



## User Fees

### Committee on Regulation

#### Proposed Recommendation from Committee | October 31, 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 an entity engaged or seeking to engage in  
4 a regulated activity.<sup>1</sup> User fees serve many purposes, for example, to shift the costs of a program  
5 from taxpayers to those persons or entities whom the program benefits, to supplement general  
6 revenue, or to incentivize or discourage certain behavior.

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

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

<sup>2</sup> 31 U.S.C. § 9701.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.<sup>3</sup>

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,<sup>4</sup> and  
22 OMB revised Circular A-25 in 2017 to update 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 design.  
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 fees are transactional,  
32 while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while  
33 others are set to promote equity or advance other values, goals, and priorities. Other statutes  
34 impose requirements that apply to a user fees program unless Congress specifies otherwise; one  
35 example is the Miscellaneous Receipts Act, which requires that money received by the  
36 government from any source be deposited into the U.S. Treasury.<sup>5</sup>

37 User fee program designers must also consider possible negative consequences such as  
38 the potential for fees to adversely affect the quality of agency decision making or its appearance  
39 of impartiality; their potential to affect the behavior of private persons and entities in unintended  
40 ways; the impact of the fees on low-income people, members of historically underserved  
41 communities, and small businesses and other small entities; and the agency’s revenue stability.  
42 The Conference has consistently emphasized the potential for public engagement to help

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<sup>3</sup> 52 Fed. Reg. 23,634 (June 24, 1987).

<sup>4</sup> Lietzan, *supra* note 1, at 3.

<sup>5</sup> 31 U.S.C. § 3302.



43 program designers obtain more comprehensive information, enhance the legitimacy of their  
44 decisions, and increase public support for their decisions.<sup>6</sup>

45 Given expanded reliance on user fees, the development of new models for user fee  
46 programs, and updated guidance on user fees from OMB, the Conference decided to revisit the  
47 subject. This Recommendation represents the Conference’s current views on the objectives,  
48 design, and implementation of user fee programs by Congress and agencies, and supplements  
49 and updates Recommendation 87-4.<sup>7</sup>

## RECOMMENDATION

### General Considerations

- 50 1. Program designers in Congress and the executive branch should identify the purpose(s) of  
51 an agency’s user fee program, such as shifting the costs of a program from taxpayers to  
52 those persons or entities whom the program benefits, supplementing general revenue, or  
53 incentivizing or discouraging certain behavior, and design statutes and rules to serve such  
54 purpose(s). Program designers should also consider whether such purpose(s) support or  
55 oppose the imposition of user fees and related waivers, exemptions, or reduced rates.  
56 Congress should consider how it should maintain accountability over government action,  
57 such as through the budgetary process or specifications on the use of taxpayer funds and  
58 money collected through user fee programs.
- 59 2. When establishing a user fee-funded program, especially one with a novel fee structure  
60 and one that collects fees from regulated entities, program designers should consider  
61 whether any feature of the program might inappropriately affect or be perceived as

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<sup>6</sup> 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).

<sup>7</sup> 52 Fed. Reg. 23,634. This Recommendation does not address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

62 inappropriately affecting agency decision making and whether any steps should be taken  
63 to mitigate those effects.

- 64 3. Program designers should consider whether a user fee may have a negative or beneficial  
65 effect on the behavior of individuals and entities subject to that fee as well as whether it  
66 might have other public costs or benefits, such as promoting equity, reducing barriers to  
67 market entry, incentivizing desirable behavior, or producing some other socially  
68 beneficial outcome.
- 69 4. Program designers should ensure user fees are not disproportionate to government costs  
70 or to the benefits received.

### **Considerations for Congress**

- 71 5. When Congress enacts a specific statute, separate from the Independent Offices  
72 Appropriations Act, authorizing an agency to collect user fees, it should specify, as  
73 applicable:
- 74 a. The manner for setting fee levels. Congress should either determine the amount of  
75 the fee, with or without adjustment for inflation, or a formula for calculating it, or  
76 alternatively give the agency discretion to determine the appropriate fee (e.g., to  
77 achieve a particular purpose or to recover some or all of the costs of providing a  
78 good or service or administering a program);
  - 79 b. Any circumstances in which the agency may or must charge a fee or, conversely,  
80 may or must waive or reduce the fee amount. Congress should determine whether  
81 it is appropriate to reduce or eliminate fees for certain individuals or entities to  
82 promote equity, reduce barriers to market entry, incentivize desirable behavior, or  
83 produce some other socially beneficial outcome;
  - 84 c. Any required minimum process for setting or modifying fees, either the notice-  
85 and-comment rulemaking process set forth in 5 U.S.C. § 553 or an alternative  
86 process, including requirements for public engagement;
  - 87 d. Any authorizations, limitations, or prescriptions on the manner in which the  
88 agency may collect fees;



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 89 e. Any required process for enforcing the obligation to pay user fees and any  
90 penalties for failure to pay required fees;
- 91 f. The availability of collected fees. Congress should determine whether the fees  
92 collected by the agency should be deposited in the U.S. Treasury, consistent with  
93 the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and made available to the  
94 agency only after appropriation;
- 95 g. The period during which the agency may expend collected fees. Should Congress  
96 determine that, for reasons of revenue stability, collected fees should remain  
97 available to the agency, it should consider, for reasons of oversight, whether they  
98 should only be available for a limited period or subject to other requirements or  
99 limitations;
- 100 h. Any authorizations or prescriptions for the uses for which the agency may expend  
101 collected fees;
- 102 i. Any requirement that the agency periodically review its user fees and any  
103 required method(s) for doing so (e.g., comparing fee amounts with corresponding  
104 costs or recalculating fees based on new developments and information); and
- 105 j. Whether the authority granted under the statute sunsets.
- 106 6. Whenever Congress decides to create a new statutory user fee program, it should reach  
107 out to relevant agencies for technical assistance early in the legislative drafting process  
108 and it should consider stakeholder input.

### **Considerations for Agencies**

- 109 7. When an agency establishes a new user fee program or sets fees under an existing  
110 program, it should follow the rulemaking requirements of 5 U.S.C. § 553 unless Congress  
111 has specified otherwise. In engaging with public stakeholders, agencies should follow the  
112 best practices suggested in Recommendations 2018-7, *Public Engagement in*  
113 *Rulemaking*, 2021-3, *Early Input on Regulatory Alternatives*, and 2023-2, *Virtual Public*  
114 *Engagement in Agency Rulemaking*, including the time and resources available to the  
115 agency to conduct such public participation opportunities.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 116 8. When engaging with the public regarding user fees, agencies should clearly communicate  
117 to the public the purpose(s) of their user fee program. Agencies should be transparent  
118 with the public, which can be accomplished through, among other things, identification  
119 of and engagement with stakeholders, public participation at early stages such as during  
120 cost and demand forecasting and the budget formulation process, and providing  
121 information on the agency's user fee program, budget proposals, and fee setting process.
- 122 9. Agencies should maintain an easy-to-find page on their websites describing their user  
123 fee-funded programs, identifying and explaining the fees, describing any waivers or  
124 exemptions available, and providing links to supporting resources, such as the governing  
125 sections of the *United States Code* and the *Code of Federal Regulations*, and recent  
126 notices in the *Federal Register*.
- 127 10. Agencies should conduct regular reviews, consistent with Recommendation 2021-2,  
128 *Periodic Retrospective Review*, of their user fee programs to ensure the programs are  
129 meeting their purposes and that the fee levels are appropriate. Agencies should also  
130 assess other resulting consequences or effects of the programs, such as those described in  
131 Paragraphs 2, 3, and 4.