



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

User Fees

Committee on Regulation

Draft Recommendation for Committee | October 19, 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 a regulated entity to support a regulatory
4 program that benefits the entity.¹ User fees serve many purposes, for example, to shift the costs
5 of a program from taxpayers to those persons or entities whom the program benefits most
6 directly, to supplement general revenue, or to incentivize or discourage certain behavior.

7 Agencies have assessed user fees since this country was founded. Congress enacted the
8 Independent Offices Appropriations Act (IOAA) in 1952, giving agencies broad authority to
9 charge user fees in connection with specific goods or services that benefit identifiable persons or
10 entities.² 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

¹ Erika Lietzan, *User Fee Programs: Design Choices and Process 7* (Oct. 1, 2023) (report to the Admin. Conf. of the U.S.).

² 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.³

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,⁴ and
22 OMB updated Circular A-25 in 2017 to establish 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 structure.
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 programs charge fees
32 to persons or entities in exchange for a specific service or good, while others charge fees to
33 regulated entities to support regulatory programs. Some fees are transactional, while others are
34 paid on a periodic basis. Some fees are set to achieve economic efficiency, while others are set to
35 promote equity or advance other values, goals, and priorities.

36 In designing a user fee program, congressional and executive-branch policymakers must
37 also consider possible negative consequences such as the potential for fees to adversely affect the
38 quality of agency decision making or its appearance of impartiality; their potential to affect the
39 behavior of private persons and entities in unintended ways; the impact of the fees on low-
40 income people and members of historically underserved communities; or the agency’s revenue
41 stability.

42 Given expanded reliance on user fees, the development of new models for user fee
43 programs, and updated guidance on user fees from OMB, the Conference decided to revisit the
44 subject. This Recommendation represents the Conference’s current views on the objectives,

³ 52 Fed. Reg. 23,634 (June 24, 1987).

⁴ Lietzan, *supra* note 1, at 3.



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45 design, and implementation of user fee programs by Congress and agencies.⁵ In particular, this
46 Recommendation encourages congressional and executive-branch program designers to engage
47 meaningfully with interested persons when they design, implement, and review user fee
48 programs. The Conference has consistently emphasized the potential for public engagement to
49 help program designers obtain more comprehensive information, enhance the legitimacy of their
50 decisions, and increase public support for their decisions.⁶

Commented [AU1]: For Committee discussion: Should the recommendation be more specific, for example by referring to “people who would be impacted by the fee”?

RECOMMENDATION

General Considerations

- 51 1. Program designers in Congress and the executive branch should identify the purpose(s) of
52 an agency’s user fee program, such as shifting the costs of a program from taxpayers to
53 those persons or entities whom the program benefits most directly, supplementing general
54 revenue, or incentivizing or discouraging certain behavior, and design statutes and rules
55 to serve such purpose(s). Program designers should also consider whether such
56 purpose(s) support or oppose the imposition of user fees and related waivers, exemptions,
57 or reduced rates.
- 58 2. When establishing a user fee-funded program, designers should address any feature of the
59 program that might inadvertently affect agency decision making, or be perceived as
60 creating a conflict of interest at the agency, especially in novel user fee structures and
61 instances in which an agency collects user fees from entities that it regulates. For
62 example, agencies should consider whether employees whose salaries are supported by
63 fees should be involved in the processes of forecasting costs, budgeting, and fee setting.

⁵ This Recommendation does not address whether agencies may or should draw on user fee receipts absent congressional authorization or outside the process for congressional appropriations, nor does it address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.

⁶ 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).



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- 64 3. Agencies should also address the risk that user fees negatively affect the behavior of
65 individuals and entities subject to user fees.

