Notices

Federal Register

Vol. 89, No. 7

Wednesday, January 10, 2024

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Assembly of the Administrative Conference of the United States adopted four recommendations at its hybrid (virtual and in-person) Eightieth Plenary Session: Best Practices for Adjudication Not Involving an Evidentiary Hearing, Identifying and Reducing Burdens on the Public in Administrative Processes, Improving Timeliness in Agency Adjudication, and User Fees.

FOR FURTHER INFORMATION CONTACT: For Recommendations 2023–5 and 2023–6, Matthew Gluth; Recommendation 2023–7, Lea Robbins; and Recommendation 2023–8, Kazia Nowacki. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *www.acus.gov.*

The Assembly of the Conference met during its Eightieth Plenary Session on December 14, 2023, to consider four proposed recommendations and conduct other business. All four recommendations were adopted.

Recommendation 2023–5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing.* This recommendation examines the wide range of procedures that agencies use when adjudicating cases in programs in which there is no legally required opportunity for an evidentiary hearing. It offers a set of broadly applicable best practices that account for the diversity of matters that agencies decide through truly informal adjudication and promote fairness, accuracy, and efficiency.

Recommendation 2023–6, *Identifying and Reducing Burdens on the Public in Administrative Processes.* This recommendation examines best practices, such as public engagement, that agencies can use to identify unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes. It also recommends strategies agencies can use to reduce unnecessary burdens, such as simplifying processes, digitizing services, and collaborating with other agencies and nongovernmental organizations.

Recommendation 2023–7, *Improving Timeliness in Agency Adjudication.* This recommendation examines strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address backlogs or delays in administrative adjudication. It identifies best practices to help agencies devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency.

Recommendation 2023–8, *User Fees.* This recommendation provides best practices for agencies and Congress to consider in designing and implementing user fees in administrative programs. It addresses how Congress and agencies might determine when user fees are appropriate; how agencies might determine fair and reasonable user fees for specific programs, including whether there are reasons for waivers, exemptions, or reduced rates; when and how agencies should engage with the public in determining or modifying user fees; and how agencies should review their user fee programs.

The Conference based its recommendations on research reports and prior history that are posted at: *https://www.acus.gov/event/80th-plenary-session.*

Authority: 5 U.S.C. 595.

Dated: January 4, 2024.

Shawne C. McGibbon,

General Counsel.

APPENDIX—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2023–5

Best Practices for Adjudication Not Involving an Evidentiary Hearing

Adopted December 14, 2023

Federal administrative adjudication takes many forms.[1] Many adjudications include a legally required opportunity for an evidentiary hearing—that is, a proceeding ''at which the parties make evidentiary submissions and have an opportunity to rebut testimony and arguments made by the opposition.'' [2] Such proceedings also follow the exclusive record principle, in which the decision maker is confined to considering ''evidence and arguments from the parties produced during the hearing process (as well as matters officially noticed) when determining factual issues.'' [3]

In many federal administrative adjudications, however, no constitutional provision, statute, regulation, or executive order grants parties the right to an evidentiary hearing.[4] Proceedings of this type include many agency decisions regarding grants, licenses, or permits; immigration and naturalization; national security; the

[1] The term ''adjudication'' as used in this Recommendation refers to the process for formulating an order that is ''a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program.'' Michael Asimow, Admin. Conf. of the U.S., Federal Administrative Adjudication Outside the Administrative Procedure Act 8 (2019).

[2] Asimow, *supra* note 1, at 10.

[3] Asimow, *supra* note 1, at 10. The Administrative Conference has used the term ''Type A adjudications'' to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is covered by the formal adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. 554, 556–557. The Conference has used the term ''Type B adjudications'' to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is not covered by the APA's formal adjudication provisions. *See* Admin. Conf. of the U.S., Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act,* 81 FR 94314 (Dec. 23, 2016).

[4] The Conference has used the term ''Type C'' adjudication to refer to adjudications that are not subject to a legally required evidentiary hearing. *See id.*

regulation of banks and other financial matters; requests for records under the Freedom of Information Act; land-use requests; and a wide variety of other matters.[5]

There are many policy reasons why adjudications might be conducted without a legally required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this Recommendation. The stakes in disputes resolved through such adjudications vary widely, but whether the stakes are low or high, each decision matters to the parties. For those involved in or familiar with these adjudications, the most important factor in their view of government may be the way these decisions are made. Accordingly, decision making in such adjudications should be accurate, efficient, and both fair and perceived to be fair, regardless of the stakes involved.

Adjudications without an evidentiary hearing differ in fundamental ways from those that include a legally required opportunity for an evidentiary hearing. In adjudications of all types, a decision maker conducts an investigation and issues an initial, preliminary, or proposed decision. In adjudications that include an evidentiary hearing, if the private party does not acquiesce in that decision, the party is entitled to an evidentiary hearing before a neutral decision maker who, after considering the evidence and arguments, issues a decision. Typically, the private party also can seek review of that decision within the agency, often by the agency head or officials exercising authority delegated by the agency head. By contrast, in adjudications without an evidentiary hearing, often the same decision maker who issued the initial, proposed, or preliminary decision issues the decision, normally after considering input from the affected party. Typically, that party is entitled to seek review of that decision by a different decision maker within the agency. These fundamental differences are reflected in this Recommendation.

No uniform set of procedures applies to all adjudications without evidentiary hearings, nor could one be devised. Some characteristics are common, however. Such adjudications often allow for document exchanges and submission of research studies, oral arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and inspections. Agencies that engage in such adjudications typically employ dispute resolution methodologies without the procedures typical of evidentiary hearings, such as the opportunity to cross examine witnesses, the prohibition of ex parte communications, the separation of adjudicative functions from investigative and prosecutorial functions, and the exclusive record principle.

While not subject to the requirement that a decision be preceded by an evidentiary hearing, adjudications without evidentiary hearings may be subject to other legal requirements. The Due Process Clause of the Constitution's Fifth Amendment may require certain minimum procedures for such adjudications that involve constitutionally protected interests in life, liberty, or property.[6] In addition, agencies conducting such adjudications typically must observe certain general provisions of the Administrative Procedure Act (APA)—in particular 5 U.S.C. 555[7] and 558—and are subject to other generally applicable statutes and regulations addressing the conduct of federal employees, rights of representation,[8] ombuds,[9] and other matters.[10] The procedures employed by agencies conducting these adjudications may also be subject to agency-specific statutes and procedural regulations. Finally, judicial review is available for many such adjudications.

