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USER FEE PROGRAMS: DESIGN CHOICES AND PROCESSES

Erika Lietzan
University of Missouri Law School

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User Fee Programs: Design Choices and Processes

Erika Lietzan[*]

[*] Erika Lietzan is the Timothy J. Heinsz Professor of Law and William H. Pittman Professor of Law at the University of Missouri School of Law. Special thanks are due to Matthew Graham (University of Missouri School of Law, Class of 2024), Tom Langdon (2025), and Jacob Wood (2025) for research support.

Introduction

A user fee is a fee assessed by the government when it provides a good or service to a private party. Classic examples include the entrance fee required to enter Yellowstone National Park and the price paid to the U.S. Postal Service for a first-class postage stamp. In these transactions, the government provides a specific benefit to an identifiable recipient, who pays the fee. Although the federal government has assessed user fees since this country was founded, broad authorizing legislation in the middle of the 20th century made it possible for agencies to craft user fee programs on their own initiative. Since that time, the federal government has relied more and more on user fee programs. Interest in relying on user fees rather than general revenue (taxes) intensified in the final quarter of the century, as the federal courts sorted through issues relating to the constitutionality of user fees and as concerns mounted about the growing federal debt.

In the late 1980s, as interest in user fees was growing, the Administrative Conference of the United States (ACUS) commissioned a report exploring their propriety. The resulting report suggested a model for user fee programs grounded in economic theory and, specifically, the goal of enhancing the efficient provision of government services.[1] ACUS, in turn, issued a recommendation addressing the institution of and implementation of user fees to promote the efficient and fair allocation of government goods and services, expressly reserving comment on the imposition of charges for other purposes—such as to enhance federal revenue or to encourage or discourage behavior unrelated to resource allocation.[2] This recommendation, addressed to both Congress and agencies establishing user fees, states that a government service for which a user fee is charged should directly benefit the payer.[3] Further, fee levels should be based on "market factors where possible" and, in the absence of a reliable market price, "the agency's costs," including "all related processing costs and that portion of other agency costs properly allocable to the service or good provided (such as anticipated capital replacement or repair costs)."[4] But, it adds, if the general public also benefits significantly from the service, the user fees "need not be set to recover fully the cost of providing that service."[5] Finally, if other considerations—such as national policy objectives, program goals, or fairness concerns—play a role in "the decision to establish fees, the costs to be recovered, or the granting of waivers or reductions," the recommendation adds, "agencies should explain the criteria used and the rationale for their selection."[6]

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[1] The consultants published a version of their report in the Boston University Law Review. Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987). The report focused on three topics: (1) an ideal model for user fees based on economic theory, (2) the legal status of federal user fees, and (3) how the details of user fee implementation might affect their legal status.

[2] Admin. Conf. of the U.S. Recommendation 87-4, *User Fees*, 52 Fed. Reg. 23629, 23634 (June 24, 1987).

[3] *Id.* The recommendation added that a "service provided by the government as a condition to the pursuit of commercial or other activity (e.g., inspections) may properly be regarded as a benefit to the feepayer where it confers an advantage on the feepayer or lessens the feepayer's imposition of costs or risks on others or on society as a whole." *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

The federal government relies on user fees far more today than it did in 1987. Hundreds of user fees are in place across dozens of agencies,[7] and collections exceed more than $500 billion per year.[8] Congress has now supplemented the broad mid-century authorizing legislation with statutes that authorize, or require, specific agencies to collect user fees. And these statutes vary. Some enactments are prescriptive (even as to the amount collected), while others specify a formula or objective (such as full cost recovery). Some statutory authorizations are permanent, while others are slated to expire so that continuing to collect fees requires reauthorization. Some user fee laws were crafted with deep involvement of the agency, payers, and other stakeholders, and some were not. Some fees are charged to regulated entities in connection with regulatory activity, while others are charged to businesses or individuals in exchange for a specific service or good. Fees charged to regulated entities are sometimes transactional—for instance, paid at the time of submission of an application—while others are paid on a periodic basis. Some agencies are fully funded by user fees, some agencies have discrete programs that are fully funded by user fees, and some agencies have only modest support from user fees. Some agencies collect more in a year than they will use in that year and maintain the leftover funds in a reserve fund in the event of shortfall (or delay in reauthorization), while others do not. And so on.

Given the passage of time since the first ACUS project on user fees, the development of newer user fee models, and some evidence of scholarly interest,[9] the federal government's heavy reliance on user fees makes a new project assessing user fee programs ripe. This report, commissioned by ACUS in the spring of 2023, examines the design and implementation of user fee programs within the executive branch.[10] The project had two goals. The first goal was to describe user fee design and implementation across a range of federal agencies—identifying design decisions that must be made and the choices available; identifying practical and legal constraints on the choices available; exploring the relationship between these choices and core values of administrative law, as applicable; and explaining how program designers might make these choices, both as a procedural matter and as a substantive matter. This entailed conducting a literature review, extensive primary source research, and staff interviews at seven agencies as

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[7] There is no authoritative public list of federal agency user fees. Congressional Research Service, R45463: ECONOMICS OF FEDERAL USER FEES 2 (Jan. 22, 2019). *See also* U.S. Government Accountability Office, GAO-19-221, FEES, FINES, AND PENALTIES: BETTER REPORTING OF GOVERNMENT-WIDE DATA WOULD INCREASE TRANSPARENCY AND FACILITATE OVERSIGHT 10 (Mar. 2019) (here) ("There is no source of data that lists all collections of specific fees, fines, and penalties at a government-wide or agency level."); *id.* at 16 (explaining that "OMB does not publicly report these data below the government-wide level."). The Appendix to this report presents a list compiled from a variety of public sources—including reports of the Government Accountability Office (GAO), agency websites, and the Budget Appendix of the U.S. Government—but it is not exhaustive.

[8] User fees collected in FY 2022 totaled $571.6 billion. Office of Management and Budget, Budget of the U.S. Government Fiscal Year 2024: Analytical Perspectives (here), Table 18-3 (column on "2022 Actual"). This was more than three times the amount collected twenty years ago. Office of Management and Budget, Budget of the U.S. Government Fiscal Year 2004: Analytical Perspective (here), Table 5-1 (column on "2002 Actual").

[9] *E.g.*, Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67 (2013); Margaret Gilhooley, *Drug User Fee Reform: The Problem of Capture and a Sunset, and the Relevance of Priorities and the Deficit*, 41 N.M.L. REV. 327 (2011); Mary K. Olson, *How Have User Fees Affected the FDA*, 25 REGULATION 20 (2002); Ernst R. Berndt, Rena M. Conti & Stephen J. Murphy, *The Generic Drug User Fee Amendments: An Economic Perspective*, 5 J.L. & BIOSCIENCES 103 (2018).

[10] This report considers only user fees assessed by agencies in the executive branch. It does not consider fees assessed by the judiciary or the legislative branch. (An example of the latter would be the fees assessed under 17 U.S.C. § 708 by the Copyright Office, which is part of the Library of Congress.)

well as two private sector entities with an interest in user fees charged by two agencies.[11] The second goal was, if appropriate in light of the research findings, to offer recommendations for agencies, and potentially Congress, relating to user fee design and implementation.

The first task was to define the concept of "user fee" for purposes of the project. The heterogeneity of user fee programs across the federal government complicated this task. Many user fee models today depart from the classic transactional model described in the first paragraph. And when an agency collects fees from companies it regulates, the notion that the fee corresponds to a benefit requires more reflection. Sometimes a person or company pays a fee when submitting an application, and the fee covers the agency's review of the application. For instance, the Food and Drug Administration (FDA) collects a filing fee when a drug company submits an application seeking permission to market a new drug,[12] and the United States Patent and Trademark Office (USPTO) collects a filing fee in connection with each patent application.[13] In a sense, the service—review of the application—benefits the applicant.[14] But the service—review of new drug and patent applications—also benefits the broader public.[15] This is not the only way modern user fee programs depart from the classic model. Some fees are paid at regular intervals by regulated parties, rather than in connection with discrete transactions. For example, every federal credit union pays an annual fee to the National Credit Union Administration.[16]

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[11] Interviews were conducted with the Agricultural Marketing Service (AMS), Customs and Border Protection (CBP), the Environmental Protection Agency (EPA), the Nuclear Regulatory Commission (NRC), the Securities and Exchange Commission (SEC), the United States Citizenship and Immigration Services (USCIS), and the U.S. Patent and Trademark Office (USPTO). Stakeholder interviews were conducted with the American Intellectual Property Law Association (AIPLA) regarding fees charged by the USPTO and with Public Citizen regarding prescription drug user fees charged by the Food and Drug Administration (FDA). These agencies were selected with the goal of ensuring diversity in user fee design. Many of the discussions informed paragraphs that now have citations to statutes, regulations, and other agency documents, rather than citations indicating an interview source. In some cases, however, an interview source is noted.

[12] 21 U.S.C. § 379h(a)(1).

[13] 35 U.S.C. § 41.

[14] The benefit is different in these two examples. Review of a patent application benefits the applicant because, if it results in patent issuance, federal law will protect the patent right. 35 U.S.C. § 271. Review of a drug application benefits the applicant only because federal law erects an artificial barrier—a premarket approval requirement—to market entry. 21 U.S.C. § 355(a). When FDA user fees were first enacted, negotiators agreed to a fiction that the fees pay for the benefit of faster reviews. Each time Congress authorizes FDA to collect user fees with new drug applications, the agency agrees to "performance goals" that include deadlines for review of applications. These negotiated non-statutory deadlines (ten months for most applications) mean FDA decides more quickly than it did previously, but the agency still does not meet the statutory 180-day deadline. *See* 21 U.S.C. § 355(c)(1). That applicants have paid for the benefit of faster review is fiction, in other words, because the statute itself requires the agency to move even faster. More recent user fee negotiations include various true benefits, such as meetings that are not required by statute.

[15] It benefits the public as follows. FDA reviews new drug applications for safety and effectiveness, and by serving a gatekeeper role it ensures that the benefit of new drugs in the market outweigh their risks. This review also ensures the development of high quality evidence about treatments in the marketplace and allows FDA to regulate the format and content of information the companies provide to prescribers and patients about their treatments. Issuance of a patent rewards invention by ensuring protection of exclusive rights to the invention for a period of time, while also securing public disclosure of the invention (in the patent document itself) in the interests of continuing research and innovation. The prospect of reward stimulates innovative activity, and the public disclosure ensures the information will eventually fall into the public domain, both of which benefit the public. Rejection of unworthy patent applications ensures that the general public does not pay the price—of having to respect exclusive rights and thus, typically, paying higher prices for commercial embodiments of an invention for a period of time—unless the invention was truly novel and not obvious.

[16] 12 U.S.C. § 1755.

In short, although many user fees are classic one-time transactional fees tied to discrete services for individual beneficiaries, some fees pay for services that benefit the public in addition to the paying party, and some are paid at designated intervals and divorced from any specific transactions. Perhaps for this reason, the Office of Management and Budget (OMB) employs the term "user fee"—or, sometimes, "user charge"—if the payer is *either* "receiving special benefits from" *or* "subject to regulation by" the program or activity funded.[17] The Government Accountability Office (GAO) sometimes calls the latter "regulatory user fees."[18] Terminology varies at agencies that assess fees. For example, while FDA calls both application fees and annual fees "user fees," the Nuclear Regulatory Commission (NRC) refers to direct payment for a service as a "user fee," which it distinguishes from the "annual fee" paid by regulated firms. This report consider all these payments to be "user fees."

For purposes of this project, a federal agency "user fee" is (1) any fee assessed by an agency for a good or service that the agency provides to the party paying the fee, as well as (2) any fee collected by an agency from an entity engaged in, or seeking to engage in, activity regulated by the agency, either to support a specific regulatory service provided to that entity or to support a regulatory program that at least in part benefits the entity.

This report proceeds as follows. Section I provides background: a history of user fee programs and various issues resolved through litigation especially in the 1970s and an explanation of the relationship between legislative appropriations and user fee collections. Section II discusses threshold questions for decision makers: whether to impose a user fee at all and whether to use the existing mid-century authorizing statute or seek separate authorizing legislation. Section III works through design and implementation choices, grouped around four topics: setting user fees, collecting user fees, using collected fees, and reviewing user fees and user fee programs. The heterogeneity of user fee programs across the federal government, and the fact that user fee program design necessarily reflects an agency's substantive mission, means

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[17] Office of Management and Budget Circular No. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 20.3 (Aug. 2022) (here) ("The payers of the user charge must be limited in the authorizing legislation to those receiving special benefits from, or subject to regulation by, the program or activity beyond the benefits received by the general public or broad segments of the public (such as those who pay income taxes or customs duties)."); *but see* Office of Management and Budget Circular No. A-25 Revised, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS SUBJECT: USER CHARGES (Nov. 2017) (here) (narrower definition) ("fees assessed for Government services and for sale or use of Government foods or resources"). For the GAO definitions of "user fee," see GAO-05-734SP: A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 100 (Sept. 1, 2005) (here) ("fee assessed to users for goods or services provided by the federal government"); *id.* ("User fees generally apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public."); GAO, GAO-08-9788SP: PRINCIPLES OF FEDERAL APPROPRIATIONS LAW VOL. II (3d. ed. Sept. 2008) (here) ("A user fee may be defined as 'a price charged by a governmental agency for a service or product whose distribution it controls,' or 'any charge collected from recipients of Government goods, services, or other benefits not shared by the public.'").

[18] Government Accountability Office, GAO-15-1718: FEDERAL USER FEES: KEY CONSIDERATIONS FOR DESIGNING AND IMPLEMENTING REGULATORY FEES 36 (Sept. 2015) (here) ("we define regulatory user fees as a subset of federal user fees which are charged to nonfederal entities subject to federal government regulation, in conjunction with regulatory activities"); *id.* at 1-2 (distinguishing between "regulatory user fees" ("a subset of federal user fees that are charged to regulated entities in conjunction with regulatory activities") and "other types of user fees (paid by businesses and individuals "in exchange for the receipt of a discrete product or service where the government is not engaging in a regulatory activity")). OMB sometimes distinguishes between "voluntary collections from the public in exchange for goods or services" ("business-like transactions with the public") and "collections from the public that are governmental in nature" (such as "regulatory fees" and "compulsory user charges"). OMB Circular No. A-11, *supra* note 17, at § 20.7.

that discussion is very high level. Section IV explains the recommendations that emerge from this report.

The recommendations—directed to decision makers at both the legislative and administrative levels—are as follows. *First*, transparency during the user fee design process and about the decisions is essential, and some degree of stakeholder involvement will be important. The manner and extent of the involvement that is appropriate will likely vary. *Second*, close attention should be paid to the possibility that imposing fees, the structure of the fee program, or the fee amounts could distort either agency decision making or private behaviors in ways that are not socially desirable. The classic concern would be that collecting fees to support its programs prompts an agency to favor the interests of regulated feepayers, but this recommendation is meant to cast a wider net. *Third*, close attention should be paid to the nature and consequences of an agency's being partly or fully dependent on user fees. In some cases, for instance, decision makers may want to create a reserve fund so that important regulatory programs are not placed at risk because collections are hard to predict. In other cases, to give another example, being fully fee-funded may discourage agency staff from administering waivers and exemptions (to the user fees) that would be socially beneficial but require resources to implement. *Fourth*, although historically program designers and scholars justified transactional user fees on economic efficiency grounds, many also support user fees as a way to increase the resources available to regulators. And there may be persuasive reasons to take *other* values, goals, and priorities into account when deciding whether to collect fees and how to structure fee programs. Put another way, resource enhancement and economic efficiency may not be the only values that matter, and in any given case other considerations (for instance, concern that perceptions of capture may undermine public confidence in the agency) may counsel against collecting a user fee or may suggest structuring the fee a particular way.

This report is both broader and more general than the report commissioned in 1987, and it suggests recommendations that are broader than those adopted by ACUS at that time. As noted, the report commissioned in 1987 explored only the efficiency rationale, and the resulting ACUS recommendation reserved comment on the imposition of charges for other purposes. The 1987 recommendation focused on calculation of a user fee grounded in economic efficiency, pointing to transparency only in stating that if other considerations play a role in the decision making process, they should be identified and a rationale for their use offered. In contrast, this report explores the fact that considerations other than efficiency may support a user fee program and, indeed, that the efficiency rationale may not work at all for more modern user fee programs, which collect fees at regular intervals from regulated industries to support the cost of regulating. And this report explores the possibility that considerations other than efficiency—including considerations of equity, as well as the desire to further other social values—may counsel against imposition of a user fee or compel particular approaches to user fee design. This report is broader also in its emphasis on the importance of transparency throughout the program design and fee setting process and its emphasis on considering collateral consequences, including effects on private incentives. The broader scope of the present report and recommendations reflects the proliferation of user fee programs since 1987 and the diversity of their approaches.

An additional note about scope and terminology is warranted. This report focuses on the design of user fee programs both at the congressional level (i.e., the drafting of statutory user fee authority) and at the agency level (i.e., the implementing of statutory user fee authority, whether

the IOAA or something else). It uses the term "decision makers" (also "planners" or "program designers") to refer to the persons making these design decisions, understanding that these individuals might be within the executive branch or within the legislative branch, depending on the situation. The term "lawmakers" in this report refers exclusively to the legislature.

Finally, in accordance with the request for proposals issued by ACUS, this project does not assess issues relating to the constitutionality of user fee programs.[19] Readers should note, however, that there are significant questions about the constitutionality of statutes that delegate to executive branch entities the power to raise money for their own use, especially (but not only) if the money is available for an unlimited amount of time without any subsequent congressional involvement, and perhaps especially if the entity has broad discretion to design its own substantive programs.[20] These concerns may have additional salience in coming years, given the resurgence of both formalism and originalism within the federal judiciary. Indeed, in February 2023, the Supreme Court agreed to review the constitutionality of the Consumer Financial Protection Bureau's (CFPB's) self-funding mechanism, pursuant to which the agency—as described by the U.S. Court of Appeals for the Fifth Circuit—"simply requisitions from the Federal Reserve an amount 'determined by the Director to be reasonably necessary to carry out' the Bureau's functions" and the "Federal Reserve must grant that request so long as it does not exceed 12% of the Federal Reserve's 'total operating expenses.'"[21] Although this is not a user fee arrangement, the outcome of the case could have implications for user fee programs throughout the executive branch.[22]

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[19] *See* Admin. Conf. of the U.S., Request for Proposals—User Fees (Jan. 20, 2023) (here) ("The focus of this project is not whether agencies may or should draw on user fee receipts absent congressional authorization or outside the process for congressional appropriations, or what constitutional limits may apply to fee-supported agency activities even when congressionally approved.").

[20] Among other things, these concerns relate to consistency with the Appropriations Clause, Art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), the Origination Clause, Art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives"), and more broadly separation of powers (including nondelegation of legislative power).

[21] Community Financial Services Ass'n of America, Ltd. v. Consumer Financial Protection Bureau, 51 F.4th 616, 624 (5th Cir. 2022). The Court of Appeals concluded that this self-funding mechanism "cannot be reconciled with the Appropriations Clause and the clause's underpinnings, the constitutional separation of powers." *Id.* at 642; *see also id.* at 640 ("An expansive executive agency insulated (no, double-insulated) from Congress's purse strings, expressly exempt from budgetary review, and headed by a single Director removable at the President's pleasure is the epitome of the unification of the purse and the sword in the executive—an abomination the Framers warned 'would destroy that division of powers on which political liberty is founded.'") (quoting Alexander Hamilton). For discussion, see Christine Kexel Chabot, *The Founder's Purse*, __ VA. L. REV. __ (2023) (arguing that Fifth Circuit's originalist approach missed a critical body of contrary historical evidence and that the CFPB arrangement aligns with Appropriations Clause directive that Congress authorize spending "by law"); *contra* Kate Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343 (1988) (arguing that the Appropriations Clause means the executive may not raise or spend funds that were not appropriated by explicit legislative action and that Congress has a constitutional duty to limit the amount and duration of each grant of spending authority).

[22] Moreover, regardless of the outcome of *Community Financial Services*, the issues will continue to percolate in the courts. *E.g.*, Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022) (affirming, over a dissent, National Marine Fisheries Service implementation of an industry-funded at-sea monitoring program under the Magnuson-Stevens Act), *cert. granted*, 143 S. Ct. 2429 (2023) (limited to the second question, relating to whether the Court should overrule *Chevron*, and not the first question, relating to whether the statute granted the agency authority to assess the fee in question).