Considerations for Congress

- 66 4. When Congress enacts a specific statute, separate from the Independent Offices
67 Appropriations Act, authorizing an agency to collect user fees, it should specify, as
68 applicable:
- 69 a. The manner for setting fee levels. Congress should determine whether it is
70 preferable to specify the amount of the fee, with or without adjustment for
71 inflation, or a formula for calculating it, or alternatively whether it is preferable to
72 give the agency greater discretion to determine the appropriate fee (e.g., to
73 achieve a particular purpose or to recover some or all of the costs of providing a
74 good or service or administering a program);
 - 75 b. Any circumstances in which the agency may or must not charge a fee or,
76 conversely, may or must waive or reduce the fee amount. Congress should
77 determine whether it is preferable to collect the same fee from all users (e.g., for
78 reasons of fairness or administrative efficiency) or, alternatively, whether
79 reducing or eliminating fees for certain users would promote equity, reduce
80 barriers to market entry, incentivize desirable behavior, or produce some other
81 socially beneficial outcome;
 - 82 c. Any required minimum process for setting or modifying fees, either the notice-
83 and-comment rulemaking process set forth in 5 U.S.C. § 553 or an alternative
84 process, including requirements for public engagement;
 - 85 d. Any limitations on the manner in which the agency may collect fees;
 - 86 e. Any required process for enforcing the obligation to pay user fees and any
87 penalties for failure to pay required fees;
 - 88 f. Requirements for the management of collected fees. Congress should determine
89 whether measures are needed to address the potential perception of bias and
90 conflicts of interest or for other reasons. Such measures may include requiring the



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- 91 agency to deposit collected funds in the U.S. Treasury or ensuring that personnel
92 whose salaries are funded by user fees do not participate in preparing the agency's
93 budget request or setting of fees;
- 94 g. Any limitations on the uses for which the agency may expend collected fees;
- 95 h. Any limitations on the period during which the agency may expend collected fees.
96 Congress should determine whether, for reasons of revenue stability, collected
97 fees should remain available to the agency until expended or, alternatively,
98 whether, for reasons of oversight, fees should only be available for a limited
99 period (e.g., a specific multi-year period or until a set expiration date);
- 100 i. Any requirement that the agency periodically review its user fees and any
101 required method for doing so (e.g., comparing fee amounts with corresponding
102 costs or recalculating fees based on new developments and information); and
- 103 j. Whether the authority granted under the statute sunsets.
- 104 5. Whenever Congress decides to create a new statutory user fee program, it should offer
105 opportunities for stakeholders to participate and provide input, such as commissioning
106 reports or holding a public hearing, and it should reach out to relevant agencies for
107 technical assistance early in the legislative drafting process.

Considerations for Agencies

- 108 6. Whenever an agency establishes a new user fee program, it should do so after notice and
109 opportunity for public comment. When appropriate, agencies should provide additional
110 opportunities for public participation, such as using an advisory committee, holding a
111 public hearing, or holding a listening session. Opportunities for public participation
112 should reflect the considerations addressed in Recommendations 2018-7, *Public*
113 *Engagement in Rulemaking*, 2021-3, *Early Input on Regulatory Alternatives*, and 2023-2,
114 *Virtual Public Engagement in Agency Rulemaking*, including the time and resources
115 available to the agency to conduct such public participation opportunities.



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- 116 7. When engaging with the public as part of rulemaking regarding user fees, agencies
117 should clearly communicate to the public the purpose of its user fee program which, for
118 example, may include objectives to promote equity or economic efficiency.
- 119 8. Agencies should maintain an easily-accessible page on their websites describing all of
120 their user fee-funded programs, identifying and explaining the fees, and providing links
121 to supporting documentation, such as the governing sections of the *United States Code*
122 and the *Code of Federal Regulations*, and recent notices in the *Federal Register*.
- 123 9. Agencies should be transparent with the public regarding their user fee program, which
124 can be accomplished through, among other things, identification of and engagement with
125 stakeholders, public participation at early stages such as during forecasting and the
126 budget formulation process, and providing information on the agency's user fee program,
127 budget proposals, and fee setting process.
- 128 10. Agencies should conduct regular reviews of their user fee programs to ensure the
129 program is meeting its purposes and not resulting in adverse consequences particularly
130 those described in Paragraphs 2 and 3.