



## **Recruiting and Hiring Agency Attorneys**

### **Ad Hoc Committee**

#### **Questions for the Committee's Consideration | October 15, 2019**

1 **Choosing Hiring Procedures With An Accurate Understanding of Which Procedures Are**  
2 **Required and Which Procedures Go Beyond What is Required**

3 Federal law affords agencies great flexibility with respect to processes they may use to fill 0905  
4 attorney positions (“0905” is the occupational code that the Office of Personnel Management  
5 (OPM) has assigned to attorney positions that fall under Schedule A of the excepted service, the  
6 subject of this project). At one end of the spectrum, agencies can hire someone without posting  
7 an announcement or otherwise accepting applications, as long as they comply with the merit  
8 system principles and equal employment opportunity laws, as highlighted in the report. On the  
9 other end, agencies can structure their hiring procedures to closely resemble those of the  
10 competitive service, including adopting a formal category or numerical rating system; hiring  
11 candidates only from approved certification lists developed by their human resources (HR)  
12 departments; and using similar preference eligibility procedures to those required for competitive  
13 service hiring. Agencies can also adopt any number of practices that fall somewhere in between  
14 these two ends.

15 Based on our research, agency practices are scattered along this spectrum, with some closely  
16 approaching both ends of it. It appears that in at least some instances, agencies adopt procedures  
17 beyond those required by law because they believe such procedures are legally required.

18 Should ACUS issue recommendations with respect to ensuring that if agencies choose hiring  
19 practices beyond those that are legally required, they do so with an understanding that they are  
20 going beyond what is legally required? If so, the following questions are designed to help guide



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21 the Committee's deliberations on the topic:

- 22 1. Should ACUS recommend that HR officials, hiring managers, or both, be better trained  
23 on statutory, regulatory, and presidentially-issued requirements pertaining to hiring of  
24 0905 attorneys? If so, what should that training entail? Who should conduct that training?
- 25 2. Should ACUS recommend who within an agency should write agency-internal hiring  
26 policies and who should train employees on these policies?
- 27 3. OPM used to publish the Federal Personnel Manual (FPM), which compiled all federal  
28 HR policies and tracked their legal evolution. Should ACUS recommend that OPM  
29 reinstate (or consider reinstating) the FPM or otherwise maintain some system allowing  
30 HR managers and attorneys involved in the hiring process to research the development of  
31 specific HR policies?
- 32 4. Should ACUS recommend factors for agencies to consider when determining what hiring  
33 procedures to implement? Such factors could include whether it is in the best interest of  
34 the agency and the public to have procedures beyond what are required for hiring 0905  
35 attorneys; agencies may easily find qualified, interested candidates without, for example,  
36 publicly posting an announcement; or there is some external factor, such as an imminent  
37 hiring freeze that necessitates minimal procedures.

### 38 **Drafting Job Announcements**

39 Although drafting job announcements is not required for 0905 positions, many if not most  
40 agencies do so nonetheless for at least some of their 0905 vacancies. The report identifies some  
41 problems with the content of many announcements, including inapplicable boilerplate language  
42 and difficult-to-decipher job qualifications. Should ACUS issue recommendations with respect  
43 to agencies' drafting of job announcements? If so, the following questions are designed to guide  
44 the Committee's deliberations on this topic:

- 45 1. Should ACUS recommend that agency hiring managers, as opposed to HR officials, draft  
46 0905 vacancy announcements?
- 47 2. Should ACUS recommend that agency officials periodically review the skills and



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- 48 qualifications listed in their announcements and, if necessary, revise these skills and  
49 qualifications to ensure they accurately reflect the hiring office's needs?
- 50 3. Should ACUS recommend that vacancy announcements distinguish between mandatory  
51 criteria and desirable (or preferred) criteria for attorney positions? Using phrases such as  
52 "highly competitive" or "highly preferred" helps ensure the applications agencies receive  
53 are focused on those areas but also allows hiring managers the flexibility to hire someone  
54 who does not meet those criteria if agency needs change.
- 55 4. Should ACUS recommend that agencies draft occupational questionnaires (exams in  
56 which applicants rank their qualifications, commonly used in the competitive service),  
57 require that applicants complete them, and screen applicants out based on their answers?
- 58 5. Should ACUS recommend that agencies convey clearly within their announcements the  
59 way they apply veterans' preference for 0905 positions?
- 60 6. Should ACUS recommend that hiring managers review the entirety of vacancy  
61 announcements before they are published? This may be particularly warranted with  
62 respect to USAJobs postings, for which HR officials may insert inapplicable language.