Statutorily required procedures and judicial review, however, may be insufficient to ensure fairness, accuracy, and efficiency in adjudications without an evidentiary hearing. Due process, the APA, and other sources of law external to the agency often do not specifically prescribe the details of agency procedures, and judicial review may be unrealistic because the costs of such review exceed the value of the interests at stake.[11] For these reasons, agency-adopted policies offer the best mechanism for establishing procedural protections for parties, promoting fairness and participant satisfaction, and facilitating the efficient and effective functioning of these adjudications. The public availability of such rules also facilitates external oversight.

This Recommendation identifies a set of best practices for adjudications without an evidentiary hearing and encourages agencies to implement them through their regulations and guidance documents. Many agencies conducting such adjudications already follow these best practices. This Recommendation recognizes that agencies adjudicate a wide range of matters, have different adjudicatory needs and available resources, and are subject to different legal requirements. What works best for one agency may not work for another. Agencies must take into account their own unique circumstances when implementing the best practices that follow. Accordingly, agencies adopting or modifying procedures for adjudication without an evidentiary hearing should tailor these best practices to their individual systems.

Recommendation

Notice of Proposed Action

1. Agencies conducting adjudications without evidentiary hearings should notify parties of the initial, proposed, or preliminary decision, including the reasons for that decision.

2. Such notice should provide sufficient detail and be given in sufficient time to allow parties to contest the initial, proposed, or preliminary decision and submit evidence to support their position. This notice should provide parties with the following information, when applicable:

a. Whether the agency provides a second chance to achieve compliance;

b. The manner by which the party can submit additional evidence and argument to influence the agency's initial, proposed, or preliminary decision;

c. The amount of time before further agency action will be taken; and

d. Whether and, if so, how parties may access materials in the agency's case file.

Opportunity To Submit Evidence and Argument

3. Agencies should allow parties in adjudications without evidentiary hearings to furnish decision makers with evidence and arguments. Depending on the stakes involved, the types of issues involved, and the agency's caseload and adjudicatory resources, the process for furnishing evidence and argument may include written submissions or oral presentations and the opportunity to rebut adverse information. Agencies should make such opportunities available in a manner that permits people with disabilities and people with limited English proficiency to take advantage of them.

4. If credibility issues are presented, the party should be permitted an opportunity to rebut adverse information.

Representation

5. When feasible, agencies should allow participants in their adjudications without evidentiary hearings to be represented by a lawyer or a lay person with relevant expertise.

6. Particularly for self-represented parties, agencies should not prevent participants in their adjudications without evidentiary hearings from obtaining assistance or support from friends, family members, or other individuals in presenting their case.

7. Agencies should make their proceedings as accessible as possible to self-represented parties by providing plain-language resources, such as frequently asked questions (FAQs), and other appropriate assistance, such as offices dedicated to helping the public navigate agency programs.

Decision Maker Impartiality

8. Agencies should tailor neutrality standards appropriately to adjudications without evidentiary hearings, which may be conducted by decision makers who engage in their own investigations or participate in investigative teams and may have prior involvement in the matter.

9. Consistent with government ethics requirements, agencies should require the recusal of employees engaged in adjudications without evidentiary hearings who have financial or other conflicts of interest in matters they are investigating or deciding.

[5] Michael Asimow, Fair Procedure in Informal Adjudication 7 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).

[6] *See Mathews* v. *Eldridge,* 424 U.S. 319 (1976); *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252, 262–63 (1987) (applying Mathews principles in a Type C context); *Goss* v. *Lopez,* 415 U.S. 565 (1975) (discussing minimal procedures required for short-term suspension from public school).

[7] *See PBG Corp.* v. *LTV Corp.* 496 U.S. 633 (1990).

[8] *See* Asimow, *supra* note 55, at 36, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies' regulations.

[9] *See* Admin. Conf. of the U.S., Recommendation 2016–5, *The Use of Ombuds in Federal Agencies,* 81 FR 94316 (Dec. 23, 2016).

[10] *See* Asimow, *supra* note 55, at 33.

[11] *Id.* at 46.

10. Agencies should require recusal of employees who reasonably may be viewed as not impartial.

11. When adjudications without evidentiary hearings involve serious sanctions, agencies should consider adopting internal separation of investigative or prosecutorial functions and adjudicatory functions.

Statement of Reasons

12. Agencies conducting adjudications without evidentiary hearings should provide oral or written statements of reasons that follow federal plain-language guidelines setting forth the rationale for the decision, including the factual and other bases for it. The level of detail in the statement should be consistent with the stakes involved in the adjudication.

Administrative Review

13. Agencies should provide for administrative review of their decisions by higher-level decision makers or other reviewers unless it is impracticable because of high caseload, lack of available staff, or time constraints, or because of low stakes.

Procedural Regulations

14. Agency regulations should specify the procedures for each adjudication without an evidentiary hearing the agency conducts. Consistent with Recommendation 92–1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements,* agencies should voluntarily use notice-and-comment rulemaking for the adoption of significant procedural regulations unless the costs outweigh the benefits of doing so.

15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural instructions, and FAQs addressing their adjudications without evidentiary hearings follow federal plain-language guidelines and are easily accessible on the agency's website.

16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and other documents that contain important information about their adjudications without evidentiary hearings are made available in languages understood by people who frequently appear before the agency.

Ombuds

17. Agencies with an ombuds program should ensure that their ombuds are empowered to handle complaints about adjudications without evidentiary hearings.

18. Agencies without an ombuds program should consider establishing one, particularly if their adjudications without evidentiary hearings have sufficient caseloads, significant stakes, or significant numbers of unrepresented parties. The establishment and standards of such programs should follow the best practices identified in Recommendation 2016–5, *The Use of Ombuds in Federal Agencies.*

19. Agencies with smaller caseloads, lower stakes, or lack of available staff should consider sharing an ombuds program with other similarly situated agencies to address any resource constraints.

20. Agencies that choose not to establish or share an ombuds program should provide alternative procedures for allowing parties to submit feedback or complaints, such as through an agency portal or dedicated email address.

