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# Administrative Conference of the United States



## 80TH PLENARY SESSION

December 14, 2023

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# Celebrating 80 Plenary Sessions

ADMINISTRATIVE CONFERENCE  
OF THE UNITED STATES  
First Plenary Session, May 27, 1968



1                                 P R O C E E D I N G S  
2                 MR. WILLIAMS:    The first plenary session of the  
3     Administrative Conference of the United States will please  
4     come to order.  
5                 Let me first give my thanks to all of you for co-  
6     operating in starting a tradition of beginning on time.  
7                 We will try to carry out this tradition in spite of  
8     weather, other obstacles, and only in case of disaster will we  
9     avoid carrying the void.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: REPORT ON THE SEVENTH PLENARY SESSION

Richard K. Berg

The Administrative Conference of the United States held its Seventh Plenary Session in Washington, D.C., on June 8-9, 1972. It adopted four recommendations for improvements in the procedures of federal agencies. Still another proposed recommendation was referred back to committee for further consideration. Finally, the Conference adopted several amendments to its bylaws, the most significant of which revised the structure of standing committees. The Committee on Information, Education and Reports was combined with the Committee on Rulemaking to create a Committee on Rulemaking and Public Information; the Committee on Personnel was combined with the Committee on Agency Organization and Procedure to create a Committee on Agency Organization and Personnel; and a new



Economic Regulation was established.ibilities of the other six committees,iance and Enforcement Proceedings, nformal Action, Judicial Review, and emained unchanged.

n behalf of the federal judiciary by H. Rehnquist, the Conference adopted ther of the Administrative Conference" ho died August 4, 1971.

The Assembly contemplates a presentation at the Twenty-ninth Plenary Session.

## 51st Plenary Adopts Recommendations on FOIA Exemption 8 and on Debarment and Suspension Procedures

At its 51st plenary session the Conference Assembly adopted two recommendations, heard a report on the Conference's progress in implementing the Administrative Dispute Resolution Act, and participated in a colloquy, "New Approaches to Regulation."

In Recommendation 95-1, "Application and Modification of Exemption 8 of the Freedom of Information Act," the Conference urged changing the scope of coverage of that exemption. Exemption 8 protects from disclosure by federal agencies certain documents relating to examination and supervision of banks and other financial institutions. The recommendation proposes that exemption 8 be retained for examination reports for "open" currently operating banks, but be significantly cut back for closed banks that have failed.



Host of the 51st plenary reception Justice Stephen Breyer addressing the Conference members and guests on January 19.



Treasury Department Member Wolf Haber, Commissioner Constance B. Newman, Public Member Jack Greenberg, Agriculture Department Member Donald A. Campbell, Public Member Richard W. Pogue.



**Plenary dates:**  
December 14 and 15, 1989  
June 14 and 15, 1990

## Administrative Conference says agencies should foster citizen participation

The Administrative Conference of the United States last week took official notice of the rising tide of public-interest-group participation in federal-agency proceedings: It approved a recommendation calling on administrative agencies, like the FCC and Federal Trade Commission, to adopt procedures that would facilitate that participation, without at the same time "impairing" the performance of their duties.

MR. OLPIN: Thank you, Walter.

I suppose Jeff Lubbers might look and see if our previous work on civil penalties could be useful in getting some discipline in the ranks.

I'm not sure that fits, Jeff, but would you take a look at it?

MR. LUBBERS: Sure.



*Please Note:  
50th Plenary  
Session is June 16*

Antonin Scalia - 4 - June 11, 1973

Let me close this too long missive by saying that I thought that you ran a very good meeting and got through a great deal of business with a minimum of bloodshed or confusion.

All good wishes to you.

Faithfully yours,

*Walter Gellhorn*  
Walter Gellhorn

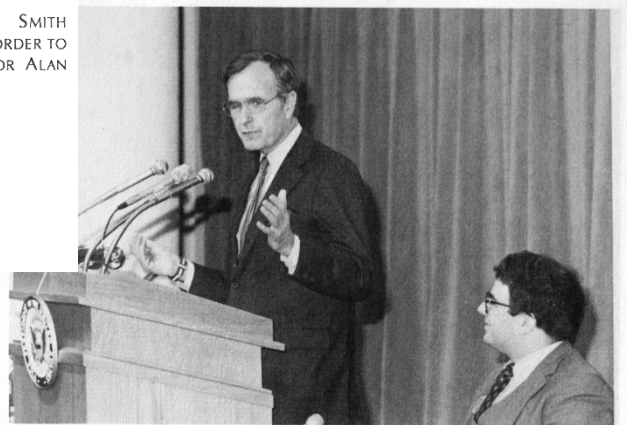
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION IMPLEMENTATION SUMMARY

Date	By	Recommendation Number
6/27/77	e:jg	68-4



CHAIRMAN LOREN A. SMITH EXPLAINS THE RULES OF ORDER TO GUEST SPEAKER SENATOR ALAN K. SIMPSON.



Vice President George Bush outlines regulatory relief measures to the Assembly at the Twenty-third Plenary Session as Chairman Loren A. Smith looks on.

# ADMINISTRATIVE CONFERENCE NEWS



Administrative Conference of the United States Fall 1987 Volume 1, Number 3

## June Plenary Session Completes Full Agenda

The Administrative Conference has urged management reforms at the Occupational Safety and Health Administration (OSHA), additional legislative protection from reprisal for certain private-sector workers who blow the whistle on their employers and a new approach to calculating user fees for some government services.

At its June 11-12 plenary session, the Conference also recommended a stricter process for the hiring of private attorneys by federal agencies and ways for Congress and agencies to avoid constitutional conflicts when arbitration is used to resolve disputes involving agency actions.

The Conference also reviewed a report on Freedom of Information Act re-

quests that are not filled to the requester's satisfaction. A report to the Conference recommended creation of an independent administrative tribunal or appointment of an ombudsman in the Department of Justice to resolve such disputes. But the Conference concluded that there was insufficient evidence that such moves would be warranted. In a statement, the Conference did suggest that the Justice Department and other agencies consider use of alternative dispute resolution techniques to expedite settlements in such cases. Following are summaries of the five Recommendations (published in Federal Register of June 24, 1987, pages 23629-23636, and available from the Conference): (continued on page 3)

## Full Plate of Research Projects Necessitates Additional Plenary Session

[T]he special plenary session . . . laid the foundations for action in December.

### Upcoming Events

- September 9 46th Plenary Session
- September 24 The Supreme Court Ad Law Docket Colloquy
- December 10 47th Plenary and 11th Session

# 80th Plenary Session Agenda

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- 9:00      **Call to Order**  
Opening Remarks by Chair Andrew Fois  
Initial Business  
*Vote on Adoption of Minutes and Resolution Governing the Order of Business*
- 9:30      **Remarks**  
Cass Sunstein  
*Robert Walmsley University Professor, Harvard Law School*
- 9:50      **Consider Recommendation**  
*Best Practices for Adjudication Not Involving an Evidentiary Hearing*
- 11:05     **Consider Recommendation**  
*Identifying and Reducing Burdens in Administrative Processes*
- 12:20     **Lunch**
- 1:00      **Panel Discussion**  
*Former ACUS Chairs Commemorate the 80th Plenary Session*
- Chair Andrew Fois, *Moderator*
  - Sally Katzen, *Acting Chairwoman, 1994*
  - Thomasina V. Rogers, *Chairwoman, 1994–1995* [Invited]
  - Paul R. Verkuil, *Chairman, 2010–2015*
  - Matthew L. Wiener, *Acting Chairman, 2017–2021, 2021–2022*
- 1:45      **Special Award Presentation**
- 1:50      **Consider Recommendation**  
*Improving Timeliness in Agency Adjudication*
- 3:05      **Consider Recommendation**  
*User Fees*
- 4:20      **Closing Remarks and Adjourn**

# Resolution Governing the Order of Business

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The time initially allotted to each item of business is separately stated in the agenda. Individual comments from the floor shall not exceed five minutes, unless further time is authorized by unanimous consent of the voting members present. A majority of the voting members present may extend debate on any item for up to 30 additional minutes. At any time after the expiration of the time initially allotted to an item, the Chair shall have discretion to move the item to a later position in the agenda.

Unless the Chair determines otherwise, amendments and substitutes to recommendations that have been timely submitted in writing to the Office of the Chair before the meeting will receive priority in the discussion of any proposed item of business; and other amendments and substitutes to recommendations will be entertained only to the extent that time permits.





# 79th Plenary Session Minutes

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June 15, 2023

## I. Call to Order and Opening Remarks

The 79th Plenary Session of the Administrative Conference of the United States (ACUS) commenced at approximately 9 a.m. on June 15, 2023. ACUS Chair Andrew Fois called the meeting to order, provided an update on recent staffing changes within the Office of the Chair, and introduced the Council Members and new members who joined ACUS since the 78th Plenary Session.

Chair Fois then gave the Chair's Report, briefly describing the recent work of the agency, highlighting several studies currently underway, notable ACUS publications that have recently been, or will soon be, released, and ongoing roundtables and forums through which ACUS provides opportunities for agencies to convene and share information.

## II. Keynote Address: Honorable Richard L. Revesz (Administrator, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget)

Following opening remarks from the Chair, OIRA Administrator Richard L. Revesz provided the keynote address. Administrator Revesz discussed his time as a member of and consultant to ACUS and offered remarks on recent executive actions to modernize regulatory review and broaden public participation in the rulemaking process, many of which drew on past ACUS recommendations. After delivering his remarks, Administrator Revesz answered questions from ACUS members.

## III. Initial Business

At the conclusion of Administrator Revesz's keynote address, Chair Fois reviewed the rules for debating and voting on matters at the Plenary Session. ACUS members then approved the minutes for the 78th Plenary Session, adopted the resolution governing the order of business at the 79th Plenary Session, and approved a technical amendment to the ACUS bylaws to clarify that notifications of intent to submit a separate statement must now be provided to the Chair (or his or her designee) in place of the Executive Director. Chair Fois then thanked members, committee chairs, staff, and consultants for their diligent work in preparing proposed recommendations for consideration by the Assembly.

## IV. Consideration of Proposed Recommendation: Proactive Disclosure of Agency Legal Materials

Chair Fois introduced the proposed recommendation, thanking: Co-Chairs of the Ad Hoc Committee on Disclosure of Agency Legal Materials Roxanne Rothschild (Government Member) and Aaron Nielson (Public Member); project consultants Margaret B. Kwoka, Bernard W. Bell, Cary Coglianese, Michael Herz, and Orly Lobel; and ACUS Staff Counsel Alexandra Sybo.

Ms. Kwoka provided an overview of the report, and Ms. Rothschild discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed recommendation. Various amendments were considered and adopted. Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

## **V. Proposed Recommendation: Virtual Public Engagement in Agency Rulemaking**

Chair Fois introduced the proposed recommendation, thanking: Chair of the Committee on Rulemaking, Bertrall Ross (Public Member); and Kazia Nowacki, in-house researcher and ACUS Staff Counsel.

Ms. Nowacki provided an overview of the report, and Mr. Ross discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed recommendation. Various amendments were considered and adopted. Chair Fois called for a vote on the recommendation, as amended, and the recommendation was adopted.

## **VI. Lunch Hour Discussion: Improving Customer Experience in the Delivery of Government Services**

During the lunch break, Chair Fois welcomed Loren DeJong Schulman (Associate Director for Performance and Personnel Management, Office of Management and Budget (OMB)) and Todd Rubin (Customer Experience Desk Officer, OMB) for a discussion of recent and ongoing administration initiatives to improve agency service delivery, reduce administrative burdens, and address systemic barriers faced by underserved communities when accessing benefits or engaging with federal programs.

## **VII. Proposed Recommendation: Using Algorithmic Tools in Retrospective Review of Agency Rules**

Chair Fois introduced the proposed recommendation, thanking: Chair of the Committee on Regulation Eloise Pasachoff (Public Member); project consultant Catherine Sharkey; and ACUS Staff Counsel Kazia Nowacki.

Ms. Sharkey provided an overview of the report, and Chair Pasachoff discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed Recommendation. Various amendments were considered and adopted. Chair Fois then called for a vote on the Recommendation, as amended, and the Recommendation was adopted.

## **VIII. Proposed Recommendation: Online Processes in Agency Adjudication**

Chair Fois introduced the proposed recommendation, thanking: Nadine Mancini (Government Member), Chair of the Committee on Regulation, and Matthew Gluth, in-house researcher and ACUS Staff Counsel.

Mr. Gluth provided an overview of the report, and Chair Mancini discussed the Committee's deliberations. Chair Fois then turned to consideration of the proposed Recommendation. Various amendments were considered and adopted. Chair Fois then called for a vote on the Recommendation, as amended, and the Recommendation was adopted.

## **IX. Closing Remarks & Adjournment**

Chair Fois thanked the panelists for their participation, invited Members to join ACUS staff for an informal reception following adjournment of the Plenary, and thanked Members and staff for their attendance and participation in the day's proceedings. At approximately 5:00 p.m., Chair Fois adjourned the 79th Plenary Session.

# ACUS Bylaws

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## Bylaws of the Administrative Conference of the United States

*Last updated: June 16, 2023*

[The numbering convention below reflects the original numbering that appeared in Title 1, Code of Federal Regulations (CFR), Part 302, which was last published in 1996. Although the original numbering convention is maintained below, the bylaws are no longer published in the CFR. The official copy of the bylaws is currently maintained on the Conference's website at <https://www.acus.gov/policy/administrative-conference-bylaws>.]

### § 302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§ 591 *et seq.*, 78 Stat. 615 (1964), as amended, authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purposes of the Administrative Conference are to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest, to promote more effective participation and efficiency in the rulemaking process, to reduce unnecessary litigation and improve the use of science in the regulatory process, and to improve the effectiveness of laws applicable to the regulatory process. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

### § 302.2 Membership

#### (a) General

(1) Each member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly, either in person or by telephone or videoconference if that is permitted for the session or meeting involved. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

#### (b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. The Chairman shall, by random selection, identify one-half of the non-Government members appointed in 2010 to serve terms ending on June 30, 2011, and the other half to serve terms ending on June 30, 2012. Thereafter, all non-Government member terms shall be for two years. No non-Government members shall at any time be in continuous service beyond three terms; provided, however, that such former members may thereafter be

appointed as senior fellows pursuant to paragraph (e) of this section; and provided further, that all members appointed in 2010 to terms expiring on June 30, 2011, shall be eligible for appointment to three continuous two-year terms thereafter.

**(c) Eligibility and Replacements**

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he or she leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he or she enters full-time government service. In the event a non-Government member of the Conference appointed by the Chairman resigns or becomes ineligible to continue as a member, the Chairman shall appoint a successor for the remainder of the term.

**(d) Alternates**

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a member may designate (by e-mail) a suitably informed alternate to participate for a member in a meeting of the committee, and that alternate may have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

**(e) Senior Fellows**

The Chairman may, with the approval of the Council, appoint persons who have served as members of or liaisons to the Conference for six or more years, former members who have served as members of the federal judiciary, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Senior fellows shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

**(f) Special Counsels**

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Special counsels shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

**§ 302.3 Committees**

**(a) Standing Committees**

The Conference shall have the following standing committees:

1. Committee on Adjudication
2. Committee on Administration
3. Committee on Judicial Review
4. Committee on Regulation
5. Committee on Rulemaking

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. The Chairman, with the approval of the Council, may establish additional standing committees or rename, modify, or terminate any standing committee.

**(b) Special Committees**

With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. Such special committees shall expire after two years, unless their term is renewed by the Chairman with the approval of the Council for an additional period not to exceed two years for each renewal term. The Chairman may also terminate any special committee with the approval of the Council when in his or her judgment the committee's assignments have been completed.

**(c) Coordination**

The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

**§ 302.4 Liaison Arrangements**

**(a) Appointment**

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

**(b) Term**

Any liaison arrangement entered into on or before January 1, 2020, shall remain in effect for the term ending on June 30, 2022. Any liaison arrangement entered into after January 1, 2020, shall terminate on June 30 in 2-year intervals in even-numbered years. The Chairman may, with the approval of the Council, extend the term of any liaison arrangement for additional terms of two years. There shall be no limit on the number of terms.

**§ 302.5 Avoidance of Conflicts of Interest**

**(a) Disclosure of Interests**

(1) The Office of Government Ethics and the Office of Legal Counsel have advised the Conference that non-Government members are special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. Accordingly, the Chairman of the Conference is authorized to prescribe requirements for the filing of information with respect to the employment and financial interests of non-Government members consistent with law, as he or she reasonably deems necessary to comply with these provisions of law, or any applicable law or Executive Order or other directive of the President with respect to participation in the activities of the Conference (including but not limited to eligibility of federally registered lobbyists).

(2) The Chairman will include with the agenda for each plenary session and each committee meeting a statement calling to the attention of each participant in such session or meeting the requirements of this section, and requiring each non-Government member to provide the information described in paragraph (a)(1), which information shall be

maintained by the Chairman as confidential and not disclosed to the public. Except as provided in this paragraph (a) or paragraph (b), members may vote or participate in matters before the Conference to the extent permitted by these by-laws without additional disclosure of interest.

**(b) Disqualifications**

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

(2) No member may vote or otherwise participate in that capacity with respect to any proposed recommendation in connection with any study as to which he or she has been engaged as a consultant or contractor by the Conference.

**(c) Applicability to Senior Fellows, Special Counsel, and Liaison Representatives**

This section shall apply to senior fellows, special counsel, and liaison representatives as if they were members.

**§ 302.6 General**

**(a) Meetings**

In the case of meetings of the Council and plenary sessions of the Assembly, the Chairman (and, in the case of committee meetings, the committee chairman) shall have authority in his or her discretion to permit attendance by telephone or videoconference. All sessions of the Assembly and all committee meetings shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to special counsel, and to liaison representatives (and to consultants and staff members insofar as matters on which they have been engaged are under consideration), and to persons who, prior to the commencement of the session or meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly (or, in the case of committee meetings, the approval of the chairman of the committee and unanimous consent of the committee).

**(b) Quorums**

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council. Action by the Council may be effected either by meeting or by individual vote, recorded either in writing or by electronic means.

**(c) Proposed Amendments at Plenary Sessions**

Any amendment to a committee-proposed recommendation that a member wishes to move at a plenary session should be submitted in writing in advance of that session by the date established by the Chairman. Any such pre-submitted amendment, if supported by a proper motion at the plenary session, shall be considered before any amendments that were not pre-submitted. An amendment to an amendment shall not be subject to this rule.

**(d) Separate Statements**

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation. A

member's failure to file or join in such a separate statement does not necessarily indicate his or her agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Chairman or his or her designee not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

**(e) Amendment of Bylaws**

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

**(f) Procedure**

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

# Public Meeting Policies & Procedures

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*Last updated: June 12, 2023*

The Administrative Conference of the United States (the “Conference”) adheres to the following policies and procedures regarding the operation and security of committee meetings and plenary sessions open to the public.

## Public Notice of Plenary Sessions and Committee Meetings

The Administrative Conference will publish notice of its plenary sessions in the *Federal Register* and on the Conference’s website, [www.acus.gov](http://www.acus.gov). Notice of committee meetings will be posted only on the Conference website. Barring exceptional circumstances, such notices will be published 15 calendar days before the meeting in question. Members of the public can also sign up to receive meeting alerts at [acus.gov/subscribe](http://acus.gov/subscribe).

## Public Access to Meetings

Members of the public who wish to attend a committee meeting or plenary session in person or remotely should RSVP online at [www.acus.gov](http://www.acus.gov) no later than two business days before the meeting. To RSVP for a meeting, go to the Calendar on ACUS’s website, click the event you would like to attend, and click the “RSVP” button. ACUS will reach out to members of the public who have RSVP’d if the meeting space cannot accommodate all who wish to attend in person.

Members of the public who wish to attend a meeting held at ACUS headquarters should first check in with security at the South Lobby entrance of Lafayette Centre, accessible from 20th Street and 21<sup>st</sup> Street NW. Members of the public who wish to attend an ACUS-sponsored meeting held at another facility should follow that facility’s access procedures.

