enforcement's surety bond requirements are a jurisdictional precondition for filing an appeal of outer continental shelf civil



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penalties with the Interior Board of Land Appeals. Comments are due February 12, 2024.

[Appeal Rights for Certain Medicare Patients](#) (CMS, Dec. 27). The Centers for Medicare & Medicaid Services issued a proposed rule that would implement an order from the federal district court for the District of Connecticut in *Alexander v. Azar*, 613 F. Supp. 3d 559 (D. Conn. 2020), *aff'd sub nom.*, *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022), which requires HHS to establish appeals processes for certain Medicare beneficiaries who are initially admitted as hospital inpatients but are subsequently reclassified as outpatients receiving observation services during their hospital stay and meet other eligibility criteria. The proposed processes would consist of expedited appeals, standard appeals, and retrospective appeals. Comments are due February 26, 2024.

APPOINTMENT AND REMOVAL

[K & R Contractors, LLC v. Keene](#) (4th Cir., Nov. 7). Following an administrative order to pay Black Lung benefits to a former employee, K & R Contractors, LLC petitioned the Fourth Circuit for review, challenging the constitutional authority of the two Department of Labor ALJs who heard and decided Keene's claim. Specifically, K & R argued that the ALJs were not appointed consistent with their status as inferior officers under the Appointments Clause and that the ALJs are insulated from removal by two layers of good-cause tenure protection, contrary to the Constitution's vesting of the executive power in the President. The Fourth Circuit denied the petition for review, holding that the Secretary of Labor properly appointed both ALJs before they took any action in the employee's case. The court did not decide the dual for-cause removal protection issue, explaining that "[b]ecause the ALJs were exercising the lawful authority of their offices, and K & R does not claim that the allegedly unconstitutional removal provisions caused it any harm, K & R is not entitled to any relief on its removal protections claim."

APPOINTMENTS AND NOMINATIONS

[SSA Commissioner Confirmed](#) (Congress, Dec. 18). The Senate voted, [50-11](#), to confirm the nomination of former Maryland Governor Martin O'Malley to be the Commissioner of Social Security for the remainder of the term expiring January 19, 2025.



CONGRESSIONAL AFFAIRS

[Congressional Constituent Service Inquiries \(ACUS\)](#) (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*. [Oral arguments](#) were heard on November 29. The Court granted certiorari on June 30, 2023, 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

[Revised Regulations Implementing the Native American Graves Protection and Repatriation Act \(DOI, Dec. 13\)](#). The Department of the Interior issued a final rule revising several regulations that implement the Native American Graves Protection and Repatriation Act, including the regulations governing the adjudication of civil penalties assessed on museums that fail to comply with the Act. Among other things, the revised rule consolidates the opportunity to contest both a substantiated failure to comply and a penalty assessment into a single hearing and requires museums to exhaust all administrative remedies (including a hearing before an ALJ and appeal to the Interior Board of Indian Appeals) before seeking judicial review.

MANAGEMENT AND OPERATIONS

[Improving Timeliness in Agency Adjudication \(ACUS\)](#) (ACUS). The ACUS Assembly adopted [Recommendation 2023-7](#), which identifies best practices to help agencies



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devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency. The Assembly was informed by a [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.

[Identifying and Reducing Burdens on the Public in Administrative Processes \(ACUS\)](#). The ACUS Assembly adopted [Recommendation 2023-6](#), which 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 Assembly was informed by a [report](#) by consultants Pamela Herd (Georgetown), Donald Moynihan (Georgetown), and Amy Widman (Rutgers).

[User Fees \(ACUS\)](#). The ACUS Assembly adopted [Recommendation 2023-8](#), which recommends best practices for agencies and Congress to consider in designing and implementing user fees in administrative programs (including application fees and filing fees in agency adjudications). The Assembly was informed by a [report](#) by consultant Erika Lietzan (Missouri Law) that examines how Congress and agencies determine when user fees are appropriate; how agencies determine fair and reasonable user fees for specific programs, including whether there are reasons for waivers, exemptions, or reduced rates; how they engage with the public in determining user fees; and how often they review their user fee programs.

PROCEDURAL RULES

[Guidance on Information from Occupational Data Tools \(SSA, Dec. 5\)](#). The Social Security Administration issued revised guidelines for adjudicators on the use of certain electronic occupational information databases in making disability determinations.

[Informal Evaluation Process for Immigrant Visas \(State Department, Dec. 7\)](#). The Department of State amended its regulations to remove the authority of consular officers to conduct informal evaluations of the family members of an immigrant visa applicant to identify potential grounds of ineligibility. The final rule eliminates 22 CFR § 42.68 in its entirety and takes effect January 8, 2024.

[Revised Rules of Practice and Procedure \(OCC, Federal Reserve, FDIC, NCUA, Dec. 28\)](#). The Office of the Comptroller of the Currency, Board of Governors



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of the Federal Reserve System, Federal Deposit Insurance Corporation, and the National Credit Union Administration adopted final changes to the Uniform Rules of Practice and Procedure to recognize the use of electronic pleadings and communications in all aspects of administrative hearings and to otherwise update and modernize the Uniform Rules. The revised rules take effect April 1, 2024.

[Best Practices for Adjudication not Involving an Evidentiary Hearing \(ACUS\)](#). The ACUS Assembly adopted [Recommendation 2023-5](#), which examines 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 Assembly was informed by a [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.

REPRESENTATION

[Fee Allocation and Direct Payment \(VA, Dec. 21\)](#). The Department of Veterans Affairs issued a notice of proposed rulemaking to establish reasonable default allocation rules for fee matters that would either allocate the entire fee to an eligible agent or attorney who provided continuous representation in the case or provide for an equal split of the fee based on the number of eligible agents or attorneys plus the claimant. The proposed rule would also limit direct fee payment to agents and attorneys who are accredited with the VA. Comments are due February 20, 2024.

[Nonlawyer Assistance and Representation \(ACUS\)](#). ACUS has launched a project to study representation and other forms of assistance provided by nonlawyers to participants in federal agency adjudication.

[Model Rules of Representative Conduct \(ACUS\)](#). Following the adoption of [Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings](#), Chair Fois convened a working group of public- and private-sector



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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.