Quality Assurance

21. Agencies conducting adjudications without evidentiary hearings should establish methods for assessing and improving the quality of their decisions to promote accuracy, efficiency, fairness, the perception of fairness, and other goals relevant to those adjudications in accordance with Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication.* Depending on the caseload, stakes, and available resources, such methods may include formal quality assessments and informal peer review on an individual basis, sampling and targeted case selection on a systemic basis, and case management systems with data analytics and artificial intelligence tools.

Administrative Conference Recommendation 2023–6

Identifying and Reducing Burdens on the Public in Administrative Processes

Adopted December 14, 2023

Each year, millions of people navigate administrative processes to access benefits and services and otherwise engage with government programs to help themselves and their families. These processes can be extraordinarily complex. Additionally, processes can vary significantly across and within government agencies. These variations can make it especially hard when members of the public need to access multiple programs at the same time, for example during key life events such as retirement, birth of a child, or unexpected disaster.

Navigating these processes requires time and effort to learn both about programs and how to access them. Complying with these processes also requires significant work, such as completing forms, obtaining and submitting information, and possibly traveling to in-person interviews or hearings. Efforts to comply can result in stress, stigma, frustration, fear, or other psychological harms. These costs—which may be described as learning, compliance, and psychological costs, respectively—can be collectively understood as administrative burden.[1]

Administrative burdens significantly affect whether and how the public accesses a wide range of government programs, including those related to veterans benefits and services, student financial aid, Social Security benefits, health care, disaster assistance, tax credits, nutrition assistance, housing assistance, and unemployment insurance. These burdens can be exacerbated when programs are not wholly administered by the federal government but in partnership with state, local, or tribal governments. Although some level of administrative burden may be necessary—to establish eligibility for programs with sufficient accuracy or to prevent fraud—research shows the cumulative effect of this burden hinders the ability of agencies to achieve their missions. Billions of dollars in government benefits go unclaimed every year,[2] and administrative burdens are a key reason.[3] Administrative burdens do not fall equally on all members of the public but fall disproportionately on certain members of historically underserved communities (including persons with disabilities),[4] the elderly, persons with limited English proficiency, and persons with poor physical or mental health.[5] Reducing administrative burden, while also taking into account other important public values such as program integrity, can make government work better for everyone.

Various authorities govern how federal agencies identify and reduce administrative burdens. The Paperwork Reduction Act (PRA) has long required agencies to identify burdens associated with information they collect from the public and explain why those burdens are necessary to administer their programs.[6] Office of Management and Budget (OMB) Circular A–11 emphasizes the importance of customer life experiences [7] and human-centered design [8] in how agencies

[1] Pamela Herd, Donald Moynihan & Amy Widman, Identifying and Reducing Burdens in Administrative Processes 4 (Oct. 4, 2023) (report to the Admin. Conf. of the U.S.). This Recommendation uses both ''administrative burden'' and ''administrative burdens.'' The singular is intended to capture the idea of burden as a theoretical concept; the plural reflects the fact that, in practice, burdens are multiple rather than singular. *See* Pamela Herd & Donald Moynihan, Administrative Burden: Policymaking by Other Means 1, 269 (2018); *see also Burden Reduction Initiative,* Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, Exec. Off. of the President, *https://www.whitehouse.gov/omb/information-regulatory-affairs/burden-reduction-initiative* (last visited Dec. 14, 2023).

[2] Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, Exec. Off. of the President, Tackling the Time Tax: How the Federal Government is Reducing Burdens to Accessing Critical Benefits and Services 9 (2023).

[3] *See* Herd et al., *supra* note 1, at 15–17.

[4] Exec. Order No. 13,985, 86 FR 7009 (Jan. 20, 2021).

[5] Tackling the Time Tax, *supra* note 2, at 10; *see also* Herd & Moynihan, *supra* note 1, at 105, 134–135, 157–162, 264; Herd et al., *supra* note 1, at 10–12.

[6] 44 U.S.C. 3501–3521.

[7] Customer life experiences are experiences that require members of the public to navigate government services across multiple programs, agencies, or levels of government. Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular A–11, Preparation, Submission, and Execution of the Budget (2023). As explained in Part 6 § 280.16, OMB will manage the selection of a limited number of customer life experiences to prioritize for government-wide action in line with the President's Management Agenda. *See also* Exec. Order No. 14,058, 86 FR 71357 (Dec. 16, 2021).

[8] OMB Circular A–11, *supra* note 7, § 280.1. Human-centered design is a technique to understand administrative process from the user's perspective and then use those insights to adjust processes to better match human capacities. Herd et al., *supra* note 1, at 22. Journey mapping is a related concept that involves documenting each step that an individual takes when engaging with an administrative process in order to better understand the process and where individuals struggle with it. *Id.*

manage organizational performance to improve service delivery.

While some administrative burdens are imposed by Congress or by state law, federal agencies have an important role to play in reducing the burdens they impose when administering their programs. Agencies employ numerous strategies to reduce those burdens, including simplifying processes, improving access for persons with limited English proficiency and persons with disabilities, expanding the availability of online (instead of solely in-person) processes, and establishing ombuds offices to assist those experiencing burdens.[9] In addition, agencies have achieved success in reducing burdens by establishing devoted customer experience (CX) teams that have sufficient policy knowledge and authority within the agency to be effective.[10]

Collaboration within and between federal agencies, and between federal agencies and state, local, and tribal governments, is also essential for burden reduction. Interagency data sharing that is consistent with the Fair Information Practice Principles [11] and all relevant law and policy, especially when used in conjunction with simplifying onerous processes or eliminating unnecessary ones, can also reduce administrative burdens.[12] In addition to collaboration across the government, federal agency partnerships with non-governmental third parties (such as legal aid organizations and others) also play a crucial role in agency efforts to reduce burden. Third parties assist agencies by providing information about how processes can be improved to serve the public better and by directly assisting members of the public who interact with government programs.[13]

This Recommendation provides best practices for agencies to use in identifying and reducing unnecessary administrative burdens. Building on previous recommendations of the Conference,[14] this Recommendation provides specific consultative techniques agencies should use to gather information from individual members of the public to gain a fuller and more accurate understanding of administrative burdens. The Recommendation encourages the use of online processes and offers other techniques to simplify and streamline processes and to make information about processes more accessible. The Recommendation also identifies broad organizational and collaborative tools agencies should employ in their burden reduction efforts, including outlining how agency leadership and staff [15] should engage with burden reduction initiatives within their agencies and across the government. The primary focus of burden reduction efforts should be with those federal agencies that have frequent or consequential interactions with the public. The tools discussed are intended to reduce burdens on the public and not become a reporting burden on agencies for which they are less relevant.