I. Background

A. History of User Fees

1. The Independent Offices Appropriations Act

Shortly after World War II, Congress passed legislation asking agencies to adopt user fees.[23] Title V of the Independent Offices Appropriations Act (IOAA), enacted in 1951, expressed the "sense of Congress" that benefits, privileges, licenses, permits, and "similar" things of "value or utility" that were provided, prepared, or issued by federal agencies should be "self-sustaining."[24] Today, section 9701 of Title 31 authorizes every agency (except a mixed-ownership government corporation) to issue regulations establishing the "charge" for a "service or thing of value" provided by the agency.[25] Each charge should be "fair" and based on the costs to the government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts.[26] "Regulations prescribed by the heads of executive agencies," the statute adds, "are subject to policies prescribed by the President and shall be as uniform as practicable."[27]

Since the 1950s, the White House has supplemented this statutory language with circulars describing federal policy on the imposition of user fees. In 1959, the Bureau of the Budget, OMB's predecessor, stated the general policy of the Executive Office of the President that a "reasonable charge … should be made to each identifiable recipient for a measurable unit or

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[23] The federal government has imposed user fees for far longer. Brief of Professors of History and Constitutional Law as Amici Curiae in Support of Petitioners, CFPB v. Community Fin. Servs. Ass'n, at 22-23 (May 15, 2023) (here) (explaining that the Customs Service, for sixty years after its establishment in 1789, had no appropriations and instead "received fees for transactions like issuing permits"); *id.* at 26-27 ("In 1792, Congress established a new Post Office. Instead of relying on annually appropriated Treasury withdrawals, Congress empowered the Office to pay its expenses out of its revenue."); *id.* at 28 (citing additional statutes from the late 1700s and 1800s that funded the Mint, the Patent Office, the Steamboat Inspection Service, and the Office of the Comptroller of the Currency through fees); *see also* Chabot, *supra* note 21, at 40-51 (detailed discussion of early Congresses authorizing self-funded customs officers, U.S. attorneys, U.S. marshals, and the Patent Board); Terrence J. Schroepfer, *Fee-Based Incentives and the Efficient Use of Spectrum*, 44 FED. COMM. L.J. 411, 415 (1992) (noting that "user fees for such items as … the maintenance of bridges date back to the Revolution").

[24] Title V, Pub. L. 92-137, 65 Stat. 268, 290 ("It is the sense of Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency … to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation … to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts … ."). This was placed in section 483 of Title 31 ("Money and Finance"). Congress revised the statutory language in 1982, when it recodified Title 31. Pub. L. 97-258, 96 Stat. 877. For instance, the phrase "each service or thing of value provided" now substitutes for "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued," and today each charge should be "fair" rather than "fair and equitable." 31 U.S.C. § 9701. For a history of this legislation, see GAO-08-9788SP, *supra* note 17, at 12-146 to 12-148.

[25] 31 U.S.C. § 9701(b).

[26] *Id.*

[27] *Id.*

amount of Government service or property from which he derives a special benefit."[28] That is, if a "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed."[29] Further, the user fee should be calculated to "recover the full cost to the Federal Government of rendering that service."[30] Examples of special services that should trigger a charge, this circular added, include a service that enables the beneficiary to "obtain more immediate or substantial gains or values … than those which accrue to the general public" (such as "receiving a patent, crop insurance, or a license to carry on a specific business") as well as a service that provides "business stability or assures public confidence in the business activity of the beneficiary" (such as "safety inspections of craft").[31] Another example would be a service "performed at the request of the recipient" and "above and beyond the services regularly received by other members of the same industry or group, or of the general public" (for instance, receiving a passport or visa).[32] In contrast, however, an agency should *not* charge for a service if "identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public" (such as "licensing of new biological products").[33] This was known as the "public benefit exclusion."[34]

Today, the federal "policy regarding fees assessed for Government services and for sale or use of Government goods or resources" appears in OMB Circular No. A-25 Revised, which was issued in 2017 and replaced the 1959 document just described.[35] Among other things, OMB has reworded the public benefit exclusion to say that an agency should not charge for a service "if identification of the *specific* [rather than *ultimate*] beneficiary is obscure, and the service can be considered primarily as benefitting the broader public."[36] And it deleted the example of licensing new biological products, which FDA performs today—for a user fee.[37] These changes reflect litigation discussed in the next subsection.

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[28] Circular A-25 (Sept. 23, 1959) (here), § 3. The Bureau of the Budget had earlier addressed user fee issues in Bulletin No. 58-3 (Nov. 13, 1957).

[29] *Id.* § 3(a)(1).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* § 3(a)(2).

[34] Janet Woodcock & Suzanne Junod, *PDUFA Lays the Foundation: Launching Into the Era of User Fee Acts* 8 (FDA publication, available here).

[35] OMB Circular A-25, *supra* note 17. Transmittal Memorandum No. 1 (Oct. 22, 1963), and Transmittal Memorandum No. 2 (Apr. 16, 1974) made targeted amendments to the 1959 bulletin, but the White House rescinded all three and revised and reissued Circular No. A-25 in its entirety in November 2017. The 1959 version and subsequent amendments can be found here.

[36] OMB Circular A-25, *supra* note 17, § 4. *See also infra* note 135 (describing the current circular's explanation when a special benefit exists).

[37] 21 U.S.C. § 379h.

2. Constitutional Questions and Supreme Court Rulings

In 1963, the Federal Communications Commission (FCC) established nominal fees for applications filed with the agency.[38] For instance, an application for a construction permit for a new television station required a filing fee of $100.[39] The FCC relied on the IOAA for its authority to impose these fees, rejecting arguments from stakeholders that the statute—if it were interpreted to provide this authority, that is, rather than simply encouraging the recovery of fees where authority otherwise existed—had unconstitutionally delegated legislative power.[40] The United States Court of Appeals for the Seventh Circuit rejected an unlawful delegation challenge in 1964.[41]

In 1970, the agency proposed a new fee schedule that included fees payable by every cable television system.[42] Cable systems did not need licenses to operate; the FCC's rules instead simply imposed conditions on their operation. Without the prospect of assessing fees in connection with applications to operate, the agency took a different approach: (1) filing fees in connection with notices submitted to request waivers or relief from various regulations, and (2) an annual fee imposed on each system.[43] It set the annual fee at 30 cents per (household) subscriber, by estimating its cost of regulating the industry, deducting the revenue it would receive from filing fees, and dividing the remainder by the total number of subscribers.[44]

The National Cable Television Association sought judicial review of the annual fee. The association argued that the IOAA—as interpreted in Circular A-25—permits an agency to charge a fee only to an "identifiable recipient" of a "measurable unit" of service from which that recipient obtains a "special benefit."[45] Furthermore, the association argued, that fee must be based on the "direct and indirect cost to the Government, value to the recipient, [and] public policy or interest served" by that service.[46] The annual fee imposed by the FCC, the association asserted, failed each requirement. That is, the FCC's regulation of the cable industry provided no special benefit, let alone to an identifiable recipient. Moreover, most cable systems made no filings with or requests to the FCC over the course of a year, meaning there was no measurable unit of service linked to the fee. Finally, the amount paid was unrelated to any value or special benefit received from the FCC; it was effectively based on the payer's gross receipts and therefore an "illegal tax."[47]

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[38] 28 Fed. Reg. 10911 (Oct. 11, 1963).

[39] *Id.* at 10914.

[40] *Id.* at 10911.

[41] Aeronautical Radio, Inc. v. United States, 335 F.2d 304, 307 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) (stating that the IOAA has the "constitutional essentials" because it states the legislative objective, the method of achievement, and guiding standards).

[42] Notice of Proposed Rulemaking in Docket 18802, 21 F.C.C. 2d 502 (Feb. 18, 1970).

[43] Report and Order, Docket No. 18802, 23 F.C.C.2d 880 (July 2, 1970), codified at 47 C.F.R. § 1.1116.

[44] Brief for Petitioner, National Cable Television Assoc. v. United States, 1973 WL 173866, at *12.

[45] *Id.*

[46] *Id.*

[47] *Id.* at *12-13. This would be illegal because Congress had authorized a fee, not a tax. *Id.* at n.41.

The Solicitor General responded, in part, that cable television operators enjoy special benefits that warrant fee assessments to recover regulatory costs, including the basic benefit of authorization to carry television broadcast signals.[48] And although the FCC conducts its activities primarily for the public's benefit, the brief added, nothing in the IOAA or Circular A-25 precluded assessment of charges so long as substantial special benefits accrue to members of an industry as a result of the agency's work.[49] Moreover, the statute did not limit fees to services specifically rendered to *individual* applicants; an agency could fairly prorate the cost of its regulatory activities among members of a benefitting group.[50] The FCC's approach to calculating the fee was a "fair" and "equitable" way of balancing "value to the recipient" with the other statutory criteria, including direct and indirect cost to the government, public policy, and other pertinent facts.[51]

Justice Douglas's brief opinion for the Court sent the matter back to the FCC for recalculation of the fee. While the regulated companies derived some benefit from the regulatory scheme, which would justify a user fee, the scheme as a whole was meant to, and did, benefit the public.[52] The Court had construed the statute to authorize only a fee based on the agency's providing a service of value to a recipient.[53] And this meant the fee had to be recalculated, so that cable television companies paid only for the benefit they received and not also for the benefit the public received.

The reasoning of this decision has proven important for the design of subsequent user fee programs and requires elaboration.[54] Justice Douglas began by drawing a sharp distinction between taxation and fee assessment. "Taxation," he wrote, is a "legislative function," and Congress "the sole organ for levying taxes."[55] A "fee," in contrast, "is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station."[56] The agency performing these services "normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."[57] The Court did not conclude that Congress had "bestowed" the taxing

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[48] The agency's regulatory framework, it argued, provides "general authorization to provide this interstate communication service in accordance with applicable rules and regulations." Brief for the United States and the Federal Communications Commission, National Cable Television Ass'n v. United States, 1973 WL 173867, at *13, citing 23 F.C.C.2d at 883.

[49] *Id.* at *19-20.

[50] *Id.* at *20-21.

[51] *Id.* at *21.

[52] National Cable Television Ass'n v. United States, 415 U.S. 336, 343 (1974) (citing 47 U.S.C. § 151).

[53] *Id.*

[54] *E.g.*, Gilhooley, *supra* note 9, at 340 (stating that user fees for new drug applications at FDA have been characterized as fees in exchange for faster reviews specifically to reflect the *National Cable* decision, because this "avoided issues about Congress's constitutional ability to delegate authority to an agency to impose a tax by reading the statute as authorizing fees based on the value given to the recipient, rather than the public interest").

[55] National Cable Television Ass'n, 415 U.S. at 340, citing U.S. Const. art. I, § 8 (giving Congress the power to "lay and collect Taxes, Duties, Impost and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); but all Duties, Imposts and Excises shall be uniform throughout the United States").

[56] *Id.* at 340-41.

[57] *Id.*

power on an agency. Instead it construed the IOAA as authorizing a "fee" tied to a benefit.[58] This aligned with the statute's instruction to consider the "value to the recipient."[59]

The Court did not address the constitutional question: whether the IOAA provided adequate standards for agency action under the Supreme Court's delegation decisions, *Schechter* and *Hampton*.[60] Nor did it consider a different constitutional question: whether, when Congress acts pursuant to its *taxing* power, Congress must provide more concrete guidance to the agency than these precedents otherwise require.[61] Instead, the Court would "read the Act narrowly to avoid constitutional problems."[62] The statutory reference to basing the fee on "public policy or interest served, and other pertinent facts," if construed literally, "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House."[63] Such an assessment would be akin to a tax, and constitutional questions would surface. These considerations would be ignored, leaving "value to the recipient" as the basis for

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[58] *Id.* at 341.

[59] *Id.*

[60] *Id.* at 342 ("Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach."), after quoting both Schechter Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.") and Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) ("'If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). As noted, *supra* note 41, the Seventh Circuit had rejected this unlawful delegation argument in 1964.

[61] It addressed this question in 1989. In *Skinner v. Mid-America Pipeline*, which concerned COBRA's authorization of pipeline safety user fees, the Court rejected an argument that "the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." 490 U.S. 212, 222-223 (1989). Consequently it did not determine whether the fee in question, which partially covered administrative costs that "actually inure to the benefit of the public," was for that reason properly characterized as a tax or a fee. Either would have been constitutional. *Id.* at 223-24. Congress need only "indicate clearly its intention to delegate" the authority to recover administrative costs that do not inure "directly" to the benefit of regulated parties. *Id.* at 224. Relying on this quote, some Courts of Appeal describe *National Cable* and *Skinner* as together setting forth a "clear statement rule"—distinct from the "intelligible principle" standard for permissible delegation set out in *Hampton*—for user fees to survive nondelegation challenges. *E.g.*, U.S. v. Rohm and Haas Co., 2 F.3d 1265, 1273-74 (3d Cir. 1993) (holding that costs incurred by the government in overseeing a hazardous waste cleanup performed and paid for by a private party pursuant to the Resource Conservation and Recovery Act (RCRA) are not recoverable, because the "clear indication mandated by" *National Cable* was lacking); U.S. v. Dico, Inc., 266 F.3d 864, 876-878 (8th Cir. 2001) (declining to apply "*National Cable* clear statement doctrine" to EPA recovery of oversight costs in connection with cleanup, because statutory scheme is remedial and not a user charge); U.S. v. E.I. DuPont de Nemours and Co., Inc., 432 F.3d 161 (3d Cir. 2005) (overruling *Rohm* and stating that because "CERCLA neither imposes user fees or taxes, nor imposes them on a regulated industry," *National Cable* "does not apply").

For additional discussion of this question, consider Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L. J. 239, 277 (2005) (arguing for more diligent enforcement of the nondelegation doctrine in the context of legislation authorizing agencies to raise and spend revenue directly, though taking the position that if Congress "delegates clearly and with the requisite specificity," it "may delegate responsibility for implementing either a fee or a tax to an administrative agency"); *see also* E. Donald Elliott, *EPA's Existing Authority to Impose a Carbon "Tax"*, 49 ENV. L. REP. 10919, 10920-21 (2019) ("Under the key U.S. Supreme Court case in the area, *National Cable Television Ass'n v. United States*, a strong presumption exists against concluding that Congress has delegated its power to *tax* to an administrative agency.") (emphasis in original).

[62] National Cable Television Ass'n, 415 U.S. at 343 ("But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.").

[63] *Id.* For instance, a lawmaker might "make the assessment heavy if the lawmaker wants to discourage the activity" or "make the levy slight if a bounty is to be bestowed." *Id.*

the fee authorized.[64] This in turn meant the FCC could not set the fee amount so that regulated companies *fully* funded their regulatory oversight.

On the same day as it decided *National Cable*, the Court released a companion decision in *Federal Power Commission v. New England Power Co*.[65] In *National Cable*, the Court had not reached the argument that the FCC impermissibly collected annual fees from companies that did not receive benefits or services.[66] In *Federal Power Commission*, it addressed the argument. The Federal Power Commission imposed an annual fee on electric utilities, taking essentially the same approach as the FCC had done; it took the annual cost of administering the Federal Power Act, deducted certain costs (such as costs associated with rendering services to electric systems not subject to its jurisdiction), and assessed the remaining total balance against all companies it regulated, in proportion to their wholesale sales and interchange of electricity.[67]

This was impermissible. The IOAA authorizes only *specific* charges for *specific* services to *specific individuals or companies*; it does not authorize assessment of fees against an entire industry *as* an industry.[68] The problem was not that agency imposed an annual fee or that it collected the fee from all members of the industry, but rather that it collected fees from companies that had no proceedings before the agency during the year in question.[69] Justice Douglas distinguished a hypothetical arrangement in which every member of an industry benefits from a specific service and pays a corresponding fee.[70] The Court affirmed the decision of the court of appeals to set aside the annual charges.[71]

These rulings tell us three things about the design of user fee programs pursuant to the IOAA. *First*, *Federal Power Commission* tells us an agency may not collect a fee under this law from a company that does not itself receive a special benefit from the agency. But this proposition is specific to the IOAA; Justice Douglas distinguished annual fees levied by the Atomic Energy Commission (AEC) and the Securities and Exchange Commission (SEC) under

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[64] *See* Seafarers International Union v. United States Coast Guard, 81 F.3d 179, 183 (D.C. Cir. 1996) (stating that the Court "essentially read the 'public policy or interest served' language out of the statute").

[65] 415 U.S. 345 (1974).

[66] It did not reach this issue because it stopped when it found that the fee structure impermissibly charged regulated cable companies for agency work that benefitted the public; it sent the fee back to the agency to recalculate at this point, without considering which companies could be assessed a fee.

[67] *Id.* at 348. It also collected an annual fee from natural gas companies in proportion to their delivery of natural gas in interstate commerce, taking the same basic approach to calculation of each company's fee. *Id.*

[68] *Id.* at 349 ("The Court of Appeals held that whole industries are not in the category of those who may be assessed, the thrust of the Act reaching only specific charges for specific services to specific individuals or companies. We agree with the Court of Appeals.").

[69] *Id.* at 351.

[70] *Id.*

[71] Justice Marshall, joined by Justice Brennan, wrote separately—one opinion for the two cases, dissenting in *National Cable* and concurring in *Federal Power Commission*. Although they were not moved by arguments that the statutes raised constitutional issues, they perceived no specific benefit provided or service rendered to the companies paying the fees, so they would have ruled in both cases that the IOAA did not authorize the annual fees charged. *Id.* at 359.

different laws.[72] *Second*, *National Cable* tells us that a user fee under the IOAA must be based on the service's (or good's) value to the recipient. Two years later, the D.C. Circuit concluded that this statutory standard is value *conferred on* the recipient, rather than value *derived by* the recipient.[73] In other words, the fees must "bear a reasonable relationship to the *cost* [to the agency] of the services rendered,"[74] rather than the value of those services to the recipient, for instance as reflected in the recipient's gross income. *Third*, an agency may assess a fee under the IOAA even if the service benefits both the feepayer and the public. To be sure *National Cable* establishes that an agency may not charge the feepayer for the benefit received by the public, but it also establishes that the agency may shift a portion of the cost of regulation to industry, even if the public benefits from the regulation.[75] Even after these rulings, though, some agencies declined to impose fees under the IOAA for services that provided a significant public benefit, citing concerns about the legality of doing so. For instance, leadership at the Department of Health and Human Services (HHS) raised the legality issue when rejecting recommendations that FDA impose user fees under the IOAA.[76]

3. Growing Interest in User Fee Programs

Reliance on user fees—both pursuant to the IOAA and pursuant to new congressional authorizations—increased in the decades that followed.[77] For instance, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) included agency-specific user fee

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[72] The AEC assessed an annual fee against operators of nuclear power reactors and operators of other nuclear facilities, and the SEC assessed an annual fee on registered investment advisors. 415 U.S. at 350 n.4. After endorsing the proposition—set forth in Circular A-25—that under the IOAA, no charge should be made "'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public," Justice Douglas added that this sentence "covers only fees imposed under" the IOAA, "not those authorized 'under more specific grants of statutory authority.'" 415 U.S. at 350 n.4.

[73] Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1138 (D.C. Cir. 1976); *see also* National Ass'n of Broadcasters v. FCC, 554 F.2d 1128, 1130 n.28 (D.C. Cir. 1976) ("In suggesting that the 'value of benefits bestowed' on a regulatee could be included in the fee, and that same would include factors beyond 'costs,' the concurrence is apparently suggesting that the fee base could go so far as to include values created by licensees out of their grants. For the reasons outlined in the body of the opinion we do not believe that the quoted Supreme Court decisions permit the inclusion of such factors. When the cost of the benefit conferred is exceeded by any material amount, one immediately gets into the taxing area and the result is revenue and not a fee.").

[74] 554 F.2d at 1138 (emphasis in original omitted, different emphasis added).

[75] *See also* Seafarers International Union of North America v. United States Coast Guard, 81 F.3d 179, 183 (D.C. Cir. 1996) ("[F]ees are valid so long as the agency levies 'specific charges for specific services to specific individuals or companies.' Under this test, it does not matter whether the ultimate purpose of the regulatory scheme giving rise to the license requirement (and accompanying user fee) is to benefit the public.").

