



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Contractors in Rulemaking

### Committee on Rulemaking

Proposed Recommendation | June 16, 2022

#### Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Agencies rely on private contractors to perform many kinds of services in support of their  
2 rulemaking activities. These services can occur at any stage of the rulemaking process. Functions  
3 that agencies assign to contractors include conducting research undergirding a rule; preparing  
4 regulatory impact analyses; facilitating meetings with interested persons; and tabulating,  
5 categorizing, or summarizing public comments the agency receives. As with other agency  
6 functions, contracting out specific rulemaking functions may help increase staffing flexibility to  
7 ease workloads, lower administrative costs, provide topic-specific expertise or access to  
8 technology that agencies do not possess internally, and provide alternative perspectives on  
9 particular issues.<sup>1</sup>

10 Agencies' use of contractors, however, may also raise distinctive concerns in the  
11 rulemaking context.<sup>2</sup> Agencies must ensure that they comply with relevant applicable legal  
12 obligations, including the prohibition on outsourcing "inherently governmental functions,"  
13 (IGFs).<sup>3</sup> They also and face a need to must exercise their discretion in a way that avoids ethics

<sup>1</sup> See Bridget C.E. Dooling & Rachel Augustine Potter, Contractors in Rulemaking (May 9, 2022) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> Cf. Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, ¶ 6, 50 Fed. Reg. 28,364, 28,365 (July 12, 1985).



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14 violations, promotes efficiency, and ensures that agency officials exercise proper oversight of  
15 contractors. With respect to the prohibition on contracting out IGFs, the Office of Management  
16 and Budget's Circular A-76, *Performance of Commercial Activities*, and the Office of Federal  
17 Procurement Policy's Policy Letter 11-01, *Performance of Inherently Governmental and Critical*  
18 *Functions*, provide examples of certain IGFs that should not be contracted out.<sup>4</sup> Circular A-76  
19 also describes activities functions that are "closely associated" with IGFs and for which agencies  
20 should exercise heightened caution when assigning such functions to contractors.<sup>5</sup>

21 Although neither Circular A-76 nor Policy Letter 11-01 describes contracting functions  
22 related to rulemaking activities in any detail, they generally provide that contractor functions  
23 should be limited to those that support the agency's policymaking activities and do not supplant  
24 the agency's decision-making role. The risk of contracting out an IGF, or even an activity closely  
25 associated with an IGF, is heightened when a contractor is drafting the text or preamble of a rule,  
26 performing analyses, or presenting strategy options to be used by agency employees in the  
27 rulemaking context. As a practical matter, these concerns may also be greater heightened when  
28 agencies enter into contracts that span multiple years and cover multiple rulemaking functions.

29 Among the applicable legal obligations is the prohibition on contracting out "inherently  
30 governmental functions."<sup>6</sup> Inherently governmental functions are those that are "so intimately  
31 related to the public interest as to require performance by Federal Government employees."<sup>7</sup>  
32 They include "functions that require either the exercise of discretion in applying Federal

<sup>4</sup> OMB CIRCULAR A-76, *supra* note 23; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Oct. 12, 2011).

<sup>5</sup> OFPP Policy Letter 11-01 defines "closely associated with IGF" in the context of policy and regulatory development as "support for policy development, such as drafting policy documents and regulations, performing analyses [and] feasibility studies, and [developing] strategy options." 76 Fed. Reg. at 56,234.

<sup>6</sup> See 48 C.F.R. § 7.503; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Oct. 12, 2011) [hereinafter OFPP Policy Letter]; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). The prohibition is reflected in the Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) [hereinafter FAIR Act], and the National Defense Authorization Act (NDAA) for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411-12 (2008).

<sup>7</sup> OFPP Policy Letter, *supra* note 6, § 3, at 56,236; accord FAIR Act, *supra* note 6, § 5, at 2384.

**Commented [CMA1]:** Comment from Senior Fellow Alan Morrison:

"The discussion of IGF's and closely associated IGFs at the top of page 2 would be improved if it included an explanation of WHY those functions should not be performed by contractors. I think that the reason is that the actual decisions, and important steps in the decisional process, cannot legally be performed by persons who are not officers of the United States. Indeed, that was one of the flaws identified by the Court in setting aside the statute in Schechter Poultry."



