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

Agencies’ use of contractors, however, may also raise distinctive concerns in the rulemaking context. Agencies must ensure that they comply with relevant legal obligations, including the prohibition on outsourcing “inherently governmental functions” (IGFs). They should also exercise their discretion in a way that avoids ethics violations, promotes efficiency, and ensures that agency officials exercise proper oversight of contractors. With respect to the prohibition on contracting out IGFs, the Office of Management and Budget’s Circular A-76, Performance of Commercial Activities, and the Office of Federal Procurement Policy’s Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, provide examples of certain IGFs that should not be contracted out. Circular A-76 also describes activities that are

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2 48 C.F.R. § 7.503; see also Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular A-76 (Revised), Performance of Commercial Activities (2003). Other relevant legal considerations may be presented under other sources of law.
“closely associated” with IGFs and for which agencies should exercise heightened caution when assigning such functions to contractors.⁴

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

Agencies must consider potential ethical issues when contracting out rulemaking functions. Although contractors are, with a few exceptions, generally not subject to the ethics laws governing federal employees, there are nevertheless potential ethics-related risks against which agencies must protect and which may not be addressed adequately under existing procurement regulations.⁵ The risks of conflicts of interest (both organizational and personal) and misuse of confidential information may be especially salient when contractors support a policymaking function such as rulemaking.⁶ The establishment and dissemination of policies and procedures within the agency about the use and, management of contractors in rulemaking, and any disclosure requirements for the disclosure of contractors in rulemakingsuch use, could be one way for agencies to mitigate these concerns.

⁴ 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 56234.
⁵ 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).
Agencies will need to consider the practical benefits and challenges of using a contractor to perform a function in furtherance of agency rulemaking. Agencies may also wish to consider alternative methods to contracting when they need to expand internal capacity in connection with rulemaking, such as by using executive branch rotations, fellowship programs, or Federally Funded Research and Development Centers, or by making arrangements under the Intergovernmental Personnel Act.

This Recommendation provides guidance to agencies for when they are considering contracting out certain rulemaking-related functions. Recognizing that agencies’ needs vary enormously, it addresses a range of legal, ethical, prudential, and practical considerations that agencies should consider when using contractors.

**RECOMMENDATION**

**Internal Management**

1. Agencies should adopt and publish written policies relating to the use of contractors to perform rulemaking-related functions and covering matters, such as:
   a. The types of rulemaking functions that the agency considers to be inherently governmental functions (IGFs) or closely associated with IGFs;
   b. Internal procedures to ensure that agency personnel do not contract out IGFs and to ensure increased scrutiny when contracting out functions that are closely associated with IGFs;
   c. Requirements for internal disclosure concerning functions contractors undertake with regard to specific rulemakings;
   d. Standards for when contractors should identify themselves as such in communications with the public in connection with a rulemaking; and
   e. Ethical rules applicable to government contractors.

2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for managers on agency policies and ethical restrictions applicable to contractors. Agencies should also consider designating an agency office...
or officer who can answer questions about the use of contractors to perform rulemaking-related functions and is responsible for deciding whether an activity is an IGF.

3. When agencies rely on contractors in a rulemaking, they should ensure that agency employees can identify contractors and are aware of contractors’ assigned functions. Agencies may address whether contractors should work in the same space as agency employees, how and to what extent they may participate in meetings with agency leadership or other meetings at which substantive policy is decided, and whether they should be provided with agency email addresses.

4. Agencies should consider ways to share information about contractors in rulemaking within and across agencies. This might include using existing contracting databases or schedules to encourage greater coordination and efficiency concerning existing rulemaking contracts, as well as informal sharing of practices for managing contractors.

Ethics

5. When selecting and managing contractors for rulemaking-related functions, agencies should evaluate whether any organization under consideration to serve as a contractor may have an actual or perceived organizational conflict of interest in connection with any assigned function. When a potential organizational conflict exists or arises, agencies should either select another contractor or put in place appropriate protections to ensure that the contractor’s outside interests do not undermine its ability to perform its assigned functions in a way that does not create an actual or perceived conflict of interest.

6. When contracting out rulemaking-related functions for which there is a risk of a personal conflict of interest by a covered employee, agencies should include provisions in the contract that the contractor will not assign functions under the contract to any employee who has an actual or perceived conflict of interest and, as appropriate, provide employee training on recognizing and disclosing personal
conflicts. The clause should also provide that, in the event that an employee,
improperly performs a function despite the existence of a personal conflict of interest,
the contractor will disclose the conflict to the agency and undertake appropriate
remedial action.

7. When contracting out rulemaking-related functions for which there is a risk of misuse
of confidential information, agencies should include provisions in the contract
that the contractor will ensure that any employee handling such information has been
appropriately trained on the necessary safeguards. The clause should also provide that
the contractor will disclose any breach of this obligation to the agency and undertake
appropriate remedial actions.

**Transparency**

8. When an agency uses a contractor to perform an activity closely associated with an
IGF in a specific rulemaking, the agency should consider disclosing the contractor’s
role in the rulemaking docket, a notice of proposed rulemaking, or preamble to the
final rule, including, if legally permissible, identifying the contractor.

9. Agencies should ensure their agreements with contractors will allow them to meet
legal requirements for disclosure of information in connection with the rulemaking
process and judicial review.

**Intergovernmental Guidance**

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