[76] Bruce N. Kuhlik, *Industry Funding of Improvements in the FDA's New Drug Approval Process: The Prescription Drug User Fee Act of 1992*, 47 FOOD & DRUG L. J. 483, 484 (1992) (noting disagreement between the Department of Health, Education, and Welfare (HEW), HHS's predecessor, which "believed that the benefits received by the general public from the services involved were primary and that the benefits received by the manufacturers were secondary" and the GAO, which believed that "although the general public accrues immeasurable health benefits, the drug manufacturers acquire benefits through the right to market the approved product for profit"); *see also* James L. Zelenay Jr., *The Prescription Drug User Fee Act: Is a Faster Food and Drug Administration Always a Better Food and Drug Administration*, 60 FOOD & DRUG L. J. 261, 275 (2005) (noting that the GAO recommended in 1971 that FDA implement user fees under the IOAA, but the agency, the Bureau of Budget, and HEW responded that it lacked the authority to do so).

[77] *See generally* CONG. BUDGET OFF., Memorandum, THE GROWTH OF FEDERAL USER CHARGES: AN UPDATE (Oct. 1995) (here).

authorizations and related provisions.[78] Section 5002 amended the Communications Act to require the FCC to assess fees associated with constructing and operating mass media and common carrier services.[79] Section 7005 directed the Secretary of Transportation to establish "pipeline safety user fees."[80] Sections 13031 to 13022 directed the Secretary of the Treasury to charge and collect fees for customs broker permits and other customs services.[81] Section 7601 directed the NRC to study the feasibility and necessity of establishing a system for assessment and collection of annual charges from persons licensed pursuant to the Atomic Energy Act.[82] Nor was COBRA the only such statute. The Omnibus Budget Reconciliation Acts of 1990 (OBRA-90) and 1993 (OBRA-93) authorized more fees; for instance, OBRA-93 authorized the FCC to auction licenses for use of the electromagnetic spectrum, i.e., for a fee.[83] In the early 1990s, Congress authorized FDA to collect user fees in connection with submission of new drug applications and biologics license applications,[84] and it has since authorized the agency to collect user fees from other industries it regulates.[85]

Increased interest in user fee programs reflects in part deregulatory initiatives over multiple presidential administrations. Although many associate deregulatory initiatives with the Reagan Administration and, more recently, the Trump Administration, the modern era of deregulatory reform began in the Carter administration.[86] To be sure, different administrations—and, for that matter, different Congresses—may pursue this sort of reform for different reasons; one might be motivated by a philosophical preference for smaller federal government, for instance, while another might be motivated by desire to reduce the federal government's debt. But user fee proposals have featured in deregulatory reform proposals through the decades since the 1970s.[87] And the federal government's debt—the budget has run a deficit every year since

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[78] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82.

[79] 100 Stat. 82, 118-121, codified at 47 U.S.C. § 158.

[80] 100 Stat. 82, 140, codified at 49 U.S.C. app. 1682a.

[81] 100 Stat. 82, 308-310, codified at 19 U.S.C. § 58c.

[82] 100 Stat. 82, 146-147, codified at 42 U.S.C. § 2213.

[83] Omnibus Budget Reconciliation Act of 1992, Pub. L. No. 103-66, § 6003, 107 Stat. 312, 397.

[84] Prescription Drug User Fee Act of 1992, Pub. L. No. 102-571, 106 Stat. 4491.

[85] *See* Appendix.

[86] Alfred C. Aman Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention*, 2 IND. J. GLOBAL LEGAL STUD. 429, 443 (1995) ("The use of market approaches to regulation and legislative deregulatory reform first began in a major way in [the Carter] administration."); *see also* Susan Dudley, *Jimmy Carter, The Great Deregulator*, THE REGULATORY REVIEW (Mar. 6, 2023) ("President Carter deserves credit for setting in motion a wave of economic deregulation that led to lasting improvements in social welfare.").

[87] Aman, *supra* note 86, at 445 ("There was a significant global backdrop to the deregulatory initiatives of the 1970s and especially the 1980s that gave added impetus to the political viability of these reforms."); *id.* at 445, 450, 453 (noting that the National Performance Review written in the Clinton Administration under Vice President Gore's direction advocates a new "rhetoric for defining the relationship of the individual to the State" with "citizens as customers" and urges "greater reliance on user fees"); Gillette & Hopkins, *supra* note 1, at 797-98 (noting that the Reagan Administration of the 1980s took a keen interest in expanding reliance on federal user fees); Peter A. Pfohl, *Who Should Pay for Agency Adjudication - A Study of 200,000 Filing Fees at the Surface Transportation Board*, 25 TRANSP. L.J. 57, 60 (1997) (suggesting that President Clinton's proposal that the Surface Transportation Board's funding be derived from user fees under the IOAA reflected his commitment to deregulating the railroads).

2001[88]—contributes to a policymaking climate receptive to shifting agency funding from appropriations (and thus general tax revenue) to user fees.[89]

The Grace Commission Report played a role in the shift to greater reliance on user fees. President Reagan had requested a private sector study of government waste; the resulting report recommended among other things changes in the administration of user fees.[90] In particular, it suggested that user fees be based, in some situations, on the value of the service to the recipient and *not* the agency's cost recovery.[91] As noted earlier, the IOAA dictates that a charge must be "based on … the costs to the Government [and] the value of the service or thing to the recipient,"[92] but based on a 1976 court of appeals ruling, agencies used the value *conferred*, which was still grounded in cost recovery. Both the Congressional Budget Office (CBO) and the GAO stated that the Grace Commission's recommendation (to use the value *to the* recipient) would require new statutory authority.[93] The Grace Commission also suggested that agencies be permitted to carry unobligated fees over from one year to the next, which would mitigate revenue fluctuation and might also incentivize agencies to create user fee programs.[94] These suggestions bore fruit in some subsequent user fee schemes.

The lower courts have since issued many rulings that provide guidance for the design and implementation of user fee programs. Several principles emerge. For example, an agency imposing fees under the IOAA may recover the *full cost* of providing a specific benefit to an identifiable beneficiary, even if the public incidentally benefits from the service.[95] The fee need only be "reasonably related" to the value of the private benefit.[96] This agency may not, however, recover costs incurred serving an "independent" public interest.[97] More generally, Congress may authorize an agency to recover its costs in providing generic services to members of a regulated

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[88] U.S. Department of Treasury, *What is the National Deficit* (here).

[89] Woodcock & Junod, *supra* note 34, at 8 (noting "reconsideration of user fees by regulators, regulated industry, Congress, and the Reagan, Bush, and Clinton administrations during the 1980s and early 1990s" in part on account of "the country's large and growing deficit").

[90] Woodcock & Junod, *supra* note 34, at 5.

[91] *Id.*

[92] 31 U.S.C. § 9701(b)(2)(A), (B).

[93] ANALYSIS OF THE GRACE COMMISSION'S MAJOR PROPOSALS FOR COST CONTROL: A JOINT STUDY BY THE CONGRESSIONAL BUDGET OFFICE AND GENERAL ACCOUNTING OFFICE 219 (Feb. 1984) ("It appears that Congressional action would be needed to implement … the user fee [recommended by the Grace Commission] … . Without legislation authorizing a user fee, the [power marketing administrations] may lack the authority to collect it in their rates, because it is not directly related to their costs of service or repayment obligations.").

[94] Woodcock & Junod, *supra* note 34, at 5. For discussion of appropriations issues, see section I.B, *infra*.

[95] Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 229–30 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994). A benefit to the public is incidental, for instance, if it comes at no added cost to the service.

[96] Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d at 732.

[97] Mississippi Power & Light Co., 601 F.2d at 230; Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 732 (D.C. Cir. 1985)).

industry without tying specific costs to specific services provided to specific companies.[98] In other words, lawmakers may authorize non-transactional fees. In this situation, the costs do not need to be "reduced by a portion artificially allocated to public benefit"; instead, it is sufficient that the fees are "reasonably related" to "services provided the feepayers."[99] In addition, an agency may impose user fees for services that assist a regulated entity in complying with its statutory duty.[100] Together these lower court rulings provide ample cover for modern user fee programs in which regulated industries essentially foot the bill for their own oversight by federal regulators. The Supreme Court has not, however, considered these issues.

Many agencies are now fully (or mostly) fee funded, and many collect fees from the industries they regulate, to cover the costs of that regulation.[101] Although this arrangement is common, it represents a significant departure from the historical efficiency rationale for user fees charged in connection with goods and services. And some may still view it as either unconstitutional or problematic as a theoretical or normative matter. Assessing these issues is beyond the scope of this report.

B. Appropriations and User Fees

The question whether user fees must be collected into the U.S. Treasury General Fund and the question whether these fees may be used by an agency without further congressional action (an appropriation)—specifically, whether the U.S. Constitution has anything to say about the answers to these questions—are beyond the scope of this report. Instead, this report reflects current practices and the views on which those practices are based, described below.

Government receipts include taxes and money collected in other ways such as leases, royalties, and interest income. Article I of the Constitution gives Congress the power to "lay and

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[98] Florida Power & Light v. United States, 846 F.2d 765, 768 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989). Pursuant to new statutory authority included in COBRA (1985), the Nuclear Regulatory Commission assessed an annual fee from power reactor operators for "generic services" that the agency "concluded were reasonably related to regulating all licensees" in that category. The statute itself had directed that the fees be "reasonably related to the regulatory service provided by the Commission." 100 Stat. 82, 146-147, codified at 42 U.S.C. § 2213. The court concluded that Congress had not meant to impose the IOAA standard—that the fee reflect the value of the agency's services to that recipient—and that in fact, under this separate statute, the NRC could "recover generic costs, that is, costs which do not have a specific identifiable beneficiary." 846 F.2d at 769.

[99] 846 F.2d at 771.

[100] Elec. Industries Ass'n, Consumer Elecs. Group v. F.C.C., 554 F.2d 1109 (D.C. Cir. 1976).

[101] Agencies that are mostly fee funded include the Federal Communications Commission (FCC), SEC, Federal Energy Regulatory Commission (FERC), NRC, the USCIS, and USPTO. *See* Federal Communications Commission, 2023 Budget-in-Brief (March 2022) (here) at 7 ("The Commission requests $390,192,000 in budget authority from regulatory fee offsetting collections."); U.S. Securities and Exchange Commission, Fiscal Year 2024 Congressional Budget Justification and Annual Performance Plan, Fiscal Year 2022 Annual Performance Report 3 (here) ("As the SEC's funding is deficit-neutral, any amount appropriated to the agency will be offset by transaction fees."); Department of Energy FY 2024 Budget in Brief 85 (here) ("Regulated entities pay fees and charges sufficient to recover the Commission's full cost of operations."); 42 U.S.C. § 2215 (requiring the Nuclear Regulatory Commission to recover, to the maximum extent practicable, 100% of its annual enacted budget excluding certain things identified in the statute and subject to any fee relief that the agency decides to grant); USCIS, Budget, Planning, and Performance (here) ("USCIS funding comes primarily from fees we charge applicants or petitioners requesting immigration or naturalization benefits. … Fees we collect from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA). … This account comprises approximately 90 percent of USCIS' total FY 2022 spending authority."); USPTO, Budget and Financial Information: Congressional Budget Justifications: Fiscal Year 2024 USPTO Budget (here) ("With full access to the fee collection estimate to offset total spending, the USPTO will use $32 million (net) from the combined operating reserves (ORs) in FY 2024, resulting in a net appropriation of $0.").

collect taxes, duties, imposts, and excises."[102] It further provides, in the Origination Clause, that all bills for raising "revenue" must originate in the House.[103] Conventional wisdom holds that some government receipts are not "revenue" in this constitutional sense—meaning that a line can be drawn between "revenue" collected pursuant to the taxing power, on the one hand, and "nonrevenue" collected pursuant to legislation that need not originate in the House, on the other hand.[104] Conventional wisdom also holds that the Origination Clause does not apply to legislation authorizing an agency to collect user fees,[105] though labeling an arrangement "user fees" would not be sufficient to remove it from the ambit of the Origination Clause,[106] and this report takes no position on the type of arrangement, if any, that would qualify as a fee not subject to the clause.[107]

The Miscellaneous Receipts Act requires that all money received by the government be deposited in the U.S. Treasury.[108] And pursuant to Article I of the Constitution, funds may be

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[102] U.S. Const. art. I, § 8 (giving Congress the power to "lay and collect Taxes, Duties, Impost and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

[103] *Id.* § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

[104] United States v. Munoz-Flores, 495 U.S. 385, 397-98 (1990) ("a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause").

[105] *E.g.*, Congressional Research Service, R46240: INTRODUCTION TO THE FEDERAL BUDGET PROCESS 9 (Jan. 10, 2023) ("Neither the Origination Clause nor House Rule XXI, clause 5, applies to the consideration of legislation concerning receipts or collections, such as user fees, that are levied on a class that benefits from a particular service, program, or activity."); *see also* Sperry Corp. v. United States, 925 F.2d 399 (Fed. Cir. 1991) (finding that Senate-originated statute—which authorized 1.5 percent deduction from Iran-U.S. claims tribunal awards as "user fees" and classified them as "miscellaneous receipts" for the U.S. Treasury—was nevertheless not intended to "raise revenue" and therefore did not violate the Origination Clause).

[106] *Cf.* National Federal of Independent Business v. Sebelius, 567 U.S. 519, 563-574 (2012) (ignoring a statutory label and concluding that the individual mandate in 26 U.S.C. § 5000A reflected an exercise of Congress's taxing power).

[107] In the early 1990s, House leadership took the position that the Origination Clause applies to a measure if the amount of funds to be collected could exceed the government's cost of providing a specific service, or if the connection between the payor and the beneficiary were attenuated. Congressional Research Service, R47292: CONGRESSIONAL RULES AND PRACTICES CONCERNING USER FEES AND OTHER NONREVENUE COLLECTIONS IN THE FEDERAL BUDGET 1 (Oct. 25, 2022); *see also* "Policies of the Chair," 137 Cong. Rec. 66 (Jan. 3, 1991). For an interesting judicial decision finding a statutory provision that was codified in the Internal Revenue Code and that referred to itself as a tax was, instead, a user fee, see Thomson Multimedia Inc. v. United States, 340 F.3d 1355 (Fed. Cir. 2003) (finding that Harbor Maintenance Tax imposed on the value of domestic and imported commercial cargo unloaded at ports use was a user fee in part because Congress "seemingly intended" it to be one, because the charge is based on a fair approximation of the cost of the benefits provided, and because the charge is not excessive in relation to the government's expenditures). In contrast, when applied to commercial goods loaded for export, based on the value of those goods, and not approximating any benefits furnished to the exporters, the same Harbor Maintenance Tax is a tax rather than a user fee, and it is therefore unconstitutional under the Export Clause of the Constitution. United States v. U.S. Shoe Corp., 523 U.S. 358 (1998).

[108] The Miscellaneous Receipts Act, which dates to 1849, requires a federal official or agent "receiving money for the Government from any source" to deposit it in the Treasury "as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302; *see* Act of Mar. 3, 1849, ch. 110, 9 Stat. 398. As explained by the Office of Legal Counsel, this statute "codifies the 'anti-augmentation principle,' under which 'an agency may not augment its appropriations from outside sources without statutory authority.'" Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs, 42 Op. O.L.C. __, 2018 WL 3450204, at *3, quoting Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts with the General Services Administration, 30 Op. O.L.C. 53, 56 (2006).

drawn from the Treasury only pursuant to appropriations made by law.[109] Agencies draw funds from the Treasury when they make outlays. They merely "obligate" money when they enter into contracts, employ staff, and submit purchase orders.[110] An "outlay" occurs when the obligation in question is liquidated, meaning that funds are transferred or disbursed from the Treasury.[111] Congress generally does not directly control outlays; instead, it authorizes an agency to act (in the agency's enabling statute and with specific substantive legislative instructions) and authorizes an agency to enter into obligations.[112] And it generally authorizes agencies to obligate money through the appropriations process, though it sometimes enacts direct spending legislation.[113] An appropriations act will provide an agency a specific dollar amount (generally a lump sum) for specific—usually broadly worded—purposes and for a specific period of time.[114] The period of time is either one year (and the funds "one-year funds") or more than one year ("multi-year funds"). In these cases, when the defined period ends, any remaining funds in the appropriation account expire.[115] Sometimes, however, Congress allows an agency to obligate appropriated funds until the funds are exhausted, meaning without a prespecified expiration date; these are "no-year funds."[116]

User fees make this straightforward arrangement more complicated, and understanding the added complexity requires a brief description of the annual budgeting process. The General Accounting Act of 1921 requires the President to submit a comprehensive budget proposal to Congress early every calendar year.[117] This budget proposal, for the upcoming federal fiscal year

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[109] U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law … .").

[110] CRS R46240, *supra* note 105, at 6.

[111] *Id.*

[112] *Id.* ("The provision of budget authority is the key point at which Congress exercises control over federal spending. Congress generally does not exercise direct control over outlays related to executive or judicial branch spending.").

[113] *Id.* at 10 ("Congressional budgetary procedures distinguish between two types of spending: discretionary spending (which is controlled through the annual appropriations process) and direct spending (also referred to as mandatory spending, for which the level of funding is controlled outside of the annual appropriations process). Discretionary and direct spending … both provide statutory authority for agencies to enter into obligations for payments from the Treasury.").

[114] Stith, *supra* note 21, at 1353 (referring to appropriations as "lump-sum grants with 'strings' attached"); *e.g.*, Pub. L. No. 116-94, Title II, 133 Stat. 2534, 2973 (Dec. 20, 2019) (Department of Housing and Urban Development Appropriations Act, 2020) ("For necessary salaries and expenses for Executive Offices, which shall be comprised of the offices of the Secretary, Deputy Secretary, Adjudicatory Services, Congressional and Intergovernmental Relations, Public Affairs, Small and Disadvantaged Business Utilization, and the Center for Faith-Based and Neighborhood Partnerships, $14,217,000, to remain available until September 30, 2021 …").

[115] Congressional Research Service, EXPIRATION AND CANCELLATION OF UNOBLIGATED FUNDS (Feb. 15, 2023) (here). Expired funds cannot be obligated, 31 U.S.C. § 1552, but they remain available for five years to pay obligations incurred before they expired, *id.* § 1553.

[116] CRS, EXPIRATION AND CANCELLATION OF UNOBLIGATED FUNDS, *supra* note 115, at 2. Even still, the balances in these appropriations accounts will be cancelled if (1) the head of the agency or the President determines that the purposes for which the appropriation was made have been carried out, and (2) no disbursement has been made against the appropriation for two consecutive fiscal years. *Id.*, citing 31 U.S.C. § 1555.

[117] Pub. L. No. 67-13, 42 Stat. 20 (June 10, 1921), codified as amended in 31 U.S.C. Chapter 11; *see* 31 U.S.C. § 1105(a) ("On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year.").

(beginning October 1 and ending September 30), covers the entire United States government.[118] Agencies submit budget requests to OMB for review,[119] but OMB and the President have the final decision.[120] Congress considers the President's proposals, often with the benefit of additional and more detailed justifications submitted by agencies,[121] and it develops and adopts its own plan for revenue and spending for the fiscal year. The resulting "concurrent resolution"—which is not enacted law—sets forth the congressional budget for the federal government for the fiscal year and usually also addresses several subsequent years.[122] Congress then separately authorizes the corresponding appropriations as part of the regular appropriations process for the fiscal year, and it may also enact direct spending legislation (and changes in tax laws, if warranted).[123]

In these various budget documents, user fees collected by agencies are usually offset against outlays, meaning the cost to the agency of producing the benefits (goods or services) that are provided to the feepayers.[124] In other words, the agency's "net" appropriation excludes these

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[118] As a practical matter, the President's budget simply passes along proposals from entities within the legislative branch and judicial branch as well as certain executive branch agencies (sometimes referred to as "independent" agencies), but the remainder of the budget proposal—covering the remaining executive branch agencies—is developed by the President with OMB. OMB Circular No. A-11, *supra* note 17, § 10.4 ("In accordance with law or established practice, OMB includes information on agencies of the Legislative Branch, the Judicial Branch, and certain Executive Branch agencies as submitted by those agencies without change.").