The Conference will make reasonable efforts to provide interested members of the public remote access to all committee meetings and plenary sessions and to provide access on its website to archived video of committee meetings and plenary sessions. The Conference will make reasonable efforts to post remote access information or instructions for obtaining remote access information on its website prior to a meeting. The *Federal Register* notice for each plenary session will also include remote access information or instructions for obtaining remote access information.

## Participation in Meetings

The 101 statutory members of the Conference as well as liaison representatives, special counsels, and senior fellows may speak at plenary sessions and committee meetings. Voting at plenary sessions is limited to the 101 statutory members of the Conference. Statutory members may also vote in their respective committees. Liaison representatives, special counsels, and senior fellow may vote in their respective committees at the discretion of the Committee Chair.

The Conference Chair, or the Committee Chair at committee meetings, may permit a member of the public to speak with the unanimous approval of all present voting members. The Conference expects that every public attendee will be respectful of the Conference’s staff, members, and others in attendance. A public attendee will be considered disruptive if he or



she speaks without permission, refuses to stop speaking when asked by the Chair, acts in a belligerent manner, or threatens or appears to pose a threat to other attendees or Conference staff. Disruptive persons may be asked to leave and are subject to removal.

### **Written Public Comments**

To facilitate public participation in committee and plenary session deliberations, the Conference typically invites members of the public to submit comments on the report(s) or recommendation(s) that it will consider at an upcoming committee meeting or plenary session.

Comments can be submitted online by clicking the "Submit a comment" button on the webpage for the project or event. Comments that cannot be submitted online can be mailed to the Conference at 1120 20th Street NW, Suite 706 South, Washington, DC 20036.

Members of the public should make sure that the Conference receives comments before the date specified in the meeting notice to ensure proper consideration.

### **Disability or Special Needs Accommodations**

The Conference will make reasonable efforts to accommodate persons with physical disabilities or special needs. If you need special accommodations due to a disability, you should contact the Staff Counsel listed on the webpage for the event or the person listed in the *Federal Register* notice no later than seven business days before the meeting.

# Member List

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## Council Members

Funmi Olorunnipa Badejo, *Head of Compliance*, Palantir Technologies  
Ronald A. Cass, *President*, Cass & Associates, PC  
Kristen Clarke, *Assistant Attorney General for Civil Rights*, U.S. Department of Justice  
Andrew Fois, *Chair*, Administrative Conference of the U.S.  
Leslie B. Kiernan, *General Counsel*, U.S. Department of Commerce  
Fernando Laguarda, *General Counsel*, AmeriCorps  
Matthew E. Morgan, *Partner*, Barnes & Thornburg LLP  
Anne Joseph O'Connell, *Adelbert H. Sweet Professor of Law*, Stanford Law School  
Nitin Shah, *Director & Associate General Counsel for Global Regulatory Affairs & Compliance*, Shopify  
Jonathan C. Su, *Partner*, Latham & Watkins LLP  
Adrian Vermeule, *Ralph S. Tyler, Jr. Professor of Constitutional Law*, Harvard Law School

## Government Members

James L. Anderson, *Deputy General Counsel, Supervision, Legislation, & Enforcement Branch*, Federal Deposit Insurance Corporation  
David J. Apol, *General Counsel*, U.S. Office of Government Ethics  
Samuel R. Bagenstos, *General Counsel*, U.S. Department of Health & Human Services  
Gregory R. Baker, *Deputy General Counsel for Administration*, Federal Election Commission  
Laura Barhydt, *Senior Regulatory Counsel*, U.S. Office of Personnel Management  
Eric S. Benderson, *Associate General Counsel for Litigation & Claims*, U.S. Small Business Administration  
Krystal J. Brumfield, *Associate Administrator for the Office of Government-wide Policy*, U.S. General Services Administration  
Daniel Cohen, *Assistant General Counsel for Regulation*, U.S. Department of Transportation  
Michael J. Cole, *Senior Attorney, Office of General Counsel*, Federal Mine Safety and Health Review Commission  
Peter J. Constantine, *Associate Solicitor, Office of Legal Counsel*, U.S. Department of Labor  
Anika S. Cooper, *Deputy General Counsel*, Surface Transportation Board  
Susan M. Davies, *Acting Assistant Attorney General, Office of Legal Policy*, U.S. Department of Justice  
Rita P. Davis, *Deputy General Counsel*, U.S. Department of Defense  
Scott A. de la Vega, *Associate Solicitor for General Law*, U.S. Department of the Interior  
Seth R. Frotman, *General Counsel*, Consumer Financial Protection Bureau  
Ami Grace-Tardy, *Assistant General Counsel for Legislation, Regulation and Energy Efficiency*, U.S. Department of Energy  
Gina K. Grippando, *Assistant General Counsel for Administrative Law*, U.S. International Trade Commission  
Carson M. Hawley, *Deputy Assistant General Counsel, Marketing, Regulatory, and Food Safety Programs Division*, U.S. Department of Agriculture

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# Ongoing Projects

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## Assembly Projects

(Directed toward development of recommendations for consideration and adoption by the Assembly)

- Choice of Forum for Judicial Review of Agency Rules
- Congressional Constituent Service Inquiries
- Individualized Guidance
- Public Engagement in Agency Rulemaking Under the Good Cause Exemption
- Public Participation in Agency Adjudication
- Using Algorithmic Tools in Regulatory Enforcement

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Forthcoming and Ongoing Studies / Publications	Agency Awards Under Equal Access to Justice Act
	Federal Administrative Procedure Sourcebook
	International Regulatory Cooperation
	Nationwide Injunctions and Federal Regulatory Programs
	Nonlawyer Assistance and Representation
	Participation of Senate-Confirmed Officials in Administrative Adjudication
	Proposed Statute to Clarify Statutory Access to Judicial Review of Agency Action
	Statement of Principles for Agency Adjudication
Recent Publications / Resources	Statement of Principles for Agency Guidance
	Timing of Judicial Review of Agency Action
	Sourcebook of Federal Judicial Review Statutes
Recent Forums	Statement of Principles for the Disclosure of Federal Administrative Materials
	Statement of Principles for Public Engagement in Agency Rulemaking
	Forum on Assisting Parties in Federal Agency Adjudication
	Forum on Enhancing Public Input in Agency Rulemaking
Ongoing Roundtables & Working Groups	Forum on Underserved Communities and the Regulatory Process
	Advice and Consent: Problems and Reforms in the Senate Confirmation of Executive-Branch Appointees
	Roundtable on Artificial Intelligence in Federal Agencies
	Alternative Dispute Resolution Advisory Group
	Council of Independent Regulatory Agencies
	Council on Federal Agency Adjudication
	Interagency Roundtable
	Roundtable on State Innovations in Administrative Procedure
Website Resources	White House Legal Aid Interagency Roundtable
	Working Group on Model Materials for Alternative Dispute Resolution
	Working Group on Model Rules of Representative Conduct
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Legislative Updates	
Summary of Recent Administrative Law Reform Bills	
Updates in Federal Agency Adjudication	



DECEMBER 11, 2023

Draft Legislative Language Proposed by the  
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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## A BILL

To provide for the proactive disclosure of specified non-exempt agency legal materials, and for other purposes.

1           *Be it enacted by the Senate and House of Representatives of*  
2           *the United States of America in Congress assembled,*

3           **SECTION 1. PROACTIVE DISCLOSURE OF SPECIFIED**  
4                                   **NON-EXEMPT AGENCY LEGAL**  
5                                   **MATERIALS.**

6           (a) AMENDMENTS TO THE FREEDOM OF INFORMATION ACT.—  
7           Section 552 of title 5, United States Code, is amended as follows:

8                           (1) Subsection (a)(2)(A) is amended by striking “final  
9                           opinions” and all that follows through the semicolon at the  
10                           end and inserting “all listed legal materials, as defined in  
11                           subsection (f)(4) and not excluded pursuant to subsection  
12                           (a)(9);”.

13                           (2) Subsection (a)(2)(D) is amended by striking “and” at  
14                           the end.

15                           (3) Subsection (a)(2)(E) is amended by adding “and” at  
16                           the end.

17                           (4) Subsection (a)(2) is further amended by adding after  
18                           subparagraph (E) the following new subparagraph:

19                           “(F) a legal materials disclosure plan, which shall describe—

20                                   “(i) which categories or types of agency legal materials an  
21                                   agency maintains;

- 1           “(ii) which of those materials the agency proactively  
2 makes available online;
- 3           “(iii) which of those materials the agency identifies as  
4 exempt or excluded from proactive disclosure obligations  
5 under this section;
- 6           “(iv) where the various categories of proactively disclosed  
7 materials can be located online;
- 8           “(v) how the public can search for relevant records;
- 9           “(vi) how outdated materials are identified and archived;  
10 and
- 11           “(vii) any other information the public needs to  
12 understand the agency’s policies concerning proactive  
13 disclosure of legal materials;”.
- 14           (5) Subsection (a)(2) is further amended in the material  
15 following subparagraph (F)—
- 16                   (i) by inserting “other type of listed legal  
17 material,” after “staff manual, instruction;” and
- 18                   (ii) by inserting “or other type of listed legal  
19 material,” after “staff manual or instruction”.
- 20           (6) Subsection (a)(4)(B) is amended by striking “to order  
21 the production of any agency records improperly withheld  
22 from the complainant” and inserting “to order the production  
23 (i) to the complainant of any agency records improperly  
24 withheld from the complainant; or (ii) to the public in  
25 compliance with subsections (a)(1) and (a)(2), for any  
26 agency records improperly withheld from the public under  
27 those subsections”.
- 28           (7) Subsection (a)(4)(F) is amended by striking “the  
29 production of any agency records improperly withheld from  
30 the complainant” and inserting “the production to the  
31 complainant of any agency records improperly withheld

1 from the complainant, or production to the public in  
2 compliance with subsections (a)(1) or (a)(2), for any agency  
3 records improperly withheld from the public.”.

4 (8) Subsection (a)(6)(C)(i) is amended by inserting after  
5 “paragraph (1), (2), or (3) of this subsection” the following:  
6 “, including a request to an agency under subsection  
7 (a)(10).”.

8 (9) Subsection (a) is further amended by adding at the end  
9 the following new paragraphs:

10 “(9) An agency may promulgate regulations identifying some  
11 listed legal materials as excluded from the requirement in subsection  
12 (a)(2) that they be made available for public inspection in electronic  
13 format. The regulations must identify the individual records or  
14 categories of records covered by the exclusion and must explain the  
15 justification for the exclusion. The only authorized bases for an  
16 exclusion are that making the records available for public inspection  
17 under subsection (a)(2) would be either (A) duplicative, because  
18 there is a large volume of records that do not vary significantly in  
19 their factual contexts or the legal issues they raise; or (B)  
20 misleading. The regulations must also describe the information, if  
21 any, the agency will make available for public inspection in  
22 electronic format instead of the excluded records themselves (such  
23 as aggregate data or representative samples) to adequately inform  
24 the public about agency activities.

25 “(10) With respect to records that an agency is required to make  
26 available to the public under paragraph (1) or (2) of this subsection  
27 but has failed to do so, and except as provided in subparagraph  
28 (3)(E), the agency, upon any request for records which (i) reasonably  
29 describes such records and (ii) is made in accordance with published  
30 rules stating the time, place, and procedures to be followed, shall  
31 make the records promptly available to the public in compliance

1 with paragraph (1) or (2) (as applicable). Each agency shall ensure  
 2 that the portals or other processes made available for requests under  
 3 paragraph (3) (including portals and processes described in  
 4 subsection (m)) are also available for requests under this  
 5 paragraph.”.

6 (10) Subsection (f) is amended—

7 (A) by striking “and” at the end of paragraph (1);

8 (B) by striking the period at the end of paragraph  
 9 (2) and inserting a semicolon; and

10 (C) by adding at the end the following new  
 11 paragraphs:

12 “(3) ‘agency legal materials’ means, with respect to the  
 13 agency concerned, all records that establish, interpret, apply,  
 14 explain, or address the enforcement of legal rights and  
 15 obligations, along with constraints imposed, implemented,  
 16 or enforced by or upon the agency. Such term includes, but  
 17 is not limited to, listed legal materials; and

18 “(4) ‘listed legal materials’ means, with respect to the  
 19 agency concerned—

20 “(A) final opinions (including concurring and  
 21 dissenting opinions) and orders, issued in  
 22 adjudications that are governed by section 554, 556,  
 23 or 557, or otherwise issued after a legally required  
 24 opportunity for an evidentiary hearing, regardless of  
 25 any designation given to the opinion or order with  
 26 respect to its legal or binding effect (such as  
 27 precedential, non-precedential, published, or  
 28 unpublished);

29 “(B) records that communicate to a member of the  
 30 public the agency’s decision not to enforce a legal  
 31 requirement against one or more individuals or

1 entities or categories thereof, including records that  
2 communicate such matters as (i) a decision to grant a  
3 waiver or exemption or (ii) an advisory opinion that  
4 applies generally applicable legal requirements to  
5 specific facts or that explains how the agency will  
6 exercise its discretion in particular cases;

7 “(C) legally binding opinions and memoranda  
8 issued by or under the authority of the agency’s chief  
9 legal officer;

10 “(D) settlement agreements to which the agency is  
11 a party;

12 “(E) memoranda of understanding, memoranda of  
13 agreement, and other similar interagency or inter-  
14 governmental agreements that affect the public;

15 “(F) operative agency delegations of legal  
16 authority;

17 “(G) operative orders of succession for agency  
18 positions whose occupants must be appointed by the  
19 President with the advice and consent of the Senate;  
20 and

21 “(H) statutory or agency designations of first  
22 assistant positions to positions whose occupants  
23 must be appointed by the President with the advice  
24 and consent of the Senate.”.

25 (11) Subsection (j)(1) is amended by adding at the end the  
26 following: “Each agency shall also designate one or more  
27 officers responsible for overseeing the development and  
28 implementation of the agency’s legal materials disclosure  
29 plan referred to in subsection (a)(2)(F), and for overseeing  
30 the agency’s compliance with all legal requirements for the  
31 proactive disclosure of listed legal materials.”.

1 (b) AMENDMENTS TO THE E-GOVERNMENT ACT.—The E-  
2 Government Act of 2002 (44 U.S.C. 3501 note) is amended as  
3 follows:

4 (1) Section 206 is amended by striking subsection (b) and  
5 redesignating subsections (c), (d), and (e), as (b), (c), and (d),  
6 respectively.

7 (2) Section 207(b) is amended—

8 (A) by striking “DEFINITIONS” and all that follows  
9 through ““directory”” and inserting “DEFINITION.—

10 In this section, the term ‘directory’”; and

11 (B) by redesignating subparagraphs (A) and (B) as  
12 paragraphs (1) and (2) and realigning accordingly.

13 (3) Section 207 is further amended by striking subsection  
14 (c) and redesignating subsections (d) through (g) as (c)  
15 through (f), respectively.

16 (4) Section 207(c) (as so redesignated) is amended—

17 (A) by striking paragraph (1);

18 (B) by redesignating paragraph (2) as paragraph  
19 (1) and, in that paragraph, by striking “Not later than  
20 1 year after the submission of recommendations  
21 under paragraph (1), the” and inserting “The”;

22 (C) by inserting after such paragraph the following  
23 new paragraph (2):

24 “(2) LISTED LEGAL MATERIALS.—The policies required  
25 by paragraph (1) shall provide guidance to agencies to  
26 ensure they present, in a clear, logical, and readily accessible  
27 fashion, listed legal materials (required by section 552 of  
28 title 5, United States Code, to be made available for public  
29 inspection in electronic format). The Director shall  
30 periodically update this guidance.”;

- 1 (D) in paragraph (3) by striking “the Committee”  
2 and inserting “relevant interagency bodies”; and
- 3 (E) in paragraph (4) by striking “paragraph  
4 (2)(A)” and inserting “paragraph (1)(A)”.
- 5 (5) Section 207(d) (as so redesignated) is amended—
- 6 (A) by striking paragraph (1);
- 7 (B) by redesignating paragraph (2) as paragraph  
8 (1) and, in that paragraph, by striking “Not later than  
9 1 year after the submission of recommendations by  
10 the Committee under paragraph (1), the” and  
11 inserting “The”;
- 12 (C) by redesignating paragraph (3) as paragraph  
13 (2) and, in that paragraph—
- 14 (i) by striking “paragraph (4)” and  
15 inserting “paragraph (3)”; and
- 16 (ii) by striking “the Committee and”; and
- 17 (D) by redesignating paragraph (4) as paragraph  
18 (3) and, in that paragraph, by striking “paragraph  
19 (2)(A)” and inserting “paragraph (1)(A)”.
- 20 (6) Section 207(e) (as so redesignated) is amended—
- 21 (A) in paragraph (1)(A)—
- 22 (i) by striking “subsections (a)(1) and (b)”  
23 and inserting “subsection (a)(1)”; and
- 24 (ii) by striking “and” at the end;
- 25 (B) in paragraph (1) by redesignating  
26 subparagraph (B) as subparagraph (C) and by  
27 inserting after subparagraph (A) the following new  
28 subparagraph:
- 29 “(B) guidance that websites should include, for each  
30 substantive rule and rule of agency organization, procedure,  
31 or practice of an agency—



1                   “(i) the text of the rule or a direct link to the text  
2                   of the rule; and

3                   “(ii) to the extent feasible, links to related agency  
4                   legal materials, such as preambles and other  
5                   guidance documents explaining the rule or  
6                   significant adjudicative opinions interpreting or  
7                   applying it; and”;

8                   (C) in paragraph (2)(A) by striking “consult the  
9                   Committee and”; and

10                  (D) in paragraph (2)(B) by striking “consulting  
11                  with the Committee and”.

12                  (7) Section 207(f) (as so redesignated) is amended by  
13                  striking paragraphs (3) through (5).



## Best Practices for Adjudication Not Involving an Evidentiary Hearing

### Committee on Adjudication

#### Proposed Recommendation for Plenary | December 14, 2023

1 Federal administrative adjudications take many forms.<sup>1</sup> Many adjudications include a  
2 legally required opportunity for an evidentiary hearing—that is, a proceeding “at which the  
3 parties make evidentiary submissions and have an opportunity to rebut testimony and arguments  
4 made by the opposition”—and, under the exclusive-record principle, confine the decision maker  
5 to considering “evidence and arguments from the parties produced during the hearing process (as  
6 well as matters officially noticed) when determining factual issues.”<sup>2</sup> The Administrative  
7 Conference has used the term “Type A adjudications” to refer to adjudications that include such  
8 an opportunity and are regulated by the formal adjudication provisions of the Administrative  
9 Procedure Act (APA).<sup>3</sup> Adjudications that include such an opportunity but are not regulated by  
10 the APA’s formal adjudication provisions are referred to as “Type B adjudications.” The  
11 Conference recommended best practices for Type B adjudications in Recommendation 2016-4,  
12 *Evidentiary Hearings Not Required by the Administrative Procedure Act*.<sup>4</sup>

13 In many federal administrative adjudications, however, no constitutional provision,  
14 statute, regulation, or executive order grants parties the right to an evidentiary hearing.

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<sup>1</sup> The term “adjudication” as used in this Recommendation refers to the process for formulating an order that is “a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program.” MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8 (2019).

<sup>2</sup> ASIMOW, *supra* note 1, at 10.

<sup>3</sup> 5 U.S.C. §§ 554, 556–557.

<sup>4</sup> 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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15 Proceedings of this type, referred to in Recommendation 2016-4 as “Type C adjudications,”  
16 include many agency decisions regarding grants, licenses, or permits; immigration and  
17 naturalization; national security; the regulation of banks and other financial matters; requests for  
18 records under the Freedom of Information Act; land-use requests; and a wide variety of other  
19 matters.<sup>5</sup>

20 There are many policy reasons why adjudications might be conducted without a legally  
21 required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this  
22 Recommendation. The stakes in disputes resolved through Type C adjudications vary widely,  
23 but, whether they are low or high, each decision matters to the parties. For the public, Type C  
24 adjudication by government agencies is often the face of justice. Accordingly, decision making  
25 in such adjudications should be accurate, efficient, and both fair and perceived to be fair,  
26 regardless of the stakes.