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33 Government authority or the making of value judgments in making decisions for the Federal  
34 Government . . .”<sup>8</sup>

35       Whereas “determining” the content of a regulation is an inherently governmental  
36 function,<sup>9</sup> providing “[s]ervices that involve or relate to the development of regulations” is not.<sup>10</sup>  
37 Rather, the provision of such services is considered to be “closely associated with the  
38 performance of inherently governmental functions.”<sup>11</sup> When agencies allow contractors to  
39 perform functions closely associated with inherently governmental functions, they must  
40 exercise heightened caution.<sup>12</sup> They must, in particular, “give special consideration to Federal  
41 employee performance of [such] functions and, when such work is performed by contractors,  
42 provide greater attention and an enhanced degree of management oversight of the contractors’  
43 activities to ensure that contractors’ duties do not expand to include performance of inherently  
44 government functions.”<sup>13</sup>

45       Agencies must also consider potential ethical issues when contracting out rulemaking  
46 functions. Although Because contractors are, with a few exceptions, generally not subject to the  
47 ethics laws governing federal employees, there are nevertheless potential ethics-related risks  
48 against which agencies must protect and which may not be addressed adequately under existing  
49 procurement regulations.<sup>14</sup> The risks of conflicts of interest (both organizational and personal)  
50 and misuse of confidential information may be especially salient when contractors support a  
51 policymaking function such as rulemaking.<sup>15</sup> Agencies can mitigate these concerns risks by

<sup>8</sup> OFPP Policy Letter, *supra* note 6, § 3(a), at 56,236; accord FAIR Act, *supra* note 6, § 5(2)(B), at 2385.

<sup>9</sup> 48 C.F.R. § 7.503(c)(5); accord OFPP Policy Letter, *supra* note 6, app. A, ex. 7, at 56,240.

<sup>10</sup> 48 C.F.R. § 7.503(d)(4); accord OFPP Policy Letter, *supra* note 6, app. B, ex. 1(d), at 56,241.

<sup>11</sup> OFPP Policy Letter, *supra* note 6, app. B, at 56,241; accord 48 C.F.R. § 7.503(d).

<sup>12</sup> See OFPP Policy Letter, *supra* note 6, § 4(a)(2), at 56,236.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., 48 C.F.R. subparts 3.11 (Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions), 9.5 (Organizational and Consultant Conflicts of Interest).

<sup>15</sup> See Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

**Commented [CA2]:** Proposed Amendment from Council:

The Council proposes striking much of the language in lines 11-28 and replacing it with what appears in lines 29-44. The main reason for this amendment is to supply a definition of “inherently governmental function,” which is missing from the Committee’s Recommendation. The amendment also brings up the definition of “activities closely associated with inherently governmental functions” from the footnote (previously footnote 5) to the above-the-line text.

**Commented [CMA3]:** Proposed Amendment from Senior Fellow Alan Morrison #1:

“This makes it clearer that potential ethical issues arising from conflicts that the contractor might have must be considered, which is, I think, the problem at issue here.”



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52 establishing and internally disseminating policies and procedures governing the use and  
53 management of contractors in rulemaking, which may include including any required disclosure  
54 related to their usegment that the agency disclose its use of contractors.

55 In addition to legal and ethical issues, Agencies will also need to consider the practical  
56 benefits and challengesdownsides of using contractors to perform rulemaking-related functions  
57 in furtherance of agency rulemaking, including whether. Those considerations might include the  
58 effects of repeated reliance on contractors might compromise agencies' in-house capacities, in  
59 particular their ability to maintain necessary career staff with appropriate skills. Agencies may  
60 also wish to consider alternative methods to contracting when they need to expand internal  
61 capacity in connection with rulemaking, such as by using executive branch rotations, fellowship  
62 programs, or federally funded research and development centers, or by making arrangements for  
63 assigning temporary employees under the Intergovernmental Personnel Act.<sup>16</sup>

64 This Recommendation provides guidance to agencies for when they are considering  
65 contracting out certain rulemaking-related functions. Recognizing that agencies' needs vary  
66 enormously, it addresses a range of legal, ethical, prudential, and practical considerations that  
67 agencies should take into account when using contractors.

### RECOMMENDATION

#### Internal Management

- 68 1. Agencies that use contractors to perform rulemaking-related functions should adopt and  
69 publish written policies related to their use. These policies should cover matters such as:
  - 70 a. The types of rulemaking functions considered to be inherently governmental  
71 functions (IGFs) or closely associated with IGFsinherently governmental  
72 functions;

<sup>16</sup> See 5 U.S.C. §§ 3371–3375; see also 5 C.F.R. part 334.

Commented [CMA4]: Proposed Amendment from Senior Fellow Alan Morrison #2:

"This paragraph is not about benefits at all, but about problems, and the opening sentence does not convey that."