[119] Each year, OMB circulates guidance to the heads of executive departments and establishments on the development of agency-specific budget requests. *E.g.*, OMB Circular No. A-11, *supra* note 17; *see* CRS R46240, *supra* note 105, at 14 ("OMB coordinates the development of the President's budget by issuing various circulars, memoranda, and other guidance documents to the heads of executive agencies. In particular, OMB Circular No. A-11 … provides agencies with an overview of applicable budgetary laws, policies for the preparation and submission of budgetary estimates, and information on financial management and budget data systems.").

[120] CRS R46240, *supra* note 105, at 14-15 ("Agency requests are typically submitted to OMB in late summer or early fall and are reviewed by OMB on behalf of the President. … Once OMB and the President make final decisions, federal agencies and departments must revise their budget requests and performance plans to conform with these decisions.").

[121] *Id.* at 15 ("In support of the President's appropriations requests, agencies prepare additional materials, frequently referred to as congressional budget justifications. These materials provide more detail than is contained in the President's budget documents and are used in support of agency testimony during Appropriations subcommittee hearings on the President's budget."); Congressional Research Service, R47106, THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW 3 (May 17, 2023) (here) ("Shortly [after the President submits his budget request to Congress], individual agencies and departments also submit detailed budget justifications to the Appropriations Committees [which] lay out in greater detail the agency's spending plans for the upcoming fiscal year as well as how the agencies used their prior year's appropriations.").

[122] *E.g.*, S. Con. Res. 5 (117th Cong.) ("A concurrent resolution setting forth the congressional budget for the United States Government for fiscal year 2021 and setting forth the appropriate budgetary levels for fiscal years 2022 through 2030"); CRS R46240, *supra* note 105, at 15 ("Because a concurrent resolution is not a law, the President cannot sign or veto it, and it does not have statutory effect, so no money can be raised or spent pursuant to it. The main purpose of the budget resolution is to establish the framework within which Congress considers separate revenue, spending, and other budget-related legislation.").

[123] OMB Circular No. A-11, *supra* note 17, at § 15.3. In recent years, rather than passing discrete appropriations bills (one corresponding to each subject matter area—defense, homeland security, and so forth—tracking the jurisdictions of the appropriations subcommittees in the House and Senate), Congress has combined the appropriations bills into and passed larger "omnibus" appropriations bills.

[124] CRS R47292, *supra* note 107, at 5 ("The definition of budget authority in Section 3(2) of the Congressional Budget Act provides for nonrevenue collections to be treated as negative amounts of budget authority rather than as revenues. As a consequence, the collected funds are presented in the budget as offsets against spending authority.").

fees. Consequently, user fees are called "offsetting" fees.[125] But there are two types: offsetting receipts and offsetting collections. And there is an important difference, explained in the next paragraph.

Again, the Miscellaneous Receipts Act states a default rule that money received by the government must be deposited in the U.S. Treasury. Like other funds in the Treasury, it cannot be obligated without an appropriation. When user fees are processed this way, budget documents call them "offsetting receipts."[126] Conventional wisdom holds that user fees collected under the IOAA are offsetting receipts, must be deposited in the U.S. Treasury, and may not be obligated without additional congressional authorization.[127]

But the Miscellaneous Receipts Act simply provides a general rule about deposits; Congress may in another statute provide otherwise.[128] And in practice it takes two other approaches with user fees. *First*, Congress sometimes authorizes an agency to deposit the fees into a fund or account earmarked for a specific purpose.[129] These are still called "offsetting receipts."[130] Congress might permanently appropriate the fund in question, or it could decline to do so, in which case the agency would need a separate appropriation before it could obligate the funds.[131] *Second*, though, Congress sometimes authorizes an agency to *retain* a user fee for *credit* to its appropriations.[132] It uses this approach when the fees are meant to augment whatever additional money is directly appropriated from general revenue. And it uses this approach when the fees reimburse expenses already borne by appropriated funds. Budget documents call these fees "offsetting collections," and these fees are usually available to the agency without any

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[125] Government Accountability Office, GAO-13-820, FEDERAL USER FEES: FEE DESIGN OPTIONS AND IMPLICATIONS FOR MANAGING REVENUE INSTABILITY 12 (Sept. 2013).

[126] GAO-08-9788SP, *supra* note 17, at 12-187 n.133 ("An offsetting receipt is a form of offsetting collection which is credited to a receipt account rather than an appropriation account."); CRS R46240, *supra* note 105, at 6 ("In most cases, offsetting collections may be obligated without further legislative action, while offsetting receipts require an explicit appropriation to be available for obligation."); CRS R47292, *supra* note 107, at 6 ("Offsetting collections are nonrevenue collections authorized by law to be credited to appropriations or fund expenditure accounts. These fees are available for obligation to meet the account's purpose without further congressional action. … In contrast, offsetting receipts are nonrevenue collections that are recorded as offsets against gross outlays but are not authorized to be credited to a specific expenditure account.").

[127] *See* OMB Circular A-25, *supra* note 17, at § 9(a) ("Unless a statute provides otherwise, user charge collections will be credited to the general fund of the Treasury as miscellaneous receipts, as required by 31 U.S.C. 3302."); GAO-13-820, *supra* note 125, at 4 ("Without additional statutory authority to retain collections, fees collected under the IOAA are deposited in the general fund of the U.S. Treasury and are generally not available to the agency or the activity generating the fees.").

[128] CRS R45463, *supra* note 7, at 9 ("Over time, Congress set out exceptions to the modern version of the Miscellaneous Receipts Act that let agencies charge user fees, accept gifts, and collect and retain fines and penalties within specified limits or as detailed in appropriations laws.").

[129] GAO-08-9788SP, *supra* note 17, at 12-186.

[130] *Id.* at 12-187.

[131] *Id.*

[132] *Id.* at 12-184.

additional step by Congress.[133] This arrangement effectively makes the agency's service self-sustaining.[134]

II. Threshold Questions

The rest of this report focuses on the design of user fee programs. It begins with threshold questions: whether to assess user fees and (if so) whether the user fee program should be developed under the IOAA or under separate legislation.

A. Whether to Assess a User Fee

Existing legislation—the IOAA—expresses the sense of Congress that benefits, privileges, permits, and similar things of value provided by agencies should be self-sustaining. OMB policy states that agencies should charge identifiable recipients for the services or privileges from which those recipients derive special benefit.[135] It also directs agencies to review their activities periodically and recommend legislative changes (to implement user charges) when appropriate. With the IOAA and OMB Circular A-25 in place, decision makers at an agency may reasonably conclude that the question whether to assess a user fee for specific services that it provides and that provide a benefit to identifiable recipients has been answered.[136]

Nevertheless, the IOAA does not *require* an agency to impose user fees when its terms are met; it merely authorizes an agency to do so.[137] Even if the agency provides benefits in the form of discrete services or privileges to identifiable recipients and the statute thus clearly applies, decision makers at an agency face the question whether to create a user fee program. And if the statute does not clearly apply—for instance, if decision makers are considering whether to charge regulated entities a generic fee to cover the cost of administering its regulations—the question becomes whether Congress should enact (or whether agency leadership should propose the enactment of) separate legislation.

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[133] *Id.* at 12-186; *see supra* note 126.

[134] OMB Circular A-25, *supra* note 17, at § 9(b); CRS R47292, *supra* note 107, at 5 ("Some statutes may provide specific authority for fees to be retained by an agency when a service is intended to be operated on a substantially self-sustaining basis.").

[135] OMB guidance states that a special benefit exists "when a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public." OMB Circular A-25, *supra* note 17, § 6. For instance, a special benefit accrues if the government's service (1) enables the beneficiary to obtain more immediate or substantial gains or values than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); (2) provides business stability or contributes to public confidence in the business activity of the beneficiary (e.g., insuring deposits in commercial banks); or (3) is performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group or by the general public (e.g., receiving a passport, visa, airman's certificate, or a Custom's inspection after regular duty hours). *Id.* § 6-a-1. The GAO's primer on appropriations synthesizes judicial decisions and administrative rulings on the services and activities that constitute special benefits for purposes of the IOAA. *See* GAO-08-9788SP, *supra* note 17, at 12-152 to 12-0157.

[136] In 2015, the GAO reported that four "independent regulatory agencies"—which it defined as agencies identified as such in the Paperwork Reduction Act, 44 U.S.C. § 3502, and by which it meant in this case the National Credit Union Administration (NCUA), the NRC, the Office of the Comptroller of the Currency (OCC), and the SEC—said they "do not follow" Circular A-25. GAO-15-1718, *supra* note 18, at 25. Other such agencies might take the same position; these were simply the four with whom GAO had spoken.

[137] Aeronautical Radio, Inc. v. United States, 335 F.2d 304, 307 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). Another statute might, however, make an agency's use of the IOAA authority mandatory. *E.g.*, 46 U.S.C. § 2110(a)(1) (applying to the U.S. Coast Guard and stating that "[e]xcept as otherwise provided in this title, the Secretary shall establish a fee or charge for a service or thing of value provided by the Secretary under this subtitle, in accordance with section 9701 of title 31.").

There is an enormous literature on the advantages and disadvantages of user financing. Considerations explored in this literature include the following.

Revenue

User fees constitute an additional source of funds for the federal government. Raising funds from private sector users (e.g., those seeking passports) or regulated parties (including those seeking a marketing authorization required by the government) allows a federal agency to cover some or all of its costs in providing the good or service, or performing regulatory activities, without relying on tax revenue. A user fee program might be designed to shift the agency mostly or entirely to user fee funding, which would allow Congress to put general revenue to other purposes or even to reduce taxes. Or the program might be designed to supplement appropriations from general revenue with user fee funds, so that the agency has more resources to operate. In this case, the agency might be able to improve its performance of its existing responsibilities (for instance, conduct more frequent inspections, conduct additional training of staff, or improve the technology it uses) without placing a burden on the Treasury.[138] Indeed, user fees might allow the agency to start activities and launch programs that would not be funded otherwise. This could include initiatives supported or even requested by the regulated community.[139]

In the case of FDA, the statutory language used to ensure prescription drug user fees supplement appropriations has put the agency in a bind when annual appropriations fail to keep up with expanding substantive responsibilities. The authorizing language, which remains in place for five years, states that in any particular fiscal year, FDA may collect and use the authorized fees only if (1) its direct appropriation for salaries and expenses for that year equals or exceeds the corresponding direct appropriation in FY 1997, adjusted for inflation, (2) the fee amount is provided in advance in the relevant appropriations acts, and (3) the agency spends at least as much from those appropriated funds for the review of human drug applications as it spent in FY 1997, adjusted for inflation.[140] In other words, the authorizing language requires FDA to spend at least as much of its appropriated funds on application review as it spends in user fees on application review.[141] Put yet another way, every year the agency must allocate enough of its annual appropriations to drug application review to maintain its authority to collect the fees in the first instance. And this: if the agency's other substantive responsibilities increase, particularly if annual appropriations do not keep the pace, other programs end up suffering while drug

[138] For instance, the SEC's Investor Advisory Committee has for years recommended that the SEC seek legislation authorizing the Commission's Division of Examiners to impose "user fees" on SEC-registered investment advisors, the revenue from which would be used to increase the frequency of on-site examination of these advisors. *E.g.*, Recommendation of the Investor Advisory Committee Legislation to Fund Investment Adviser Examinations (Nov. 22, 2013) (here); Recommendation of the SEC Investor Advisory Committee's Disclosure Subcommittee to Promote Investor Protection through Oversight of Investment Advisers (draft of June 5, 2023) (here). Legislation has been considered, e.g., H.R. 5726 (102d Cong.) (passed the House) but not enacted.

[139] The prescription drug industry's support of user fees to support more timely review of new drug applications was critical to passage of the drug user fee law in 1992. *See generally* Kuhlik, *supra* note 76.

[140] 21 U.S.C. § 379h(f)(1), (g)(1), (g)(2). The reference year was initially 1992.

[141] Congressional Research Service, R44864: PRESCRIPTION DRUG USER FEE ACT (PDUFA): 2017 REAUTHORIZATION AS PDUFA VI (Mar. 16, 2018).

application review remains well supported.[142] On the one hand, this problem could be avoided if Congress provided sufficient appropriations for the remaining responsibilities it assigns to the agency. On the other hand, this structural approach makes important agency programs vulnerable when Congress, perhaps predictably, increases the agency's workload without providing sufficient new funding. The problem is not the user fee legislation *per se*, but the fact that its drafters did not engage with the fact that subsequent Congresses were likely to tie the agency's hands by increasing its workload without sufficiently increasing its appropriations.

In an era of budget constraints, user fees may be appealing for their potential to increase the resources available to an agency. But there may be reason for caution when user fees from regulated parties are used to grow regulatory programs. One concern might be that the political challenges inherent in passing new mandates and appropriations to fund those mandates impose helpful discipline on expansion of the administrative state. Another might be that agencies that turn too readily to self-funding in cooperation with regulated industry may undertake programs that benefit that industry without considering the impact on others, including those to whom the fees will be passed on.[143]

Efficiency

The initial argument in favor of user fees was that assessing fees for services and goods provided by the government serves efficiency goals. Classical economic theory holds that resources are efficiently allocated when the price of a good equals its marginal cost of production.[144] The idea is that shifting to user fees set at marginal cost for government goods and services provided on a transactional basis to individuals and entities—such as stamps and passports—will ensure that these goods and services are neither over-consumed nor under-consumed. With a user fee in place, the potential beneficiary of the good or service "is the one who must pay the opportunity cost"—i.e., the additional cost that society incurs in providing that increment of good or service.[145] Consumers who do not value the good or service enough will eschew it, and the resulting demand will indicate to the government exactly how much to

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[142] Gilhooley, *supra* note 9, at 141 ("However, when the budget for the FDA was reduced, the FDA had to cut back its resources devoted to foods and other programs without cutting back on the resources for drugs. Thus, other programs bore a disproportionate amount of the cutback, reducing the ability to act faster on regulatory needs in other areas."); Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1766 (2008) ("By 2001, FDA's efforts to rob Peter to pay Paul allocated about 1,000 more full-time equivalents (FTEs) to drug and biologic review activities and 1,000 fewer FTEs to other FDA programs that 'ensure [existing] food safety, approve new medical devices such as heart valves and pacemakers, and monitor devices once on the market.'"); Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, 60 ADMIN. L. REV. 431, 453-454 (2008) ("But the impact on the FDA as an institution is highly destructive. This system not only creates rich and poor functions within the four centers that have user fees, but it leaves the remaining two centers, CFSAN and the National Center for Toxicological Research (NCTR), and the FDA field force absolutely destitute.").

[143] "Self-funding" means, here, self-sustaining with funds from the industry being regulated. In these situations, even if Congress must appropriate the collected fees for the agency's use, lawmakers might not apply the same level of scrutiny to the agency's programs as they would if they were appropriating taxpayer revenue. And if Congress also authorizes offsetting collections and dispenses with appropriating the collected fees altogether, legislators might have even less incentive (and opportunity) to scrutinize planned outlays.

[144] For insights, see Uwe E. Reinhardt, *Reflections on the Meaning of Efficiency: Can Efficiency Be Separated from Equity*, 10 YALE L. & POL'Y REV. 302 (1992).

[145] Gillette & Hopkins, *supra* note 1, at 806.

provide.[146] And thus, in this scenario, the level of production perfectly reflects consumer preference; exactly the right number of goods (or services) is produced.[147] OMB Circular A-25 reflects the influence of this theory, stating that each agency should "promote efficient allocation of the Nation's resources by establishing charges for special benefits provided to the recipient that are at least as great as costs to the Government of providing the special benefits."[148]

In addition to these allocative efficiency arguments, there are "productive efficiency" (sometimes "production efficiency") arguments in favor of user fees. Productive efficiency occurs when good and services are produced at the lowest possible cost; within an organization, this efficiency is reached when producing one more unit of the good (or service) would require sacrificing resources (such as time, money, or other finite resources). The GAO explains that user fees can foster productive efficiency by "increasing awareness of the costs of publicly provided services" and "therefore increasing incentives to reduce costs where possible."[149] The U.S. Department of Agriculture's (USDA's) Economic Research Service, in a 1999 report on fee financing of meat and poultry inspections, explained the potential for user fees to further productive efficiency. In short, it explains, administering a user fee program can involve generating detailed information about the costs of regulatory activities and sometimes their outcomes, and this information can allow the agency "to operate more effectively by allocating resources to their most productive uses and by identifying reasons for unusual cost overruns."[150]

Efficiency arguments may support fees assessed in connection with specific goods and services provided to identifiable beneficiaries—the kinds of fees that the IOAA authorizes—but the rationale does not work for more modern fee programs, which collect fees at regular intervals from regulated industries to support the cost of regulating. And even in the transactional setting, whether and to what extent efficiency arguments support a particular fee imposed by a particular agency will vary. For instance, it is not clear they apply when fees are assessed transactionally for regulatory services—such as to support review of an application that must be approved for market entry. In this situation, one might expect demand for the service to be relatively inelastic

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[146] *Id.* This happens because user fees "privatize decision-making in that they permit private parties to decide how much of a government good or service to use (and thus how much should be provided) based on whether the good or service is worth the cost imposed by the user fee." Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L. J. 1507, 1541 (2001). In this passage Professor Beermann describes one category of "privatization" in the "privatization" movement—based on a taxonomy offered by Professor Cass—rather than making an argument for user fees. *Id.*; *see generally* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988).

[147] *See* U.S. Government Accountability Office, GAO-08-386SP: FEDERAL USER FEES: A DESIGN GUIDE (May 2008) (here), at 2 ("By requiring identifiable beneficiaries to pay for the costs of services, user fees can simultaneously constrain demand and reveal the value that beneficiaries place on the service. If those benefiting from a service do not bear the full social cost of the service, they may seek to have the government provide more of the service than is economically efficient. User fees may also foster production efficiency by increasing awareness of the costs of publicly provided services and therefore increasing incentives to reduce costs where possible.").

[148] OMB, Circular A-25, *supra* note 17, at 2.

[149] GAO-08-386SP, *supra* note 147, at 2.

[150] James M. MacDonald, Fred Kuchler, Jean C. Buzby, Fitzroy Lee, & Lorna Aldrich, AGRICULTURAL ECONOMIC REPORT NO. (AER-775): USER-FEE FINANCING OF USDA MEAT AND POULTRY INSPECTION 19 (Mar. 1999) (here).

to the fee level.[151] In contrast, a user fee that might further allocative efficiency is one charged for a good that is both voluntary and also offered in the private market.[152] An example might be the voluntary auditing and laboratory services offered by the USDA's Agricultural Marketing Service (AMS), for which it charges a user fee.[153] Finally, even if a particular user fee would contribute to efficiency, decision makers may identify social policy reasons to eschew imposition of the fee, i.e., to further values other than economic efficiency. An example might be search and rescue conducted by the United States Coast Guard, for which lawmakers prohibit user fees.[154]

Privatization

Some literature justifies user fees on a different, but related, basis: properly designed, they can stimulate competition from the private sector in the form of alternative or complementary goods and services.[155] Examples might include private sector competitors to the United States Postal Service (USPS). Encouraging this competition may serve efficiency goals, but it could also have a different goal: reducing the deficit (and federal debt) by replacing the government altogether with a private sector actor. Doing so might be a normative goal, for instance tied to a view that the federal government's size and role should be much more limited than they are. There may be compelling arguments against full privatization of some goods and services, however. Decision makers may conclude that consumption of a particular good or service furthers important social values and should be encouraged through subsidization by general revenue from taxpayers. Some may subscribe to normative or theoretical arguments that providing certain services, or types of services, is the government's job and should not be handled by the private sector, even if that would be more efficient.

Equity

Some literature suggests a "fairness" argument in support of user fees. For instance Professors Gillette and Hopkins suggested in 1987 that "matching" benefits and burdens might

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[151] *Id.* at 18 ("However, because Federal inspection is mandatory for meat and poultry products shipped in interstate commerce, the demand for inspection services will not be sensitive to the fee. … Fees can neither improve nor diminish allocative efficiency in inspection services if they do not affect the volume of services provided."); *but see* Gillette & Hopkins, *supra* note 1, at 807 ("Even if there is a degree of coercion in the decision to use the service, however, a user fee may have important efficiency advantages.").

