Federal agencies charge user fees as part of many programs. A “user fee,” for purposes of this Recommendation, is any fee that an agency (1) charges for a good or service that the agency provides to the party paying the fee or (2) collects from a regulated entity to support a regulatory program that benefits the entity.¹ User fees serve many purposes, for example, to shift the costs of a program from taxpayers to those persons or entities whom the program benefits most directly, to supplement general revenue, or to incentivize or discourage certain behavior.

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

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

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

There have been significant developments since ACUS last addressed this topic in 1987. Congress and agencies have continued to expand the collection of and reliance on user fees,4 and OMB updated Circular A-25 in 2017 to establish Federal policy regarding fees assessed for government services, resources, and goods; provide information on which activities are subject to user fees and the basis for setting user fees; and provide guidance for implementing and collecting user fees.

Today, user fee programs serve many purposes and vary significantly in their structure. Some are established by a specific statute. Such statutes may specify the fee amount, provide a formula for calculating fees, or prescribe a standard for the agency to use in establishing reasonable fees (e.g., full or partial cost recovery). Some statutory authorizations are permanent, while others sunset and require periodic reauthorization. Other programs are established by agencies on their own initiative under the IOAA or other authority. Some programs charge fees to persons or entities in exchange for a specific service or good, while others charge fees to regulated entities to support regulatory programs. Some fees are transactional, while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while others are set to promote equity or advance other values, goals, and priorities.

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

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

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4 Lietzan, supra note 1, at 3.
design, and implementation of user fee programs by Congress and agencies. In particular, this Recommendation encourages congressional and executive-branch program designers to engage meaningfully with interested persons when they design, implement, and review user fee programs. The Conference has consistently emphasized the potential for public engagement to help program designers obtain more comprehensive information, enhance the legitimacy of their decisions, and increase public support for their decisions.

RECOMMENDATION

General Considerations

1. Program designers in Congress and the executive branch should identify the purpose(s) of an agency’s user fee program, such as shifting the costs of a program from taxpayers to those persons or entities whom the program benefits most directly, supplementing general revenue, or incentivizing or discouraging certain behavior, and design statutes and rules to serve such purpose(s). Program designers should also consider whether such purpose(s) support or oppose the imposition of user fees and related waivers, exemptions, or reduced rates.

2. When establishing a user fee-funded program, designers should address any feature of the program that might inadvertently affect agency decision making, or be perceived as creating a conflict of interest at the agency, especially in novel user fee structures and instances in which an agency collects user fees from entities that it regulates. For example, agencies should consider whether employees whose salaries are supported by fees should be involved in the processes of forecasting costs, budgeting, and fee setting.

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

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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 appropriatons, nor does it address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.

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

Considerations for Congress

4. When Congress enacts a specific statute, separate from the Independent Offices
Appropriations Act, authorizing an agency to collect user fees, it should specify, as
applicable:

   a. The manner for setting fee levels. Congress should determine whether it is
      preferable to specify the amount of the fee, with or without adjustment for
      inflation, or a formula for calculating it, or alternatively whether it is preferable to
      give the agency greater discretion to determine the appropriate fee (e.g., to
      achieve a particular purpose or to recover some or all of the costs of providing a
      good or service or administering a program);

   b. Any circumstances in which the agency may or must not charge a fee or,
      conversely, may or must waive or reduce the fee amount. Congress should
      determine whether it is preferable to collect the same fee from all users (e.g., for
      reasons of fairness or administrative efficiency) or, alternatively, whether
      reducing or eliminating fees for certain users would promote equity, reduce
      barriers to market entry, incentivize desirable behavior, or produce some other
      socially beneficial outcome;

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

   d. Any limitations on the manner in which the agency may collect fees;

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

   f. Requirements for the management of collected fees. Congress should determine
      whether measures are needed to address the potential perception of bias and
      conflicts of interest or for other reasons. Such measures may include requiring the
agency to deposit collected funds in the U.S. Treasury or ensuring that personnel
whose salaries are funded by user fees do not participate in preparing the agency’s
budget request or setting of fees;

g. Any limitations on the uses for which the agency may expend collected fees;
h. Any limitations on the period during which the agency may expend collected fees.

Congress should determine whether, for reasons of revenue stability, collected
fees should remain available to the agency until expended or, alternatively,
whether, for reasons of oversight, fees should only be available for a limited
period (e.g., a specific multi-year period or until a set expiration date);
i. Any requirement that the agency periodically review its user fees and any
required method for doing so (e.g., comparing fee amounts with corresponding
costs or recalculating fees based on new developments and information); and
j. Whether the authority granted under the statute sunsets.

5. Whenever Congress decides to create a new statutory user fee program, it should offer
opportunities for stakeholders to participate and provide input, such as commissioning
reports or holding a public hearing, and it should reach out to relevant agencies for
technical assistance early in the legislative drafting process.

Considerations for Agencies

6. Whenever an agency establishes a new user fee program, it should do so after notice and
opportunity for public comment. When appropriate, agencies should provide additional
opportunities for public participation, such as using an advisory committee, holding a
public hearing, or holding a listening session. Opportunities for public participation
should reflect the considerations addressed in Recommendations 2018-7, Public
Engagement in Rulemaking, 2021-3, Early Input on Regulatory Alternatives, and 2023-2,
Virtual Public Engagement in Agency Rulemaking, including the time and resources
available to the agency to conduct such public participation opportunities.
7. When engaging with the public as part of rulemaking regarding user fees, agencies should clearly communicate to the public the purpose of its user fee program which, for example, may include objectives to promote equity or economic efficiency.

8. Agencies should maintain an easily-accessible page on their websites describing all of their user fee-funded programs, identifying and explaining the fees, and providing links to supporting documentation, such as the governing sections of the United States Code and the Code of Federal Regulations, and recent notices in the Federal Register.

9. Agencies should be transparent with the public regarding their user fee program, which can be accomplished through, among other things, identification of and engagement with stakeholders, public participation at early stages such as during forecasting and the budget formulation process, and providing information on the agency’s user fee program, budget proposals, and fee setting process.

10. Agencies should conduct regular reviews of their user fee programs to ensure the program is meeting its purposes and not resulting in adverse consequences particularly those described in Paragraphs 2 and 3.