27 Type C adjudication differs from Type A and Type B adjudication in fundamental ways.  
28 In adjudications of all types, a decision maker conducts an investigation and issues a front-line  
29 decision, i.e., a proposed or preliminary decision. In Type A and Type B adjudication, if the  
30 private party does not acquiesce in the front-line decision, it is entitled to an evidentiary hearing  
31 before a neutral decision maker who, after considering the evidence and arguments, issues a  
32 decision. Typically, the private party can also seek review of that decision within the agency,  
33 often by the agency head or delegated officials. By contrast, in Type C adjudication, often the  
34 front-line decision maker issues what this Recommendation refers to as the “primary decision,”  
35 normally after considering input from the affected party. Typically, that party is entitled to seek  
36 review of the primary decision by a different decision maker within the agency. These  
37 fundamental differences are reflected in this Recommendation.

38 No uniform set of procedures applies to all Type C adjudications, nor could one be  
39 devised. Some characteristics are common, however. Type C adjudications often allow for

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<sup>5</sup> Michael Asimow, Fair Procedure in Informal Adjudication 16 (Oct. 16, 2023) (draft report to the Admin. Conf. of the U.S.).



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40 document exchanges and submission of research studies, oral arguments, public hearings,  
41 conferences with staff, interviews, negotiations, examinations, and inspections. Frequently, the  
42 decision maker in a Type C adjudication is involved in the underlying investigation or other  
43 preliminary proceedings. Ex parte communication between the parties and the decision maker is  
44 routine, and the decision maker is free to rely on their own knowledge and consider materials not  
45 submitted as evidence.<sup>6</sup> Agencies that engage in Type C adjudication typically employ dispute  
46 resolution methodologies that lack the procedures typical of evidentiary hearings, such as the  
47 opportunity to cross examine witnesses, the prohibition of ex parte communications, the  
48 separation of adjudicative from investigative and prosecutorial functions, and the exclusive  
49 record principle.

50 While not subject to the requirement that a decision be preceded by an evidentiary  
51 hearing, Type C adjudications may be subject to other legal requirements. The Due Process  
52 Clause of the Constitution's Fifth Amendment may require certain minimum procedures for  
53 Type C adjudications involving constitutionally protected interests in life, liberty, or property.<sup>7</sup>  
54 In addition, agencies conducting Type C adjudication typically must observe certain general  
55 provisions of the APA—in particular 5 U.S.C. §§ 555<sup>8</sup> and 558—and are subject to other  
56 generally applicable statutes and regulations addressing the conduct of federal employees, rights  
57 of representation,<sup>9</sup> ombuds,<sup>10</sup> and other matters.<sup>11</sup> The procedures employed by agencies

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<sup>6</sup> Asimow, *supra* note 5, at 7–10.

<sup>7</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262–63 (1987) (applying *Mathews* principles in a Type C context); *Goss v. Lopez*, 415 U.S. 565 (1975) (minimal procedures required for short-term suspension from public school).

<sup>8</sup> *PBG Corp. v. LTV Corp.* 496 U.S. 633 (1990).

<sup>9</sup> See Asimow, *supra* note 6, at 62, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies' regulations.

<sup>10</sup> See Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

<sup>11</sup> Asimow, *supra* note 5, at 56.



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58 conducting Type C adjudications may also be subject to agency-specific statutes and procedural  
59 regulations. Finally, judicial review is available for many Type C adjudications.

60 These legal requirements, however, may provide minimal protection in Type C  
61 adjudication. Due process, the APA, and other sources of law external to the agency often do not  
62 specifically prescribe the details of agency procedures, and judicial review may be unrealistic  
63 because the costs of such review exceed the value of the interests at stake.<sup>12</sup> For these reasons,  
64 agency-adopted policies offer the best mechanism for establishing procedural protections for  
65 parties, promoting fairness and participant satisfaction, and facilitating the efficient and effective  
66 functioning of Type C adjudications. The public availability of such rules also facilitates external  
67 oversight.

68 This Recommendation identifies a set of best practices for Type C adjudication and  
69 encourages agencies to implement them through their regulations and guidance documents.  
70 Many agencies conducting Type C adjudications already follow these best practices. Agencies  
71 adopting or modifying Type C adjudication procedures should tailor these best practices to their  
72 individual systems.

### RECOMMENDATION

#### Notice of Proposed Action

- 73 1. Agencies conducting Type C adjudications should notify parties of the front-line  
74 decision, i.e., the proposed or preliminary decision, including the reasons for that  
75 decision.
- 76 2. Such notice should provide sufficient detail and be given in sufficient time to allow  
77 parties to contest the front-line decision and submit evidence to support their position.

78 This notice should provide parties with the following information, when applicable:

- 79 a. Whether the agency provides a second chance to achieve compliance;

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<sup>12</sup> *Id.* at 8–9, 75.



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- 80           b. The manner by which the party can submit additional evidence and argument to  
81           influence the agency's front-line decision;
- 82           c. The amount of time before further agency action will be taken; and
- 83           d. How materials in the agency's case file can be accessed.

### **Opportunity to Submit Evidence and Argument**

- 84           3. Agencies should allow parties in Type C adjudications to furnish decision makers with  
85           evidence and arguments. Depending on the stakes involved, the types of issues involved,  
86           and the agency's caseload and adjudicatory resources, the process for furnishing evidence  
87           and argument may include written submissions or oral presentations.
- 88           4. When credibility issues are presented, a party should be permitted an opportunity to rebut  
89           adverse information.

### **Representation**

- 90           5. Agencies should allow, when feasible, participants in their Type C adjudications to be  
91           represented by a lawyer or a lay person with expertise in the program administered by the  
92           agency.
- 93           6. Apart from representation, agencies should allow participants in their Type C  
94           adjudications to obtain assistance or support from friends, family members, or other  
95           individuals in presenting their case.
- 96           7. Agencies should make their proceedings as accessible as possible to self-represented  
97           parties by providing plain-language resources, such as frequently asked questions  
98           (FAQs), and other appropriate assistance, such as offices dedicated to helping the public  
99           navigate agency programs.

### **Decision Maker Impartiality**

- 100          8. Agencies should tailor neutrality standards appropriately to Type C adjudications, which  
101          may be conducted by decision makers who engage in their own investigations or  
102          participate in investigative teams and may have prior involvement in the matter.



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- 103 9. Consistent with government ethics requirements, agencies should require the recusal of  
104 employees engaged in Type C adjudications who have financial or other conflicts of  
105 interest in matters they are investigating or deciding.
- 106 10. Agencies should require recusal of employees whom stakeholders may reasonably view  
107 as not impartial.
- 108 11. When Type C adjudications involve serious sanctions, agencies should consider adopting  
109 internal separation of investigative or prosecutorial and adjudicatory functions and  
110 limitations on ex parte communications.

### **Statement of Reasons**

- 111 12. Agencies conducting Type C adjudications should provide oral or written statements of  
112 reasons that follow federal plain language guidelines setting forth the rationale for the  
113 primary decision, i.e., the final decision issued by the front-line decision maker, including  
114 the factual and other bases for it.

### **Administrative Review**

- 115 13. Agencies should provide for administrative review of their primary decisions by higher-  
116 level decision makers or other reviewers unless it is impracticable because of high  
117 caseload, low stakes, lack of available staff, or time constraints.

### **Procedural Regulations**

- 118 14. Agency regulations should specify the procedures for each Type C adjudication the  
119 agency conducts. Consistent with Recommendation 92-1, *The Procedural and Practice*  
120 *Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, agencies  
121 should voluntarily use notice-and-comment rulemaking for the adoption of significant  
122 procedural regulations unless the costs outweigh the benefits of doing so.
- 123 15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural  
124 instructions, and FAQs addressing their Type C adjudications follow federal plain-  
125 language guidelines and are easily accessible on the agency's website.



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126 16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and  
127 other documents that contain important information about their Type C adjudications are  
128 made available in languages understood by people who frequently appear before the  
129 agency.

### **Ombuds**

130 17. Agencies with an ombuds program should ensure that their ombuds are empowered to  
131 handle complaints about Type C adjudications.

132 18. Agencies without an ombuds program should consider establishing one, particularly if  
133 their Type C adjudications have sufficient caseloads, significant stakes, or significant  
134 numbers of unrepresented parties. The establishment and standards of such programs  
135 should follow the best practices suggested in Recommendation 2016-5, *The Use of*  
136 *Ombuds in Federal Agencies*.

137 19. Agencies with smaller caseloads, lower stakes, or lack of available staff should consider  
138 sharing an ombuds program with other similarly situated agencies to address resource  
139 constraints.

140 20. Agencies that choose not to establish or share an ombuds program should provide  
141 alternative procedures for allowing parties to submit feedback or complaints, such as  
142 through an agency portal or dedicated email address.

### **Quality Assurance**

143 21. Agencies conducting Type C adjudications should establish methods for assessing and  
144 improving the quality of their decisions to promote accuracy, efficiency, fairness, the  
145 perception of fairness, and other goals relevant to their adjudications in accordance with  
146 Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*.  
147 Depending on the caseload, stakes, and available resources, such methods may include  
148 formal quality assessments and informal peer review on an individual basis, sampling and  
149 targeted case selection on a systemic basis, and case management systems with data  
150 analytics and artificial intelligence tools.





## Best Practices for Adjudication Not Involving an Evidentiary Hearing

### Committee on Adjudication

#### Proposed Recommendation for Plenary | December 14, 2023

1 Federal administrative adjudications take many forms.<sup>1</sup> Many adjudications include a  
 2 legally required opportunity for an evidentiary hearing—that is, a proceeding “at which the  
 3 parties make evidentiary submissions and have an opportunity to rebut testimony and arguments  
 4 made by the opposition.”<sup>2</sup> ~~Such proceedings also follow and, under the exclusive-record~~  
 5 ~~principle, confine in which the decision maker is confined~~ to considering “evidence and  
 6 arguments from the parties produced during the hearing process (as well as matters officially  
 7 noticed) when determining factual issues.”<sup>2</sup> ~~The Administrative Conference has used the term~~  
 8 ~~“Type A adjudications” to refer to adjudications that include such an opportunity and are~~  
 9 ~~regulated by the formal adjudication provisions of the Administrative Procedure Act (APA).<sup>3</sup>~~  
 10 ~~Adjudications that include such an opportunity but are not regulated by the APA’s formal~~  
 11 ~~adjudication provisions are referred to as “Type B adjudications.” The Conference recommended~~

<sup>1</sup> The term “adjudication” as used in this Recommendation refers to the process for formulating an order that is “a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program.” MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8 (2019).

<sup>2</sup> ASIMOW, *supra* note 1, at 10. ~~The Administrative Conference has used the term “Type A adjudications” to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is regulated by the formal adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556–557. The Conference has used the term “Type B adjudications” to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is not regulated by the APA’s formal adjudication provisions. See Admin. Conf. of the U.S., Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016).~~

~~<sup>3</sup> 5 U.S.C. §§ 554, 556–557.~~

**Commented [CMA1]:** Comment from Special Counsel Jeffrey Lubbers.

I would not say “regulated” and would substitute “also covered” [The reason is that the APA doesn’t “regulate” in the same way we usually use that word.] (see parallel amendment on Line 10)

**Commented [CMA2]:** Comment from Special Counsel Jeffrey Lubbers.

I would also use “covered” instead of “regulated” (see parallel amendment on line 9)

DRAFT December 8, 2023



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12 ~~best practices for Type B adjudications in Recommendation 2016-4, *Evidentiary Hearings Not*~~  
13 ~~*Required by the Administrative Procedure Act.*<sup>4</sup>~~

**Commented [CA3]:** Proposed Amendment from Council #1 (including footnote 2) (see parallel amendments throughout)

14 In many federal administrative adjudications, however, no constitutional provision,  
15 statute, regulation, or executive order grants parties the right to an evidentiary hearing.<sup>5</sup>  
16 Proceedings of this type ~~referred to in Recommendation 2016-4 as “Type C adjudications,”~~  
17 include many agency decisions regarding grants, licenses, or permits; immigration and  
18 naturalization; national security; the regulation of banks and other financial matters; requests for  
19 records under the Freedom of Information Act; land-use requests; and a wide variety of other  
20 matters.<sup>6</sup>

**Commented [CA4]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

21 There are many policy reasons why adjudications might be conducted without a legally  
22 required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this  
23 Recommendation. The stakes in disputes resolved through ~~such Type C~~ adjudications vary  
24 widely, but, whether they are low or high, each decision matters to the parties. ~~For the public,~~  
25 ~~Type C adjudication by government agencies is often the face of justice~~For those involved or  
26 ~~familiar with these adjudications, the most important factor in their view of government may be~~  
27 ~~the way these decisions are made.~~ Accordingly, decision making in such adjudications should be  
28 accurate, efficient, and both fair and perceived to be fair, regardless of the stakes.

**Commented [CA5]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA6]:** Proposed Amendment from Council #2

29 ~~Type C a~~Adjudication ~~without an evidentiary hearing~~ differs ~~from Type A and Type B~~  
30 ~~adjudication~~ in fundamental ways ~~from adjudication that includes a legally required opportunity~~  
31 ~~for an evidentiary hearing.~~ In adjudications of all types, a decision maker conducts an  
32 investigation and issues a ~~front line decision, i.e., a~~ proposed or preliminary decision. In ~~Type A~~  
33 ~~and Type B~~ adjudication ~~that includes a legally required opportunity for an evidentiary hearing,~~  
34 if the private party does not acquiesce in ~~the front line~~that decision, it is entitled to an evidentiary

**Commented [CA7]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA8]:** Proposed Amendment from Council #3 (see parallel amendments throughout)

**Commented [CA9]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

<sup>4</sup> 81 Fed. Reg. 94,314 (Dec. 23, 2016).

<sup>5</sup> The Conference has used the term “Type C” adjudication to refer to adjudications that are not subject to a legally required evidentiary hearing. *See id.*

<sup>6</sup> Michael Asimow, Fair Procedure in Informal Adjudication 16 (Oct. 16, 2023) (draft report to the Admin. Conf. of the U.S.).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

35 hearing before a neutral decision maker who, after considering the evidence and arguments,  
36 issues a decision. Typically, the private party can also seek review of that decision within the  
37 agency, often by the agency head or delegated officials. By contrast, in **Type-C** adjudication  
38 **without an evidentiary hearing**, often the **front-line** same decision maker **who issued the proposed**  
39 **or preliminary decision** issues **what this Recommendation refers to as the “primary decision,”**  
40 normally after considering input from the affected party. Typically, that party is entitled to seek  
41 review of the **primary** decision by a different decision maker within the agency. These  
42 fundamental differences are reflected in this Recommendation.

43 No uniform set of procedures applies to all **Type-C** adjudications **without evidentiary**  
44 **hearings**, nor could one be devised. Some characteristics are common, however. **Type-C** **Such**  
45 adjudications often allow for document exchanges and submission of research studies, oral  
46 arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and  
47 inspections. **Frequently, the decision maker in a Type-C adjudication is involved in the**  
48 **underlying investigation or other preliminary proceedings. Ex parte communication between the**  
49 **parties and the decision maker is routine, and the decision maker is free to rely on their own**  
50 **knowledge and consider materials not submitted as evidence.**<sup>7</sup> Agencies that engage in **Type-C**  
51 **such** adjudication typically employ dispute resolution methodologies **that lack** without the  
52 procedures typical of evidentiary hearings, such as the opportunity to cross examine witnesses,  
53 the prohibition of ex parte communications, the separation of adjudicative from investigative and  
54 prosecutorial functions, and the exclusive record principle.

55 While not subject to the requirement that a decision be preceded by an evidentiary  
56 hearing, **Type-C** adjudications **without evidentiary hearings** may be subject to other legal  
57 requirements. The Due Process Clause of the Constitution’s Fifth Amendment may require  
58 certain minimum procedures for **Type-C** **such** adjudications **that involving involve**

**Commented [CA10]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA11]:** Proposed Amendment from Council #3 (see parallel amendments throughout)

**Commented [CA12]:** Proposed Amendment from Council #3 (see parallel amendments throughout)

**Commented [CA13]:** Proposed Amendment from Council #3 (see parallel amendments throughout)

**Commented [CA14]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA15]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA16]:** Proposed Amendment from Council #4

**Commented [CA17]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA18]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA19]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

<sup>7</sup> Asimow, *supra* note 5, at 7–10.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

59 constitutionally protected interests in life, liberty, or property.<sup>8</sup> In addition, agencies conducting  
60 ~~Type C~~ such adjudications typically must observe certain general provisions of the APA—in  
61 particular 5 U.S.C. §§ 555<sup>9</sup> and 558—and are subject to other generally applicable statutes and  
62 regulations addressing the conduct of federal employees, rights of representation,<sup>10</sup> ombuds,<sup>11</sup>  
63 and other matters.<sup>12</sup> The procedures employed by agencies conducting ~~Type C~~ these adjudications  
64 may also be subject to agency-specific statutes and procedural regulations. Finally, judicial  
65 review is available for many ~~Type C~~ such adjudications.

66 ~~These legal requirements, however, may provide minimal protection~~ Statutorily required  
67 ~~procedures and judicial review, however, may be insufficient to ensure fairness, accuracy, and~~  
68 ~~efficiency in Type C adjudication without an evidentiary hearing.~~ Due process, the APA, and  
69 other sources of law external to the agency often do not specifically prescribe the details of  
70 agency procedures, and judicial review may be unrealistic because the costs of such review  
71 exceed the value of the interests at stake.<sup>13</sup> For these reasons, agency-adopted policies offer the  
72 best mechanism for establishing procedural protections for parties, promoting fairness and  
73 participant satisfaction, and facilitating the efficient and effective functioning of ~~Type C~~ these  
74 adjudications. The public availability of such rules also facilitates external oversight.

75 This Recommendation identifies a set of best practices for ~~Type C~~ adjudication ~~without~~  
76 ~~an evidentiary hearing~~ and encourages agencies to implement them through their regulations and  
77 guidance documents. Many agencies conducting ~~Type C~~ such adjudications already follow these  
78 best practices. ~~This Recommendation recognizes that agencies adjudicate a wide range of~~

<sup>8</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262–63 (1987) (applying *Mathews* principles in a Type C context); *Goss v. Lopez*, 415 U.S. 565 (1975) (minimal procedures required for short-term suspension from public school).

<sup>9</sup> *PBG Corp. v. LTV Corp.* 496 U.S. 633 (1990).

<sup>10</sup> See Asimow, *supra* note 66, at 62, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies' regulations.

<sup>11</sup> See Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

<sup>12</sup> Asimow, *supra* note 6, at 56.

<sup>13</sup> *Id.* at 8–9, 75.

Commented [CA20]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA21]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA22]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA23]: Proposed Amendment from Council #5

Commented [CA24]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA25]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA26]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA27]: Proposed Amendment from Council #1 (see parallel amendments throughout)



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79 matters, have different adjudication needs and available resources, and are subject to different  
80 legal requirements. What works best for one agency may not work for another. Agencies must  
81 take into account their own unique circumstances when implementing the best practices that  
82 follow. Accordingly, Agencies agencies adopting or modifying Type C adjudication procedures  
83 for adjudication without an evidentiary hearing should tailor these best practices to their  
84 individual systems.

Commented [CA28]: Proposed Amendment from Council #6

Commented [CA29]: Proposed Amendment from Council #1 (see parallel amendments throughout)

### RECOMMENDATION

#### Notice of Proposed Action

- 85 1. Agencies conducting Type C adjudications without evidentiary hearings should notify  
86 parties of the front line decision, i.e., the proposed or preliminary decision, including the  
87 reasons for that decision.
- 88 2. Such notice should provide sufficient detail and be given in sufficient time to allow  
89 parties to contest the front line proposed or preliminary decision and submit evidence to  
90 support their position. This notice should provide parties with the following information,  
91 when applicable:
  - 92 a. Whether the agency provides a second chance to achieve compliance;
  - 93 b. The manner by which the party can submit additional evidence and argument to  
94 influence the agency's front line proposed or preliminary decision;
  - 95 c. The amount of time before further agency action will be taken; and
  - 96 d. Whether and, if so, How how parties may access materials in the agency's case  
97 file can be accessed.