[152] *E.g.*, Gillette & Hopkins, *supra* note 1, at 805 ("If the government is producing goods that could be provided at least as well by the market, user fees certainly are appropriate.")

[153] 7 U.S.C. § 1622(h) ("To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection.").

[154] 46 U.S.C. § 2110(a)(5) ("The Secretary may not collect a fee or charge under this subsection for any search or rescue service.").

[155] *See* Aman, *supra* note 86, at 456 ("User fees can also serve several other important purposes, beyond simply raising revenues. These purposes include encouraging more efficient allocation of services between government and the private sector as well as encouraging privatization of governmental activities.").

be compelled by "considerations of fairness."[156] More recently, a Congressional Research Service (CRS) report on user fees observed that "linking the fiscal burden of publicly provided benefits to those who enjoy those benefits … can promote fairness" in addition to efficiency.[157] Like efficiency arguments, equity arguments may support fees assessed in connection with specific goods and services provided to identifiable beneficiaries, but the rationale does not work for programs that collect fees from regulated industries to support the cost of regulating. For example, it might apply if only some taxpayers avail themselves of services and goods (passports, stamps, access to national parks) offered by the agency. It might also apply if the agency performs a service for all comers but offers an enhanced version, at the user's discretion, for an additional fee. An example might be the user fee charged for the premium processing services that the U.S. Citizenship and Immigration Services (USCIS) provides for certain immigration-related forms.[158] In that case, "fairness"—and in particular, matching the special benefit to the additional burden on the government, so that taxpayers more generally are not subsidizing a specialized service that only a few beneficiaries enjoy—might support a user fee.[159]

In other situations, however, fairness concerns may cut in the other direction. For instance, Professors Gillette and Hopkins suggest that the "fairness of charging a user fee may be questionable if individuals are required by law to use a service"—thus calling into question a fee assessed in connection with mandatory registration of bicycles.[160] Professor Beermann notes that "some user fees appear to be imposed simply because government can do so and the group upon whom the fee is imposed cannot use the political process to resist them."[161] He gives the example of user fees associated with immigration into the United States, as well as user fees imposed on criminal defendants and prisoners at the state level.[162] "It is unclear," he writes,

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[156] Gillette & Hopkins, *supra* note 1, at 799; *id*. at 814 (noting one assumption "that fair distributions create a correspondence between costs and benefits of governmental provision" and thus "pricing of any governmentally supplied good or service should be set to recover the costs of provision").

[157] CRS R45463, *supra* note 7, at 4; *see also* GAO-08-386SP, *supra* note 147, at 2 ("Equity means that everyone pays their fair share … .").

[158] Premium processing provides for expedited review of the Form I-129 (petition for a nonimmigrant worker), Form I-140 (immigrant petition for alien worker), Form I-765 (application for employment authorization), and Form I-539 (application to extend or change nonimmigrant status). In exchange for the premium processing fee, USCIS guarantees that it will take action on the case within specified time periods—such as 30 calendar days for an F-1 (academic) student who seeks "optional practical training" (OPT) employment authorization—essentially authorization for temporary employment in the student's field of study. See USCIS, *How Do I Request Premium Processing* (here).

[159] Pfohl, *supra* note 87, at 70-71 ("Under the IOAA, user fees can be understood as a useful economic tool used to reduce the subsidization by general taxpayers for aspects of an agency's operations that are solely enjoyed by beneficiaries of that agency's services. … This is thought to be 'fairer' than paying for certain agency operations through general United States Department of Treasury appropriations.").

[160] Gillette & Hopkins, *supra* note 1, at 818; *e.g.*, Coalition for Fair and Eq. Reg. of Docks on Lake of the Ozarks v. FERC, 297 F.3d 771, 778 (8th Cir. 2002) ("A tax is a general charge not correlated to a particular benefit, whereas a fee is a charge exacted in exchange for a benefit of which the payor has *voluntarily* availed itself.") (emphasis added).

[161] Beermann, *supra* note 146, at 1543-44.

[162] *Id.*

"whether these fees are motivated by a desire to rationalize consumption or are simply revenue raising measures where there appears to be an easy source of revenue."[163]

Achieving Policy Goals

User fee programs may provide opportunities for lawmakers to achieve public policy objectives—incentivize some behaviors and discourage others—without directly regulating private behavior.[164] To begin with, the decision to charge itself presents an opportunity to effect policy. If demand for a particular good or service would be price elastic, decision makers can discourage or encourage consumption (and associated behaviors) with the decision to charge or not charge, respectively.[165] Some might support a fee for search and rescue by the National Park Service, for instance, on the theory that it would discourage unreasonable risk taking. Another example might be the oil import fee authorized by the Trade Expansion Act of 1962. This statute provided that if the Secretary of the Treasury "finds [an] article is being imported … in such quantities or under such circumstances as to threaten to impair the national security," the President "shall take such action … as he deems necessary to adjust the imports" so they will not impair national security.[166] Concerns about the country's dependence on foreign oil led both President Nixon and President Ford to impose fees on importers bringing oil into the country.[167] To give another example, Professor Elliott has proposed that the Environmental Protection Agency (EPA) charge user fees to entities that dispose of carbon dioxide in the air, to accomplish public policy goals unrelated to efficiency and revenue generation.[168]

Policy goals can also be furthered by structural choices within a user fee program, for instance with the amounts charged for differing services and in the exemptions and waivers

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[163] *Id.*

[164] *See* CRS R45463, *supra* note 7, at 10 ("Statutory texts governing many fees, including those noted above, have evolved over many years and involve substantive policy decisions, often related to industry or programmatic concerns."); *id.* at 6 (discussing possibility, though difficulty, of designing user fees to directly influence activities that generate negative spillover, i.e., comparable to a Pigouvian tax).

[165] *See* Aman, *supra* note 86, at 456 ("The expected distributional effect of fee-based governmental service is that less of a service will be demanded so that the decision to reject or employ a user fee is best viewed as based on a desire to induce a socially-optimal amount of the underlying good or service. Setting user fees thus allows government to have an effect on the market without direct regulation.").

[166] This amendment to section 232(b) of the Trade Expansion Act of 1962 was made by section 127(d) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1993), codified at 19 U.S.C. § 1862(d) (since amended).

[167] In *Federal Energy Administration v. Algonquin*, the Supreme Court quickly dispensed with an argument grounded in National Cable that it needed to construe the Trade Expansion Act narrowly to avoid an unconstitutional delegation. 462 U.S. 548 (1976). It distinguished the decision in *National Cable*, which had been prompted by language in the IOAA directing that agencies base user fees on "public policy or interest served, and other pertinent facts." The Trade Expansion Act, in contrast, limited the President to actions necessary to eliminate a threat to national security, and it included standards to guide the President's decision. 462 U.S. at 548 n.10.

[168] *See* Elliott, *supra* note 61, at n.7 ("If polluters were forced to pay, they would clean up to avoid the cost …"). It is not clear that the IOAA would provide sufficient authority for EPA to move forward. *National Cable* suggests that a user fee under the IOAA must be calculated to reflect the cost to the government of providing the service or good that benefits the user. (Professor Elliott leans heavily on the other factors listed in the IOAA—"the value of the service or thing to the recipient" and "public policy or interest served"—but it is not clear these survived *National Cable*, *see supra* part I.A.2.) In this case, the government does not provide the air, and the fact that air is a common resource does not change that fact. The benefit provided would not be the air itself but *permission* to pollute (to burden the common resource). Perhaps the IOAA authorizes recovery of only the cost of administering the permitting scheme. Whether Congress could constitutionally enact a "Pigouvian emission charge," *id.* at 10922—i.e., approximating the social cost of the emission—as a user fee is beyond the scope of this project.

offered. For example, USPTO charges fees for both patent applications and, once the patent is issued, maintaining the patent right; the front-end fees are lower, and the agency is more dependent on the post-allowance fees. This structure is meant to encourage innovation by imposing a low financial barrier to filing for a patent; the inventor may then assess, over time, whether continued prosecution and maintenance of the patent is worth the investment.[169] In contrast, a front-loaded fee structure—high patent application fee without (or with low) maintenance fees—would have created a high barrier to patenting, which USPTO concluded might discourage innovation. To give another example, the Federal Circuit observed in 2006 that Congress could rationally decide to set patent fees above USPTO's funding needs "to deter the filing and prosecution of certain types of patent application."[170] And the D.C. Circuit in 2010 rejected a challenge to a new Department of Transportation fee policy designed to enable airports to increase landing fees during peak periods in order to reduce congestion.[171]

Some would argue, however, that lawmakers hoping to modify private behavior should regulate that behavior directly rather than indirectly through economic incentives. In the interviews for this project, one person raised what was essentially a deontological concern about the government pretending to do one thing (charge a fee) when it is really trying to do another (regulate behavior). Others might have a more pragmatic concern; sometimes incentives fail to operate as intended. For example, EPA set differing fees for paper manifests and electronic manifests submitted by hazardous waste receiving facilities, to encourage the transition to electronic submission. Because the receiving facilities pass the fee on to the shippers, however, they have not been motivated to invest in conversion to electronic submissions.[172] Systemwide conversion to electronic manifests may instead require a formal mandate.

Potential for Unintended Consequences

Just as a user fee program might accomplish policy objectives other than efficiency and revenue enhancement, it might have unintended consequences. Several scholars have raised concerns that fees charged by regulatory agencies to subsidize regulatory services or to provide general support for regulation might skew agency decision making. For instance, in an empirical study Professors Frakes and Wasserman found that USPTO's fee schedule "biases the [US]PTO toward granting patents" and, moreover, that the effect is more pronounced when USPTO stands to benefit the most from the grant, i.e., when the applications pertain to technologies with high renewal rates or are filed by large entities, and when "markers indicative of an underfunded

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[169] USPTO Interview; *see also* Patent Fee Proposal Detailed Appendix Presented to Patent Public Advisory Committee (Aug. 2018) (here), Slide 17 ("Fee Structure Philosophy").

[170] Figueroa v. United States, 466 F.3d 1023, 1033 (Fed. Cir. 2006) ("The Supreme Court has recognized that Congress may legitimately impose taxes or fees in order to discourage undesirable behavior."). In this case, the court of appeals rejected a constitutional challenge to the fees—specifically that by authorizing fees that exceeded USPTO's operating costs, Congress had exceeded the powers granted it by the Patent Clause.

[171] Air Transport Ass'n of Am., Inc. v. U.S. Dept. of Transp., 613 F.3d 206, 212 (D.C. Cir. 2010) ("These three changes—allowing an airport to include certain costs in the rate base for determining landing fees during congested hours, instituting the two-part fee structure, and permitting landing fees to vary throughout the day—are the basic elements of the DOT's plan to decrease congestion."). In this case, the court of appeals rejected arguments that each change violated one or more statutes, such as the rule in the Airports and Airways Improvement Act of 1982, 49 U.S.C. § 47107(a)(1), that an airport may not charge a fee that is unreasonable or unjustly discriminatory.

[172] EPA Interview.

[US]PTO are present."[173] They attribute this to the fact that USPTO is fully dependent on fees derived from patent examination and post-allowance fees—and that it is mostly dependent on the latter, which it can collect only if it grants the patent in the first instance.[174]

Of course, empirical evidence of statistical bias does not answer the social welfare question. For instance, a statistical bias in favor of feepayers might be socially desirable in some cases, correcting what would otherwise have been an undesirable tendency to favor regulatory beneficiaries.[175] In the case of USPTO, though, the concern has been that the bias might be contrary to social welfare. To put it most simply, because patent applications include a filing fee that support the salaries of USPTO examiners, those examiners might be disposed to rule favorably on patent applications to ensure a continuing stream of fees and continued employment. They might, in other words, issue lower quality patents—for instance, for inventions that were obvious and thus would have been developed anyway, without society paying the price of a 17-year (now 20-year) patent term.[176]

Some raise a similar concern about new drug applications at FDA; applicants pay sizeable fees (currently $4 million per new application[177]) that support drug center salaries, and some believe this creates a conflict of interest that results in approval of drugs that are less safe or less effective.[178] Empirical studies on the question have generally found that user fees have no impact on the quality of drug approval decisions, at least when post-approval drug safety issues are used as a proxy for a poor quality approval decision.[179] Concerns about a potential conflict of

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[173] Frakes & Wasserman, *supra* note 9, at 70. This use of the term "bias" is a reference to a statistical finding: distortion of a statistical result due to a factor that is not meant to be part of its derivation.

[174] *Id.* at 69 (noting that the agency "is heavily dependent on post-allowance fees—fees the USPTO only collects when it grants a patent—to fund its operations," which "creates a possible financial incentive" to grant patents).

[175] *See* Beermann, *supra* note 146, at 1546-47 ("Beneficiaries, on the other hand, may have a strong incentive to lobby for a benefit, and if the beneficiaries are a small and cohesive group, they may succeed without regard to whether the benefit is politically acceptable generally or socially desirable. Even though some oversight, for example by a legislative committee, is theoretically possible, without anyone with an incentive to complain, under many circumstances it is unlikely that the political process effectively will check government provision of benefits. With user fees financing all or some of the provision of the government good or service, this element of political distortion is less of a problem.").

[176] Frakes & Wasserman, *supra* note 9, at 71 ("a grant-biased [US]PTO is likely to systematically issue patents that end up imposing significant costs on society without bestowing the commensurate benefits of innovation").

[177] 88 Fed. Reg. 48881 (July 28, 2023) (rates for FY 2024).

[178] Gilhooley, *supra* note 9, at 348 ("The user fees for drug reviews present a special risk of capture because the industry funding supports the salaries of the very individuals who review drugs for approval.").

[179] Henry Grabowski & Y. Richard Wang, *Do Faster Food and Drug Administration Drug Reviews Adversely Affect Patient Safety? An Analysis of the 1992 Prescription Drug User Fee Act*, 51 J. L. & ECON. 377, 410 (2008) (reviewing new drugs introduced from 1992 to 2002 and finding that, while more novel drugs and shorter time between foreign and U.S. approval result in a larger number of serious adverse events, there is no association between FDA review time and adverse events after controlling for these and other factors); Ernest R. Berndt, et al., *Industry Funding of the FDA: Effects of PDUFA on Approval Times and Withdrawal Rates*, 4 NAT. REV. DRUG DISC. 545 (2005) (reviewing 25 years of drug approvals and finding that the proportion of approvals ultimately leading to safety withdrawals before user fees and after user fees were not statistically different—ranging between 2% and 3%, depending on the method of analysis); FDA, Center for Drug Evaluation and Research, CDER REPORT TO THE NATION: 2004 43 (2005) (here) (comparing the rates of safety-based withdrawals from 1971 to 2005 and finding no meaningful difference between the incidence before and after enactment of user fees, around 3%); Michael A. Friedman et al., *The Safety of Newly Approved Medicines: Do Recent Market Removals Mean There Is a Problem?*, 281 JAMA 1728 (1999) (reviewing the regulatory history of five drugs withdrawn from the market for safety reasons and, on the basis of the

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interest have nevertheless prompted calls for repeal of the FDA user fee statute, which are probably unrealistic.[180] More realistic proposals have focused on solutions such as reducing the extent to which review of applications depends on user fees.[181] A recent decision from the U.S. Court of Appeals for the Federal Circuit also suggests that agency decisionmakers will be less susceptible to influence (by the prospect of user fees increasing or decreasing on account of their decisions) if the fees must pass through the U.S. Treasury and be appropriated by Congress pursuant to a budget request prepared by someone else at the agency.[182] In addition, steps to minimize the appearance of a conflict of interest may be important even if empirical studies do not substantiate bias, if public confidence in the agency's decision making is considered especially important.[183] For instance, FDA's user fees are tied to a set of performance goals that focus on standardizing and streamlining review procedures rather than on the outcome of application review.[184]

Finally, although most literature seems to focus on the potential for a user fee program to bias agency decision makers, implementation of a user fee program might unexpectedly skew private behaviors in ways that are not socially desirable. For instance, twenty years ago a student note argued that the Bureau of Land Management (BLM) was charging an insufficient fee to

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submission and approval timelines, finding no relationship between reduced review processing time and the removals) (authored by senior agency leadership). Although some work has found that drugs receiving faster reviews have a higher incidence of serious adverse drug reactions in patients, that same work has also found little association between user fees and those drug reactions—suggesting that the primary factor is the review speed, *not* the user fee. *E.g.*, Mary K. Olson, *The Risk We Bear: The Effects of Review Speed and Industry User Fees on New Drug Safety*, 27 J. HEALTH ECON. 175 (2008) ("Once the effects of review speed are taken into account, the analysis shows little association between user fees and serious ADR counts, which suggests that the primary impact of user fees or PDUFA on drug risks occurs through review speed.").

[180] *E.g.*, Michael Carome, M.D., *Outrage of the Month: Congress Reauthorizes FDA-Corrupting User Fees for Five More Years*, HEALTH LETTER (Dec. 2022) (here) ("Largely because of these user fees, the relationship between the FDA and the pharmaceutical and medical-device industries over the past 20 to 30 years has grown ever cozier—resulting in regulatory capture of the agency by these industries. Reversing this regulatory capture will require Congress to rescind user-fee–based funding of the agency and restore public—not industry—funding of the agency.").

[181] *E.g.*, Gilhooley, *supra* note 9, at 330 (arguing for "at a minimum, limiting user fee support to half of the cost of the drug approval program, with the rest coming from government appropriations").

[182] *See, e.g.*, Mobility Workx, LLC v. Unified Patents, LLC, 15 F.4th 1146 (Fed. Cir. 2021) (rejecting due process arguments grounded in claim that the Patent Trial and Appeal Board administrative patent judges have an incentive to institute proceedings that will lead to cancellation of patents, in order to collect post-institution fees that will fund the agency, because (1) the USPTO Director, not the patent judges, have responsibility for the USPTO's budget request, and (2) in any case collected fees "do not automatically become available to the agency").

[183] *See* Institute of Medicine of the National Academies, THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC 198 (2007) ("Many have argued that relying so heavily on industry funds is inherently inappropriate and damaging to the reputation and functioning of CDER, indeed, of any regulatory entity. Some CDER staff, as well as some public advocates have expressed discomfort with this funding based on real or perceived 'capture' of the agency, that is, that the center's increasing dependence on industry funding in itself creates a sense of obligation 'to please' on the part of the agency. The Pharmaceutical Research and Manufacturers of America (PhRMA) itself has expressed a concern about this perception."); *see also* Zelenay, *supra* note 76, at 332-334 (arguing that FDA's dependence on user fees "might negatively affect the public's perception of FDA and thereby undermine FDA's ability to engage in certain critical activities," such as effectively warning consumers about potential dangers in marketed drugs and inducing companies to engage in voluntary recalls).

[184] The agency and industry work together to shape those performance goals. This strikes some as appropriate, because typically the goals relate to interactions between the two (e.g., how many days it will take the agency to respond to a request for a particular type of meeting while an application is pending), but strike others as presenting the opportunity for capture. Public Citizen, for instance, has raised concerns about not being in the room for those discussions. *See also* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321 (2010) (suggesting that industry participation in agency proceedings can contribute to capture).

ranchers grazing their stock on western public lands, which was predictably leading to overgrazing and environmental injuries including desertification, endangerment of species, and destruction of riparian areas.[185] To give another example, the GAO once performed a case study on the use of water in the Columbia Basin Project in the Pacific Northwest, which showed that "if the price charged for water provided to farmers for irrigation purposes were raised to market levels, water would be diverted from farming to the production of electricity, and the value of farmland would drop significantly."[186]

B. Whether to Seek Separate Statutory Authorization

If decision makers choose to proceed with user fees, another question is whether the fees should be imposed under the IOAA, under separate statutory authority, or under both. The answer to this question may depend on the answer to the design questions considered in the next section of this report. For instance, proceeding under the IOAA limits the scope of a user fee program; an agency may collect fees only in connection with specific goods or services that benefit identifiable persons or entities. For some agencies, this user fee may be all that is needed. But for others, the IOAA will be inadequate. To give another example, decision makers want an agency to recover some or all of its operating costs from an industry it regulates, in the form of generic fees for regulatory services, separate legislation will be needed. Rather than focusing on the specific user fee design issues that would dictate whether the IOAA may be used, this subsection focuses on a broader question: the relative roles of Congress and the agency under the two options (IOAA versus a separate statute).