This Recommendation also includes a recommendation directed to OMB that builds on OMB's prior actions directed at reducing burdens. It recommends that OMB provide agencies with additional guidance for measurement and consideration of administrative burden and forgone benefits and services, as well as provide additional guidance on agencies' consideration of the potential advantages and disadvantages of administrative data sharing. This guidance could take many forms, including written guidance or agency-specific or government-wide training. In addition, again building on past recommendations of the Conference and related implementation efforts,[16] this Recommendation encourages OMB to provide agencies with additional guidance on the use of flexibilities under the PRA to conduct CX research. It also includes a recommendation to Congress that, when developing new legislation that establishes or affects administrative programs, it should provide express statutory authority for agencies to share data where beneficial for achieving the goals of the legislation.

Recommendation

Burden Identification and Reduction Principles

1. Federal agencies should seek to identify and reduce administrative burdens that the public faces when interacting with government programs.

2. Agencies' efforts to identify and reduce burdens should take into account the experiences and perspectives of members of the public who interact with government programs.

3. Because members of the public often interact with multiple government agencies and programs during key life experiences, such as retirement, birth of a child, or unexpected disaster, agency and program officials should collaborate to identify and reduce burdens that would predictably arise during those experiences.

4. When undertaking efforts to identify and reduce burdens, agencies should consider the effects on other important public values, including program integrity.

Burden Identification Strategies

5. Agencies should adopt procedures for consulting with members of the public who interact with government programs to better inform agency officials about the nature of the burdens their processes impose. In seeking to do so, agencies should try to identify and consult with those who may face disproportionate burdens in accessing agency programs. Agencies should employ multiple consultative techniques, including:

a. Client outreach, such as surveys and focus groups;

b. Requests for public comment;

c. Complaint portals available on agency websites;

d. Consultation with agency staff who work with the public, including agency ombuds or public advocate staff; and

e. Consultation with nongovernmental organizations, advocacy groups, and other members of the private sector (such as representatives, program navigators who help members of the public engage with governmental processes, and social workers) who assist members of the public.

6. To help identify burdens, agencies should use the information obtained through such consultation to identify the procedures members of the public face, and resulting burdens, at each step in the process.

7. To determine agencies' authority to reduce burdens, agencies should trace the legal or operational source of identified burdens to determine whether they are imposed by statute or by regulation, guidance, or agency practice, at the federal or state level.

8. Agencies should, to the extent feasible, estimate and quantify any learning, compliance, or psychological costs of interacting with their programs. These costs

---

[9] *See* Herd et al., *supra* note 1, at 28; *see also* Tackling the Time Tax, *supra* note 2, at 48–49; White House Legal Aid Interagency Roundtable, Access to Justice through Simplification (2022); Admin. Conf. of the U.S., Recommendation 2016–5, *The Use of Ombuds in Federal Agencies,* 81 FR 94316 (Dec. 23, 2016).

[10] Herd et al., *supra* note 1, at 26. Under Executive Order 14,058, the term ''customer'' refers to any individual, business, or organization that interacts with an agency or program, and the term ''customer experience'' refers to the public's perceptions of and overall satisfaction with interactions with an agency, product, or service. *See* 86 FR at 71358. This Recommendation uses the term ''customer'' following its use in that Executive Order, notwithstanding the debate regarding the appropriateness of referring to members of the public as ''customers.'' *See, e.g., Does DHS Really Have Customers?,* U.S. Dep't of Homeland Sec., *https://www.dhs.gov/news/2022/06/23/does-dhs-really-have-customers* (last visited Dec. 14, 2023).

[11] *Fair Information Practice Principles (FIPPs),* Fed. Priv. Council, Off. of Mgmt. & Budget, Exec. Off. of the President, *https://www.fpc.gov/resources/fipps* (last visited Dec. 14, 2023).

[12] *See* Herd et al., *supra* note 1, at 18, 29–31; *see also* Tackling the Time Tax, *supra* note 2, at 36, 41.

[13] *See* Herd et al., *supra* note 1, at 46; *see also* Admin. Conf. of the U.S. & Legal Servs. Corp., Forum, Assisting Parties in Federal Administrative Adjudication (2023); Admin. Conf. of the U.S., Recommendation 2021–9, *Regulation of Representatives in Agency Adjudicative Proceedings,* 87 FR 1721 (Jan. 12, 2022).

[14] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2023–4, *Online Processes in Agency Adjudication,* 88 FR 42681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2023–2, *Virtual Public Engagement in Agency Rulemaking,* 88 FR 42680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021–3, *Early Input on Regulatory Alternatives,* 86 FR 36082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2019–3, *Public Availability of Agency Guidance Documents,* 84 FR 38931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Rulemaking,* 86 FR 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017–3, *Plain Language in Regulatory Drafting,* 82 FR 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2016–6, *Self-Represented Parties in Administrative Hearings,* 81 FR 94319 (Dec. 23, 2016).

[15] For the purposes of this Recommendation, agency leadership and staff include a wide range of stakeholders such as general counsels, chief information officers, chief risk officers, and chief data officers, as well as ombuds and officials responsible for compliance with laws such as the Privacy Act (5 U.S.C. 552a) and the PRA.

[16] *See also* Admin. Conf. of the U.S., Recommendation 2018–1, *Paperwork Reduction Act Efficiencies,* 83 FR 30683 (June 29, 2018); Admin. Conf. of the U.S., Recommendation 2012–4, *Paperwork Reduction Act,* 77 FR 47808 (Aug. 10, 2012).

include the time it takes to learn about programs and how to access them, the work it takes to comply with program requirements, and the stress or stigma resulting from engaging with administrative programs, as well as forgone benefits or services.