Commented [CA30]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA31]: Proposed Amendment from Council #3 (see parallel amendments throughout)

Commented [CA32]: Proposed Amendment from Council #3 (see parallel amendments throughout)

Commented [CA33]: Proposed Amendment from Council #3 (see parallel amendments throughout)

Commented [CA34]: Proposed Amendment from Council #7

#### Opportunity to Submit Evidence and Argument

- 98 3. Agencies should allow parties in Type C adjudications without evidentiary hearings to  
99 furnish decision makers with evidence and arguments. Depending on the stakes involved,  
100 the types of issues involved, and the agency's caseload and adjudicatory resources, the

Commented [CA35]: Proposed Amendment from Council #1 (see parallel amendments throughout)



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101 process for furnishing evidence and argument may include written submissions or oral  
102 presentations.

- 103 4. When credibility issues are presented, such as when the decision maker intends to rely on  
104 evidence obtained from a source other than the party, a the party should be permitted an  
105 opportunity to rebut adverse information. Agencies should make such opportunities  
106 available in a manner that permits people with disabilities and people with limited  
107 English proficiency to take advantage of them.

Commented [CA36]: Proposed Amendment from Council #8

Commented [CA37]: Proposed Amendment from Council #9

**Representation**

- 108 5. When feasible, Agencies-agencies should allow when feasible, participants in their Type  
109 C-adjudications without evidentiary hearings to be represented by a lawyer or a lay  
110 person with expertise in the program administered by the agency.

Commented [CA38]: Proposed Amendment from Council #1 (see parallel amendments throughout)

- 111 6. Apart from representation Particularly for self-represented parties, agencies should allow  
112 not prevent participants in their Type C-adjudications without evidentiary hearings to  
113 from obtaining assistance or support from friends, family members, or other individuals  
114 in presenting their case.

Commented [CA39]: Proposed Amendment from Council #1 (see parallel amendments throughout)

Commented [CA40]: Proposed Amendment from Council #10

- 115 7. Agencies should make their proceedings as accessible as possible to self-represented  
116 parties by providing plain-language resources, such as frequently asked questions  
117 (FAQs), and other appropriate assistance, such as offices dedicated to helping the public  
118 navigate agency programs.

**Decision Maker Impartiality**

- 119 8. Agencies should tailor neutrality standards appropriately to Type C-adjudications without  
120 evidentiary hearings, which may be conducted by decision makers who engage in their  
121 own investigations or participate in investigative teams and may have prior involvement  
122 in the matter.

Commented [CA41]: Proposed Amendment from Council #1 (see parallel amendments throughout)

- 123 9. Consistent with government ethics requirements, agencies should require the recusal of  
124 employees engaged in Type C-adjudications without evidentiary hearings who have  
125 financial or other conflicts of interest in matters they are investigating or deciding.

Commented [CA42]: Proposed Amendment from Council #1 (see parallel amendments throughout)



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126 10. Agencies should require recusal of employees **whom stakeholders** may reasonably **be**  
127 **viewed** as not impartial.

128 11. When **Type C** adjudications **without evidentiary hearings** involve serious  
129 **sanctions consequences**, agencies should consider adopting internal separation of  
130 investigative or prosecutorial and adjudicatory functions **and limitations on ex parte**  
131 **communications**.

**Commented [CA43]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CMA44]:** Proposed amendment by Senior Fellow Alan Morrison.

**Commented [CA45]:** Proposed Amendment from Council #11

### Statement of Reasons

132 12. Agencies conducting **Type C** adjudications **without evidentiary hearings** should provide  
133 oral or written statements of reasons that follow federal plain language guidelines setting  
134 forth the rationale for the **primary decision, i.e., the final decision issued by the front line**  
135 **decision maker**, including the factual and other bases for it. **The level of detail in the**  
136 **statement should be consistent with the stakes involved in the adjudication.**

**Commented [CA46]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

**Commented [CA47]:** Proposed Amendment from Council #3 (see parallel amendments throughout)

**Commented [CA48]:** Proposed Amendment from Council #12

### Administrative Review

137 13. Agencies should provide for administrative review of their **primary** decisions by higher-  
138 level decision makers or other reviewers unless it is impracticable because of high  
139 caseload, **low stakes**, lack of available staff, or time constraints, **or because of low stakes**.

**Commented [CA49]:** Proposed Amendment from Council #3 (see parallel amendments throughout)

### Procedural Regulations

140 14. Agency regulations should specify the procedures for each **Type C** adjudication **without**  
141 **an evidentiary hearing** the agency conducts. Consistent with Recommendation 92-1, *The*  
142 *Procedural and Practice Rule Exemption from the APA Notice-and-Comment*  
143 *Rulemaking Requirements*, agencies should voluntarily use notice-and-comment  
144 rulemaking for the adoption of significant procedural regulations unless the costs  
145 outweigh the benefits of doing so.

**Commented [CA50]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

146 15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural  
147 instructions, and FAQs addressing their **Type C** adjudications **without evidentiary**



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148 **hearings** follow federal plain-language guidelines and are easily accessible on the  
149 agency's website.

**Commented [CA51]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

- 150 16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and  
151 other documents that contain important information about their **Type C** adjudications  
152 **without evidentiary hearings** are made available in languages understood by people who  
153 frequently appear before the agency.

**Commented [CA52]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

### Ombuds

- 154 17. Agencies with an ombuds program should ensure that their ombuds are empowered to  
155 handle complaints about **Type C** adjudications **without evidentiary hearings**.

**Commented [CA53]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

- 156 18. Agencies without an ombuds program should consider establishing one, particularly if  
157 their **Type C** adjudications **without evidentiary hearings** have sufficient caseloads,  
158 significant stakes, or significant numbers of unrepresented parties. The establishment and  
159 standards of such programs should follow the best practices suggested in  
160 Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*.

**Commented [CA54]:** Proposed Amendment from Council #1 (see parallel amendments throughout)

- 161 19. Agencies with smaller caseloads, lower stakes, or lack of available staff should consider  
162 sharing an ombuds program with other similarly situated agencies to address resource  
163 constraints.

- 164 20. Agencies that choose not to establish or share an ombuds program should provide  
165 alternative procedures for allowing parties to submit feedback or complaints, such as  
166 through an agency portal or dedicated email address.

### Quality Assurance

- 167 21. Agencies conducting **Type C** adjudications **without evidentiary hearings** should establish  
168 methods for assessing and improving the quality of their decisions to promote accuracy,  
169 efficiency, fairness, the perception of fairness, and other goals relevant to **their those**  
170 adjudications in accordance with Recommendation 2021-10, *Quality Assurance Systems*  
171 *in Agency Adjudication*. Depending on the caseload, stakes, and available resources, such  
172 methods may include formal quality assessments and informal peer review on an

**Commented [CA55]:** Proposed Amendment from Council #1 (see parallel amendments throughout)





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173 individual basis, sampling and targeted case selection on a systemic basis, and case  
174 management systems with data analytics and artificial intelligence tools.



## Identifying and Reducing Burdens on the Public in Administrative Processes

### Committee on Administration and Management

#### Proposed Recommendation for Plenary | December 14, 2023

1 Each year, millions of people navigate administrative processes to access benefits and  
2 services and otherwise engage with government programs to help themselves and their families.  
3 These processes can be extraordinarily complex. Additionally, processes can vary significantly  
4 across and within government agencies. These variations can make it especially hard when  
5 individuals need to access multiple programs at the same time, for example during key life  
6 events such as retirement, birth of a child, or unexpected disaster.

7 Navigating these processes requires time and effort, both to learn about programs and  
8 how to access them. Complying with these processes also requires significant work, such as  
9 completing forms, obtaining and submitting information, and possibly traveling to in-person  
10 interviews or hearings. Efforts to comply can result in stress, stigma, frustration, fear, or other  
11 psychological harms. These costs—which may be described as learning, compliance, and  
12 psychological costs, respectively—can be collectively understood as administrative burden.<sup>1</sup>

13 Administrative burdens significantly impact whether and how the public accesses a wide  
14 range of government programs, including those related to veterans benefits and services, student

<sup>1</sup> Pamela Herd, Donald Moynihan & Amy Widman, *Identifying and Reducing Burdens in Administrative Processes* 4 (Oct. 4, 2023) (draft report to the Admin. Conf. of the U.S.). This Recommendation uses both “administrative burden” and “administrative burdens.” The singular is intended to capture the idea of burden as a theoretical concept; the plural reflects the fact that, in practice, burdens are multiple rather than singular. *See* PAMELA HERD & DONALD MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 1, 269 (2018). *See also Burden Reduction Initiative*, OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, <https://www.whitehouse.gov/omb/information-regulatory-affairs/burden-reduction-initiative> (last visited Nov. 9, 2023).

**DRAFT November 16, 2023**

**Commented [CoA&M1]:** Proposed Amendment from the Committee on Administration & Management:

The Committee voted to replace the original title of this Recommendation (*Identifying and Reducing Burdens in Administrative Processes*).



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15 financial aid, Social Security benefits, health care, disaster assistance, tax credits, nutrition  
16 assistance, housing assistance, and unemployment insurance. These burdens can be exacerbated  
17 when programs are not wholly administered by the federal government but in partnership with  
18 state, local, or tribal governments. Although some level of administrative burden may be  
19 necessary—to establish eligibility for programs with sufficient accuracy or to prevent fraud—  
20 research shows the cumulative effect of this burden hinders the ability of agencies to achieve  
21 their missions. Billions of dollars in government benefits go unclaimed every year,<sup>2</sup> and  
22 administrative burdens are a key reason for this gap.<sup>3</sup> Administrative burdens do not fall equally  
23 on all members of the public but fall disproportionately on certain members of historically  
24 underserved communities (including people with disabilities),<sup>4</sup> the elderly, those for whom  
25 English is not their primary language, people with poor physical or mental health, and persons of  
26 limited literacy.<sup>5</sup> Reducing administrative burden, while also taking into account other important  
27 public values such as program integrity, can make government work better for everyone.

28 Various authorities govern how federal agencies identify and reduce administrative  
29 burdens. The Paperwork Reduction Act (PRA) has long required agencies to identify burdens  
30 associated with information they collect from the public and explain why those burdens are  
31 necessary to administer their programs.<sup>6</sup> Office of Management and Budget (OMB) Circular

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<sup>2</sup> OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, TACKLING THE TIME TAX: HOW THE FEDERAL GOVERNMENT IS REDUCING BURDENS TO ACCESSING CRITICAL BENEFITS AND SERVICES 9 (2023).

<sup>3</sup> Herd et. al, *supra* note 1, at 16–18.

<sup>4</sup> Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

<sup>5</sup> TACKLING THE TIME TAX, *supra* note 2, at 10; *see also* Herd et. al, *supra* note 1, at 10–12; HERD & MOYNIHAN, *supra* note 1, at 105, 134–135, 157–162, and 264.

<sup>6</sup> 44 U.S.C. §§ 3501–3521.



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32 No. A-11 emphasizes the importance of customer life experiences<sup>7</sup> and human-centered design<sup>8</sup>  
33 in how agencies manage organizational performance to improve service delivery.

34 While some administrative burdens are imposed by Congress or by state law, federal  
35 agencies have an important role to play in reducing the burdens they impose when administering  
36 their programs. Agencies employ numerous strategies to reduce those burdens, including  
37 simplifying processes, improving language access, expanding the availability of online (instead  
38 of solely in-person) processes, and establishing ombuds offices to assist those experiencing  
39 burdens.<sup>9</sup> In addition, agencies have achieved success in reducing burdens by establishing  
40 devoted customer experience (CX) teams that have sufficient policy knowledge and authority  
41 within the agency to be effective.<sup>10</sup>

42 Collaboration within and between federal agencies, and between federal agencies and  
43 state, local, and tribal governments, is also essential for burden reduction. Data sharing between  
44 agencies that is consistent with the Fair Information Practice Principles, especially when used in  
45 conjunction with simplifying onerous processes or eliminating unnecessary ones, can also reduce

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<sup>7</sup> Customer life experiences are experiences that require members of the public to navigate government services across multiple programs, agencies, or levels of government. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2023). As explained in Part 6 § 280.16, OMB will manage the selection of a limited number of customer life experiences to prioritize for government-wide action in line with the President's Management Agenda. *See also* Exec. Order No. 14,058, 86 Fed. Reg. 71,357 (Dec. 16, 2021).

<sup>8</sup> OMB CIRCULAR A-11, *supra* note 7, § 280.1. Human-centered design is a technique to understand administrative process from the user's perspective and then use those insights to adjust processes to better match human capacities. Herd et. al, *supra* note 1, at 22. Journey mapping is a related concept that involves documenting each step that an individual takes when engaging with an administrative process in order to better understand the process and where individuals struggle with it. *Id.*

<sup>9</sup> *See* Herd et. al, *supra* note 1, at 28. *See also* TACKLING THE TIME TAX, *supra* note 2, at 48–49; White House Legal Aid Interagency Roundtable, Access to Justice through Simplification (2022); Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

<sup>10</sup> Herd et. al, *supra* note 1, at 26. Under Executive Order 14,058, the term “customer” refers to any individual, business, or organization that interacts with an agency or program, and the term “customer experience” refers to the public's perceptions of and overall satisfaction with interactions with an agency, product, or service. *See* 86 Fed. Reg. at 71,358. This Recommendation uses the term “customer” following its use in that Executive Order, notwithstanding the debate regarding the appropriateness of referring to members of the public as “customers.” *See, e.g., Does DHS Really Have Customers?*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/news/2022/06/23/does-dhs-really-have-customers> (last visited Nov. 9, 2023).



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46 administrative burdens.<sup>11</sup> In addition to collaboration across the government, federal agency  
47 partnerships with non-governmental third parties (such as legal aid organizations and others) also  
48 play a crucial role in agency efforts to reduce burden. Third parties assist agencies by providing  
49 information about how processes can be improved to better serve the public and by directly  
50 assisting individuals who interact with government programs.<sup>12</sup>

51 This Recommendation provides best practices for agencies to use in identifying and  
52 reducing unnecessary administrative burdens. Building on previous recommendations of the  
53 Conference,<sup>13</sup> this Recommendation provides specific consultative techniques agencies should  
54 use to gather information from individual members of the public to better understand  
55 administrative burdens. The Recommendation encourages the use of online processes and offers  
56 other techniques to simplify and streamline processes and to make information about processes  
57 more accessible. The Recommendation also identifies broad organizational and collaborative  
58 tools agencies should employ in burden reduction efforts, including outlining how agency  
59 leadership and staff<sup>14</sup> should engage with burden reduction initiatives within their agencies and  
60 across the government. The primary focus of burden reduction efforts should be with those  
61 federal agencies that have the greatest interaction with the public. The tools discussed are

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<sup>11</sup> See Herd et. al, *supra* note 1, at 19, 30–32. See also TACKLING THE TIME TAX, *supra* note 2, at 36, 41; *Fair Information Practice Principles (FIPPs)*, FED. PRIV. COUNCIL, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, <https://www.fpc.gov/resources/fipps> (last visited Nov. 7, 2023).

<sup>12</sup> See Herd et. al, *supra* note 1, at 48. See also Admin. Conf. of the U.S. & Legal Servs. Corp., Forum, Assisting Parties in Federal Administrative Adjudication (2023); Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, 87 Fed. Reg. 1721 (Jan. 12, 2022).

<sup>13</sup> Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (Jul. 3, 2023); Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42,680 (Jul. 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (Jul. 8, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 86 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

<sup>14</sup> For the purposes of this Recommendation, agency leadership and staff include a wide range of stakeholders such as general counsels, chief information officers, chief risk officers, and chief data officers, as well as ombuds and officials responsible for compliance with laws such as the Privacy Act (5 U.S.C. § 552a) and the PRA.



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62 intended to reduce burdens on the public and not become a reporting burden on agencies for  
63 which they are less relevant.

64 This Recommendation also includes a recommendation directed to OMB that builds on  
65 the substantial guidance and efforts OMB has already provided on burden reduction. It  
66 recommends that OMB provide agencies with additional guidance for measurement and  
67 consideration of administrative burden and foregone benefits and services, as well as provide  
68 additional guidance on agencies' examination of the potential advantages and disadvantages of  
69 administrative data sharing. This guidance could take many forms, including written guidance or  
70 agency-specific or government-wide training. In addition, again building on past  
71 recommendations of the Conference and related implementation efforts,<sup>15</sup> this Recommendation  
72 outlines how agencies and OMB should leverage the PRA in support of burden reduction efforts,  
73 including by expanding flexibilities under the PRA for agencies to conduct customer experience  
74 research. It also includes a recommendation to Congress that, when developing new legislation  
75 that establishes or affects administrative programs, it should provide express statutory authority  
76 for agencies to share data where beneficial for achieving the goals of the legislation.

### RECOMMENDATION

#### Burden Identification and Reduction Principles

- 77 1. Federal agencies should seek to identify and reduce administrative burdens that the public  
78 faces when interacting with government programs.
- 79 2. Agencies' efforts to identify and reduce burdens should take into account the experiences  
80 and perspectives of individuals who interact with government programs.
- 81 3. Because individuals often interact with multiple government agencies and programs  
82 during key life experiences, such as retirement, birth of a child, or unexpected disaster,

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<sup>15</sup> See also Admin. Conf. of the U.S., Recommendation 2018-1, *Paperwork Reduction Act Efficiencies*, 83 Fed. Reg. 30,683 (Jun. 29, 2018); Admin. Conf. of the U.S., Recommendation 2012-4, *Paperwork Reduction Act*, 77 Fed. Reg. 47,808 (Aug. 10, 2012).



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- 83 agency and program officials should collaborate to identify and reduce burdens that  
84 would predictably arise during those experiences.
- 85 4. When undertaking efforts to identify and reduce burdens, agencies should consider the  
86 impacts on other important public values, including program integrity.

### **Burden Identification Strategies**

- 87 5. Agencies should institutionalize procedures for consulting with individuals who interact  
88 with government programs to better understand the burdens in those programs. In seeking  
89 to do so, agencies should try to identify and consult with those who may face  
90 disproportionate burdens in accessing agency programs. Agencies should employ  
91 multiple consultative techniques, including:
- 92 a. Client outreach, such as surveys and focus groups;
  - 93 b. Requests for public comment;
  - 94 c. Complaint portals available on agency websites;
  - 95 d. Consultation with agency staff who work with the public, including agency  
96 ombuds or public advocate staff; and
  - 97 e. Consultation with members of the private sector who assist individuals, such as  
98 representatives, program navigators, and social workers.
- 99 6. To help identify burdens, agencies should use the information obtained through such  
100 consultation to identify the procedures individuals face, and resulting burdens, at each  
101 step in the process.
- 102 7. To determine agencies' authority to reduce burdens, agencies should trace the legal or  
103 operational source of identified burdens in order to determine whether they are imposed  
104 by statute or by regulation, guidance, or agency practice, at the federal or state level.
- 105 8. Agencies should measure administrative burdens associated with their programs by  
106 estimating and quantifying, to the extent feasible, any learning, compliance, or  
107 psychological costs of interacting with their programs. These costs include the time it  
108 takes to learn about programs and how to access them, the work it takes to comply with



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109 program requirements, and the stress or stigma involved with engaging with  
110 administrative programs, as well as forgone benefits or services.

### **Burden Reduction Strategies**

- 111 9. Agencies should periodically review their administrative processes to identify  
112 opportunities to simplify them by, as appropriate:
- 113 a. Limiting the number of steps in processes;
  - 114 b. Reducing the length of required forms;
  - 115 c. Limiting documentation requirements, where possible; and
  - 116 d. Expanding language access.
- 117 10. Agencies should allow the public to interact with government programs using online  
118 processes while still retaining in-person processes when necessary to ensure access to  
119 benefits and services. In particular, agencies should, when possible:
- 120 a. Create alternatives for requirements for “wet” signatures, such as digital or  
121 telephonic signatures, consistently across the agency;
  - 122 b. Allow individuals to use universal logins used by government agencies; and
  - 123 c. Allow individuals to interact with agencies by telephone or video conference  
124 rather than requiring in-person appointments.
- 125 11. When permitted by law, agencies should reduce steps individuals must take to receive  
126 benefits or services by using information in the government’s possession to determine  
127 program eligibility or to pre-populate enrollment forms or by automatically selecting the  
128 most beneficial program options for individuals unless they decide to opt out.
- 129 12. Agencies should make information about their programs as easy as possible to find and  
130 understand, proactively provide information to members of the public about their  
131 eligibility for benefits and services, and allow individuals to expeditiously access records  
132 pertaining to themselves when required for obtaining benefits and services.
- 133 13. Agencies should provide information in plain language and, when appropriate and  
134 feasible, in multiple languages to ensure individuals can understand and use the  
135 information.