### 63 **Posting and Advertising Job Announcements**

64 Although posting and advertising job announcements are not required for 0905 positions, many  
65 if not most agencies do so nonetheless for at least some of their 0905 vacancies. Should ACUS  
66 issue recommendations with respect to agencies' posting and advertising their job  
67 announcements? If so, the following questions are designed to guide the Committee's  
68 deliberations on this topic:

- 69 1. Should ACUS recommend agencies post announcements on USAJobs?
- 70 2. Should ACUS recommend additional/other locations and resources for agencies to  
71 advertise announcements, such as their own websites, professional or informal contacts  
72 of agency personnel, former agency attorneys and interns, law school career offices,  
73 professional legal associations, and relevant professional networking websites?
- 74 3. Should ACUS recommend that agencies leave their announcements open for a specific



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75 period? Two weeks? More? Fewer?

76 4. Should ACUS issue any recommendations with respect to using numerical application  
77 limits? One option is to recommend that if agencies do use such limits, they at least note  
78 what the limit is in the announcement.

79 5. With respect to achieving a diverse<sup>1</sup> applicant pool, Recommendation 2019-1, *Agency*  
80 *Recruitment and Selection of Administrative Law Judges* states: “agencies must also  
81 ensure that recruitment and selection comply with . . . equal employment opportunity and  
82 government-wide initiatives to promote diversity and inclusion in the federal workforce”  
83 and “[t]o ensure the widest possible awareness of their Administrative Law Judge (ALJ)  
84 vacancies and an optimal and broad pool of applicants, agencies should announce their  
85 vacancies on . . . websites that might reach a diverse range of potential ALJ applicants.”  
86 Should ACUS reproduce this recommendation in the context of 0905 attorneys?

### 87 **Reviewing Applications and Interviewing Applicants**

88 Although receiving applications and interviewing applicants are not required for 0905 positions,  
89 many if not most agencies do so nonetheless for at least some of their 0905 vacancies. Should  
90 ACUS issue recommendations with respect to agencies’ reviewing applications and interviewing  
91 applicants? If so, the following questions are designed to guide the Committee’s deliberations on  
92 this topic:

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<sup>1</sup> Note that an OPM memorandum that implements Executive Order 13,583, *Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce* defines “workforce diversity” as follows:

a collection of individual attributes that together help agencies pursue organizational objectives efficiently and effectively. These include, but are not limited to, characteristics such as national origin, language, race, color, disability, ethnicity, gender, age, religion, sexual orientation, gender identity, socioeconomic status, veteran status, and family structures. The concept also encompasses differences among people concerning where they are from and where they have lived and their differences of thought and life experiences.

U.S. OFFICE OF PERSONNEL MGMT., GOVERNMENT-WIDE DIVERSITY AND INCLUSION STRATEGIC PLAN 6 (2011).



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- 93 1. Should ACUS recommend that agencies use a panel to review applications and/or  
94 interview applicants? A panel may avoid individual biases but may also take longer.  
95 2. If ACUS recommends that agencies use panels in the hiring process, should it  
96 recommend that the panels be diverse and, if so, diverse across what criteria?  
97 Roundtable participants indicated that it may be important for interviewees to “see  
98 themselves” in an interviewer so that they would feel welcome at the agency.  
99 3. Should ACUS recommend that agencies timely communicate with applicants the  
100 results of key decisions (e.g., hired, not hired) and the completion of key steps (e.g.,  
101 application received, application reviewed) in the application process?