Burden Reduction Strategies

9. Agencies should periodically review their administrative processes to identify opportunities to simplify them by, as appropriate:

a. Limiting the number of steps in processes;

b. Reducing the length of required forms;

c. Limiting documentation requirements, where possible;

d. Eliminating notary requirements and substituting unsworn statements under penalty of perjury; and

e. Expanding access to persons with limited English proficiency and persons with disabilities.

10. Agencies should allow the public to interact with government programs using online processes while still retaining in-person processes when necessary to ensure access to benefits and services. In particular, agencies should, when possible:

a. Create alternatives (such as digital or telephonic signatures) for requirements for ''wet'' signatures;

b. Allow members of the public to use universal logins used by government agencies;

c. Allow members of the public to interact with agencies by telephone or video conference rather than requiring in-person appointments; and

d. Make agency websites and processes accessible on mobile devices.

11. When permitted by law, agencies should reduce steps members of the public must take to receive benefits or services by using information in the government's possession to determine program eligibility, prepopulate enrollment forms, or automatically select the most beneficial program options for members of the public unless they decide to opt out.

12. Agencies should make information about their programs as easy as possible to find and understand, proactively provide information to members of the public about their eligibility for benefits and services, and allow members of the public to expeditiously access records pertaining to themselves when required for obtaining benefits and services.

13. Agencies should timely provide information in plain language and, when appropriate and feasible, in multiple languages to ensure members of the public can understand and use the information.

14. Agencies should increase the availability of assistance for members of the public interacting with their programs, beyond continuing to enable members of the public to rely on assistance from other persons such as family or friends, by:

a. Working with legal aid organizations and others who provide pro bono or ''low'' bono (below market rate but not free) services to increase availability of representation;

b. Establishing rules authorizing accredited or qualified nonlawyer representatives to practice before the agency; and

c. Expanding the use of agency staff, including front-line staff, ombuds, and public advocates, as well as government-sponsored and -supported entities designed to help members of the public navigate government processes.

15. Agencies should identify unnecessary administrative burdens that are required by statutes in their Supporting Statements under the Paperwork Reduction Act (PRA) and in their annual proposed legislative program submissions to the Office of Management and Budget (OMB) under OMB Circular A–19.

Agency Organization

16. Political appointees, senior executives, and other agency leaders should prioritize burden identification strategies and reduction efforts, using their leadership positions to articulate burden reduction goals for agency staff and outline commitments for achieving them, particularly when such commitments require collaboration between agency units. Agencies should connect their burden reduction goals to their strategic planning and reporting goals under the Government Performance and Results Act.

17. Agencies should identify whether they have particular programs or functions that involve interaction with the public. Agencies with such programs should assemble a team devoted to improving the experiences that these members of the public have when interacting with the agency, often referred to as customer experience (CX) teams. CX teams should have thorough knowledge of relevant agency programs. Senior career staff should partner with one or more political appointees to provide CX teams with sufficient authority within the agency to accomplish their goals.

18. Agencies should include their general counsels and other relevant staff with statutory responsibilities related to burden reduction (for example, privacy officers and PRA officers) in such reduction efforts as early as possible in order to facilitate agency efforts to maximize burden reduction.

Agency Collaboration

19. Federal agencies should expand efforts to collaborate with other entities to maximize burden reduction. In particular, program and legal staff should collaborate with their chief data officer and other relevant officials on ways to share data across federal agencies and between federal and state agencies, consistent with the Fair Information Practice Principles and all relevant law and policy, in order to:

a. Increase outreach to members of the public who may be eligible for administrative programs;

b. Reduce requirements for forms and documentation; and

c. Under certain conditions, provide for automatic enrollment and renewal.

20. Agencies should work with their chief data officers and other relevant officials in cross-agency working groups to share information about best practices for reducing burden and using data-sharing agreements.

Roles for OMB and Congress

21. OMB should provide agencies with additional guidance, potentially including models and training, to inform agency:

a. Measurement and consideration of administrative burden and forgone benefits and services, such as in regulatory impact analyses;

b. Examination of the potential legal or policy advantages and disadvantages of administrative data sharing, in particular providing additional positive examples of data sharing; and

c. Use of flexibilities under the PRA to make it easier for agencies to conduct CX research and to improve agency service delivery.

22. When developing legislation that establishes or affects administrative programs, Congress should provide express statutory authority for agencies to share data where doing so would further the goals of the legislation and not cause undue harm to other legislative purposes or critical privacy interests.

Administrative Conference Recommendation 2023–7

Improving Timeliness in Agency Adjudication

Adopted December 14, 2023

It is often said that justice delayed is justice denied. Indeed, one rationale underlying the adjudication of many types of cases by executive branch agencies is that they often can decide them more quickly through administrative methods than the courts can through judicial methods.

Federal agencies adjudicate millions of cases each year, including applications for benefits and services, applications for licenses and permits, and enforcement actions against persons suspected of violating the law. Members of the public depend on the timely adjudication of their cases. Delayed adjudication, especially given the possible added time of judicial review, can have significant consequences, particularly for members of historically underserved communities.

The time it takes an agency to decide a case depends on, among other variables, the evidentiary and procedural demands of the case, the volume of cases pending before the agency, and the resources available to the agency to adjudicate cases. Many factors can affect these variables, such as the funds appropriated by Congress, which directly impact the resources that agencies can allocate to adjudication. Other factors include the establishment and expansion of programs by Congress, economic and demographic changes, trends in federal employment affecting agencies' ability to recruit and retain personnel involved in adjudication, disruptions to agency operations, such as the COVID–19 pandemic, and agency organizational structures and procedures.[1] When delays or backlogs increase, agencies frequently face pressure from parties, representatives, Congress, the media, and others to process and decide cases more promptly.