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- 136 14. Agencies should increase the availability of assistance for individuals interacting with  
137 their programs, beyond continuing to enable individuals to rely on assistance from other  
138 persons such as family or friends, by:
- 139 a. Working with legal aid organizations and others who provide pro bono or “low”  
140 bono (below market rate but not free) services to increase availability of  
141 representation;
  - 142 b. Establishing rules governing non-attorney representatives who may practice  
143 before the agency; and
  - 144 c. Expanding the use of agency staff, including front-line staff, ombuds, and public  
145 advocates, as well as government-sponsored and -supported entities, such as  
146 navigator programs.
- 147 15. Agencies should identify unnecessary administrative burdens that are required by statutes  
148 in their Supporting Statements under the Paperwork Reduction Act (PRA) and in their  
149 annual proposed legislative program submissions to the Office of Management and  
150 Budget (OMB) under OMB Circular No. A-19.

### **Agency Organization**

- 151 16. Agency leaders should prioritize burden identification strategies and reduction efforts,  
152 using their leadership positions to articulate burden reduction goals for agency staff and  
153 outline commitments for achieving them, particularly when such commitments require  
154 collaboration between agency departments. Agencies should connect their burden  
155 reduction goals to their strategic planning and reporting goals under the Government  
156 Performance and Results Act.
- 157 17. Agencies should identify whether they have particular programs or functions that involve  
158 interaction with the public. Agencies with such programs should assemble a team  
159 devoted to improving the experiences that these individuals have when interacting with  
160 the agency, often referred to as customer experience (CX) teams. CX teams should have  
161 thorough knowledge of relevant agency programs. Senior career staff should partner with



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162 one or more political appointees to provide CX teams with sufficient authority within the  
163 agency to accomplish their goals.

164 18. Agencies should include their general counsels and other relevant staff with statutory  
165 responsibilities related to burden reduction (for example, privacy officers and PRA  
166 officers) in such reduction efforts as early as possible in order to facilitate agency efforts  
167 to maximize burden reduction.

### **Agency Collaboration**

168 19. Federal agencies should expand efforts to collaborate with other entities to maximize  
169 burden reduction. In particular, program and legal staff should collaborate with their chief  
170 data officer on ways to share data across federal agencies and between federal and state  
171 agencies, consistent with the Fair Information Practice Principles, in order to:

- 172 a. Increase outreach to individuals who may be eligible for administrative programs;
- 173 b. Reduce requirements for forms and documentation; and
- 174 c. Under certain conditions, provide for automatic enrollment and renewal.

175 20. Agencies should work with their chief data officers in cross-agency working groups to  
176 share information about best practices for reducing burden and using data-sharing  
177 agreements.

### **Roles for OMB and Congress**

178 21. OMB should provide agencies with additional guidance, potentially including positive  
179 models and training, to inform agency:

- 180 a. Measurement and consideration of administrative burden and foregone benefits  
181 and services, such as in regulatory impact analyses;
- 182 b. Examination of the potential legal or policy advantages and disadvantages of  
183 administrative data sharing, in particular providing additional positive examples  
184 of data sharing; and
- 185 c. Use of flexibilities under the PRA to inform CX research and to improve agency  
186 service delivery in order to make it easier for agencies to conduct CX research.



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187 22. When developing new legislation that establishes or affects administrative programs,  
188 Congress should provide express statutory authority for agencies to share data where  
189 beneficial for achieving the goals of the legislation.



## Identifying and Reducing Burdens on the Public in Administrative Processes

### Committee on Administration and Management

#### Proposed Recommendation for Plenary | December 14, 2023

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**DRAFT December 11, 2023**

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23 fall equally on all members of the public but fall disproportionately on certain members of  
24 historically underserved communities (including people with disabilities),<sup>4</sup> the elderly, those for  
25 whom English is not their primary language, people with poor physical or mental health, and  
26 persons of limited literacy.<sup>5</sup> Reducing administrative burden, while also taking into account other  
27 important public values such as program integrity, can make government work better for  
28 everyone.

29 Various authorities govern how federal agencies identify and reduce administrative  
30 burdens. The Paperwork Reduction Act (PRA) has long required agencies to identify burdens  
31 associated with information they collect from the public and explain why those burdens are  
32 necessary to administer their programs.<sup>6</sup> Office of Management and Budget (OMB) Circular

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<sup>2</sup> Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, Exec. Off. of the President, *Tackling the Time Tax: How the Federal Government is Reducing Burdens to Accessing Critical Benefits and Services* 9 (2023).

<sup>3</sup> Herd et al., *supra* note 1, at 16–18.

<sup>4</sup> Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

<sup>5</sup> *TACKLING THE TIME TAX*, *supra* note 2, at 10; *see also* Herd et al., *supra* note 1, at 10–12; HERD & MOYNIHAN, *supra* note 1, at 105, 134–135, 157–162, and 264; Herd et al., *supra* note 1, at 10–12.

<sup>6</sup> 44 U.S.C. §§ 3501–3521.



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33 No. A-11 emphasizes the importance of customer life experiences<sup>7</sup> and human-centered design<sup>8</sup>  
34 in how agencies manage organizational performance to improve service delivery.

35 While some administrative burdens are imposed by Congress or by state law, federal  
36 agencies have an important role to play in reducing the burdens they impose when administering  
37 their programs. Agencies employ numerous strategies to reduce those burdens, including  
38 simplifying processes, improving language access for persons with limited English proficiency,  
39 expanding the availability of online (instead of solely in-person) processes, and establishing  
40 ombuds offices to assist those experiencing burdens.<sup>9</sup> In addition, agencies have achieved  
41 success in reducing burdens by establishing devoted customer experience (CX) teams that have  
42 sufficient policy knowledge and authority within the agency to be effective.<sup>10</sup>

Commented [CA2]: Proposed Amendment from Council #1

43 Collaboration within and between federal agencies, and between federal agencies and  
44 state, local, and tribal governments, is also essential for burden reduction. Interagency Data data  
45 sharing between agencies that is consistent with the Fair Information Practice Principles and all

<sup>7</sup> Customer life experiences are experiences that require members of the public to navigate government services across multiple programs, agencies, or levels of government. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2023). As explained in Part 6 § 280.16, OMB will manage the selection of a limited number of customer life experiences to prioritize for government-wide action in line with the President’s Management Agenda. *See also* Exec. Order No. 14,058, 86 Fed. Reg. 71,357 (Dec. 16, 2021).

<sup>8</sup> OMB CIRCULAR A-11, *supra* note 7, § 280.1. Human-centered design is a technique to understand administrative process from the user’s perspective and then use those insights to adjust processes to better match human capacities. Herd *et al*, *supra* note 1, at 22. Journey mapping is a related concept that involves documenting each step that an individual takes when engaging with an administrative process in order to better understand the process and where individuals struggle with it. *Id.*

<sup>9</sup> *See* Herd *et al*, *supra* note 1, at 28. *See also* TACKLING THE TIME TAX, *supra* note 2, at 48–49; White House Legal Aid Interagency Roundtable, Access to Justice through Simplification (2022); Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

<sup>10</sup> Herd *et al*, *supra* note 1, at 26. Under Executive Order 14,058, the term “customer” refers to any individual, business, or organization that interacts with an agency or program, and the term “customer experience” refers to the public’s perceptions of and overall satisfaction with interactions with an agency, product, or service. *See* 86 Fed. Reg. at 71,358. This Recommendation uses the term “customer” following its use in that Executive Order, notwithstanding the debate regarding the appropriateness of referring to members of the public as “customers.” *See, e.g., Does DHS Really Have Customers?*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/news/2022/06/23/does-dhs-really-have-customers> (last visited Nov. 9, 2023).



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46 relevant law and policy,<sup>11</sup> especially when used in conjunction with simplifying onerous  
47 processes or eliminating unnecessary ones, can also reduce administrative burdens.<sup>12</sup> In addition  
48 to collaboration across the government, federal agency partnerships with non-governmental third  
49 parties (such as legal aid organizations and others) also play a crucial role in agency efforts to  
50 reduce burden. Third parties assist agencies by providing information about how processes can  
51 be improved to better serve the public better and by directly assisting individuals who interact  
52 with government programs.<sup>13</sup>

53 This Recommendation provides best practices for agencies to use in identifying and  
54 reducing unnecessary administrative burdens. Building on previous recommendations of the  
55 Conference,<sup>14</sup> this Recommendation provides specific consultative techniques agencies should  
56 use to gather information from individual members of the public to better understand gain a fuller  
57 and more accurate understanding of administrative burdens. The Recommendation encourages  
58 the use of online processes and offers other techniques to simplify and streamline processes and  
59 to make information about processes more accessible. The Recommendation also identifies  
60 broad organizational and collaborative tools agencies should employ in burden reduction efforts,

Commented [CMA3]: Proposed Amendment from Government Member Stephanie Tatham #1 (see parallel amendment at line 183).

<sup>11</sup> Fair Information Practice Principles (FIPPs), FED. PRIV. COUNCIL, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, <https://www.fpc.gov/resources/fipps> (last visited Nov. 7, 2023).

<sup>12</sup> See Herd et al, *supra* note 1, at 19, 30–32. See also TACKLING THE TIME TAX, *supra* note 2, at 36, 41. Fair Information Practice Principles (FIPPs), FED. PRIV. COUNCIL, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, <https://www.fpc.gov/resources/fipps> (last visited Nov. 7, 2023).

<sup>13</sup> See Herd et al, *supra* note 1, at 48. See also Admin. Conf. of the U.S. & Legal Servs. Corp., Forum, Assisting Parties in Federal Administrative Adjudication (2023); Admin. Conf. of the U.S., Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, 87 Fed. Reg. 1721 (Jan. 12, 2022).

<sup>14</sup> Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (Jul. 3, 2023); Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42,680 (Jul. 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (Jul. 8, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 86 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016).



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61 including outlining how agency leadership and staff<sup>15</sup> should engage with burden reduction  
62 initiatives within their agencies and across the government. The primary focus of burden  
63 reduction efforts should be with those federal agencies that have ~~the greatest frequent or~~  
64 ~~consequential~~ interactions with the public. The tools discussed are intended to reduce burdens on  
65 the public and not become a reporting burden on agencies for which they are less relevant.

Commented [CA4]: Proposed Amendment from Council #2

66 This Recommendation also includes a recommendation directed to OMB ~~building on~~  
67 ~~OMB's prior actions directed at reducing burdens that builds on the substantial guidance and~~  
68 ~~efforts OMB has already provided on burden reduction.~~ It recommends that OMB provide  
69 agencies with additional guidance for measurement and consideration of administrative burden  
70 and foregone benefits and services, as well as provide additional guidance on agencies'  
71 examination of the potential advantages and disadvantages of administrative data sharing. This  
72 guidance could take many forms, including written guidance or agency-specific or government-  
73 wide training. In addition, again building on past recommendations of the Conference and related  
74 implementation efforts,<sup>16</sup> this Recommendation ~~outlines how agencies and encourages OMB to~~  
75 ~~provide agencies with additional guidance on the use of should leverage the PRA in support of~~  
76 ~~burden reduction efforts, including by expanding flexibilities under the PRA for agencies to~~  
77 conduct customer experience research. It also includes a recommendation to Congress that, when  
78 developing new legislation that establishes or affects administrative programs, it should provide  
79 express statutory authority for agencies to share data where beneficial for achieving the goals of  
80 the legislation.

<sup>15</sup> For the purposes of this Recommendation, agency leadership and staff include a wide range of stakeholders such as general counsels, chief information officers, chief risk officers, and chief data officers, as well as ombuds and officials responsible for compliance with laws such as the Privacy Act (5 U.S.C. § 552a) and the PRA.

<sup>16</sup> See also Admin. Conf. of the U.S., Recommendation 2018-1, *Paperwork Reduction Act Efficiencies*, 83 Fed. Reg. 30,683 (Jun. 29, 2018); Admin. Conf. of the U.S., Recommendation 2012-4, *Paperwork Reduction Act*, 77 Fed. Reg. 47,808 (Aug. 10, 2012).





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**RECOMMENDATION**

**Burden Identification and Reduction Principles**

- 81 1. Federal agencies should seek to identify and reduce administrative burdens that the public  
82 faces when interacting with government programs.
- 83 2. Agencies' efforts to identify and reduce burdens should take into account the experiences  
84 and perspectives of individuals who interact with government programs.
- 85 3. Because individuals often interact with multiple government agencies and programs  
86 during key life experiences, such as retirement, birth of a child, or unexpected disaster,  
87 agency and program officials should collaborate to identify and reduce burdens that  
88 would predictably arise during those experiences.
- 89 4. When undertaking efforts to identify and reduce burdens, agencies should consider the  
90 impacts-effects on other important public values, including program integrity.

**Burden Identification Strategies**

- 91 5. Agencies should institutionalize-adopt procedures for consulting with individuals who  
92 interact with government programs to better understand-inform agency officials about the  
93 nature of the burdens in those programs their processes impose. In seeking to do so,  
94 agencies should try to identify and consult with those who may face disproportionate  
95 burdens in accessing agency programs. Agencies should employ multiple consultative  
96 techniques, including:
- 97 a. Client outreach, such as surveys and focus groups;
- 98 b. Requests for public comment;
- 99 c. Complaint portals available on agency websites;
- 100 d. Consultation with agency staff who work with the public, including agency  
101 ombuds or public advocate staff; and
- 102 e. Consultation with nongovernmental organizations, advocacy groups, and other  
103 members of the private sector (such as representatives, program navigators who  
104 help individuals engage with governmental processes, and social workers) who



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105 assist individuals, ~~such as representatives, program navigators, and social~~  
106 ~~workers.~~

Commented [CA5]: Proposed Amendment from Council #3

- 107 6. To help identify burdens, agencies should use the information obtained through such  
108 consultation to identify the procedures individuals face, and resulting burdens, at each  
109 step in the process.
- 110 7. To determine agencies' authority to reduce burdens, agencies should trace the legal or  
111 operational source of identified burdens in order to determine whether they are imposed  
112 by statute or by regulation, guidance, or agency practice, at the federal or state level.
- 113 8. Agencies should measure administrative burdens associated with their programs by  
114 estimating and quantifying, to the extent feasible, any learning, compliance, or  
115 psychological costs of interacting with their programs. These costs include the time it  
116 takes to learn about programs and how to access them, the work it takes to comply with  
117 program requirements, and the stress or stigma involved with engaging with  
118 administrative programs, as well as forgone benefits or services.

### Burden Reduction Strategies

- 119 9. Agencies should periodically review their administrative processes to identify  
120 opportunities to simplify them by, as appropriate:
- 121 a. Limiting the number of steps in processes;
  - 122 b. Reducing the length of required forms;
  - 123 c. Limiting documentation requirements, where possible; and
  - 124 d. Expanding ~~language access to persons with limited English proficiency and~~  
125 ~~persons with disabilities.~~
- 126 10. Agencies should allow the public to interact with government programs using online  
127 processes while still retaining in-person processes when necessary to ensure access to  
128 benefits and services. In particular, agencies should, when possible:
- 129 a. Create alternatives ~~(such as digital or telephonic signatures) for requirements for~~  
130 ~~"wet" signatures, and ensure such alternatives are accepted by all relevant agency~~  
131 ~~programs such as digital or telephonic signatures, consistently across the agency.~~

Commented [CA6]: Proposed Amendment from Council #4

Commented [CA7]: Proposed Amendment from Council #5



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- 132 b. Allow individuals to use universal logins used by government agencies; ~~and~~  
133 c. Allow individuals to interact with agencies by telephone or video conference  
134 rather than requiring in-person appointments; ~~and~~  
135 ~~e-d. Eliminate notary requirements and substitute 28 U.S.C. § 1746.~~
- 136 11. When permitted by law, agencies should reduce steps individuals must take to receive  
137 benefits or services by using information in the government’s possession to determine  
138 program eligibility or to pre-populate enrollment forms or by automatically selecting the  
139 most beneficial program options for individuals unless they decide to opt out.
- 140 12. Agencies should make information about their programs as easy as possible to find and  
141 understand, proactively provide information to members of the public about their  
142 eligibility for benefits and services, and allow individuals to expeditiously access records  
143 pertaining to themselves when required for obtaining benefits and services.
- 144 13. Agencies should provide information in plain language and, when appropriate and  
145 feasible, in multiple languages to ensure individuals can understand and use the  
146 information.
- 147 14. Agencies should increase the availability of assistance for individuals interacting with  
148 their programs, beyond continuing to enable individuals to rely on assistance from other  
149 persons such as family or friends, by:
- 150 a. Working with legal aid organizations and others who provide pro bono or “low”  
151 bono (below market rate but not free) services to increase availability of  
152 representation;
- 153 b. Establishing rules ~~governing authorizing accredited or qualified non-~~  
154 ~~attorney lawyer~~ representatives ~~who may to~~ practice before the agency; and
- 155 c. Expanding the use of agency staff, including front-line staff, ombuds, and public  
156 advocates, as well as government-sponsored and -supported entities, ~~such as~~  
157 ~~navigator programs designed to help individuals navigate government processes.~~
- 158 15. Agencies should identify unnecessary administrative burdens that are required by statutes  
159 in their Supporting Statements under the Paperwork Reduction Act (PRA) and in their

Commented [CMA8]: Proposed Amendment from Senior Fellow Alan Morrison.

Commented [CA9]: Proposed Amendment from Council #6

Commented [CA10]: Proposed Amendment from Council #7



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160 annual proposed legislative program submissions to the Office of Management and  
161 Budget (OMB) under OMB Circular No. A-19.

### Agency Organization

- 162 16. ~~Agency Political appointees, senior executives, and other agency~~ leaders should prioritize  
163 burden identification strategies and reduction efforts, using their leadership positions to  
164 articulate burden reduction goals for agency staff and outline commitments for achieving  
165 them, particularly when such commitments require collaboration between agency  
166 ~~departments~~ units. Agencies should connect their burden reduction goals to their strategic  
167 planning and reporting goals under the Government Performance and Results Act.
- 168 17. Agencies should identify whether they have particular programs or functions that involve  
169 interaction with the public. Agencies with such programs should assemble a team  
170 devoted to improving the experiences that these individuals have when interacting with  
171 the agency, often referred to as customer experience (CX) teams. CX teams should have  
172 thorough knowledge of relevant agency programs. Senior career staff should partner with  
173 one or more political appointees to provide CX teams with sufficient authority within the  
174 agency to accomplish their goals.
- 175 18. Agencies should include their general counsels and other relevant staff with statutory  
176 responsibilities related to burden reduction (for example, privacy officers and PRA  
177 officers) in such reduction efforts as early as possible in order to facilitate agency efforts  
178 to maximize burden reduction.

Commented [CA11]: Proposed Amendment from Council #8

### Agency Collaboration

- 179 19. Federal agencies should expand efforts to collaborate with other entities to maximize  
180 burden reduction. In particular, program and legal staff should collaborate with their chief  
181 data officer ~~and senior agency official for privacy~~ on ways to share data across federal  
182 agencies and between federal and state agencies, consistent with the Fair Information  
183 Practice Principles ~~and all relevant law and policy~~, in order to:
- 184 a. Increase outreach to individuals who may be eligible for administrative programs;

Commented [CMA12]: Proposed amendment from Government Member Stephanie Tatham #2 (see parallel amendment at lines 187-188).

Commented [CMA13]: Proposed Amendment from Government Member Stephanie Tatham #1 (see parallel amendment at lines 45-6).



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- 185           b. Reduce requirements for forms and documentation; and
- 186           c. Under certain conditions, provide for automatic enrollment and renewal.
- 187 20. Agencies should work with their chief data officers and senior agency officials for
- 188 privacy in cross-agency working groups to share information about best practices for
- 189 reducing burden and using data-sharing agreements.

**Commented [CMA14]:** Proposed Amendment from Government Member Stephanie Tatham #2 (see parallel amendment at line 181).