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- 73        b. Internal procedures to ensure that agency employees do not contract out **IGFs**  
74              **inherently governmental functions** and to ensure increased scrutiny when  
75              contracting out functions that are closely associated with **IGFs****inherently**  
76              **governmental functions**;
- 77        c. Requirements for internal disclosure concerning functions contractors undertake  
78              with regard to specific rulemakings;
- 79        d. Standards for when contractors should identify themselves as such in  
80              communications with the public in connection with rulemakings; and
- 81        e. Ethical rules applicable to contractors, **including their employees**.
- 82        2. To enhance their management of contractors, agencies should consider providing  
83              rulemaking-specific training for **managers****employees** on agency policies and ethical  
84              restrictions applicable to contractors. Agencies should also consider designating an  
85              agency office or officer to answer questions about the use of contractors to perform  
86              rulemaking-related functions and be responsible for deciding whether an activity is an  
87              **IGF****inherently governmental functions**.
- 88        3. When agencies rely on contractors in a rulemaking, they should ensure that agency  
89              employees can identify contractors and are aware of contractors' assigned functions.  
90              Agencies should specifically focus on whether contractors should work in the same space  
91              as agency employees, how and to what extent they may participate in meetings with  
92              agency leadership or other meetings at which substantive policy is decided, and whether  
93              they should be provided with their own agency email addresses.
- 94        4. Agencies should consider ways to share information about contractors in rulemaking  
95              within and across agencies. This might include using existing contracting databases or  
96              schedules to promote greater coordination and efficiency concerning existing rulemaking  
97              contracts, as well as informal sharing of practices for managing contractors.

**Commented [CMA5]:** Comments from Public Member Jack Beermann & Senior Fellow Alan Morrison:

Not sure what is meant by this. Disclosure of what? Please clarify the subject of disclosure that is recommended.

**Commented [CMA6]:** Proposed Amendment from Senior Fellow Alan Morrison #3:

"Individual employees may have conflicts, even if the contractor does not."



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### Ethics

- 98 5. When selecting and managing contractors for rulemaking-related functions, agencies  
99 should evaluate whether any firm under consideration to serve as a contractor may have  
100 an actual or perceived organizational conflict of interest in connection with any assigned  
101 function. When a potential organizational conflict exists or arises, agencies should either  
102 select another contractor or put in place appropriate protections to ensure that the  
103 contractor's outside interests do not undermine its ability to perform its assigned  
104 functions in a way that does not create an actual or perceived conflict of interest.
- 105 6. When contracting out rulemaking-related functions for which there is a risk of a personal  
106 conflict of interest by a covered employee of the contractor, agencies should provide in  
107 the contract that the contractor will not assign functions to any employee who has an  
108 actual or perceived conflict of interest and, as appropriate, provide employee training will  
109 train employees on recognizing and disclosing personal conflicts. The contract should  
110 also provide that, in the event that an employee improperly performs a function despite  
111 the existence of a personal conflict of interest, the contractor will disclose the conflict to  
112 the agency and undertake appropriate remedial action.
- 113 7. When contracting out rulemaking-related functions for which there is a risk of misuse of  
114 confidential information, agencies should provide in the contract that the contractor will  
115 ensure that any employee handling such information has been appropriately trained on  
116 the necessary safeguards. The contract should also provide that the contractor will  
117 disclose any breach of this obligation misuse of confidential information to the agency  
118 and undertake appropriate remedial actions.

### Transparency

- 119 8. When an agency uses a contractor to perform an activity closely associated with an IGF  
120 in a specific rulemaking, the agency should consider disclosing the contractor's role in  
121 the rulemaking docket, the notice of proposed rulemaking, or and the preamble to the

**Commented [CMA7]:** Comment from Public Member Jack Beermann:

"I think we need a definition of 'covered employee.' It is not clear to me what that refers to."

**Commented [CMA8]:** Proposed Amendment from Public Member Jack Beermann #1:

"I found the word 'improperly' confusing. I think it would be better just to delete the word because I believe the remainder of the sentence covers the conflict of interest without it, and the word implies that perhaps there is something else wrong with the way the employee performed the function."

**Commented [CMA9]:** Proposed Amendment from Public Member Jack Beermann #2:

"I suggest changing 'breach of this obligation' to 'misuse of confidential information' because the only obligation mentioned is to put something in the contract and it is my understanding that the intent is to refer to misuse of confidential information."



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122 final rule. Agencies should, including, if legally permissible unless legally precluded,  
123 also disclose the identity of the contractor.

- 124 9. Agencies should ensure that their agreements contracts with contractors will allow the  
125 agencies to meet legal requirements for disclosure of information in connection with the  
126 rulemaking process and judicial review.

**Commented [CMA10]:** Proposed Amendment from Senior Fellow Alan Morrison #4:

"I would change 'if legally permissible' (which generally limits disclosure) to 'unless legally precluded' which generally favors disclosure."

### Intergovernmental Guidance

- 127 10. The Office of Management and Budget should consider assessing whether current agency  
128 practices align with broader procurement best practices and providing whether to provide  
129 guidance on contractor-performed functions associated with rulemaking processes.  
130 Among other things, this guidance might provide specific examples of rulemaking-  
131 related functions that qualify as IGFs-inherently governmental functions and should not  
132 be contracted out or that are closely associated with IGFs-inherently governmental  
133 functions such that agencies should exercise heightened caution when contracting out  
134 those functions.

**Commented [CMA11]:** Proposed Amendment from Public Member Jack Beermann #3