Congressional Oversight

Agency decision makers may proceed immediately under the IOAA, assuming the agency provides goods or services to identifiable beneficiaries. No further congressional action would be needed to create a user fee program or set the fees. Proceeding directly under the IOAA might therefore avoid a protracted legislative process with an uncertain outcome. It would not, however, avoid congressional involvement altogether. As already noted, conventional wisdom states that an agency may not obligate funds collected under the IOAA without an appropriation. And the appropriations process would provide Congress with an opportunity to impose conditions on the agency's use of the funds, for instance by limiting the purposes to which the funds could be put.

If lawmakers opted for separate statutory authorization, they could take the same approach and require the agency to wait for an appropriation. Or they could eliminate that step, passing legislation that both authorizes and appropriates.[187] Indeed, they could also authorize the agency to maintain a reserve fund—of fees collected but not obligated—and even authorize the agency to obligate collected fees in future years without limitation. All these options would eliminate opportunities for congressional oversight. In contrast, lawmakers could create

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[185] Michelle M. Campana, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. ENVTL. L. J. 403 (2002).

[186] GAO-08-9788SP, *supra* note 17, at 12-146, citing GAO/PAD-83-10, CONGRESSIONAL ATTENTION IS WARRANTED WHEN USER CHARGES OR OTHER POLICY CHANGES CAUSE CAPITAL LOSSES (1982).

[187] GAO-13-820, *supra* note 125, at 4 ("Congress may provide agencies with the authority to collect and use a fee within authorizing legislation, within appropriations legislation, or within both.").

additional opportunities for oversight, by not only requiring appropriation but also including a sunset on the authorizing statute. For example, FDA's user fee statutes generally must be reauthorized every five years, which triggers close scrutiny of the agency's performance and not only its user fee authority but more generally its powers and mandate.[188] Although a sunset provides additional opportunities for congressional oversight, it has a drawback. Because the agency is heavily dependent on fees to operate, the pressure to enact reauthorizing legislation before the agency's fee authority expires creates profound pressure during negotiation of that legislation. Some argue this pressure gives industry undue leverage,[189] though the advantage probably varies from cycle to cycle. Some rounds of FDA user fee reauthorization have included provisions opposed by industry.

Level of Design Decision Making

Proceeding with a separate statute will require deciding how many design details should be prescribed by the legislature and how many should be left to the agency's discretion.[190] A detailed statute might specify the fee amounts, for instance, as well as when and how the fees should be collected and how they may be used. A more general statute might broadly authorize or direct the agency to collect its operating costs through user charges. There are examples of both on the books, and the reasons to be prescriptive or instead offer flexibility may vary. For instance, the SEC implements statutory user fee language that is detailed and prescriptive as to fee structure and amounts, and the lack of agency flexibility may provide certainty to the market and reassurance to stakeholders that agency choices will not affect market behavior.[191]

Ability to Engage in Policymaking

Decision makers may want to accomplish policy objectives with the user fee program other than revenue generation and economic efficiency. The prior subsection offered some examples; for instance, USPTO has structured its fee program to encourage innovation by imposing a relatively low barrier to filing patent applications.[192] Other examples might include waivers and exemptions adopted for substantive policy reasons, including considerations of equity. Consider, for instance, fishing permit fees charged by the National Marine Fisheries

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[188] *E.g.*, FDA User Fee Reauthorization Act of 2022, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Division F, Pub. L. No. 117-180, 136 Stat. 2114 (2022) (reauthorizing fee authority for fiscal years 2023 through 2027). EPA's pesticide registration fees similarly must be reauthorized every five years, with the same general result. *E.g.*, Pesticide Registration Improvement Extension Act of 2018, Pub. L. no. 116-8, 133 Stat. 484 (2018) (reauthorizing fee authority for fiscal years 2019 through 2023).

[189] Gilhooley, *supra* note 9, at 345 ("As Commissioner Kessler has observed, the negotiation process gives the industry leverage over [FDA's] ability to set priorities."); *id.* at 351 (noting that FDA "faces, in effect, a funding sunset for a critical program every five years, and the prospect of having to let go of half of its drug review staff" and considering "whether the Obama administration might be 'pressured' to accept questionable changes in order to avoid having to layoff needed medical reviewers").

[190] *See* CRS R45463, *supra* note 7, at 1 ("The statutory basis for each particular fee or user charge varies in specificity and in the degree of discretion granted to the executive branch. For example, authorizing legislation might specify in detail how certain fees are imposed and how proceeds are used. In other cases, federal agencies rely on broader authorities to impose user fees."); GAO-13-820, *supra* note 125, at 4 ("In these specific fee authorities, Congress determines the degree of flexibility to make fee design and implementation decisions that will be retained or delegated to the agency.").

[191] SEC Interview.

[192] *See supra* part II.A.

Service (NMFS); the agency, by regulation, has provided that indigenous persons engaged in angling or spear fishing must register but are not required to pay the fee.[193] An agency proceeding under the IOAA would not be able to take these policy considerations into account; *National Cable* and subsequent court of appeals cases limit an agency to cost recovery considerations. An agency designing its user fee program pursuant to a different statutory authorization might be able to consider policy issues, but this would depend on whether Congress gave policymaking discretion to the agency in the first instance as well as the instructions given in the fee authorizing legislation.[194] In contrast, designing the program at the legislative level will permit lawmakers to craft a program that achieves a balance of differing policy goals.

Using Both

Unless Congress directs otherwise, an agency could assess fees under both the IOAA and a separate statute. The NRC, for instance, does both. On the basis of the IOAA, it collects fees for specific services at a professional hourly rate.[195] Separately, it assesses fees under the Nuclear Energy Innovation and Modernization Act (NEIMA), which requires it to collect 100% of its enacted budget from the entities it regulates, excluding certain things identified in the statute and subject to any fee relief that the agency decides to grant.[196] But Congress could direct otherwise. Some agency statutes preclude the assessment of user fees; for instance USDA may not collect user fees for meat inspections,[197] and FDA's annual appropriation usually states that it may not supplement its authorized user fees with IOAA fees.[198] To give another example,

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[193] 50 C.F.R. § 600.1410(f) ("Indigenous people engaging in angling or spear fishing must register, but are not required to pay a fee.").

[194] For instance, a federal district court enjoined implementation of a USCIS rule implementing fee changes for immigrant benefit requests in September 2020, citing in part the agency's reliance on factors that "Congress did not intend" it to consider. Immigrant Legal Resource Ctr. v. Wolf, 491 F. Supp.3d 520 (N.D. Cal. 2020). The agency had for the first time established a nonwaivable fee to apply for asylum, and in the notice of proposed rulemaking it had expressly stated its purpose to deter frivolous applications. *Id.* at 544, citing 84 Fed. Reg. 62280, 62320 (Nov. 14, 2019). To give another example, the American Intellectual Property Law Association (AIPLA) has raised concerns that some of USPTO's user fee program design decisions constitute impermissible policymaking. AIPLA Comments on USPTO Patent Fees Proposal 3 (May 25, 2023) (here) (noting that USPTO seemed to be considering "significant fee increases or new fees" in connection with continuations and terminal disclaimers and writing that "AIPLA believes there is, at least, an appearance, that the Office is using these more substantial fee increases to implement policy changes and/or modify applicant behavior, rather than recover the cost of the Office's operations"). The USPTO lacks substantive rulemaking authority. Merck & Co., Inc. v. Kessler, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) ("As we have previously held, the broadest of the [US]PTO's rulemaking powers—35 U.S.C. § 6(a)—authorizes the Commissioner to promulgate regulations directed only to 'the conduct of proceedings in the [USPTO]'; it does NOT grant the Commissioner the authority to issue substantive rules.") (capitalization in original); *compare* 21 U.S.C. § 371 (giving FDA "authority to promulgate regulations for the efficient enforcement of this chapter"); 47 U.S.C. § 154 (giving the FCC power to "make such rules and regulations … as may be necessary in the execution of its functions").

[195] In 87 Fed. Reg. 37197 (June 1, 2022), the NRC explains how it calculated its most recent hourly rate. Essentially it takes the resources budgeted for the services (salaries, benefits, and indirect program support) and divides that number by the protected number of full-time-equivalent hours that will be needed. The actual fee set for a particular service will then reflect the hourly rate times an appropriate multiplier—for instance the number of hours it takes, on average, to perform that service.

[196] Pub. L. No. 115-439, 132 Stat. 5565 (2019), codified as 42 U.S.C. § 2215.

[197] *E.g.*, 21 U.S.C. § 695 ("The cost of inspection rendered on and after July 1, 1948, under the requirements of laws relating to Federal inspection of meat and meat food products shall be borne by the United States …").

[198] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Title VI, 136 Stat. 4459, 4492 ("[N]one of these funds shall be used to develop, establish, or operate any program of user fees authorized by 31 U.S.C. 9701.").

Congress has passed appropriations act restrictions prohibiting the Federal Aviation Administration (FAA) from imposing new user fees without specific statutory authority.[199]

III. Program Design

Fee design issues fall into four general buckets: setting user fees, collecting the fees, using the fees, and reviewing and revising the fees and fee program.[200]

A. Setting User Fees

Transactional versus Non-transactional Fees

A user fee program designer must decide whether the agency will assess transactional fees, non-transactional fees, or both. Transactional fees are assessed in connection with a particular good or service provided to an identifiable beneficiary. Examples include the fee for a passport or postage stamp, the fee paid with a patent application, and the fee paid with an application to market a tobacco product. A non-transactional fee is not associated with a specific good or service; an example would be the general assessment fee paid by financial institutions to the Office of the Comptroller of the Currency (OCC).[201] The choice between transactional fees and non-transactional fees will largely be dictated by the agency's statutory responsibilities and the nature of its interactions with the prospective feepayers. For instance, the National Park Service (NPS), which manages more than 400 park units (including national parks), logically charges transactional fees: entrance fees to the national parks, as well as various other user fees such as amenity fees for campground sites and commercial use authorization fees for concessioners operating in the park units.[202] An agency that regulates industry—such as EPA, FDA, or the NRC—may have both options, depending on the nature of its responsibilities.

When both transactional and non-transactional fees are possible, the following considerations may be relevant. *First*, collecting non-transactional fees will require an authorizing statute other than the IOAA. As explained in section I.A.2, the IOAA has been interpreted to authorize only fees for discrete services or things of value that are provided to identifiable beneficiaries. *Second*, collecting non-transactional fees (under a separate statute), and collecting transactional fees under a statute other than the IOAA, may allow the fee program designer to structure the program to achieve policy goals unrelated to revenue enhancement and economic efficiency. For example, the decision maker might allocate fees among payers or payer classes on the basis of policy preferences rather than their proportionate shares of the agency's

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[199] Pub. L. No. 110-161, 121 Stat. 1844, 2379 (2007) ("[N]one of the funds in this [Appropriations] Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act."). The GAO takes the position that this language precludes reliance on the IOAA. GAO-15-303SP: PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: ANNUAL UPDATE OF THE THIRD EDITION 12-5 (Mar. 2015) (here).

[200] The GAO divided fee design issues into these four categories in its 2008 guide on user fee design. *See generally* GAO-08-386SP, *supra* note 147.

[201] 12 U.S.C. § 16 ("The Comptroller of the Currency may collect an assessment, fee, or other charge from any entity described in section 1813(q)(1) of this title, as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office of the Comptroller of the Currency."); OCC Bulletin 2022-25, Office of the Comptroller of the Currency Fees and Assessments: Calendar Year 2023 Fees and Assessments Structure (Dec. 1, 2022) (here).

[202] *See generally* U.S. Government Accountability Office, GAO-16-166: NATIONAL PARK SERVICE: REVENUES FROM FEES AND DONATIONS INCREASED, BUT SOME ENHANCEMENTS ARE NEEDED TO CONTINUE THIS TREND (Dec. 2015) (here).

costs.[203] Or a decision maker might choose to recover less than the agency's full costs for policy reasons, including the desire to encourage consumption of the good or service.[204] These options are not possible if the agency assesses transactional fees under the IOAA.[205] *Third*, collecting non-transactional fees, necessarily under a separate statute, can be a way for an agency to become fully fee-funded or, at least, to generate significant collections that might replace or supplement regular appropriations. Transactional fees under a statute other than the IOAA may also be a way to do so.

Fee Setting Discretion

An agency setting user fees under the IOAA must set fees to recover from a beneficiary the cost of providing a specific benefit to that beneficiary.[206] If lawmakers enact a different statute to authorize fee collection, they will need to decide how much discretion to allow the agency in the setting of fees. For instance, Congress could set the fees by statute, with or without a provision for regular inflation adjustment. This is relatively uncommon, but consider by way of example the statutory requirement that U.S. Customs and Border Protection (CBP) collect $7 for the immigration inspection of each passenger arriving at a port of entry in the United States.[207] Another approach is to lay out a formula. For instance, lawmakers set a fee of 1.5 percent of the first $5 million and 1 percent of any amount over the first $5 million from every award by the Iran-United States Claims Tribunal in favor of a U.S. claimant, to cover the government's costs of participating in the claims program.[208]

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[203] GAO-13-820, *supra* note 125, at 10 ("In some cases, a less precise alignment between costs and each fee is chosen in order to achieve a policy or administrative goal.").

[204] Gillette & Hopkins, *supra* note 1, at 799 ("Where consumption of services confers substantial benefits on nonpayers, it may be desirable to charge fees that recover less than full costs in order to avoid disincentives for individuals or firms to engage in socially useful conduct."); CRS R45463, *supra* note 7, at 5 ("For instance, federal policymakers might choose to charge pharmaceutical companies application fees lower than the full cost of associated approval processes because introducing new drugs onto the market may have wider positive social benefits.")

[205] National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1107 (D.C. Cir. 1976) ("Thus, the IOAA must be interpreted to limit the Commission to assessing fees at a rate which reasonably reflects the cost of services performed or the expense of other value transferred to the payor."); Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985) ("the fee must be reasonably related to and may not exceed the value of the service to the recipient"); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1138 (D.C. Cir. 1976) ("This standard is not met where the persons who receive essentially the same physical services from the agency are charged a grossly variable fee solely for the reason that some are larger or have more income than others."); Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1116 (D.C. Cir. 1976) ("we interpret the statute and the Supreme Court decisions to require reasonable particularization of the basis for the fees, accomplished by an allocation of costs to the smallest unit that is practical").

[206] *See supra* note 205. OMB guidance states that (1) when the government is acting in its capacity as sovereign, the fee should be sufficient to recover the full cost to the government of providing the service, resource, or good, and (2) when the government is not acting in its capacity as sovereign, e.g., is leasing space in federally owned buildings, the fee should be based on market prices. OMB Circular A-25, *supra* note 17, § 6-a-2 (a) and (b). The first proposition finds support in *National Cable*, *Federal Power Commission*, and the lower court cases that followed. The distinction between acting as sovereign and acting as a contractor, for IOAA user fee calculation purposes, finds support in, among other things, Yosemite National Park & Curry Co. v. United States, 686 F.2d 925 (Ct. Cl. 1982). *See also* In Re: National Park Service—Special Park Use Fees (GAO File B-307319) (Aug. 23, 2007) (here) (finding "nothing in IOAA to prohibit an agency from setting a fee in a commercial or proprietary transaction that reflects the market price").

[207] 8 U.S.C. § 1356(d).

[208] Pub. L. No. 99-93, § 502, 99 Stat. 405, 438 (Aug. 16, 1985), 50 U.S.C. § 1701 note.

More commonly, lawmakers direct the agency to set fees to achieve a particular goal—for instance, to collect an aggregate amount that equals their appropriations for the year, as they have instructed the SEC. The Securities Exchange Act states that every national securities exchange must pay a fee to the SEC "at a rate equal to $15 per $1,000,000 of the aggregate dollar amount of sales of securities" transacted on the exchange.[209] It then directs the SEC to adjust this number to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales" for the fiscal year, is "reasonably likely to produce aggregate fee collections" equal to the SEC's regular appropriation for the fiscal year.[210]

Another variation directs the agency to set fees so as to recover the "reasonable costs" or even the "full costs" of providing a particular service or of regulating more generally. Lawmakers might include additional guidance or not. Consider, for instance, the Federal Land Policy and Management Act, which authorizes the Department of the Interior to recover the "reasonable costs" of processing applications for rights of way; it adds that the Secretary "may" consider factors such as the monetary value of the rights or privileges sought by the applicant, the portion of the cost incurred for the benefit of the general public rather than for the exclusive benefit of the applicant, and the public service provided.[211] Or consider the Hazardous Waste Electronic Manifest Establishment Act,[212] which directs EPA to establish an electronic manifest system and authorizes it to impose "on users such reasonable service fees as the Administrator determines to be necessary to pay costs incurred in developing, operating, maintaining, and upgrading the system."[213] Lawmakers also directed EPA to determine the "fee structure that is necessary to recover the full cost … of providing system-related services."[214] This gave considerable discretion to the agency, which used rulemaking to develop a formula for calculating the user fee, with variables such as "help desk costs," "indirect costs," "marginal labor costs," and "system setup costs," all defined.[215] The regulations do not state the actual fees, however. Instead, in consultation with its e-Manifest Advisory Board, a federal advisory committee subject to the Federal Advisory Committee Act, EPA runs the formula and publishes user fee schedules on its website every two years.[216]

Fee Setting Procedures

An agency that assesses fees under the IOAA must write regulations. The statute authorizes an agency to "prescribe regulations establishing the charge for a service or thing of

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[209] 15 U.S.C. § 78ee(b).

[210] 15 U.S.C. § 78ee(j).

[211] *E.g.*, 42 U.S.C. § 1734 (").

[212] Pub. L. No. 112-195, 126 Stat. 1452, *codified at* 42 U.S.C. § 6939g.

[213] 42 U.S.C. § 6939g(c)(1), (g). The fees are deposited into a dedicated revolving fund in the U.S. Treasury, but they are not available to EPA for obligation until they have been transferred to EPA pursuant to an appropriations act. *Id.* § 6939g(c)(4), (d)(2).

[214] *Id.* § 6939g(c)(3)(A).

[215] 83 Fed. Reg. 420 (Jan. 3, 2018); *see* 42 C.F.R. §§ 264.1312 (user fee calculation methodology applicable to owners and operators of hazardous waste treatment, storage and disposal facilities).

[216] 42 C.F.R. § 264.1313 (a) (describing the update every two years); 85 Fed. Reg. 85631 (Dec. 29, 2020) (announcing three-day public meeting to seek the Board's input on user fees for FY 2022 and FY 2023).

value provided by the agency."[217] The Federal Circuit's predecessor concluded decades ago that this means an agency may impose fees under the statute only after issuing regulations.[218] And OMB policy similarly states that user charges under the IOAA should be instituted through the promulgation of regulations.[219]

The courts have not considered whether any exceptions to notice and comment might apply, either to the initial design of a user fee program under the IOAA or to subsequent fee schedule updates.[220] But it is hard to avoid concluding that an agency should follow notice and comment procedures when initially designing its fee program, if only because the statute does not require a fee program in the first instance. In practice, agencies do follow notice-and-comment procedures when designing programs under the IOAA, though some have opted to put only the resulting framework and formulas in the Code of Federal Regulations; these agencies update the fee schedule without notice and comment and publish the results in the *Federal Register*. For example, the Federal Energy Regulatory Commission's user fee regulations state that it will "update its fees each fiscal year according to the formula" laid out in the regulations, simply publishing the new fees in the *Federal Register*.[221] Staff of one agency suggested in an interview that notice-and-comment procedures would generally be prudent for annual fee setting under the IOAA even if not required, though, to avoid reversal if the resulting fees were challenged as arbitrary and capricious.[222]

In another fee authorizing statute, Congress could take a different approach. Actions taken at the agency to implement the statute—including fee setting, if Congress required it to be done at the agency level—would constitute "rules" under the Administrative Procedure Act.[223] If lawmakers did not specify a procedure for the agency to follow, the APA would control,

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[217] 31 U.S.C. § 9701(b).