### Roles for OMB and Congress

- 190 21. OMB should provide agencies with additional guidance, potentially including positive
- 191 models and training, to inform agency:
- 192           a. Measurement and consideration of administrative burden and foregone benefits
- 193           and services, such as in regulatory impact analyses;
- 194           b. Examination of the potential legal or policy advantages and disadvantages of
- 195           administrative data sharing, in particular providing additional positive examples
- 196           of data sharing; and
- 197           c. Use of flexibilities under the PRA in order to inform and make it easier for
- 198 agencies to conduct CX research and to improve agency service delivery in order
- 199 to make it easier for agencies to conduct CX research.
- 200 22. When developing new legislation that establishes or affects administrative programs,
- 201 Congress should provide express statutory authority for agencies to share data where
- 202 beneficial for achieving the goals of the legislation doing so would further the goals of the
- 203 legislation and not cause disproportionate effects that would negatively affect other
- 204 legislative purposes or endanger critical privacy interests.

**Commented [CA15]:** Proposed Amendment from Council #9

**Commented [CA16]:** Proposed Amendment from Council #10



## Improving Timeliness in Agency Adjudication

### Ad Hoc Committee

#### Proposed Recommendation for Plenary | December 14, 2023

1           It is often said that justice delayed is justice denied. Indeed, one rationale underlying the  
2 adjudication of many types of cases by executive branch agencies is that they can often decide  
3 them more quickly through administrative methods than the courts can through judicial methods.

4           Federal agencies adjudicate millions of cases each year, including applications for  
5 benefits and services, applications for licenses and permits, and enforcement actions against  
6 persons suspected of violating the law. Members of the public depend on the timely adjudication  
7 of their cases. Delayed adjudication, especially given the added time of possible judicial review,  
8 can have significant consequences, particularly for members of historically underserved  
9 communities.

10           The time it takes an agency to decide a case depends on, among other variables, the  
11 evidentiary and procedural demands of the case, the volume of cases pending before the agency,  
12 and the resources available to the agency to adjudicate cases. Many factors can affect these  
13 variables, such as the funds appropriated by Congress, which directly impact the resources that  
14 agencies can allocate to adjudication. Other factors include the establishment and expansion of  
15 programs by Congress, economic and demographic changes, trends in federal employment,  
16 disruptions to agency operations such as the COVID-19 pandemic, and agency organizational  
17 structures and procedures.<sup>1</sup> When delays or backlogs increase, agencies frequently face pressure

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<sup>1</sup> Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication (Oct. 11, 2023) (draft report to the Admin. Conf. of the U.S.).



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18 from parties, representatives, Congress, the media, and others to process and decide cases more  
19 promptly.

20 Agencies rely on a wide range of procedural, organizational, personnel, technological,  
21 and other initiatives to promote timeliness and to respond to concerns about timeliness when they  
22 arise. The Administrative Conference has adopted many recommendations identifying specific  
23 methods that agencies have used or might use to improve timeliness. One of its earliest  
24 recommendations encourages agencies to collect and analyze case processing data to “develop  
25 improved techniques fitted to [their] particular needs to reduce delays” and measure the  
26 effectiveness of those techniques.<sup>2</sup> Later recommendations address options including:

- 27 • Delegation of final decisional authority subject to discretionary review by the  
28 agency head;<sup>3</sup>
- 29 • Use of precedential decision making by appellate decision makers;<sup>4</sup>
- 30 • Adoption of procedures for summary judgment<sup>5</sup> and prehearing discovery;<sup>6</sup>
- 31 • Use of a broad suite of active case management techniques;<sup>7</sup>
- 32 • Establishment of quality assurance systems;<sup>8</sup>

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<sup>2</sup> Admin. Conf. of the U.S., Recommendation 69-1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 38 Fed. Reg. 19,784 (July 23, 1973).

<sup>3</sup> Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); *see also* Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

<sup>6</sup> Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973).

<sup>7</sup> Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).

<sup>8</sup> Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).



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- 33                   • Development of reasonable time limits or step-by-step time goals for agency  
34                   action;<sup>9</sup>
- 35                   • Use of alternative dispute resolution (ADR) techniques;<sup>10</sup>
- 36                   • Use of simplified or expedited procedures in appropriate cases;<sup>11</sup>
- 37                   • Use of remote hearings;<sup>12</sup>
- 38                   • Aggregation of similar claims;<sup>13</sup>
- 39                   • Use of personnel management devices;<sup>14</sup> and
- 40                   • Implementation of electronic case management and publicly accessible online  
41                   processes.<sup>15</sup>

42                   These recommendations remain valuable resources for policymakers charged with  
43                   promoting and improving timeliness in agency adjudication. As technologies develop,  
44                   policymakers are also increasingly looking to artificial intelligence and other advanced

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<sup>9</sup> Recommendation 86-7, *supra* note 7, ¶ 7; Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).

<sup>10</sup> Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 52 Fed. Reg. 23,635 (June 24, 1987).

<sup>11</sup> Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990); Recommendation 86-7, *supra* note 7, ¶ 3.

<sup>12</sup> Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Conferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86-7, *supra* note 7.

<sup>13</sup> Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Recommendation 86-7, *supra* note 7, ¶ 9.

<sup>14</sup> Recommendation 86-7, *supra* note 7, ¶ 1.

<sup>15</sup> Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).





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45 algorithmic tools to streamline or automate time-consuming, error-prone, or resource-intensive  
46 processes.<sup>16</sup>

47 At the same time, no single method will promote timeliness at all agencies in all  
48 circumstances. Each agency has its own mission, serves different communities, adjudicates  
49 according to a distinct set of legal requirements, has different resources available to it, and faces  
50 different operational realities. Moreover, in promoting timely adjudication, agencies must remain  
51 sensitive to other values of administrative adjudication such as decisional quality, procedural  
52 fairness, consistency, transparency, customer service, and equitable treatment. Building on  
53 earlier recommendations, this Recommendation provides a general framework that agencies and  
54 Congress can use to foster an organizational culture of timeliness in agency adjudication in  
55 accord with principles of fairness, accuracy, and efficiency and devise plans to address increased  
56 caseloads, delays, backlogs, and other timeliness concerns when they arise.

### RECOMMENDATION

#### Information Collection

57 1. Agencies should ensure their electronic or other case management systems are collecting  
58 data necessary to accurately monitor and detect changes in case processing times at all  
59 levels of their adjudication systems (e.g., initial level, hearing level, appellate review  
60 level), identify the causes of changes in case processing times, and devise methods to  
61 promote or improve timeliness without adversely affecting decisional quality, procedural  
62 fairness, or other objectives. Agencies should identify the kinds of data or records that  
63 Congress, media representatives, researchers, or other stakeholders frequently request, to  
64 ensure that agency personnel responsible for responding to such requests can do so in an  
65 efficient manner. Agencies should ensure that electronic or other case management  
66 systems track the following information:

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<sup>16</sup> Cf. David Freeman Engstrom et al., *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* 38, 45 (2020) (report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); see also Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Nov. 1, 2023).



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- 67           a. The number of proceedings of each type pending, commenced, and concluded  
68           during a standard reporting period (e.g., week, month, quarter, year) within and  
69           across different levels of their adjudication systems;
- 70           b. The current status of each case pending at every level of their adjudication  
71           systems; and
- 72           c. For each case, the number of days required to meet critical case processing  
73           milestones within and across different levels of their adjudication systems.
- 74        2. To meet organizational goals and clarify stakeholder expectations, agencies should  
75        communicate regularly with internal and external stakeholders. In addition to formal  
76        engagements, agencies should provide ongoing opportunities for interested persons  
77        within and outside the agency to provide feedback and suggestions. Methods for  
78        obtaining information include:
- 79           a. Stakeholder surveys;
- 80           b. Listening sessions and other meetings;
- 81           c. Requests for information published in the *Federal Register*;
- 82           d. Online feedback forms; and
- 83           e. Use of ombuds.

### **Performance Goals and Standards**

- 84        3. Agencies should adopt organizational performance goals that encourage and provide  
85        clear expectations for timeliness. Performance goals may take several forms, including  
86        goals contained in agency strategic plans, rules establishing time limits for concluding  
87        cases, or policies instituting step-by-step time goals. In developing organizational  
88        performance goals for timeliness, agencies should:
- 89           a. Use the information described in Paragraphs 1 and 2 to develop goals that are  
90           reasonable and objective;
- 91           b. Encourage interested persons within and outside the agency to participate in the  
92           development of such goals; and



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- 93                   c. Periodically reevaluate such goals to ensure they (i) continue to be reasonable;  
94                   (ii) encourage and provide clear expectations for timeliness; and (iii) do not  
95                   adversely affect decisional quality or the fairness or integrity of proceedings.
- 96           4. When agencies consider timeliness or productivity in appraising the performance of  
97           employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive Service,  
98           and in setting timeliness or productivity expectations for administrative law judges, who  
99           are not subject to performance appraisals, they should:
- 100           a. Use the information described in Paragraphs 1 and 2 to develop measures that are  
101           reasonable and objective and provide clear expectations for timeliness;
- 102           b. Encourage interested persons within and outside the agency, including employees  
103           to whom the measures apply, to participate in the development of such measures;
- 104           c. Ensure measures reflect tasks within the control of individual employees;
- 105           d. Ensure measures take into account the range of case types and tasks performed by  
106           individual employees as well as resources (e.g., staff support, technology) at their  
107           disposal;
- 108           e. For employees who decide cases, ensure measures do not inadvertently lead them  
109           to decide cases in a particular way;
- 110           f. For all employees, ensure measures do not inadvertently lead them to take actions  
111           that would adversely affect decisional quality or the fairness or integrity of  
112           proceedings; and
- 113           g. Periodically reevaluate such measures.

### **Organizational, Procedural, Technological, and Case Management Techniques**

114           The Administrative Conference has adopted many recommendations, listed in the Preamble,  
115           that identify organizational, procedural, technological, and case management techniques that  
116           agencies should use, in appropriate circumstances, to promote timeliness in adjudication or  
117           respond to increased caseloads, delays, backlogs, and other timeliness concerns. Agencies  
118           should also implement the following best practices, as appropriate.



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- 119 5. Agencies should narrow disputes and resolve cases at the earliest possible level of their  
120 adjudication systems and, at each level, through the least time- and resource-intensive  
121 processes available and appropriate to the circumstances, such as informal prehearing  
122 procedures, alternative dispute resolution, streamlined procedures, or decision making on  
123 the written record.
- 124 6. As appropriate, agencies should adopt procedures for: (i) resolving multiple cases in a  
125 single proceeding, such as the aggregation of similar claims; or (ii) resolving recurring  
126 legal or factual issues, such as precedential decision making or substantive rulemaking.
- 127 7. Agencies should adopt processes for screening cases at intake to: (i) resolve procedural  
128 issues as early as possible; (ii) identify cases that may be appropriate for less time- and  
129 resource-intensive processes, such as those listed in Paragraphs 5 and 6; (iii) identify  
130 cases that can be resolved quickly because they are legally and factually straightforward;  
131 and (iv) identify cases that should be prioritized or expedited.
- 132 8. Agencies should adopt procedures that standardize the allocation of tasks among  
133 adjudicators, managers, and legal and paralegal support staff.
- 134 9. Agencies should review and update as necessary their Human Capital Operating Plans  
135 (5 C.F.R. pt. 250) to ensure their hiring and position management needs are properly  
136 aligned with their operational goals for adjudication.
- 137 10. Agencies should automate—using artificial intelligence, for example—routine tasks that  
138 do not require a significant exercise of discretion when automation will not adversely  
139 affect quality or program integrity. Such tasks may include receiving filings and  
140 evidence, establishing new case files, associating records with case files, de-duplicating  
141 records, assigning cases to agency personnel for action, screening cases as described in  
142 Paragraph 7, and generating and releasing standardized correspondence.
- 143 11. Agencies should outsource routine tasks that do not require a significant exercise of  
144 discretion—such as transcription, scanning records, or mailing correspondence—when it  
145 would be more efficient and cost-effective for a contractor to perform them.
- 146 12. Agencies should adopt rules and policies that reflect best practices for case management,  
147 including evidentiary development, motions practice, intervention, extensions of time,



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- 148 decision writing, and methods for encouraging prompt action and discouraging undue  
149 delay by parties. At the same time, agencies should ensure that adjudicators, managers,  
150 and support staff have sufficient flexibility to manage individual cases fairly, accurately,  
151 and efficiently, and test alternative case management techniques that may reveal new best  
152 practices. Agencies should periodically reevaluate such rules and policies, using the  
153 information described in Paragraphs 1 and 2, to ensure they continue to reflect best  
154 practices for case management and provide relevant personnel with sufficient flexibility  
155 to manage individual cases and test alternative case management techniques.
- 156 13. Agencies should establish organizational units, supervisory structures, and central and  
157 field operations that reinforce timeliness and facilitate appropriate communication among  
158 agency personnel involved in adjudication at all levels of an adjudication system.
- 159 14. Agencies should update public websites and electronic case management systems so that  
160 they are able to handle the volume of current and future cases efficiently and effectively.

### **Strategic Planning**

- 161 15. Agencies should engage in evidence-based and transparent strategic planning to  
162 anticipate and address concerns about timeliness, including increased caseloads, delays,  
163 and backlogs. In undertaking such strategic planning, agencies should:
- 164 a. Use the information described in Paragraphs 1 and 2 to identify case processing  
165 trends such as geographical or temporal variations in case intake or case  
166 processing times, assess the causes of timeliness concerns, and identify points at  
167 all levels of their adjudication systems that are causing delays;
  - 168 b. Review previous efforts to address timeliness concerns to understand what  
169 initiatives have been attempted and which have been effective;
  - 170 c. Consider a wide range of options for improving timeliness in the adjudication  
171 process without adversely affecting decisional quality, procedural fairness,  
172 program integrity, or other objectives. Options may include organizational,  
173 procedural, technological, case management, and other techniques, including  
174 those identified in previous Conference recommendations and Paragraphs 5–14;



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- 175 d. Engage in candid discussions with adjudicators, managers, and support staff at all  
176 levels of their adjudication systems, as well as interested persons outside the  
177 agency, regarding the benefits, costs, and risks associated with different options  
178 for improving timeliness;
- 179 e. Develop proposed plans for addressing timeliness concerns, and solicit feedback  
180 on the plan from interested persons within and outside of the agency;
- 181 f. Consider pilot studies and demonstration projects before implementing  
182 interventions broadly to test the effectiveness of different interventions and  
183 identify unintended consequences; and
- 184 g. Designate a senior official responsible for coordinating the activities described in  
185 this Paragraph.

### **Communication, Coordination, and Collaboration**

- 186 16. Agencies should enhance communication between components involved in their  
187 adjudication systems and other components that carry out functions necessary for timely  
188 adjudication, such as those that oversee information technology, human resources, budget  
189 planning, office space, and procurement.
- 190 17. Agencies should coordinate with the President, when required, and with Congress by  
191 providing information on recommended legislative changes and appropriations that  
192 would promote timeliness generally or address ongoing timeliness concerns.
- 193 18. Agencies should partner with federal entities such as the Chief Information Officers  
194 Council, the U.S. Digital Service, the General Services Administration, and the Office of  
195 Personnel Management to develop and implement best practices for leveraging  
196 information technology, human capital, and other resources to promote or improve  
197 timeliness.
- 198 19. Agencies should share information with each other about their experiences with and  
199 practices for promoting timeliness generally and addressing ongoing timeliness concerns.  
200 The Office of the Chair of the Administrative Conference should provide for the  
201 interchange of such information, as authorized by 5 U.S.C. § 594(2).



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- 202 20. Agencies should institutionalize partnerships with relevant legal service providers, other  
203 nongovernmental organizations, and state and local government agencies that advocate  
204 for or provide assistance to individuals who participate as parties in agency adjudications.
- 205 21. Agencies should make informational materials available to adjudicators, managers, and  
206 legal and paralegal support staff and conduct regular training sessions for such personnel  
207 on best practices for fair, accurate, and efficient case management.
- 208 22. Agencies should provide parties and representatives with resources to help them navigate  
209 their adjudication systems, understand procedural alternatives that may expedite decision  
210 making in appropriate cases, and learn about best practices for efficient and effective  
211 advocacy before the agency. Such resources may include informational materials (e.g.,  
212 documents written in plain language and available in languages other than English, short  
213 videos, decision trees, and visualizations), navigator programs, and counseling for self-  
214 represented parties.
- 215 23. As early as possible and at key points throughout the adjudication process, agencies  
216 should provide self-represented parties with plain-language materials informing them of:  
217 (i) their right to be represented by an attorney or qualified nonlawyer legal service  
218 provider; (ii) the potential benefits of representation; and (iii) options for obtaining  
219 representation.
- 220 24. Agencies should publicly identify those case management priorities and procedures that  
221 have been adopted to improve timeliness and may result in parties' cases being identified  
222 for aggregation, expedition, or similar alternative techniques.
- 223 25. Agencies should publicly disclose average processing times and aggregate processing  
224 data for claims pending, commenced, and concluded during a standard reporting period;  
225 any deadlines or processing goals for adjudicating cases; and information about the  
226 agency's plans for and progress in addressing timeliness concerns.
- 227 26. When agencies consider timeliness or productivity in appraising the performance of  
228 employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive Service,  
229 and when they set timeliness or productivity expectations for administrative law judges,  
230 who are not subject to performance appraisals, they should disclose such measures



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231 publicly and explain how they were developed. For employees who are subject to  
232 performance appraisal, agencies should disclose publicly: (i) how they use such measures  
233 to appraise employees, and (ii) whether employees are eligible for incentive awards based  
234 on timeliness or productivity.

### **Consideration for Congress**

235 27. Congress ordinarily should not impose statutory time limits on agency adjudication. If  
236 Congress does consider imposing time limits on adjudication by a particular agency, it  
237 should first seek information from the agency and stakeholders. If Congress does decide  
238 to impose time limits, it should do so only after determining that the benefits of such  
239 limits outweigh the costs. If Congress then decides time limits are necessary or  
240 warranted, it should require agencies to adopt reasonable time limits or, in rare  
241 circumstances, impose such limits itself. In setting any statutory time limits, Congress  
242 should:

- 243 a. Recognize that preexisting statutory or regulatory frameworks or special  
244 circumstances (e.g., a sudden substantial increase in an agency's caseload or the  
245 complexity of the issues in a particular case) may justify an agency's failure to  
246 conclude a case within the proposed statutory time limit;
- 247 b. State expressly what should occur if the agency does not meet its statutory  
248 deadline; and
- 249 c. State expressly whether affected persons may or may not enforce the time limit  
250 through judicial action and, if so, the nature of the relief available for this  
251 purpose.





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## Improving Timeliness in Agency Adjudication

### Ad Hoc Committee

#### Proposed Recommendation for Plenary | December 14, 2023

1 It is often said that justice delayed is justice denied. Indeed, one rationale underlying the  
2 adjudication of many types of cases by executive branch agencies is that they can often decide  
3 them more quickly through administrative methods than the courts can through judicial methods.

4 Federal agencies adjudicate millions of cases each year, including applications for  
5 benefits and services, applications for licenses and permits, and enforcement actions against  
6 persons suspected of violating the law. Members of the public depend on the timely adjudication  
7 of their cases. Delayed adjudication, especially given the possible added time of possible judicial  
8 review, can have significant consequences, particularly for members of historically underserved  
9 communities.

10 The time it takes an agency to decide a case depends on, among other variables, the  
11 evidentiary and procedural demands of the case, the volume of cases pending before the agency,  
12 and the resources available to the agency to adjudicate cases. Many factors can affect these  
13 variables, such as the funds appropriated by Congress, which directly impact the resources that  
14 agencies can allocate to adjudication. Other factors include the establishment and expansion of  
15 programs by Congress, economic and demographic changes, trends in federal employment  
16 affecting agencies' ability to recruit and retain personnel involved in adjudication, disruptions to  
17 agency operations such as the COVID-19 pandemic, and agency organizational structures and

Commented [CA1]: Proposed Amendment from Council #1

DRAFT December 8, 2023



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18 procedures.<sup>1</sup> When delays or backlogs increase, agencies frequently face pressure from parties,  
19 representatives, Congress, the media, and others to process and decide cases more promptly.