Agencies rely on a wide range of procedural, organizational, personnel,

[1] Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.).

technological, and other initiatives to promote timeliness and to respond to concerns about timeliness when they arise. The Administrative Conference has adopted many recommendations identifying specific methods that agencies have used or might use to improve timeliness. One of its earliest recommendations encourages agencies to collect and analyze case processing data to ''develop improved techniques fitted to [their] particular needs to reduce delays'' and measure the effectiveness of those techniques.[2] Later recommendations address options including:

- Delegation of final decisional authority subject to discretionary review by the agency head; [3]
- Use of precedential decision making by appellate decision makers; [4]
- Adoption of procedures for summary judgment [5] and prehearing discovery; [6]
- Use of a broad suite of active case management techniques; [7]
- Implementation of electronic case management and publicly accessible online processes; [8]
- Establishment of quality assurance systems; [9]
- Development of reasonable time limits or step-by-step time goals for agency action; [10]
- Use of alternative dispute resolution (ADR) techniques; [11]
- Use of simplified or expedited procedures in appropriate cases; [12]
- Use of remote hearings; [13]
- Aggregation of similar claims; [14] and
- Use of personnel management strategies.[15]

These recommendations remain valuable resources for policymakers charged with promoting and improving timeliness in agency adjudication. As technologies develop, policymakers also are increasingly looking to artificial intelligence and other advanced algorithmic tools to streamline or automate time-consuming, error-prone, or resource-intensive processes.[16]

At the same time, no single method will promote timeliness at all agencies in all circumstances. Each agency has its own mission, serves different communities, adjudicates according to a distinct set of legal requirements, has different resources available to it, and faces different operational realities. Moreover, in promoting timely adjudication, agencies must remain sensitive to other values of administrative adjudication such as decisional quality, procedural fairness, consistency, transparency, customer service, and equitable treatment. Building on earlier recommendations, this Recommendation provides a general framework that agencies and Congress can use to both foster an organizational culture of timeliness in agency adjudication in accord with principles of fairness, accuracy, and efficiency and devise plans to address increased caseloads, delays, backlogs, and other timeliness concerns when they arise.

Recommendation

Information Collection

1. Agencies should ensure their electronic or other case management systems are collecting data necessary for accuracy in monitoring and detecting changes in case processing times at all levels of their adjudication systems (*e.g.,* initial level, hearing level, appellate review level), identify the causes of changes in case processing times, and devise methods to promote or improve timeliness without adversely affecting decisional quality, procedural fairness, or other objectives. Agencies should identify the kinds of data or records that Congress, media representatives, researchers, or other interested persons frequently request to ensure that agency personnel responsible for responding to such requests can do so in an efficient manner. Agencies should ensure that electronic or other case management systems track the following information:

a. The number of proceedings of each type pending, commenced, and concluded during a standard reporting period (*e.g.,* week, month, quarter, year) within and across different levels of their adjudication systems;

b. The current status of each case pending at every level of their adjudication systems; and

c. For each case, the number of days required to meet critical case processing milestones within and across different levels of their adjudication systems.

2. To meet organizational goals and obtain information about expectations for adjudication timelines, agencies should communicate regularly with interested persons within and outside the agency. In addition to formal engagements, agencies should provide ongoing opportunities for interested persons within and outside the agency to provide feedback and suggestions. Methods for obtaining such information include:

a. Surveys of interested persons within and outside the agency;

b. Listening sessions and other meetings;

c. Requests for information published in the **Federal Register**;

d. Online feedback forms; and

e. Use of ombuds.

Performance Goals and Standards

3. Agencies should adopt organizational performance goals that encourage and provide clear expectations for timeliness. Performance goals may take several forms, including goals contained in agency strategic plans, guidelines establishing time limits for concluding cases, and policies instituting step-by-step time goals. In developing organizational performance goals for timeliness, agencies should:

a. Use the information described in Paragraphs 1 and 2 to develop goals that are reasonable and objective;

b. Encourage interested persons within and outside the agency to participate in the development of such goals; and

c. Periodically reevaluate such goals to ensure they (i) continue to be reasonable; (ii) encourage and provide clear expectations for timeliness; and (iii) do not adversely affect decisional quality or the fairness or integrity of proceedings.

4. When agencies use timeliness or productivity measures in appraising the performance of employees, as defined in 5 U.S.C. 4301, and members of the Senior Executive Service, or in setting timeliness or productivity expectations for administrative law judges, who are not subject to performance appraisals, agencies should:

---

[2] Admin. Conf. of the U.S., Recommendation 69–1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies,* 38 FR 19784 (July 23, 1973).

[3] Admin. Conf. of the U.S., Recommendation 68–6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency,* 38 FR 19783 (July 23, 1973); *see also* Admin. Conf. of the U.S., Recommendation 2020–3, *Agency Appellate Systems,* 86 FR 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 83–3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act,* 48 FR 57461 (Dec. 30, 1983).

[4] Admin. Conf. of the U.S., Recommendation 2022–4, *Precedential Decision Making in Agency Adjudication,* 88 FR 2312 (Jan. 13, 2023).

[5] Admin. Conf. of the U.S., Recommendation 70–3, *Summary Decision in Agency Adjudication,* 38 FR 19785 (July 23, 1973).

[6] Admin. Conf. of the U.S., Recommendation 70–4, *Discovery in Agency Adjudication,* 38 FR 19786 (July 23, 1973).

[7] Admin. Conf. of the U.S., Recommendation 86–7, *Case Management as a Tool for Improving Agency Adjudication,* 51 FR 46989 (Dec. 30, 1986).

[8] Admin. Conf. of the U.S., Recommendation 2023–4, *Online Processes in Agency Adjudication,* 88 FR 42681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018–3, *Electronic Case Management in Federal Administrative Adjudication,* 83 FR 30686 (June 29, 2018).

[9] Admin. Conf. of the U.S., Recommendation 73–3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation,* 38 FR 16840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication,* 87 FR 1722 (Jan. 12, 2022).

[10] Recommendation 86–7, *supra* note 7, ¶ 7; Admin. Conf. of the U.S., Recommendation 78–3, *Time Limits on Agency Actions,* 43 FR 27509 (June 26, 1978).

[11] Admin. Conf. of the U.S., Recommendation 86–3, *Agencies' Use of Alternative Means of Dispute Resolution,* 51 FR 25643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88–5, *Agency Use of Settlement Judges,* 53 FR 26030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87–5, *Arbitration in Federal Programs,* 52 FR 23635 (June 24, 1987).

[12] Admin. Conf. of the U.S., Recommendation 90–6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission,* 55 FR 53271 (Dec. 28, 1990); Recommendation 86–7, *supra* note 7, ¶ 3.

[13] Admin. Conf. of the U.S., Recommendation 2021–4, *Virtual Hearings in Agency Adjudication,* 86 FR 36083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014–7, *Best Practices for Using Video Teleconferencing for Hearings,* 79 FR 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011–4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion,* 76 FR 48795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86–7, *supra* note 7.