[218] Sohio Transportation Co. v. United States, 766 F.2d 499, 502 (Fed. Cir. 1985) (stating, after agency implemented fees under the IOAA and the Mineral Leasing Act of 1920, that "[i]t is uncontested here that under these two statutes the Secretary is required to issue regulations …"); Alyeska Pipeline Service Co. v. United States, 624 F.2d 1005, 1009 (Ct. Cl. 1980) ("The general rule applicable to all agencies, as provided in the Independent Offices Appropriation Act, is that the government may obtain reimbursement of its expenses in issuing licenses or permits only pursuant to authorizing regulations …").

[219] OMB Circular A-25, *supra* note 17, § 7(a) ("The general policy is that user charges will be instituted through the promulgation of regulations.").

[220] *But see* Five Flags Pipe Line Co. v. U.S. Dept. of Transp., 1992 WL 78773 (D.D.C. 1992) (notice and comment required for user fee schedule under COBRA, because user fees are a "rule" and exception from notice and comment for interpretive rules does not apply).

[221] 18 C.F.R. § 381.104(a).

[222] *Cf.* Ayuda v. Attorney General, 551 F. Supp. 33 (D.D.C. 1987) (rejecting "arbitrary and capricious" challenge of filing fees assessed under IOAA for services rendered by Immigration and Naturalization Services, noting that the fees "were established through appropriate administrative procedures after adequate cost analysis and with opportunity for public participation"), affirmed, 848 F.2d 1297 (D.C. Cir. 1297) (describing district court decision "that the increased fees readily withstood appellants' arbitrary-and-capricious challenge in view of the two-year, agency-wide process of review, complete with elaborate cost accounting and notice-and-comment procedures").

[223] *See* 5 U.S.C. § 551(4); Five Flags Pipe Line Co. v. U.S. Dept. of Transp., 1992 WL 78773 (D.D.C. 1992) (finding that natural gas pipeline user fees imposed pursuant to COBRA constitute a rule within the meaning of the APA, and noting the definition includes "approval or prescription for the future of rates"); Carlson v. Postal Reg. Comm'n, 938 F.3d 337, 343 (D.C. Cir. 2019) (decision of United States Postal Service to raise the price of the Forever Stamp by five cents was a "rule" to which the "notice and comment guarantees of section 553 of the APA apply").

requiring notice and comment unless an exception (such as "good cause") applied.[224] But lawmakers could instead specify procedures for general implementation decisions (if any are required) as well as fee schedule updates. And in some cases, there may be little point to requiring elaborate proceedings at the agency level. If the statutory instructions are so precise that the agency exercises very little discretion at the fee-setting stage, for instance, mandating notice and comment may impose costs on the agency—and impose delay, which in some cases could make the fees out of date (i.e., if they are meant to correspond to actual costs and if costs change quickly)—without any corresponding benefit. For example, the Securities Exchange Act states that the SEC "shall not be required to comply with the provisions of section 553 of title 5," i.e., shall not be required to follow notice and comment procedures, when setting transaction fees payable by the national securities exchanges.[225] The SEC simply issues a fee rate advisory when it adjusts its fee rates.[226] In contrast, the USPTO's statutory instructions direct it to match its aggregate patent fees with its aggregate patent costs, which gives the agency broad flexibility in implementation, and Congress mandated a process that includes two rounds of engagement with the public—initial high-level discussions with an advisory committee and in a public hearing, followed by traditional notice and comment.[227] The additional step allows the agency to refine its approach before publishing a notice of proposed rulemaking (NPRM) in the *Federal Register*. This is beneficial because USPTO can make more significant adjustments in response to pre-NPRM public input than would be possible—under the "logical outgrowth" doctrine—in a final rule after one round of public comment.[228]

If the agency is tasked with setting fees to recover all the direct and indirect costs of its regulatory program, and if it also projects those costs and thus sets the target number itself as part of the annual budget proposal process, some stakeholders may have concerns it has an incentive to overstate its costs or that it lacks an incentive to restrain its expenditures (obligations).[229] That said, if the agency sets the fees itself, various accounting principles,

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[224] *See* 5 U.S.C. § 553(b)(3) (stating that notice and comment are not required "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[225] 15 U.S.C. § 78ee(j)(3). For another variation, see Asiana Airlines v. FAA, 134 F.3d 393 (D.C. Cir. 1998) (rejecting argument that FAA was required to conform to APA notice and comment procedures when implementing fees under Federal Aviation Reauthorization Act, which instead expressly directed an interim final rule and then final rule).

[226] *E.g.*, U.S. Securities and Exchange Commission Press Release 2022-50, *Fee Rate Advisory # 1 for Fiscal Year 2022* (Apr. 8, 2022) (here).

[227] USPTO's authority to set patent user fees—which was amended by the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284—appears at 35 U.S.C. § 41. Sections 10(d) and (e) of the AIA, which were not codified, require the multistep public process. 125 Stat. 284, 317-318.

[228] USPTO Interview. In simple terms, if a reviewing court finds the final rule to be a "logical outgrowth" of the proposed rule, the court will find the original notice of proposed rulemaking adequate. Conversely, if the final rule is not a logical outgrowth of the proposed rule, it would say the original notice was inadequate.

[229] GAO-13-820, *supra* note 125, at 11 ("We have found over the years that fees set through the regulatory process may be updated more frequently than fees set in statute: therefore, they may more consistently align collections with costs. However, we have also previously reported that, in the past, stakeholders expressed concern about the agency incentive to inflate costs or the lack of incentive to restrain costs. This risk may be reduced, and tools for Congressional and stakeholder oversight may be enhanced, if the agency clearly reports its methods for setting the fee, including an accounting of program costs and the assumptions it uses to project future program costs and fee collections.")

standards, and requirements, and associated federal guidelines, may apply.[230] Issues relating to agency financial management and financial systems are beyond the scope of this project. But transparency when translating the aggregate target number into specific user fees may alleviate these concerns. When it calculates its user fees each year, for example, the NRC posts work papers and a downloadable spreadsheet on its website to supplement both its proposed rule and its final rule.[231] In addition, in some cases it may be important to include stakeholders (such as feepayers) when forecasting costs in the first instance as part of the budget process, both to refine the forecasts and to discuss significant new obligations (such as new technology) that will be passed along through fees.[232]

An agency fully funded by regulatory fees may need to develop fee structures for prospective new entrants with emerging technologies (who are not yet being regulated), without having collected funds (from those new entrants) to support the work of developing the fee structure. The NRC, for instance, recently implemented a new annual fee structure for certain small modular reactors after the companies interested in developing these reactors told the agency that the reactors would not be economical at the annual fee set for larger reactors.[233] But no such reactors had been built which, as a practical matter, meant that the staff work developing the fee structure had to be funded by fees paid by other (actual) licensees. In these situations, considerations of equity (for fee-paying licensees) might conflict with the need to provide certainty for innovators (future licensees considering investing in technology but uncertain about the user fees they might face).[234] Transparency in these situations is important, but agency staff may need to defer some work until after fees are paid, to achieve an acceptable balance between equity for some and certainty for others, and lawmakers may need to consider the impact of the resulting uncertainty on innovation incentives.

Reductions, Waivers, and Exemptions

Program designers also face the question whether to institute fee reductions, waivers, and exemptions, and, if so, on what grounds, and whether these should be automatic or assessed by agency staff on a case-by-case basis.[235] This report does not draw a distinction between "waiver"

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[230] *Id*. ("Further, federal agencies must also follow guidelines regarding their cost accounting information, providing some safeguards against artificial inflation of program costs.").

[231] NRC Interview; *see, e.g.*, FY 2023 Final Fee Rule Work Papers (here) and Spreadsheet (here). This followed a 2017 GAO report that recommended the NRC "[c]learly present information in NRC's proposed fee rule, final fee rule, and fee work papers, by defining and consistently using key terms, providing complete calculations for how fees are determined, and ensuring the accuracy of the fee rules and work papers, so that stakeholders can understand fee calculations and provide substantive comments to the agency on them." GAO-17-232, NUCLEAR REGULATORY COMMISSION: REGULATORY FEE-SETTING CALCULATIONS NEED GREATER TRANSPARENCY 27 (Feb. 2017).

[232] Other considerations may need to be weighed against the benefits of transparency about the user fee calculations. One article suggests that CBP and the predecessor to USCIS have in the past raised concerns that full transparency about costs in connection with immigration of airline passengers could present a risk to homeland security. Charles E. Smith, *Air Transportation Taxation: The Case for Reform*, 75 J. AIR L. & COM. 915, 936-37 (2010).

[233] *See* 88 Fed. Reg. 39120, 39132 (June 15, 2023) (discussing changes to 10 C.F.R. § 171.15).

[234] NRC Interview.

[235] In 2017, ACUS adopted nine recommendations offering best practices and factors for agencies to consider regarding their waiver and exemption practices and procedures. Admin. Conf. of the U.S. Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61728 (Dec. 24, 1987).

and "exemption." It might be possible to articulate a conceptual distinction for purposes of this report, but the terms are used widely, and usage does not appear to be consistent.[236] In any case, these elements are common in user fee programs, as are reductions in rates.

Waivers, exemptions, and reduced rates typically reflect policy decisions unrelated to achieving efficiency and increasing revenue. A variety of examples—reflecting different social priorities—follow. By statute, a company that submits a new drug application for an "orphan designated" product—one intended to treat a rare disease or condition—need not pay the now $4 million user fee that other applicants pay.[237] Congress also directed FDA to waive or reduce the user fee if doing so is necessary to protect the public health.[238] Lawmakers directed the U.S. Postal Service to set subsidized rates for certain classes of mail users, such as the blind.[239] When authorizing the Secretary of the Interior to collect recreation fees on federal recreational lands, Congress prohibited fees for use of overlooks or scenic lookouts as well as fees for parking and picnicking along roads.[240] Members of Gold Star Families—next of kin of a member of the U.S. Armed Forces who lost his or her life in a war, terrorist attack, or qualifying situation[241]—receive lifetime passes that cover entrance fees at national parks and wildlife refuges as well as day use fees at national forests and grasslands and on lands managed by the National Park Service, U.S. Fish and Wildlife Service, U.S. Forest Service, Bureau of Land Management, Bureau of Reclamation, and U.S. Army Corps of Engineers.[242] To encourage victims to come forward and work with law enforcement and other appropriate agencies, USCIS charges no fee when administering the T visa (for victims of a severe form of trafficking in persons) and the U visa (for victims of certain qualifying criminal activities, including domestic violence, sexual assault, hate crimes, human trafficking, involuntary servitude, and certain other serious offenses).[243] In many of these cases, arguments for economic efficiency that would lead to strict cost recovery have yielded to broader social priorities or arguments about equity.[244]

Also, many regulatory user fee programs have lower rates for small entities. This may reflect a concern that the fee would otherwise operate as a barrier to entry for these entities and a

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[236] *See* Aaron L. Nielson, *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* 35-36 (Nov. 1, 2017) (final report to the Admin. Conf. of the U.S.) (adopting a definition for each, but noting that agencies may understand the terms differently and that Congress has not consistently distinguished between the terms, and noting the possibility that "a distinction between waiver and exemption is not worth preserving [or] fighting about").

[237] 21 U.S.C. § 379h(a)(1)(A)(F); 88 Fed. Reg. 48881 (July 28, 2023) (rates for FY 2024).

[238] 21 U.S.C. § 379h(d)(1)(A). FDA has explained in guidance how it will make this determination. FDA, GUIDANCE FOR INDUSTRY: PRESCRIPTION DRUG USER FEE ACT WAIVERS, REDUCTIONS, AND REFUNDS FOR DRUG AND BIOLOGICAL PRODUCTS (Oct. 2019) (here).

[239] 39 U.S.C. § 3403 ("matter for blind and other handicapped persons").

[240] 16 U.S.C. § 6802(d)(1).

[241] *See* Department of Defense Instruction 1348.36 (here).

[242] *See* National Park Service, Free Entrance to National Parks for Gold Star Families and Veterans (here).

[243] USCIS Interview; USCIS, Victims of Human Trafficking and Other Crimes (here); *see* USCIS Fee Schedule (here).

[244] *See* Gillette & Hopkins, *supra* note 1, at 814 (noting argument that "recipients of certain government services should pay fees that are keyed to" their "relative affluence," so that for instance "the disadvantaged or impoverished should receive user fee waivers or exemptions"); *id.* (noting argument that "fair distribution requires redistribution of existing allocations of wealth in order to ensure access to certain goods regardless of one's willingness or ability to pay" and that in this case "an appeal to fairness may override user fees that otherwise would engender efficient allocations of resources").

decision—perhaps grounded in equity considerations or perhaps grounded in economic theory—to facilitate their market entry and thus competition with larger organizations.[245] Sometimes Congress mandates small business waivers and fee reductions by statute.[246] Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), for example, a small business applicant is eligible for a partial waiver of the pesticide registration service (user) fee otherwise payable to EPA.[247] In other instances, the agency has made the choice itself; the NRC's modified annual fee structure for small modular reactors, discussed above, provides one example.[248]

There may be reason for caution, however, when embedding waivers, exemptions, and reduced rates into a user fee program. At a fully fee-funded agency, these arrangements may be difficult to justify both internally and externally, because other payers will have to subsidize the services provided to (or regulation of) the non-payers. Moreover, if the waiver, exemption, or reduction is administered on a case-by-case basis, full-fee payers will also have to subsidize the cost of performing the individualized assessments to determine *whether* to provide relief in the first instance. This could raise fairness concerns, which could be exacerbated if the fee waivers also increase consumption of the service or good in question. These fairness concerns would have to be balanced with the values furthered by the waivers and exemptions.

Another concern might be the difficulty of predicting the impact of waivers, exemptions, and variable rates on demand; significantly higher demand might cause the agency's costs to exceed its collections (a situation known as "revenue instability").[249] For these reasons, a public process might be helpful to explore potential waivers, exemptions, and reduced rates and to shape those decisions. In developing its alternative approach for non-light water reactor small modular reactors, for instance, the NRC held several public meetings and considered a position paper from the Nuclear Energy Institute, before then conducting an informal rulemaking.[250]

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[245] GAO-15-1718, *supra* note 18, at 12 ("This can be an equity consideration that takes into account small entities' ability to pay the regulatory user fee and compete with larger businesses and organizations.").

[246] When an agency uses rulemaking to set fees, the Regulatory Flexibility Act will require that it consider the impact of its proposal on small entities. 5 U.S.C. §§ 601-612. But the D.C. Circuit has said that an agency setting fees under the IOAA may not set a different fee rate for small entities simply because they are small entities. Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1138 (D.C. Cir. 1976).

[247] 7 U.S.C. § 136w-8(b)(7)(F). *See also* GAO-15-1718, *supra* note 18, at 12 ("the Pesticide Registration Improvement Act of 2003, as amended, provides for fee waivers for small businesses and for exemptions from fees in certain circumstances based on factors such as number of employees and volume of revenue"), citing Pub. L. No. 108-199, 118 Stat. 419 (Jan. 23, 2004). For another example, see *id.* at 12 ("the Leahy-Smith America Invents Act required the U.S. Patent and Trademark Office to establish reduced fee rates for micro entities"), citing Pub. L. No. 112-29,125 Stat. 284 (Sept. 16, 2011).

[248] *See* 88 Fed. Reg. 39120, 39132 (June 15, 2023) (discussing changes to 10 C.F.R. § 171.15); *see also* GAO-15-1718, *supra* note 18, at 13 ("NCUA and OCC—which have broad authority to set their fees—take into account the amount of assets held by the financial institutions that they regulate when setting their fee amounts. As a result of this fee structure, smaller financial institutions with fewer assets pay a lower amount than larger ones.").

[249] GAO-13-820 *supra* note 125, at 30 ("In programs where fees for some activities subsidize the costs for other activities, payers' overuse of the subsidized activity may affect the agency's ability to cover costs.").

[250] 88 Fed. Reg. at 39132 ("In developing an approach to assess annual fees to future non-LWR SMRs, the NRC considered stakeholder input from these public meetings and analyzed a position paper from the Nuclear Energy Institute (NEI), 'NEI Input on NRC Annual Fee Assessment for Non-Light Water Reactors.'").

B. Collecting User Fees

Decisions about collecting user fees fall into two categories: decisions relating to *when* and *how* payment will be made (for instance, whether fees will be assessed at the time of a particular service or instead assessed at regular intervals) and decisions relating to how the obligation to pay will be enforced (for instance, the consequences of failure to pay). The agency's statutory responsibilities and the nature of its interactions with feepayers will dictate some of the answers. For instance, an agency collecting entrance fees from individual visitors to a national park (NPS) will have different choices than will an agency collecting annual fees from licensed nuclear reactors (NRC) or an agency collecting application fees in connection with patent applications (USPTO).

When to Collect User Fees

A transactional user fee could be collected before the good or service is provided, as is the case for passport applications, new drug applications, and patent applications.[251] Or it could be collected after the good or service is provided, for instance pursuant to an invoice. The NRC takes this approach, invoicing reactors after the fact for regulatory services that it performs.[252] So does EPA, invoicing hazardous waste receiving facilities on a monthly basis based on the number of manifests they submit.[253] If an agency will be invoicing users after the fact on the basis of an hourly rate for services provided over a period of time, transparency about the number of hours likely to be reflected on the invoice will be important.[254] In some cases, it may make sense for users to track consumption of an agency's service and provide their own report with regular payments. CBP takes this approach, directing airlines to report and remit the immigration inspection fees they collect from passengers.[255] In contrast, non-transactional user fees will need to be collected at some sort of regular interval. They could be assessed annually or more often, such as quarterly, and they could be assessed at the same time for every user or at differing times. While companies with approved new drug applications must pay an annual program fee to FDA by the first business day after October 1,[256] some nuclear reactor licensees

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[251] For transactional fees imposed under the IOAA, OMB states a preference for collection "in advance of, or simultaneously with, the rendering of services" unless appropriations and authority are provided in advance to allow reimbursable services. OMB Circular A-25, *supra* note 17, § 6-a-2-c.

[252] NRC Interview. *See* 10 C.F.R. § 170.12 (quarterly invoicing).

[253] EPA Interview.

[254] The GAO reported in 2020 that NRC licensees had stated the agency's project managers "do not always communicate about that status of regulatory actions, which can cause the licensees' bills for NRC's oversight to be higher than expected." U.S. Government Accountability Office, GAO-20-362, NUCLEAR REGULATORY COMMISSION: FEE-SETTING, BILLING, AND BUDGETING PROCESSES HAVE IMPROVED, BUT ADDITIONAL ACTIONS COULD ENHANCE EFFORTS 21-22 (Feb. 2020).

[255] CBP Interview; 8 C.F.R. §§ 286.4 ("It is the responsibility of the air or sea carriers, travel agents, tour wholesalers, or other parties, which issue tickets or documents for transportation … to collect the fee … from all passengers transported to the United States … ."), 286.5 ("Fee remittances shall be sent to the Immigration and Naturalization Service, at a designated Treasury depository, for receipt no later than 31 days after the close of the calendar quarter in which the fees are collected …"). The same approach is taken for customs fees imposed by CBP. *See* 19 C.F.R. § 24.22(g) ("a fee … must be collected and remitted to CBP for services provided in connection with the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States …").

[256] 21 U.S.C. § 379h(a)(2)(A)(i). FDA sends an invoice and payment instructions in August. *See* 88 Fed. Reg. 48881 (July 28, 2023) (discussing prescription drug user fee rates and process for FY 2024).

pay their annual fee to the NRC on the anniversary of their licensing date, while others pay their annual fee in quarterly installments.[257]

When setting a schedule for fee collection, decision makers will need to consider the risk that the agency's collections will not match its costs as well as the consequences of that revenue instability. Congressional decisions about the relationship between the agency's user fee authorization and its appropriations may affect the risk. As noted earlier, for example, lawmakers could authorize the agency to retain its fees for credit to its appropriations, structuring the program so that fees reimburse expenses already borne by those appropriations. In this case, under-collection—if fees fell below the forecasted amount—would not affect the agency's ability to obligate funds, and the timing of collection would similarly not create a risk of revenue instability.[258] The agency's statutory responsibilities may also play a role. If an agency needs to enter into significant obligations early in the fiscal year, for example, it might need to front-load fee collection unless Congress similarly provides authority to obligate appropriated funds and reimburse the U.S. Treasury.[259]

In deciding when to collect fees, decision makers will also need to consider administrative burdens on the agency and the users. For instance it will be important to audit the user fee program—for instance, to ensure that all users are charged appropriately and, in fact, submit their fees—and differing collection timing may be more or less burdensome to audit. (If the agency decides to allow users to self-report their usage and pay at regular intervals, auditing the users may become important.) Whether and how the agency chooses to enforce the obligation to pay—for instance, if it chooses to refuse service in the event of nonpayment—should also affect the payment timing selected.