20 Agencies rely on a wide range of procedural, organizational, personnel, technological,  
21 and other initiatives to promote timeliness and to respond to concerns about timeliness when they  
22 arise. The Administrative Conference has adopted many recommendations identifying specific  
23 methods that agencies have used or might use to improve timeliness. One of its earliest  
24 recommendations encourages agencies to collect and analyze case processing data to “develop  
25 improved techniques fitted to [their] particular needs to reduce delays” and measure the  
26 effectiveness of those techniques.<sup>2</sup> Later recommendations address options including:

- 27 • Delegation of final decisional authority subject to discretionary review by the  
28 agency head;<sup>3</sup>
- 29 • Use of precedential decision making by appellate decision makers;<sup>4</sup>
- 30 • Adoption of procedures for summary judgment<sup>5</sup> and prehearing discovery;<sup>6</sup>
- 31 • Use of a broad suite of active case management techniques;<sup>7</sup>

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<sup>1</sup> Jeremy S. Graboyes & Jennifer L. Selin, *Improving Timeliness in Agency Adjudication* (Oct. 11, 2023) (draft report to the Admin. Conf. of the U.S.).

<sup>2</sup> Admin. Conf. of the U.S., Recommendation 69-1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 38 Fed. Reg. 19,784 (July 23, 1973).

<sup>3</sup> Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); see also Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

<sup>6</sup> Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973).

<sup>7</sup> Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).



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- 32 • **Implementation of electronic case management and publicly accessible online**
- 33 **processes;**<sup>8</sup>
- 34 • Establishment of quality assurance systems;<sup>9</sup>
- 35 • Development of reasonable time limits or step-by-step time goals for agency
- 36 action;<sup>10</sup>
- 37 • Use of alternative dispute resolution (ADR) techniques;<sup>11</sup>
- 38 • Use of simplified or expedited procedures in appropriate cases;<sup>12</sup>
- 39 • Use of remote hearings;<sup>13</sup>
- 40 • Aggregation of similar claims;<sup>14</sup> **and**
- 41 • Use of personnel management **strategies**<sup>15</sup> **and**

<sup>8</sup> Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

<sup>9</sup> Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).

<sup>10</sup> Recommendation 86-7, *supra* note 7, ¶ 7; Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).

<sup>11</sup> Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 52 Fed. Reg. 23,635 (June 24, 1987).

<sup>12</sup> Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990); Recommendation 86-7, *supra* note 7, ¶ 3.

<sup>13</sup> Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86-7, *supra* note 7.

<sup>14</sup> Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Recommendation 86-7, *supra* note 7, ¶ 9.

<sup>15</sup> Recommendation 86-7, *supra* note 7, ¶ 1.



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42 ~~• Implementation of electronic case management and publicly accessible online~~  
43 ~~processes.~~<sup>16</sup>

44 These recommendations remain valuable resources for policymakers charged with  
45 promoting and improving timeliness in agency adjudication. As technologies develop,  
46 policymakers are also increasingly looking to artificial intelligence and other advanced  
47 algorithmic tools to streamline or automate time-consuming, error-prone, or resource-intensive  
48 processes.<sup>17</sup>

49 At the same time, no single method will promote timeliness at all agencies in all  
50 circumstances. Each agency has its own mission, serves different communities, adjudicates  
51 according to a distinct set of legal requirements, has different resources available to it, and faces  
52 different operational realities. Moreover, in promoting timely adjudication, agencies must remain  
53 sensitive to other values of administrative adjudication such as decisional quality, procedural  
54 fairness, consistency, transparency, customer service, and equitable treatment. Building on  
55 earlier recommendations, this Recommendation provides a general framework that agencies and  
56 Congress can use to foster an organizational culture of timeliness in agency adjudication in  
57 accord with principles of fairness, accuracy, and efficiency and **to** devise plans to address  
58 increased caseloads, delays, backlogs, and other timeliness concerns when they arise.

**RECOMMENDATION**

**Information Collection**

59 1. Agencies should ensure their electronic or other case management systems are collecting  
60 data necessary ~~to accurately monitor and detect changes for accuracy in monitoring and~~

<sup>16</sup> Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

<sup>17</sup> Cf. David Freeman Engstrom et al., *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* 38, 45 (2020) (report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); see also Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Nov. 1, 2023).



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61 **detecting changes** in case processing times at all levels of their adjudication systems (e.g.,  
62 initial level, hearing level, appellate review level), identify the causes of changes in case  
63 processing times, and devise methods to promote or improve timeliness without  
64 adversely affecting decisional quality, procedural fairness, or other objectives. Agencies  
65 should identify the kinds of data or records that Congress, media representatives,  
66 researchers, or other **stakeholders interested persons** frequently request, to ensure that  
67 agency personnel responsible for responding to such requests can do so in an efficient  
68 manner. Agencies should ensure that electronic or other case management systems track  
69 the following information:

- 70 a. The number of proceedings of each type pending, commenced, and concluded  
71 during a standard reporting period (e.g., week, month, quarter, year) within and  
72 across different levels of their adjudication systems;
- 73 b. The current status of each case pending at every level of their adjudication  
74 systems; and
- 75 c. For each case, the number of days required to meet critical case processing  
76 milestones within and across different levels of their adjudication systems.

- 77 2. To meet organizational goals and **obtain information about expectations for adjudication**  
78 **timelines** ~~clarify stakeholder expectations~~, agencies should communicate regularly with  
79 **interested persons within and outside the agency** ~~internal and external stakeholders~~. In  
80 addition to formal engagements, agencies should provide ongoing opportunities for  
81 interested persons within and outside the agency to provide feedback and suggestions.  
82 Methods for obtaining information include:

- 83 a. **Stakeholder s** ~~Surveys of interested persons within and outside the agency~~;
- 84 b. Listening sessions and other meetings;
- 85 c. Requests for information published in the *Federal Register*;
- 86 d. Online feedback forms; and
- 87 e. Use of ombuds.

Commented [CA2]: Proposed Amendment from Council #2



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**Performance Goals and Standards**

- 88 3. Agencies should adopt organizational performance goals that encourage and provide  
89 clear expectations for timeliness. Performance goals may take several forms, including  
90 goals contained in agency strategic plans, rules establishing time limits for concluding  
91 cases, or policies instituting step-by-step time goals. In developing organizational  
92 performance goals for timeliness, agencies should:
- 93 a. Use the information described in Paragraphs 1 and 2 to develop goals that are  
94 reasonable and objective;
  - 95 b. Encourage interested persons within and outside the agency to participate in the  
96 development of such goals; and
  - 97 c. Periodically reevaluate such goals to ensure they (i) continue to be reasonable;  
98 (ii) encourage and provide clear expectations for timeliness; and (iii) do not  
99 adversely affect decisional quality or the fairness or integrity of proceedings.
- 100 4. When agencies ~~consider use~~ timeliness or productivity ~~measures~~ in appraising the  
101 performance of employees, as defined in 5 U.S.C. § 4301, and members of the Senior  
102 Executive Service, and in setting timeliness or productivity expectations for  
103 administrative law judges, who are not subject to performance appraisals, ~~they agencies~~  
104 should:
- 105 a. Use the information described in Paragraphs 1 and 2 to develop ~~measures or~~  
106 ~~expectations~~ that are reasonable and objective and provide clear expectations for  
107 timeliness;
  - 108 b. Encourage interested persons within and outside the agency, including employees  
109 to whom the measures ~~or expectations~~ apply, to participate in the development of  
110 such measures ~~or expectations~~;
  - 111 c. Ensure measures ~~or expectations~~ reflect tasks within the control of individual  
112 employees;
  - 113 d. Ensure measures ~~or expectations~~ take into account the range of case types and  
114 tasks performed by individual employees as well as resources (e.g., staff support,  
115 technology) at their disposal;



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- 116 e. For employees who decide cases, ensure measures **or expectations** do not
- 117 ~~inadvertently~~ lead them to decide cases in a particular way;
- 118 f. For all employees, ensure measures **or expectations** do not ~~inadvertently~~ lead
- 119 them to take actions that would adversely affect decisional quality or the fairness
- 120 or integrity of proceedings; and
- 121 g. Periodically reevaluate such measures **or expectations**.

Commented [CA3]: Proposed Amendment from Council #3 (see parallel amendment at line 118)

Commented [CA4]: Proposed Amendment from Council #3 (see parallel amendment at line 117)

**Organizational, Procedural, Technological, and Case Management Techniques**

122 The Administrative Conference has adopted many recommendations, listed in the Preamble,  
123 that identify organizational, procedural, technological, and case management techniques that  
124 agencies should use, in appropriate circumstances, to promote timeliness in adjudication or  
125 respond to increased caseloads, delays, backlogs, and other timeliness concerns. Agencies  
126 should also implement the following best practices, as appropriate.

- 127 5. Agencies should narrow disputes and resolve cases at the **lowestearliest** possible level of
- 128 their adjudication systems and, at each level, ~~through use~~ the least time- and resource-
- 129 intensive processes available and appropriate to the circumstances, such as informal
- 130 prehearing procedures, alternative dispute resolution, streamlined procedures, or decision
- 131 making on the written record.
- 132 6. As appropriate, agencies should adopt procedures for: (i) resolving multiple cases in a
- 133 single proceeding, such as the aggregation of similar claims; or (ii) resolving recurring
- 134 legal or factual issues, such as precedential decision making or substantive rulemaking.
- 135 7. Agencies should adopt processes for screening cases at intake to: (i) resolve procedural
- 136 issues as early as possible; (ii) identify cases that may be appropriate for less time- and
- 137 resource-intensive processes, such as those **describedlisted** in Paragraphs 5 and 6; (iii)
- 138 identify cases that can be resolved quickly because they are legally and factually
- 139 straightforward; and (iv) identify cases that should be prioritized or expedited.
- 140 8. Agencies should adopt procedures that standardize the allocation of tasks among
- 141 adjudicators, managers, ~~and staff attorneys, and legal and~~ paralegal support staff.



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- 142 9. Agencies should review and update as necessary their Human Capital Operating Plans  
143 (5 C.F.R. pt. 250) to ensure their hiring and position management needs are properly  
144 aligned with their operational goals for adjudication.
- 145 10. Agencies should automate ~~using artificial intelligence, for example~~ routine tasks that  
146 do not require a significant exercise of discretion when automation will not adversely  
147 affect quality or program integrity. Such tasks may include receiving filings and  
148 evidence, establishing new case files, associating records with case files, de-duplicating  
149 records, assigning cases to agency personnel for action, screening cases as described in  
150 Paragraph 7, and generating and releasing standardized correspondence.
- 151 11. Agencies should outsource routine tasks that do not require a significant exercise of  
152 discretion—such as transcription, scanning records, or mailing correspondence—when it  
153 would be more efficient and cost-effective for a contractor to perform them ~~and there are~~  
154 ~~no legal or policy reasons to assign the tasks to agency personnel (e.g., restrictions on~~  
155 ~~access to sensitive personal information or confidential national security information).~~
- 156 12. Agencies should adopt rules and policies that reflect best practices for case management,  
157 including evidentiary development, motions practice, intervention, extensions of time,  
158 decision writing, and methods for encouraging prompt action and discouraging undue  
159 delay by parties. At the same time, agencies should ensure that adjudicators, managers,  
160 and support staff have sufficient flexibility to manage individual cases fairly, accurately,  
161 and efficiently, and test alternative case management techniques that may reveal new best  
162 practices. Agencies should periodically reevaluate such rules and policies, using the  
163 information described in Paragraphs 1 and 2, to ensure they continue to reflect best  
164 practices for case management and provide relevant personnel with sufficient flexibility  
165 to manage individual cases and test alternative case management techniques.
- 166 13. Agencies should establish organizational units, supervisory structures, and central and  
167 field operations that reinforce timeliness and facilitate appropriate communication among  
168 agency personnel involved in adjudication at all levels of an adjudication system.
- 169 14. Agencies should update public websites and electronic case management systems so that  
170 they are able to handle the volume of current and future cases efficiently and effectively.

Commented [CA5]: Proposed Amendment from Council #4

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**Strategic Planning**

- 171 15. Agencies should engage in evidence-based and transparent strategic planning to  
172 anticipate and address concerns about timeliness, including increased caseloads, delays,  
173 and backlogs. In undertaking such strategic planning, agencies should:
- 174 a. Use the information described in Paragraphs 1 and 2 to identify case processing  
175 trends such as geographical or temporal variations in case intake or case  
176 processing times, assess the causes of timeliness concerns, and identify points at  
177 all levels of their adjudication systems that are causing delays;
  - 178 b. Review previous efforts to address timeliness concerns to understand what  
179 initiatives have been attempted and which have been effective;
  - 180 c. Consider a wide range of options for improving timeliness in the adjudication  
181 process without adversely affecting decisional quality, procedural fairness,  
182 program integrity, or other objectives. Options may include organizational,  
183 procedural, technological, case management, and other techniques, including  
184 those identified in previous Conference recommendations and Paragraphs 5–14;
  - 185 d. Engage in candid discussions with adjudicators, managers, and support staff at all  
186 levels of their adjudication systems, as well as interested persons outside the  
187 agency, regarding the benefits, costs, and risks associated with different options  
188 for improving timeliness;
  - 189 e. Develop proposed plans for addressing timeliness concerns, and solicit feedback  
190 on the plan from interested persons within and outside of the agency;
  - 191 f. Consider pilot studies and demonstration projects before implementing  
192 interventions broadly to test the effectiveness of different interventions and  
193 identify unintended consequences; and
  - 194 g. Designate a senior official responsible for coordinating the activities described in  
195 this Paragraph.



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**Communication, Coordination, and Collaboration**

- 196 16. Agencies should **enhance facilitate** communication between components involved in their  
197 adjudication systems and other components that carry out functions necessary for timely  
198 adjudication, such as those that oversee information technology, human resources, budget  
199 planning, office space, and procurement.
- 200 17. Agencies should coordinate, **as appropriate,** with the President, **when required,** and with  
201 Congress by providing information on recommended legislative changes and  
202 appropriations that would promote timeliness generally or address ongoing timeliness  
203 concerns.
- 204 18. Agencies should partner with federal entities such as the Chief Information Officers  
205 Council, the U.S. Digital Service, the General Services Administration, and the Office of  
206 Personnel Management to develop and implement best practices for leveraging  
207 information technology, human capital, and other resources to promote or improve  
208 timeliness.
- 209 19. **Unless precluded by law,** **Agencies** should share information with each other about their  
210 experiences with and practices for promoting timeliness generally and addressing  
211 ongoing timeliness concerns. The Office of the Chair of the Administrative Conference  
212 should provide for the interchange of such information, as authorized by 5 U.S.C. §  
213 594(2).
- 214 20. Agencies should **develop institutionalize** partnerships with relevant legal service  
215 providers, other nongovernmental organizations, and state and local government agencies  
216 that advocate for or provide assistance to individuals who participate as parties in agency  
217 adjudications.
- 218 **21.** Agencies should make informational materials available to adjudicators, managers, **staff**  
219 **attorneys, and legal and** paralegal support staff. **Agencies should and** conduct regular

Commented [CA7]: Proposed Amendment from Council #6

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220 training sessions for such personnel on best practices for fair, accurate, and efficient case  
221 management.

**Communication and Transparency**

222 ~~21-22.~~ Agencies should provide parties and representatives with resources to help them  
223 navigate their adjudication systems, understand procedural alternatives that may expedite  
224 decision making in appropriate cases, and learn about best practices for efficient and  
225 effective advocacy before the agency. Such resources may include informational  
226 materials (e.g., documents written in plain language and available in languages other than  
227 English, short videos, decision trees, and visualizations), navigator programs, and  
228 counseling for self-represented parties.

229 ~~22-23.~~ As early as possible and at key points throughout the adjudication process,  
230 agencies should provide self-represented parties with plain-language materials informing  
231 them of: (i) their right to be represented by an attorney or qualified nonlawyer legal  
232 service provider; (ii) the potential benefits of representation; and (iii) options for  
233 obtaining representation.

234 ~~23-24.~~ Agencies should publicly identify those case management priorities and  
235 procedures that have been adopted to improve timeliness and may result in parties' cases  
236 being identified for aggregation, expedition, or similar alternative techniques.

237 ~~24-25.~~ Agencies should publicly disclose average processing times and aggregate  
238 processing data for claims pending, commenced, and concluded during a standard  
239 reporting period; any deadlines or processing goals for adjudicating cases; and  
240 information about the agency's plans for and progress in addressing timeliness concerns.

241 Agencies should consider whether and to what extent they should disclose such  
242 information with respect to agency subcomponents.

243 ~~25-26.~~ When agencies consider timeliness or productivity in appraising the performance  
244 of employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive  
245 Service, and when they set timeliness or productivity expectations for administrative law  
246 judges, who are not subject to performance appraisals, they should disclose such

Commented [CA9]: Proposed Amendment from Council #8



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247 measures publicly and explain how they were developed. For employees who are subject  
248 to performance appraisal, agencies should disclose publicly: (i) how they use such  
249 measures to appraise employees, and (ii) whether employees are eligible for incentive  
250 awards based on timeliness or productivity.

**Consideration for Congress**

251 ~~26-27.~~ Congress ordinarily should not impose statutory time limits on agency  
252 adjudication. If Congress does consider imposing time limits on adjudication by a  
253 particular agency, it should first seek information from the agency and stakeholders. If  
254 Congress does decide to impose time limits, it should do so only after determining that  
255 the benefits of such limits outweigh the costs. If Congress then decides time limits are  
256 necessary or warranted, it should require agencies to adopt reasonable time limits or, in  
257 rare circumstances, impose such limits itself. In setting any statutory time limits,  
258 Congress If Congress decides that time limits on particular agency adjudications are  
259 needed, it should:

Commented [CA10]: Proposed Amendment from Council #9

- 260 a. Recognize that preexisting statutory or regulatory frameworks or special
- 261 circumstances (e.g., a sudden substantial increase in an agency’s caseload or the
- 262 complexity of the issues in a particular case) may justify an agency’s failure to
- 263 conclude a case within the proposed statutory time limit;
- 264 b. State expressly what should occur if the agency does not meet its statutory
- 265 deadline; and
- 266 c. State expressly whether affected persons may or may not enforce the time limit
- 267 through judicial action and, if so, the nature of the relief available for this
- 268 purpose.



## User Fees

### Committee on Regulation

#### Proposed Recommendation for Plenary | December 14, 2023

1 Federal agencies charge user fees as part of many programs. A “user fee,” for purposes of  
2 this Recommendation, is any fee that an agency (1) charges for a good or service that the agency  
3 provides to the party paying the fee or (2) collects from an entity engaged or seeking to engage in  
4 a regulated activity.<sup>1</sup> User fees serve many purposes, for example, to shift the costs of a program  
5 from taxpayers to those persons or entities whom the program benefits, to supplement general  
6 revenue, or to incentivize or discourage certain behavior.

7 Agencies have assessed user fees since this country was founded. In 1952, Congress  
8 enacted the Independent Offices Appropriations Act (IOAA), giving agencies broad authority to  
9 charge user fees in connection with specific goods or services that benefit identifiable persons or  
10 entities.<sup>2</sup> The Bureau of the Budget, the predecessor to the Office of Management and Budget  
11 (OMB), issued Circular A-25 in 1959 to implement the IOAA. Since 1982, when the President’s  
12 Private Sector Survey on Cost Control urged expanded application of user fees, Congress and  
13 agencies have increasingly relied on user fees, instead of or in addition to general revenue, to  
14 fund federal programs.

15 In 1987, the Administrative Conference adopted Recommendation 87-4, *User Fees*,  
16 which identified basic principles for Congress and agencies to consider in establishing user fee  
17 programs and setting fee levels. Recommendation 87-4 stated that a “government service for

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<sup>1</sup> Erika Lietzan, *User Fee Programs: Design Choices and Process 7* (Nov. 9, 2023) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> 31 U.S.C. § 9701.



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18 which a user fee is charged should directly benefit fee payers.” It also identified principles  
19 intended to efficiently and fairly allocate government goods and services.<sup>3</sup>

20 There have been significant developments since ACUS last addressed this topic in 1987.  
21 Congress and agencies have continued to expand the collection of and reliance on user fees,<sup>4</sup> and  
22 OMB revised Circular A-25 in 2017 to update federal policy regarding fees assessed for  
23 government services, resources, and goods; provide information on which activities are subject  
24 to user fees and the basis for setting user fees; and provide guidance for implementing and  
25 collecting user fees.