[14] Admin. Conf. of the U.S., Recommendation 2016–2, *Aggregation of Similar Claims in Agency Adjudication,* 81 FR 40260 (June 21, 2016); Recommendation 86–7, *supra* note 7, ¶ 9.

[15] Recommendation 86–7, *supra* note 7, ¶ 1.

[16] *Cf.* David Freeman Engstrom et al., Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies 38, 45 (2020) (report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence,* 86 FR 6616 (Jan. 22, 2021); *see also* Exec. Order No. 14,110, 88 FR 75191 (Nov. 1, 2023).

a. Use the information described in Paragraphs 1 and 2 to develop measures or expectations that are reasonable and objective and provide clear expectations for timeliness;

b. Encourage interested persons within and outside the agency, including employees to whom the measures or expectations apply, to participate in the development of such measures or expectations;

c. Ensure measures or expectations reflect tasks within the control of individual employees;

d. Ensure measures or expectations take into account the range of case types and tasks performed by individual employees as well as resources (*e.g.,* staff support, technology) at their disposal;

e. For employees who decide cases, ensure measures or expectations do not lead them to decide cases in a particular way;

f. For all employees, ensure measures or expectations do not lead them to take actions that would adversely affect decisional quality or the fairness or integrity of proceedings; and

g. Periodically reevaluate such measures or expectations.

Organizational, Procedural, Technological, and Case Management Techniques

The Administrative Conference has adopted many recommendations, listed in the Preamble, that identify organizational, procedural, technological, and case management techniques that agencies should use, in appropriate circumstances, to promote timeliness in adjudication or respond to increased caseloads, delays, backlogs, and other timeliness concerns. Agencies should also implement the following best practices, as appropriate:

5. Agencies should narrow disputes and resolve cases at the lowest possible level of their adjudication systems and, at each level, use the least time- and resource-intensive processes available and appropriate to the circumstances, such as informal prehearing procedures, alternative dispute resolution, streamlined procedures, or decision making on the written record.

6. As appropriate, agencies should adopt procedures for (i) resolving multiple cases in a single proceeding, such as the aggregation of similar claims; and (ii) resolving recurring legal or factual issues, such as precedential decision making or substantive rulemaking.

7. Agencies should adopt processes for screening cases at intake to (i) resolve procedural issues as early as possible; (ii) identify cases that may be appropriate for less time- and resource-intensive processes, such as those described in Paragraphs 5 and 6; (iii) identify cases that can be resolved quickly because they are legally and factually straightforward; and (iv) identify cases that should be prioritized or expedited.

8. Agencies should adopt procedures that standardize the allocation of tasks among adjudicators, managers, staff attorneys, and paralegal support staff.

9. Agencies should review and update as necessary their Human Capital Operating Plans (5 CFR pt. 250) to ensure their hiring and position management needs are aligned properly with their operational goals for adjudication.

10. Agencies should automate routine tasks that do not require a significant exercise of discretion when automation will not adversely affect quality or program integrity. Such tasks may include receiving filings and evidence, establishing new case files, associating records with case files, de-duplicating records, assigning cases to agency personnel for action, screening cases as described in Paragraph 7, and generating and releasing standardized correspondence.

11. Agencies should outsource routine tasks that do not require a significant exercise of discretion—such as transcribing, scanning records, or mailing correspondence—when it would be more efficient and cost-effective for a contractor to perform them and there are no legal or policy reasons to assign the tasks to agency personnel (*e.g.,* restrictions on access to sensitive personal or national security information).

12. Agencies should adopt rules and policies that reflect best practices for case management, including evidentiary development, motions practice, intervention, extensions of time, decision writing, and methods for encouraging prompt action and discouraging undue delay by parties. At the same time, agencies should ensure that adjudicators, managers, and support staff have sufficient flexibility to manage individual cases fairly, accurately, and efficiently, and test alternative case management techniques that may reveal new best practices. Agencies should periodically reevaluate such rules and policies, using the information described in Paragraphs 1 and 2, to ensure they continue to reflect best practices for case management and provide relevant personnel with sufficient flexibility to manage individual cases and test alternative case management techniques.

13. Agencies should establish organizational units, supervisory structures, and central and field operations that reinforce timeliness and facilitate appropriate communication among agency personnel involved in adjudication at all levels of an adjudication system.

14. Agencies should update public websites and electronic case management systems so that they are able to handle the volume of current and future cases efficiently and effectively.

Strategic Planning

15. Agencies should engage in evidence-based and transparent strategic planning to anticipate and address concerns about timeliness, including increased caseloads, delays, and backlogs. In undertaking such strategic planning, agencies should:

a. Use the information described in Paragraphs 1 and 2 to identify case processing trends such as geographical or temporal variations in case intake or case processing times, assess the causes of timeliness concerns, and identify points at all levels of their adjudication systems that are causing delays;

b. Review previous efforts to address timeliness concerns to understand what initiatives have been attempted and which have been effective;

c. Consider a wide range of options for improving timeliness in the adjudication process without adversely affecting decisional quality, procedural fairness, program integrity, or other objectives. Options may include organizational, procedural, technological, case management, and other techniques, including those identified in previous Conference recommendations and Paragraphs 5–14;

d. Engage in candid discussions with adjudicators, managers, and support staff at all levels of their adjudication systems, as well as interested persons outside the agency, regarding the benefits, costs, and risks associated with different options for improving timeliness;

e. Develop proposed plans for addressing timeliness concerns, and solicit feedback on the plans from interested persons within and outside of the agency;

f. Consider pilot studies and demonstration projects before implementing interventions broadly to test the effectiveness of different interventions and identify unintended consequences; and

g. Designate a senior official responsible for coordinating the activities described in this Paragraph.

Coordination and Collaboration

16. Agencies should facilitate communication between components involved in their adjudication systems and other components that carry out functions necessary for timely adjudication, such as those that oversee information technology, human resources, budget planning, office space, and procurement.

17. Agencies should coordinate, as appropriate, with the President and Congress by providing information on recommended legislative changes and appropriations that would promote timeliness generally or address ongoing timeliness concerns.

