



User Fees

Committee on Regulation

Proposed Recommendation for Plenary | December 14, 2023

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

12 Agencies have assessed user fees since this country was founded. In 1952, Congress
13 enacted the Independent Offices Appropriations Act (IOAA), giving agencies broad authority to
14 charge user fees in connection with specific goods or services that benefit identifiable persons or
15 entities.² The Bureau of the Budget, the predecessor to the Office of Management and Budget
16 (OMB), issued Circular A-25 in 1959 to implement the IOAA. Since 1982, when the President’s
17 Private Sector Survey on Cost Control urged expanded application of user fees, Congress and
18 agencies have increasingly relied on user fees, instead of or in addition to general revenue, to
19 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.).

² 31 U.S.C. § 9701.

Commented [CA1]: Proposed Amendment from Council #1:

This proposed amendment would revise the second part of the Committee’s proposed definition to clarify that, unlike a tax, a user fee must relate to a benefit received by the payer.

Commented [CA2]: Proposed Amendment from Council #2



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20 In 1987, the Administrative Conference adopted Recommendation 87-4, *User Fees*,
21 which identified basic principles for Congress and agencies to consider in establishing user fee
22 programs and setting fee levels. Recommendation 87-4 stated that a “government service for
23 which a user fee is charged should directly benefit fee payers.” It also identified principles
24 intended to ~~efficiently and fairly~~ allocate government goods and services ~~efficiently and fairly~~.³

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

31 Today, user fee programs serve many purposes and vary significantly in their design.
32 Some are established by a specific statute. Such statutes may specify the fee amount, provide a
33 formula for calculating fees, or prescribe a standard for the agency to use in establishing
34 reasonable fees (e.g., full or partial cost recovery). Some statutory authorizations are permanent,
35 while others sunset and require periodic reauthorization. Other programs are established by
36 agencies on their own initiative under the IOAA or other authority. Some fees are transactional,
37 while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while
38 others are set to ~~promote equity or~~ advance other values, goals, and priorities. Other statutes
39 impose requirements that apply to a user fees program unless Congress specifies otherwise; one
40 example is the Miscellaneous Receipts Act, which requires that money received by the
41 government from any source be deposited into the U.S. Treasury.⁵

42 User fee program designers must also consider possible negative consequences such as
43 the potential for fees to adversely affect the quality of agency decision making or its appearance
44 of impartiality; their potential to affect the behavior of private persons and entities in unintended
45 ways; the impact of the fees on low-income people, members of historically underserved

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

⁴ See Lietzan, *supra* note 1, at 3.

⁵ 31 U.S.C. § 3302.

Commented [CA3]: Proposed Amendment from Council #3



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46 communities, and small businesses and other small entities; and the agency's revenue stability.
47 The Conference has consistently emphasized the potential for public engagement to help
48 program designers obtain more comprehensive information, enhance the legitimacy of their
49 decisions, and increase public support for their decisions.⁶

50 Given expanded reliance on user fees, the development of new models for user fee
51 programs, and updated guidance on user fees from OMB, the Conference decided to revisit the
52 subject. This Recommendation represents the Conference's current views on the objectives,
53 design, and implementation of user fee programs by Congress and agencies, and supplements
54 and updates Recommendation 87-4.⁷

RECOMMENDATION

General Considerations

55 1. Program designers in Congress and the executive branch in creating or modifying user
56 fees, Congress or agencies, as appropriate, should identify the purpose(s) of an agency's
57 user fee program, such as shifting the costs of a program from taxpayers to those persons
58 or entities whom the program benefits, supplementing general revenue, or incentivizing
59 or discouraging certain behavior, and design statutes and rules to serve such purpose(s).
60 Program designers Congress or agencies should also consider whether or not such
61 purpose(s) support or oppose the imposition of user fees and related there are reasons for
62 waivers, exemptions, or reduced rates. Congress should consider how it should maintain
63 accountability over government action, such as through the budgetary process or
64 specifications on the use of taxpayer funds and money collected through user fee
65 programs.

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).

⁷ 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 such user fees and related waivers, exemptions, or reduced rates further 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?



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- 66 2. When establishing a user fee-funded program, especially one with a novel fee structure
67 and one that collects fees from regulated entities, ~~program designers~~Congress or
68 ~~agencies, as appropriate~~ should consider whether any feature of the program might
69 inappropriately affect or be perceived as inappropriately affecting agency decision
70 making and whether any steps should be taken to mitigate those effects.
- 71 3. ~~Program designers~~Congress or ~~agencies, as appropriate~~ should consider whether a user
72 fee may have a negative or beneficial effect on the behavior of individuals and entities
73 subject to that fee, ~~as well as~~Program designers should also consider whether ~~the user~~
74 ~~fee~~ might have other public ~~costs or~~ benefits, such as promoting equity, reducing barriers
75 to market entry, incentivizing desirable behavior, or producing some other socially
76 beneficial outcome, ~~or might have other public costs~~. ~~Congress or agencies, as~~
77 ~~appropriate, should set forth procedures for waiving or reducing user fees that would~~
78 ~~potentially exclude low-income individuals and members of historically underserved~~
79 ~~communities from participating in the administrative process~~.
- 80 4. ~~Program designers~~Congress or ~~agencies, as appropriate~~ should ensure user fees are not
81 disproportionate ~~in relation~~ to government costs or to the benefits ~~users~~ received.