### 102 **Hiring Issues Related to Legal Interns**

#### 103 *Hiring Former Interns As 0905 Attorneys*

104 Many roundtable participants supported agencies’ hiring of well-performing former legal interns  
105 as 0905 attorneys upon being admitted to a bar, though they noted there were significant  
106 structural barriers to doing so. For example, an agency cannot generally “convert” a legal intern  
107 to an 0905 attorney upon the intern’s admission to a bar. Rather, that intern must follow  
108 whatever procedure the agency has chosen to adopt for hiring of its 0905 attorneys (e.g., submit  
109 an application, apply via USAJobs). Additionally, for an agency to hire 2L interns as 0905  
110 attorneys after they graduate and are admitted to the bar (about 12 months after the internship  
111 ends) requires significant long-term planning. Should ACUS issue recommendations with  
112 respect to agencies’ hiring of former interns as 0905 attorneys? If so, the following questions are  
113 designed to guide the Committee’s deliberations on this topic:

- 114 1. Should ACUS recommend OPM amend Schedule A to allow agencies to convert  
115 automatically legal interns to 0905 attorneys upon graduation and admission to a bar?  
116 2. Should ACUS recommend any management practices to facilitate agencies’ long-  
117 term planning to hire legal interns as 0905 attorneys?



118 *Hiring Students As Paid Legal Interns*

119 Roundtable officials indicated that hiring students as paid legal interns is difficult because paid  
120 legal interns are part of Schedule D of the excepted service and their hiring process is therefore  
121 subject to more procedural requirements than the hiring process for unpaid interns. Partially  
122 because of the additional procedures required, some agencies only hire unpaid interns, which  
123 means that the pool of former interns is heavily biased in favor of those from schools that fund  
124 unpaid summer internships or those who have access to wealth. Should ACUS issue  
125 recommendations with respect to agencies' hiring of paid legal interns? If so, the following  
126 question is designed to guide the Committee's deliberations on this topic:

- 127 1. Should ACUS recommend that OPM permit agencies to hire students as paid interns  
128 using the same procedures required of agencies to hire students as unpaid interns?

129 **The Probationary Period**

130 Under federal law, the probationary period is part of the hiring process. During this period,  
131 which is required for career civil service employees, hiring officials closely evaluate employees  
132 to determine whether they demonstrate fully the qualifications for continued employment. If the  
133 employee during this probationary period fails to demonstrate fully his or her qualifications for  
134 continued employment, the agency must terminate his or her employment. For excepted service  
135 employees, the probationary period constitutes the first two years of service with the agency.  
136 Should ACUS issue recommendations with respect to agency practices related to the  
137 probationary period for 0905 attorneys? If so, how should ACUS address this topic?

138 **Non-ALJ Adjudicators**

139 Non-ALJ adjudicators (e.g., administrative judges) preside over informal agency adjudications.  
140 Unlike ALJs, who are part of Schedule E of the excepted service, non-ALJ adjudicators are often  
141 0905 attorneys. There are likely unique considerations that are part of the hiring process for non-  
142 ALJ adjudicators as compared to other kinds of 0905 attorneys. For example, non-ALJ



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143 adjudicators must be impartial. The treatment of impartiality in the non-preamble portion of  
144 Recommendation 2019-2 is limited to the following paragraph: “The guidelines and procedures  
145 for the hiring of ALJs should be designed and administered to ensure the hiring of ALJs who will  
146 carry out the functions of the office with impartiality and maintain the appearance of  
147 impartiality.” The preamble refers to Executive Order 13,843, *Excepting Administrative Law*  
148 *Judges from the Competitive Service*, which notes that impartiality is an important trait for ALJs.  
149 Should ACUS issue recommendations with respect to agency hiring of non-ALJ adjudicators? If  
150 so, the following question is designed to guide the Committee’s deliberations on this topic:

- 151 1. Should ACUS recommend any specific hiring practices beyond those designed to  
152 evaluate the impartiality of non-ALJ adjudicators?

### 153 **Presidential Management Fellows**

154 Presidential Management Fellows (PMFs) are Schedule D excepted service employees who  
155 serve two-year terms as PMFs and, if they successfully complete their requirements, are  
156 generally converted to full-time competitive service employees. Several roundtable participants  
157 noted that they are unable to convert law school graduates to 0905 attorneys upon completion of  
158 their Presidential Management Fellowship due to restrictions in the PMF program regulations.  
159 Should ACUS issue recommendations with respect to agencies’ hiring of recent law school  
160 graduates as PMFs? If so, how should ACUS address this?