Federal agencies charge user fees as part of many programs. For purposes of this project, a federal agency “user fee” is (1) any fee assessed by an agency for a good or service that the agency provides to the party paying the fee, as well as (2) any fee collected by an agency from an entity engaged in, or seeking to engage in, activity regulated by the agency, either to support a specific regulatory service provided to that entity or to support a regulatory program that at least in part benefits that entity. 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 an entity engaged or seeking to engage in a regulated activity. User fees serve many purposes, for example, to shift the costs of a program from taxpayers to those persons or entities whom the program directly benefits, to supplement general revenue, or to incentivize or discourage certain behavior.

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

1 Erika Lietzan, User Fee Programs: Design Choices and Processes 6 (Nov. 9, 2023) (report to the Admin. Conf. of the U.S.).
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 allocate government goods and services efficiently and fairly.

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, and OMB revised Circular A-25 in 2017 to update 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 design. 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 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. Other statutes impose requirements that apply to a user fees program unless Congress specifies otherwise; one example is the Miscellaneous Receipts Act, which requires that money received by the government from any source be deposited into the U.S. Treasury.

User fee program designers 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, members of historically underserved communities; and the potential for fees to disproportionately burden individuals and entities who cannot afford them.

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5 52 Fed. Reg. 23,634 (June 24, 1987).
6 See Lietzan, supra note 1, at 3.
communities, and small businesses and other small entities; and the agency’s revenue stability.

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. 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, design, and implementation of user fee programs by Congress and agencies, and supplements and updates Recommendation 87-4.

RECOMMENDATION

General Considerations

1. Program designers in Congress and the executive branchIn creating or modifying user fees, Congress or agencies, as appropriate, 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, supplementing general revenue, or incentivizing or discouraging certain behavior, and design statutes and rules to serve such purpose(s).

Program designers Congress or agencies should also consider whether or not such purpose(s) support or oppose the imposition of user fees and related waivers, exemptions, or reduced rates. Congress should consider how it should maintain accountability over government action, such as through the budgetary process or specifications on the use of taxpayer funds and money collected through user fee programs.


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.

Commented [CA4]: Proposed Amendment from Council #4

Commented [CMA5]: Proposed Amendment from Public Member Bernard W. Bell

"The term ‘support or oppose’ seems awkward. I propose the following modification: ‘Program designers should also consider whether or not such purpose(s) support or oppose the imposition of user fees and related waivers, exemptions, or reduced rates furthers or undermines the achievement of such purposes.’"

Commented [CMA6]: Comment from Senior Fellow Alan Morrison #1

Should “accountability for government action” be changed to “accountability for imposition of user fees” - current version too open ended?
2. When establishing a user fee-funded program, especially one with a novel fee structure and one that collects fees from regulated entities, program designers Congress or agencies, as appropriate, should consider whether any feature of the program might inappropriately affect or be perceived as inappropriately affecting agency decision making and whether any steps should be taken to mitigate those effects.

3. Program designers Congress or agencies, as appropriate, should consider whether a user fee may have a negative or beneficial effect on the behavior of individuals and entities subject to that fee; as well as whether it the user fee might have other public costs or benefits, such as promoting equity, reducing barriers to market entry, incentivizing desirable behavior, or producing some other socially beneficial outcome. Congress or agencies, as appropriate, should set forth procedures for waiving or reducing user fees that would potentially exclude low-income individuals and members of historically underserved communities from participating in the administrative process.

4. Program designers Congress or agencies, as appropriate, should ensure user fees are not disproportionate in relation to government costs or to the benefits users received.

Considerations for Congress

5. 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 either determine the amount of the fee, with or without adjustment for inflation, or set a formula for calculating it, or alternatively give the agency 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 charge a fee or, conversely, may or must waive or reduce the fee amount. Congress should determine whether it is appropriate to reduce or eliminate fees for certain individuals or entities to

Commented [CA7]: Proposed Amendment from Council #5

Commented [CMA8]: Comment from Senior Fellow Alan Morrison #2:

This expresses concern that user fees revenue not be disproportionate to the benefits to those who pay them. But line 52 (P. 1) allows user fees to supplement government revenue. Are they consistent with each other?
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 through 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 authorizations, limitations, or prescriptions as pertaining to 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. **The availability of collected fees**. Congress should determine whether or not the fees collected by the agency should be deposited in the U.S. Treasury, consistent with the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and made available to the agency only after appropriation;

g. **The period during which the agency may expend collected fees**. Should Congress determine that, for reasons of revenue stability, collected fees should remain available to the agency, it should consider, for reasons of oversight, whether they should only be available for a limited period or subject to other requirements or limitations;

h. **Any authorizations or prescriptions for the uses for which the agency may expend collected fees**;

i. **Any requirement that the agency periodically review its user fees and any required method(s) 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**.

6. Whenever Congress decides to create a new statutory user fee program, it should reach out to relevant agencies for technical assistance early in the legislative drafting process and it should consider **stakeholder input from interested persons**.
Considerations for Agencies

7. When an agency establishes a new user fee program or sets fees under an existing program, it should follow the rulemaking requirements of 5 U.S.C. § 553 unless Congress has specified otherwise. In engaging with interested members of the public stakeholders, agencies should follow the best practices suggested 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.

8. When engaging with the public regarding user fees, agencies should clearly communicate to the public the purpose(s) of their user fee programs, the nature of the fee setting process, and the uses for which the agency expends collected fees. Agencies should also be transparent with and engage the public, when conducting activities that may affect the design of their user fee programs or the level of their fees, for instance by which can be accomplished through, among other things, identification of and engagement with stakeholders, inviting public participation at early stages such as during cost and demand forecasting and the budget formulation process, and providing information on the agency’s user fee program, budget proposals, and fee setting process.

9. Agencies should maintain an easy-to-find page on their websites describing their user fee-funded programs, identifying and explaining the fees, describing any waivers or exemptions available, identifying the uses for which the agency expends collected fees, and providing links to supporting resources, such as the governing sections of the United States Code and the Code of Federal Regulations, and recent notices in the Federal Register.

10. Agencies should conduct regular reviews, consistent with Recommendation 2021-2, Periodic Retrospective Review, of their user fee programs to ensure the programs are meeting their purposes and that the fee levels are appropriate. Agencies should also assess other resulting consequences or effects of the programs, such as those described in Paragraphs 2, 3, and 4.