26 Today, user fee programs serve many purposes and vary significantly in their design.  
27 Some are established by a specific statute. Such statutes may specify the fee amount, provide a  
28 formula for calculating fees, or prescribe a standard for the agency to use in establishing  
29 reasonable fees (e.g., full or partial cost recovery). Some statutory authorizations are permanent,  
30 while others sunset and require periodic reauthorization. Other programs are established by  
31 agencies on their own initiative under the IOAA or other authority. Some fees are transactional,  
32 while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while  
33 others are set to promote equity or advance other values, goals, and priorities. Other statutes  
34 impose requirements that apply to a user fees program unless Congress specifies otherwise; one  
35 example is the Miscellaneous Receipts Act, which requires that money received by the  
36 government from any source be deposited into the U.S. Treasury.<sup>5</sup>

37 User fee program designers must also consider possible negative consequences such as  
38 the potential for fees to adversely affect the quality of agency decision making or its appearance  
39 of impartiality; their potential to affect the behavior of private persons and entities in unintended  
40 ways; the impact of the fees on low-income people, members of historically underserved  
41 communities, and small businesses and other small entities; and the agency’s revenue stability.  
42 The Conference has consistently emphasized the potential for public engagement to help

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<sup>3</sup> 52 Fed. Reg. 23,634 (June 24, 1987).

<sup>4</sup> Lietzan, *supra* note 1, at 3.

<sup>5</sup> 31 U.S.C. § 3302.



43 program designers obtain more comprehensive information, enhance the legitimacy of their  
44 decisions, and increase public support for their decisions.<sup>6</sup>

45 Given expanded reliance on user fees, the development of new models for user fee  
46 programs, and updated guidance on user fees from OMB, the Conference decided to revisit the  
47 subject. This Recommendation represents the Conference’s current views on the objectives,  
48 design, and implementation of user fee programs by Congress and agencies, and supplements  
49 and updates Recommendation 87-4.<sup>7</sup>

## RECOMMENDATION

### General Considerations

- 50 1. Program designers in Congress and the executive branch should identify the purpose(s) of  
51 an agency’s user fee program, such as shifting the costs of a program from taxpayers to  
52 those persons or entities whom the program benefits, supplementing general revenue, or  
53 incentivizing or discouraging certain behavior, and design statutes and rules to serve such  
54 purpose(s). Program designers should also consider whether such purpose(s) support or  
55 oppose the imposition of user fees and related waivers, exemptions, or reduced rates.  
56 Congress should consider how it should maintain accountability over government action,  
57 such as through the budgetary process or specifications on the use of taxpayer funds and  
58 money collected through user fee programs.
- 59 2. When establishing a user fee-funded program, especially one with a novel fee structure  
60 and one that collects fees from regulated entities, program designers should consider  
61 whether any feature of the program might inappropriately affect or be perceived as

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<sup>6</sup> Cf. Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Agency Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); see also Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023); Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42,680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021).

<sup>7</sup> 52 Fed. Reg. 23,634. This Recommendation does not address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.



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62 inappropriately affecting agency decision making and whether any steps should be taken  
63 to mitigate those effects.

- 64 3. Program designers should consider whether a user fee may have a negative or beneficial  
65 effect on the behavior of individuals and entities subject to that fee as well as whether it  
66 might have other public costs or benefits, such as promoting equity, reducing barriers to  
67 market entry, incentivizing desirable behavior, or producing some other socially  
68 beneficial outcome.
- 69 4. Program designers should ensure user fees are not disproportionate to government costs  
70 or to the benefits received.

### **Considerations for Congress**

- 71 5. When Congress enacts a specific statute, separate from the Independent Offices  
72 Appropriations Act, authorizing an agency to collect user fees, it should specify, as  
73 applicable:
- 74 a. The manner for setting fee levels. Congress should either determine the amount of  
75 the fee, with or without adjustment for inflation, or a formula for calculating it, or  
76 alternatively give the agency discretion to determine the appropriate fee (e.g., to  
77 achieve a particular purpose or to recover some or all of the costs of providing a  
78 good or service or administering a program);
  - 79 b. Any circumstances in which the agency may or must charge a fee or, conversely,  
80 may or must waive or reduce the fee amount. Congress should determine whether  
81 it is appropriate to reduce or eliminate fees for certain individuals or entities to  
82 promote equity, reduce barriers to market entry, incentivize desirable behavior, or  
83 produce some other socially beneficial outcome;
  - 84 c. Any required minimum process for setting or modifying fees, either the notice-  
85 and-comment rulemaking process set forth in 5 U.S.C. § 553 or an alternative  
86 process, including requirements for public engagement;
  - 87 d. Any authorizations, limitations, or prescriptions on the manner in which the  
88 agency may collect fees;





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- 89 e. Any required process for enforcing the obligation to pay user fees and any  
90 penalties for failure to pay required fees;
- 91 f. The availability of collected fees. Congress should determine whether the fees  
92 collected by the agency should be deposited in the U.S. Treasury, consistent with  
93 the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and made available to the  
94 agency only after appropriation;
- 95 g. The period during which the agency may expend collected fees. Should Congress  
96 determine that, for reasons of revenue stability, collected fees should remain  
97 available to the agency, it should consider, for reasons of oversight, whether they  
98 should only be available for a limited period or subject to other requirements or  
99 limitations;
- 100 h. Any authorizations or prescriptions for the uses for which the agency may expend  
101 collected fees;
- 102 i. Any requirement that the agency periodically review its user fees and any  
103 required method(s) for doing so (e.g., comparing fee amounts with corresponding  
104 costs or recalculating fees based on new developments and information); and
- 105 j. Whether the authority granted under the statute sunsets.
- 106 6. Whenever Congress decides to create a new statutory user fee program, it should reach  
107 out to relevant agencies for technical assistance early in the legislative drafting process  
108 and it should consider stakeholder input.

### **Considerations for Agencies**

- 109 7. When an agency establishes a new user fee program or sets fees under an existing  
110 program, it should follow the rulemaking requirements of 5 U.S.C. § 553 unless Congress  
111 has specified otherwise. In engaging with public stakeholders, agencies should follow the  
112 best practices suggested in Recommendations 2018-7, *Public Engagement in*  
113 *Rulemaking*, 2021-3, *Early Input on Regulatory Alternatives*, and 2023-2, *Virtual Public*  
114 *Engagement in Agency Rulemaking*, including the time and resources available to the  
115 agency to conduct such public participation opportunities.



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- 116 8. When engaging with the public regarding user fees, agencies should clearly communicate  
117 to the public the purpose(s) of their user fee program. Agencies should be transparent  
118 with the public, which can be accomplished through, among other things, identification  
119 of and engagement with stakeholders, public participation at early stages such as during  
120 cost and demand forecasting and the budget formulation process, and providing  
121 information on the agency's user fee program, budget proposals, and fee setting process.
- 122 9. Agencies should maintain an easy-to-find page on their websites describing their user  
123 fee-funded programs, identifying and explaining the fees, describing any waivers or  
124 exemptions available, and providing links to supporting resources, such as the governing  
125 sections of the *United States Code* and the *Code of Federal Regulations*, and recent  
126 notices in the *Federal Register*.
- 127 10. Agencies should conduct regular reviews, consistent with Recommendation 2021-2,  
128 *Periodic Retrospective Review*, of their user fee programs to ensure the programs are  
129 meeting their purposes and that the fee levels are appropriate. Agencies should also  
130 assess other resulting consequences or effects of the programs, such as those described in  
131 Paragraphs 2, 3, and 4.



## User Fees

### Committee on Regulation

#### Proposed Recommendation for Plenary | December 14, 2023

1 Federal agencies charge user fees as part of many programs. For purposes of this project,  
 2 a federal agency “user fee” is (1) any fee assessed by an agency for a good or service that the  
 3 agency provides to the party paying the fee, as well as (2) any fee collected by an agency from an  
 4 entity engaged in, or seeking to engage in, activity regulated by the agency, either to support a  
 5 specific regulatory service provided to that entity or to support a regulatory program that at least  
 6 in part benefits the entity. A “user fee,” for purposes of this Recommendation, is any fee that an  
 7 agency (1) charges for a good or service that the agency provides to the party paying the fee or  
 8 (2) collects from an entity engaged or seeking to engage in a regulated activity.<sup>1</sup> User fees serve  
 9 many purposes, for example, to shift the costs of a program from taxpayers to those persons or  
 10 entities whom the program directly benefits, to supplement general revenue, or to incentivize or  
 11 discourage certain behavior.

12 Agencies have assessed user fees since this country was founded. In 1952, Congress  
 13 enacted the Independent Offices Appropriations Act (IOAA), giving agencies broad authority to  
 14 charge user fees in connection with specific goods or services that benefit identifiable persons or  
 15 entities.<sup>2</sup> The Bureau of the Budget, the predecessor to the Office of Management and Budget  
 16 (OMB), issued Circular A-25 in 1959 to implement the IOAA. Since 1982, when the President’s  
 17 Private Sector Survey on Cost Control urged expanded application of user fees, Congress and  
 18 agencies have increasingly relied on user fees, instead of or in addition to general revenue, to  
 19 fund federal programs.

<sup>1</sup> Erika Lietzan, User Fee Programs: Design Choices and Processes 6 (Nov. 9, 2023) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> 31 U.S.C. § 9701.

**Commented [CA1]:** Proposed Amendment from Council #1:  
 This proposed amendment would revise the second part of the Committee’s proposed definition to clarify that, unlike a tax, a user fee must relate to a benefit received by the payer.  
**Commented [CA2]:** Proposed Amendment from Council #2

DRAFT December 8, 2023



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20 In 1987, the Administrative Conference adopted Recommendation 87-4, *User Fees*,  
21 which identified basic principles for Congress and agencies to consider in establishing user fee  
22 programs and setting fee levels. Recommendation 87-4 stated that a “government service for  
23 which a user fee is charged should directly benefit fee payers.” It also identified principles  
24 intended to ~~efficiently and fairly~~ allocate government goods and services ~~efficiently and fairly~~.<sup>3</sup>

25 There have been significant developments since ACUS last addressed this topic in 1987.  
26 Congress and agencies have continued to expand the collection of and reliance on user fees,<sup>4</sup> and  
27 OMB revised Circular A-25 in 2017 to update federal policy regarding fees assessed for  
28 government services, resources, and goods; provide information on which activities are subject  
29 to user fees and the basis for setting user fees; and provide guidance for implementing and  
30 collecting user fees.

31 Today, user fee programs serve many purposes and vary significantly in their design.  
32 Some are established by a specific statute. Such statutes may specify the fee amount, provide a  
33 formula for calculating fees, or prescribe a standard for the agency to use in establishing  
34 reasonable fees (e.g., full or partial cost recovery). Some statutory authorizations are permanent,  
35 while others sunset and require periodic reauthorization. Other programs are established by  
36 agencies on their own initiative under the IOAA or other authority. Some fees are transactional,  
37 while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while  
38 others are set to ~~promote equity or~~ advance other values, goals, and priorities. Other statutes  
39 impose requirements that apply to a user fees program unless Congress specifies otherwise; one  
40 example is the Miscellaneous Receipts Act, which requires that money received by the  
41 government from any source be deposited into the U.S. Treasury.<sup>5</sup>

42 User fee program designers must also consider possible negative consequences such as  
43 the potential for fees to adversely affect the quality of agency decision making or its appearance  
44 of impartiality; their potential to affect the behavior of private persons and entities in unintended  
45 ways; the impact of the fees on low-income people, members of historically underserved

<sup>3</sup> 52 Fed. Reg. 23,634 (June 24, 1987).

<sup>4</sup> See Lietzan, *supra* note 1, at 3.

<sup>5</sup> 31 U.S.C. § 3302.

Commented [CA3]: Proposed Amendment from Council #3



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46 communities, and small businesses and other small entities; and the agency's revenue stability.  
47 The Conference has consistently emphasized the potential for public engagement to help  
48 program designers obtain more comprehensive information, enhance the legitimacy of their  
49 decisions, and increase public support for their decisions.<sup>6</sup>

50 Given expanded reliance on user fees, the development of new models for user fee  
51 programs, and updated guidance on user fees from OMB, the Conference decided to revisit the  
52 subject. This Recommendation represents the Conference's current views on the objectives,  
53 design, and implementation of user fee programs by Congress and agencies, and supplements  
54 and updates Recommendation 87-4.<sup>7</sup>

### RECOMMENDATION

#### General Considerations

55 1. Program designers in Congress and the executive branch in creating or modifying user  
56 fees, Congress or agencies, as appropriate, should identify the purpose(s) of an agency's  
57 user fee program, such as shifting the costs of a program from taxpayers to those persons  
58 or entities whom the program benefits, supplementing general revenue, or incentivizing  
59 or discouraging certain behavior, and design statutes and rules to serve such purpose(s).  
60 Program designers Congress or agencies should also consider whether or not such  
61 purpose(s) support or oppose the imposition of user fees and related there are reasons for  
62 waivers, exemptions, or reduced rates. Congress should consider how it should maintain  
63 accountability over government action, such as through the budgetary process or  
64 specifications on the use of taxpayer funds and money collected through user fee  
65 programs.

<sup>6</sup> Cf. Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Agency Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); see also Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023); Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42,680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021).

<sup>7</sup> 52 Fed. Reg. 23,634. This Recommendation does not address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.

**Commented [CA4]:** Proposed Amendment from Council #4

**Commented [CMA5]:** Proposed Amendment from Public Member Bernard W. Bell:

"The term 'support or oppose' seems awkward. I propose the following modification: 'Program designers should also consider whether or not such purpose(s) support or oppose the imposition of such user fees and related waivers, exemptions, or reduced rates further or undermines the achievement of such purposes.'"

**Commented [CMA6]:** Comment from Senior Fellow Alan Morrison #1:

Should "accountability for government action" be changed to "accountability for imposition of user fees" - current version too open ended?



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- 66 2. When establishing a user fee-funded program, especially one with a novel fee structure  
67 and one that collects fees from regulated entities, ~~program designers~~Congress or  
68 agencies, as appropriate, should consider whether any feature of the program might  
69 inappropriately affect or be perceived as inappropriately affecting agency decision  
70 making and whether any steps should be taken to mitigate those effects.
- 71 3. ~~Program designers~~Congress or agencies, as appropriate, should consider whether a user  
72 fee may have a negative or beneficial effect on the behavior of individuals and entities  
73 subject to that fee, ~~as well as~~Program designers should also consider whether ~~the user~~  
74 ~~fee~~ might have other public ~~costs or~~ benefits, such as promoting equity, reducing barriers  
75 to market entry, incentivizing desirable behavior, or producing some other socially  
76 beneficial outcome, ~~or might have other public costs~~. Congress or agencies, as  
77 appropriate, should set forth procedures for waiving or reducing user fees that would  
78 potentially exclude low-income individuals and members of historically underserved  
79 communities from participating in the administrative process.
- 80 4. ~~Program designers~~Congress or agencies, as appropriate, should ensure user fees are not  
81 disproportionate ~~in relation~~ to government costs or to the benefits ~~users~~ received.

### Considerations for Congress

- 82 5. When Congress enacts a specific statute, separate from the Independent Offices  
83 Appropriations Act, authorizing an agency to collect user fees, it should specify, as  
84 applicable:
- 85 a. *The manner for setting fee levels.* Congress should either determine the amount of  
86 the fee, with or without adjustment for inflation, ~~or set~~ a formula for calculating it,  
87 or alternatively give the agency discretion to determine the appropriate fee (e.g.,  
88 to achieve a particular purpose or to recover some or all of the costs of providing  
89 a good or service or administering a program);
- 90 b. *Any circumstances in which the agency may or must charge a fee or, conversely,*  
91 *may or must waive or reduce the fee amount.* Congress should determine whether  
92 it is appropriate to reduce or eliminate fees for certain individuals or entities to

Commented [CA7]: Proposed Amendment from Council #5

Commented [CMA8]: Comment from Senior Fellow Alan Morrison #2:

This expresses concern that user fees revenue not be disproportionate to the benefits to those who pay them. But line 52 (P. 1) allows user fees to supplement government revenue. Are they consistent with each other?

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93 promote equity, reduce barriers to market entry, incentivize desirable behavior, or  
94 produce some other socially beneficial outcome;

95 c. *Any required minimum process for setting or modifying fees*, either *through* the  
96 notice-and-comment rulemaking process set forth in 5 U.S.C. § 553 or an  
97 alternative process, including requirements for public engagement;

98 d. *Any authorizations, limitations, or prescriptions ~~on~~ pertaining to the manner in*  
99 *which the agency may collect fees*;

100 e. *Any required process for enforcing the obligation to pay user fees and any*  
101 *penalties for failure to pay required fees*;

102 f. *The availability of collected fees*. Congress should determine whether *or not* the  
103 fees collected by the agency should be deposited in the U.S. Treasury, consistent  
104 with the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and made available to the  
105 agency only after appropriation;

106 g. *The period during which the agency may expend collected fees*. Should Congress  
107 determine that, for reasons of revenue stability, collected fees should remain  
108 available to the agency, it should consider, for reasons of oversight, whether they  
109 should only be available for a limited period or subject to other requirements or  
110 limitations;

111 h. *Any authorizations or prescriptions for the uses for which the agency may expend*  
112 *collected fees*;

113 i. *Any requirement that the agency periodically review its user fees and any*  
114 *required method(s) for doing so* (e.g., comparing fee amounts with corresponding  
115 costs or recalculating fees based on new developments and information); and

116 j. *Whether the authority granted under the statute sunsets*.

117 6. Whenever Congress decides to create a new statutory user fee program, it should reach  
118 out to relevant agencies for technical assistance early in the legislative drafting process  
119 and it should consider *stakeholder input from interested persons*.

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Commented [CMA9]: Comment from Senior Fellow Alan Morrison #3:

Tells Congress to decide on penalties for late payment - should we add interest, including the rate?

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## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Considerations for Agencies

- 120 7. When an agency establishes a new user fee program or sets fees under an existing  
121 program, it should follow the rulemaking requirements of 5 U.S.C. § 553 unless Congress  
122 has specified otherwise. In engaging with **interested members of the public stakeholders**,  
123 agencies should follow the best practices suggested in Recommendations 2018-7, *Public*  
124 *Engagement in Rulemaking*, 2021-3, *Early Input on Regulatory Alternatives*, and 2023-2,  
125 *Virtual Public Engagement in Agency Rulemaking*, ~~including the time and resources~~  
126 ~~available to the agency to conduct such public participation opportunities.~~
- 127 8. ~~When engaging with the public regarding user fees, a~~ agencies should clearly  
128 communicate to the public the purpose(s) of ~~its~~ **their** user fee programs, ~~the nature of the~~  
129 ~~fee setting process, and the uses for which the agency expends collected fees.~~ Agencies  
130 should also be transparent with ~~and engage~~ the public; ~~when conducting activities that~~  
131 ~~may affect the design of their user fee programs or the level of their fees, for instance by~~  
132 ~~which can be accomplished through, among other things, identification of and~~  
133 ~~engagement with stakeholders, inviting~~ public participation at early stages such as during  
134 cost and demand forecasting and ~~the budget formulation process, and providing~~  
135 ~~information on the agency's user fee program, budget proposals, and fee setting process.~~
- 136 9. Agencies should maintain an easy-to-find page on their websites describing their user  
137 fee-funded programs, identifying and explaining the fees, describing any waivers or  
138 exemptions available, ~~identifying the uses for which the agency expends collected fees,~~  
139 and providing links to supporting resources, such as the governing sections of the *United*  
140 *States Code* and the *Code of Federal Regulations*, and recent notices in the *Federal*  
141 *Register*.
- 142 10. Agencies should conduct regular reviews, consistent with Recommendation 2021-2,  
143 *Periodic Retrospective Review*, of their user fee programs to ensure the programs are  
144 meeting their purposes and that the fee levels are appropriate. Agencies should also  
145 assess other resulting consequences or effects of the programs, such as those described in  
146 Paragraphs 2, 3, and 4.

**Commented [CA10]:** Proposed Amendment from Council #6:

The cited recommendations take agency time and resource constraints into account.

**Commented [CA11]:** Proposed Amendment from Council #7:

The proposed amendment would more clearly distinguish between public engagement during the initial design of the program (Paragraph 7) and public engagement at other junctures (Paragraph 8).

**Commented [CA12]:** Proposed Amendment from Council #8





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