18. Agencies should partner with federal entities such as the Chief Information Officers Council, the U.S. Digital Service, the General Services Administration, and the Office of Personnel Management to develop and implement best practices for leveraging information technology, human capital, and other resources to promote or improve timeliness.

19. Unless precluded by law or otherwise inappropriate, agencies should share information with each other about their experiences with and practices for promoting timeliness generally and addressing ongoing timeliness concerns. The Office of the Chair of the Administrative Conference should provide for the interchange of such information, as authorized by 5 U.S.C. 594(2).

20. Agencies should develop partnerships with relevant legal service providers, other nongovernmental organizations, and state and local government agencies that advocate for or provide assistance to individuals who participate as parties in agency adjudications.

21. Agencies should make informational materials available to adjudicators, managers, staff attorneys, and paralegal support staff. Agencies should conduct regular training sessions for such personnel on best practices for fair, accurate, and efficient case management.

Communication and Transparency

22. Agencies should provide parties and representatives with resources to help them navigate their adjudication systems, understand procedural alternatives that may expedite decision making in appropriate cases, and learn about best practices for efficient and effective advocacy before the agency. Such resources may include informational materials (*e.g.,* documents written in plain language and available in languages other than English, short videos, decision trees, and visualizations), navigator programs, and counseling for self-represented parties.

23. As early as possible and at key points throughout the adjudication process, agencies should provide self-represented parties with plain-language materials informing them of (i) their right to be represented by an attorney or qualified nonlawyer legal service provider; (ii) potential benefits of representation; and (iii) options for obtaining representation.

24. Agencies should publicly identify case management priorities and procedures that have been adopted to improve timeliness and may result in parties' cases being identified for aggregation, expedition, or similar alternative techniques.

25. Agencies should publicly disclose (i) average processing times and aggregate processing data for claims pending, commenced, and concluded during a standard reporting period; (ii) any deadlines or processing goals for adjudicating cases; and (iii) information about the agency's plans for and progress in addressing timeliness concerns. Agencies should consider whether and to what extent they should disclose such information pertaining to agency subcomponents.

26. When agencies use timeliness or productivity measures in appraising the performance of employees, as defined in 5 U.S.C. 4301, and members of the Senior Executive Service, or in setting timeliness or productivity expectations for administrative law judges, who are not subject to performance appraisals, they should disclose such measures or expectations publicly and explain how they were developed. For employees who are subject to performance appraisal, agencies should disclose publicly (i) how they use such measures to appraise employees, and (ii) whether employees are eligible for incentive awards based on timeliness or productivity.

Consideration for Congress

27. As set forth in Recommendation 78–3, *Time Limits on Agency Actions,* Congress ordinarily should not impose statutory time limits on agency adjudication. If Congress does consider imposing time limits on adjudication by a particular agency, it should first seek information from the agency and interested persons. If Congress does decide to impose time limits, it should do so only after determining that the benefits of such limits outweigh the costs. If Congress then decides time limits are necessary or warranted, it should require agencies to adopt reasonable time limits or, in rare circumstances, impose such limits itself. In setting any statutory time limits, Congress should:

a. Recognize that preexisting statutory or regulatory frameworks or special circumstances (*e.g.,* a sudden substantial increase in an agency's caseload or the complexity of the issues in a particular case) may justify an agency's failure to conclude a case within the proposed statutory time limit;

b. State expressly what should occur if the agency does not meet its statutory deadline;

c. State expressly whether affected persons may or may not enforce the time limit through judicial action and, if so, the nature of the relief available for this purpose; and

d. Consider the need to increase agency resources to enable the agency to meet its statutory deadline.

Administrative Conference Recommendation 2023–8

User Fees

Adopted December 14, 2023

Federal agencies charge user fees as part of many programs. For purposes of this Recommendation, 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 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 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.[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 increasingly have 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 allocate government goods and services efficiently and fairly.[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 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 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.[5]

When designing user fee programs, Congress and agencies 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 small businesses and other small entities; the agency's revenue stability; and congressional oversight. The Conference consistently has emphasized the potential for public engagement to help policymakers obtain more comprehensive information, enhance the legitimacy of their decisions, and increase public support for their decisions.[6]

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.[7]

[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.

[3] 52 FR 23634 (June 24, 1987).

[4] See Lietzan, *supra* note 1, at 3.

[5] 31 U.S.C. 3302.

[6] *Cf.* Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Agency Rulemaking,* 84 FR 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 FR 42680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021–3, *Early Input on Regulatory Alternatives,* 86 FR 36082 (July 8, 2021).

[7] This Recommendation does not address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.

Recommendation

General Considerations

1. In 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. Congress or agencies also should consider whether or not there are reasons for waivers, exemptions, or reduced rates.

2. When establishing a user fee-funded program, especially one with a novel fee structure and one that collects fees from regulated entities, 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. 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. Congress or agencies also should consider whether the user fee might have other public benefits, such as promoting equity, reducing barriers to market entry, incentivizing desirable behavior, or producing some other socially beneficial outcome, or might have other public costs. Congress or agencies, as appropriate, should set forth procedures for waiving or reducing user fees that would cause undue hardship for low-income individuals, members of historically underserved communities, small businesses, and other small entities.

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

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, 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 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 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, including interest (specifying rates);*

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 input from interested persons.

7. Congress should maintain oversight of agencies that operate user fee programs, such as through the appropriations process or authorizing legislation that specifies the purpose, time, and availability for money collected through user fee programs.

Considerations for Agencies

8. 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, 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.*

9. Agencies should communicate clearly 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 also should 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 inviting public participation at early stages such as during cost and demand forecasting and budget formulation.

10. 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**.

11. 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 also should assess other resulting consequences or effects of the programs, such as those described in Paragraphs 2, 3, and 4.

[FR Doc. 2024–00302 Filed 1–9–24; 8:45 am]

BILLING CODE 6110–01–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0081]

Importation of Fresh Rhizomes of Turmeric (Curcuma longa L.) for Consumption From Mexico Into the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with importation of fresh rhizomes of turmeric (*Curcuma longa* L.) for consumption from Mexico into the United States. Based on the analysis, we have determined that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh rhizomes of turmeric from Mexico. We are making the pest risk analysis available to the public for review and comment.

DATES: We will consider all comments that we receive on or before March 11, 2024.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2023–0081 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2023–0081, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *www.regulations.gov*