Considerations for Congress

- 82 5. When Congress enacts a specific statute, separate from the Independent Offices
83 Appropriations Act, authorizing an agency to collect user fees, it should specify, as
84 applicable:
- 85 a. *The manner for setting fee levels*. Congress should either determine the amount of
86 the fee, with or without adjustment for inflation, ~~or set~~ a formula for calculating it,
87 or alternatively give the agency discretion to determine the appropriate fee (e.g.,
88 to achieve a particular purpose or to recover some or all of the costs of providing
89 a good or service or administering a program);
- 90 b. *Any circumstances in which the agency may or must charge a fee or, conversely,*
91 *may or must waive or reduce the fee amount*. Congress should determine whether
92 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?

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93 promote equity, reduce barriers to market entry, incentivize desirable behavior, or
94 produce some other socially beneficial outcome;

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

98 d. *Any authorizations, limitations, or prescriptions ~~on~~ pertaining to the manner in*
99 *which the agency may collect fees*;

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

102 f. *The availability of collected fees*. Congress should determine whether *or not* the
103 fees collected by the agency should be deposited in the U.S. Treasury, consistent
104 with the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and made available to the
105 agency only after appropriation;

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

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

113 i. *Any requirement that the agency periodically review its user fees and any*
114 *required method(s) for doing so* (e.g., comparing fee amounts with corresponding
115 costs or recalculating fees based on new developments and information); and

116 j. *Whether the authority granted under the statute sunsets*.

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

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Commented [CMA9]: Comment from Senior Fellow Alan Morrison #3:

Tells Congress to decide on penalties for late payment - should we add interest, including the rate?

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Considerations for Agencies

- 120 7. When an agency establishes a new user fee program or sets fees under an existing
121 program, it should follow the rulemaking requirements of 5 U.S.C. § 553 unless Congress
122 has specified otherwise. In engaging with **interested members of the public stakeholders**,
123 agencies should follow the best practices suggested in Recommendations 2018-7, *Public*
124 *Engagement in Rulemaking*, 2021-3, *Early Input on Regulatory Alternatives*, and 2023-2,
125 *Virtual Public Engagement in Agency Rulemaking*, ~~including the time and resources~~
126 ~~available to the agency to conduct such public participation opportunities.~~
- 127 8. ~~When engaging with the public regarding user fees, a~~ agencies should clearly
128 communicate to the public the purpose(s) of ~~its~~ **their** user fee programs, ~~the nature of the~~
129 ~~fee setting process, and the uses for which the agency expends collected fees.~~ Agencies
130 should also be transparent with ~~and engage~~ the public; ~~when conducting activities that~~
131 ~~may affect the design of their user fee programs or the level of their fees, for instance by~~
132 ~~which can be accomplished through, among other things, identification of and~~
133 ~~engagement with stakeholders, inviting~~ public participation at early stages such as during
134 cost and demand forecasting and ~~the budget formulation process, and providing~~
135 ~~information on the agency's user fee program, budget proposals, and fee setting process.~~
- 136 9. Agencies should maintain an easy-to-find page on their websites describing their user
137 fee-funded programs, identifying and explaining the fees, describing any waivers or
138 exemptions available, ~~identifying the uses for which the agency expends collected fees,~~
139 and providing links to supporting resources, such as the governing sections of the *United*
140 *States Code* and the *Code of Federal Regulations*, and recent notices in the *Federal*
141 *Register*.
- 142 10. Agencies should conduct regular reviews, consistent with Recommendation 2021-2,
143 *Periodic Retrospective Review*, of their user fee programs to ensure the programs are
144 meeting their purposes and that the fee levels are appropriate. Agencies should also
145 assess other resulting consequences or effects of the programs, such as those described in
146 Paragraphs 2, 3, and 4.

Commented [CA10]: Proposed Amendment from Council #6:

The cited recommendations take agency time and resource constraints into account.

Commented [CA11]: Proposed Amendment from Council #7:

The proposed amendment would more clearly distinguish between public engagement during the initial design of the program (Paragraph 7) and public engagement at other junctures (Paragraph 8).

Commented [CA12]: Proposed Amendment from Council #8