Most funds collected by agencies, including user fees, are collected using fully electronic methods: wire transfer, automated clearing house (ACH) transfer, or credit or debit card payments.[260] Electronic collection is said to reduce administrative burden, reduce costs for both agencies and payers, increase processing speed and accuracy, and reduce risks such as the risk of theft.[261] For these reasons, the GAO generally recommends electronic collection of user fees,[262] and as for fees collected under the IOAA, OMB says that "[e]very effort should be made to keep the costs of collection to a minimum."[263] In some cases, additional efficiencies can be achieved by collecting from users through a regulated intermediary. As already noted, for example, CBP

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[257] Annual fees under $100,000 are paid annually. Annual fees over $100,000 are paid quarterly. 10 C.F.R. § 171.19.

[258] SEC Interview.

[259] The GAO reported in 2013 that USCIS enters into yearlong contracts at the start of the fiscal year and needs collections equal to the full contract amount at the time it enters into the contract. GAO-13-820, *supra* note 125, at 28.

[260] *See* GAO-10-11, BUDGET ISSUES: ELECTRONIC PROCESSING OF NON-IRS COLLECTIONS HAS INCREASED BUT BETTER UNDERSTANDING OF COST STRUCTURE IS NEEDED 8 (Nov. 2009) ("Since 2005, agency use of collection methods has reflected [the Department of the Treasury's Financial Management Service's] increased focus on electronic payments. Fully electronic payments accounted for more than 80 percent of dollars collected by agencies other than IRS for fiscal years 2005 through 2009, with $441 billion of the almost $509 billion collected using fully electronic methods in fiscal year 2009.").

[261] *See generally id.*; *see also* GAO-15-1718, *supra* note 18, at 16 (noting that the SEC and OCC reported that switching to electronic collection of user fees reduced their administrative burden).

[262] GAO-15-1718, *supra* note 18, at 16.

[263] OMB Circular A-25, *supra* note 17, § 7(e-f).

collects user fees from airline passengers for immigration services, but these fees are administered by the airlines and remitted by the airlines to the U.S. Treasury.[264]

In some situations, the reduction of administrative costs from electronic collection might need to be balanced against other social values. Electronic collection could erect a barrier to use of the good or service in question. In these cases, if program designers want to encourage use of the good or service to effect a particular social policy, a different means of collection might need to be used. Thus an agency collecting fees from private individuals may need to consider accessibility issues, which could limit its freedom to implement electronic collection. But if an agency is meant to be fully fee-funded, the increase in administrative costs from permitting non-electronic fee payment would have to be recouped in the fees themselves.

How to Enforce the Obligation to Pay User Fees

Program designers will need to decide whether and how the agency will enforce the obligation to pay user fees. Enforcing the obligation to pay user fees presupposes an effective and efficient mechanism for determining whether payment was required, how much payment was required, and whether it occurred.[265] For example, CBP periodically audits the airlines, which are required to collect and remit fees, and will invoice an airline when it finds underreporting.[266]

Whether late payment or nonpayment occurs, and how often it occurs, may depend on the agency, the nature of the fee, the type of feepayer, and other considerations. The options available to the agency in the event of late payment or nonpayment will also vary. In some situations, late collection or non-collection of a user fee may create a revenue instability problem at the agency, meaning that the agency's collections might not cover its costs. A decision maker considering possible enforcement mechanisms will need to assess whether the agency can continue to operate the program (or provide the service) without the fee. In other situations, enforcement might not be a high priority or might not be a high priority in every instance. For instance, if the agency's approach were to impose a late fee proportional to the size of the late user fee, a very small user fee might not be worth chasing down.[267] And depending on the service, decision makers may conclude that it is more important to encourage consumption of the good or service—because use of the good or service furthers other social values—than to enforce the user fee.[268]

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[264] 8 C.F.R. §§ 286.1-286.7. In 2008, the Federal Circuit held that American Airlines was not required to remit fees that it was unable to collect, for instance because the tickets were issued by travel agents in countries that prohibit collection of U.S. user fees at the time of ticketing. Am. Airlines v. United States, 551 F.3d 1294, 1303 (Fed. Cir. 2008) ("We affirm the ruling that the statutes and regulations governing the Immigration User Fee and the AQI User Fee do not impose liability on the carrier for payment of the fees that are not actually collected from passengers.").

[265] *E.g.*, GAO-15-1718, *supra* note 18, at 15 ("agencies need to have internal controls in place for all user fees to ensure that all fees due are collected and that each user pays the correct amount").

[266] CBP Interview.

[267] CBP Interview (noting that although very few hazardous waste receiving facilities are late with payment, the late payers are typically smaller entities with fewer manifests and thus lower user fees in the first instance).

[268] AMS Interview.

In some cases of fees for specific services, it may be not only simple but effective to decline service until payment has occurred.[269] If the agency collects non-transactional fees, however, or if it collects transactional fees *after* the service has been provided, withholding service will not be an option. In this case, a penalty—such as interest on the charges or doubling the fee—may be effective to discourage late payment or nonpayment.[270] If there are concerns that late fees will be ineffective, decision makers may want to consider other options. For example, CBP relies on payment of an international carrier bond; its regulations authorize liquidated damages for an airline's failure to pay the passenger processing fee in an amount equal to "two times the passenger processing fees that were required to be collected."[271] FDA has even more powerful tools; for example, if a generic company fails to pay its annual program fee within 20 calendar days of the due date, the agency (1) places the parent company on a publicly available arrears list, (2) refuses to receive any subsequent generic application from the company, and (3) deems every drug marketed by the company to be "misbranded," which triggers a variety of enforcement options including criminal prosecution for introducing the drugs into interstate commerce.[272]

C. Using Collected Fees

As noted earlier, an agency needs authorization to use (obligate) collected fees in addition to authorization to collect the fees in the first instance. If it collects fees under the IOAA, the authority to obligate those fees will take the form of a separate appropriation from the U.S. Treasury. If it collects fees pursuant to another law, then (a) the ordinary rule could apply, i.e., authorization to use the fees could take the form of separate language in an annual appropriations bill, (b) the authorizing language could appear in the appropriations legislation itself,[273] or (c) the authorizing legislation could dispense with the ordinary rule that the collected fees will be deposited in the U.S. Treasury and must be separately appropriated.[274] Both user fee authorizing language and appropriations language (when required) can impose constraints on the agency's ability to obligate the funds. Differing approaches to the language retain more or less control for lawmakers in Congress and give more or less flexibility to the implementing agencies.

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[269] GAO-15-1718, *supra* note 18, at 16 ("For fees that are collected at the time of specific transactions (rather than at regular intervals), agencies can ensure all fees are collected by withholding a service until they are paid."). FERC's regulations, for example, provide that a filing is "deficient" if it is not accompanied by the appropriate fee (or a petition for waiver), and that the agency will not process a deficient filing. 18 C.F.R. § 381.103.

[270] GAO-13-820, *supra* note 125, at 29 ("In the event payers do not remit fees in a timely manner, the agency may need tools such as penalties to ensure remittance compliance.").

[271] 19 C.F.R. § 113.64.

[272] *See* FDA, Generic Drug User Fee Amendments (here). Nonpayment of annual pesticide maintenance fees to EPA can result in cancellation of the associated pesticide registrations, but in practice these cancellations are often voluntary, meaning they result from business decisions to discontinue the products in question. *E.g.*, 87 Fed. Reg. 10200 (Feb. 23, 2022) (announcing several dozen product cancellation orders).

[273] Some statutes that authorize an agency to administer a particular program also include language purporting to authorize a subsequent congressional appropriation of the necessary funds, but this language does not itself constitute an appropriation, and as a practical matter it is not binding on any subsequent legislative vote.

[274] As noted earlier, conventional wisdom states that Congress may provide an agency with offsetting collection authority, in which case no appropriation is needed to use the fee collections.

Lawmakers will need to decide when the agency may use the collected fees. Broadly speaking there are three choices: (1) the fees may be used until expended, in which case the agency has "no-year funds," (2) the fees may be used for a specific multi-year period ("multi-year funds"), or (3) authorization to use the fees expires, even if they have not been obligated, at the end of the fiscal year. Allowing fees to be obligated until expended may mitigate the agency's risk of revenue instability. For example, if the agency's activity level depends on exogenous factors that it cannot fully control or predict—the pace of scientific innovation, for instance, geopolitical developments, or the broader economic climate—it could create a reserve fund of unexpended fees, which it could then use as needed as its workload ebbed and flowed. Agencies with multi-year funds may similarly be able to maintain reserve funds to stabilize cash flow and mitigate revenue instability. No-year funds and multi-year funds do, however, generally reduce congressional oversight of the agency's activities. Alternatives include making funds available only for the fiscal year or authorizing the placement of excess funds in a reserve fund but requiring an appropriation for their use.[275] Appropriations themselves might be for less money than the agency expects to collect. But not authorizing an agency to use all fees collected could mean that the agency lacks sufficient resources to do all that the statute requires of it.

Requiring an agency or agency program to be fully fee-funded may mean that the agency uses collected fees to provide services for persons who do not pay fees. This would occur if lawmakers required, or authorized the agency to implement and the agency implemented, waivers and exemptions from the fee schedule. Using fees to support activities that do not directly benefit the feepayer may provoke objections from the payers. If acceptance of the fees is viewed as important, it may also be important to assure payers that their fees will result in benefits to them.[276]

Substantive controls on the uses to which fees may be put might appear in the authorizing legislation, the appropriation, or a combination of the two. If an agency is fully (or essentially fully) fee-funded, its basic authorizing language provides the key parameters, though these may vary in their level of detail. If the agency is only partly fee-funded, the fee-authorizing language will presumably prescribe specific uses for the fees. FDA's user fee authorization statutes illustrate this. In recent provisions reauthorizing medical device user fees for another five years, for example, Congress listed activities that may be supported: activities necessary for the review of premarket submissions, issuing letters in response to these submissions, inspecting manufacturing establishments and other facilities in connection with review of submissions, monitoring research conducted in connection with these submissions, handling requests to

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[275] GAO-13-820, *supra* note 125, at 16 ("Limiting the availability of fee collections may also have future budgetary implications for Congress. For example, as mentioned above, USPTO collections in excess of appropriations are deposited into the Patent and Trademark Fee Reserve Fund and are not available to the agency without additional Congressional action. If these amounts are made available in future years rather than in the year the fees were collected, the action will count or "score" as new budget authority against discretionary spending limits in place in a given future fiscal year, and will not offset against budget authority made available that year. The effect of this scoring may make the fee-funded activities appear more costly and can make granting access to previously collected amounts a less desirable option for Congressional fee designers. The outcome can lead to the buildup of unavailable and unobligated balances.").

[276] *Id.* at 14 ("For example, … patent fee collections can only be used for patent processes, and trademark fee collections can only be used for trademark processes, as well as the proportionate share of the administrative costs of the agency. USPTO officials stated that patent and trademark customers are typically two distinct groups and this division helps to assure stakeholders that their fees are supporting the activities that affect them directly.").

perform clinical research in anticipation of premarket submissions, developing related guidance and policy documents, developing certain test methods and performance standards, providing technical assistance to manufacturers, classifying and reclassifying medical devices, evaluating post-market studies required of companies, and compiling or reviewing information on relevant devices to identify safety and effectiveness issues.[277] FDA's tobacco user fees provided a helpful contrast; unlike its centers regulating drugs and devices, the agency's Center for Tobacco Products is fully fee-funded.[278] The fee-authorizing language simply states that fees, once appropriated, should be used for costs "related to the regulation of tobacco products,"[279] and the substantive tobacco provisions in Chapter IX of its statute therefore provide the necessary controls.[280]

Lawmakers face a basic choice between stating the specific activities the agency may support with fees, on the one hand, and broadly authorizing use of the fees to support the agency's work, on the other hand. In the case of an agency that is fully fee-funded, the latter choice means the agency's organic statute effectively dictates how the fees may be spent. In turn, though, if that statute itself confers broad discretion to the agency, lawmakers have chosen to maximize agency discretion and minimize their own control.[281] Between the two ends of the spectrum, though, a range of possibilities strike differing balances between legislative control and administrative flexibility. Legislatively prescribing the activities the agency may support with fees (i.e., these but not those) may complicate the agency's accounting obligations and perhaps add to the agency's operating costs.[282] In addition, prescriptive rules about activities the agency may support with fees could make it difficult for the agency to respond (for instance, curtailing programs or making adjustments) when circumstances change unexpectedly.[283] In contrast, though, a broad grant of authority to use fees without caveats, combined with a plan for the agency to be fully fee-funded, relinquishes legislative control and may be concerning to some, especially if combined with broadly worded agency authority in the first instance.

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[277] 21 U.S.C. § 379j(h) (stating that the fees may be spend only "to defray the costs of the resources allocated for the process for the review of device applications"); *id.* § 379i (defining "the process for the review of device applications").

[278] *See* U.S. Food and Drug Administration, REPORT TO THE HOUSE AND SENATE COMMITTEES ON APPROPRIATIONS: TOBACCO PRODUCT USER FEES 2 (Nov. 2, 2021) (here).

[279] 21 U.S.C. § 387s(c)(2). This states that fees are available (after appropriation) to pay the costs of agency activities "related to the regulation of tobacco products" under that statute and the Family Smoking Prevention and Tobacco Control Act. In practice this has allowed the agency to spend user fees to support activities that arguably conflict with the feepayer's interests. It has in the past spent quarterly user fees from tobacco product manufacturers to support public education about the risks of those very same tobacco products—including at least one program in 2018 that aimed to encourage adults to quit smoking. *See* FDA Report, *supra* note 278, at 15 (describing a program that "[e]ncourages cigarette smokers to quit through messages of support that underscore the health benefits of quitting" and that "[t]argets smokers ages 25 to 54 who have attempted to quit smoking in the last year but were unsuccessful").

[280] 21 U.S.C. §§ 387-387v.

[281] Concern was voiced during the interviews for this project that an adverse ruling in the pending *Loper* case, *see supra* note 22, could jeopardize the ability of some fully fee-funded agencies to maintain existing programs.

[282] GAO-13-820, *supra* note 125, at 14 ("For example, the narrower the subset of activities for which collections can be used, the more detailed and potentially expensive the required cost accounting.").

[283] *Id.* at 14 ("[S]tatutes that too narrowly limit how fees can be used reduces both Congress's flexibility to make resource decisions and an agency's flexibility to reallocate resources. This can make it more difficult to pursue public policy goals or respond to changing program needs, such as when the activities intended to achieve fee-funded purposes change.")

D. Reviewing User Fees and Fee Programs

The final set of design questions relate to review of user fees (i.e., updating the fees) and review of the user fee program itself. The discussion here does not include audits or other reviews of an agency's financial statements or practices that might be required to comply with applicable accounting principles, standards, or requirements, such as those pursuant to the Chief Financial Officers Act of 1990. Issues related to agency financial management and financial systems are beyond the scope of this project.

Reviewing and Adjusting the Fees

Decision makers will need to decide whether, how often, and for what purpose the user fees will be reviewed. One possibility would be to audit past years in order to improve the fee-setting process itself to ensure greater accuracy in the fee amounts. This type of review might consider whether transactional fee amounts aligned with the corresponding costs in the end, assuming they were meant to do so. Or it might consider whether collected fees aligned with predictions, and therefore with appropriations, in order to improve the agency's approach to forecasting. The scope and frequency of this type of review may depend on the nature of the fees themselves (for instance, whether the fees are meant to cover the direct cost of providing a particular service or instead meant to cover the agency's full direct and indirect costs of regulation). They may also depend on how and where the fees are laid out in the first instance—whether Congress provided a formula in legislation, for instance, or instead authorized the collection of user fees for a particular purpose, which the agency calculates. In addition to general reviews to improve the fee setting process, there may be reason in some cases for an agency, or the GAO at congressional request, to review a discrete aspect of the agency's user fee implementation. For instance, in 2018, the GAO reviewed NRC's process for billing licensees for service fees. This resulted in five recommendations, such as the recommendation that, in developing the agency's plan for electronic billing, the agency's CFO involve licensees and, in particular, solicit and consider their information needs.[284]

The most common type of review is recalculation (adjustment) of the fees to reflect new developments and information.[285] Whether fees are transactional or meant to recover all the agency's operating costs, if they are not adjusted regularly as the agency's costs or demands for its services increase, fee collections could become inadequate to cover the costs that they are intended to cover (revenue instability). Eventually, updating the fees would become urgent, but a significant fee increase at that point could face implementation challenges. For instance, in 2007 USCIS conducted its first user fee review in nine years and then increased fees by an average of 86 percent; predictably the agency had a massive influx of applications in the final month before the fee increase took effect.[286] Another agency, however, might not experience a similar surge in

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[284] *See generally* GAO-18-318, NUCLEAR REGULATORY COMMISSION: ADDITIONAL ACTION NEEDED TO IMPROVE PROCESS FOR BILLING LICENSEES (Mar. 2018); *see also* GAO-20-362, *supra* note 254 (recommending that the NRC "(1) develop guidance on when to communicate work progress information to licensees, and (2) ensure costs are clearly defined in its public cost estimates").

[285] The Chief Financial Officer of any agency subject to the Chief Financial Officers (CFO) Act of 1990, 31 U.S.C. §§ 901-03, must, on a biennial basis, review the fees imposed by the agency for services it provides and recommend changes as needed. 31 U.S.C. § 902(a)(8). For a list of agencies subject to the CFO Act, see 31 U.S.C. § 901(b).

[286] GAO-13-820, *supra* note 125, at 10.

use of its services before a new rate took effect. In any case, providing adequate notice of a fee change will be important so that feepayers may make informed personal or business decisions about their use of the services in question and, in some cases, so that they can make appropriate adjustments for the new rate. Unexpected increases in already large fees for regulatory services may complicate business planning for companies. To give another example, the airline industry collects customs fees and immigration inspection fees from passengers, and the companies need time to adjust their electronic systems to reflect changes made by CBP to the fee structure and rates.

In short, regular and transparent review and adjustment of fees can avoid surprises and help promote acceptance of fee increases. It may also result in the fees being more current, i.e., more closely reflecting actual costs.[287] Regular adjustments allow the fee setter to take into account changing circumstances, such as changes in the demand for the particular good or service, as well as changes in the agency's costs stemming from other factors.[288] But depending on when the fee-setting process occurs, the age of the data on which the process relies, and when the fees take effect, even an annual fee-setting process may produce a fee schedule that is quickly superseded. Staff at the NRC begin preparing fee policy papers in the summer before each fiscal year begins, for instance, followed by a Commission vote, and then preparation of a notice of proposed rulemaking, which is typically not published until January (of the fiscal year to which the fees pertain). The final rule is not published until June, and the rule does not take effect until August. As a result, for each fiscal year (October 1 to September 31), the fees are not effective until August, when there are only two months left. This means that from October to August of each year, the agency operates under the prior fiscal year's fee rule. During the final two months, when the new fees are in effect, it retroactively adjusts the fees so that actual collections for the year reconcile with the fee rates for the year.[289] The SEC, in contrast, does not use notice and comment rulemaking; it sets its transaction fee rate promptly after the President signs the fiscal year's appropriations bill.[290] Even still, this can occur well into the fiscal year, and until that point the SEC has been collecting fees under the prior year's rates. As a result, the rate for the balance of the year is designed to ensure that aggregate collections, including these already collected fees, align with the appropriation for the year.[291]

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[287] *Id.* at 11 ("We have found over the years that fees set through the regulatory process may be updated more frequently than fees set in statute: therefore, they may more consistently align collections with costs.").

[288] GAO-15-1718, *supra* note 18, at 23 n.39 ("Among the general benefits of user fee reviews are that they: (1) help to ensure that Congress, stakeholders, and agencies have complete information about changing costs and whether a fee needs to be changed; (2) help agencies determine if they are prepared for any spikes or surges in demand; (3) help agencies and feepayers avoid a sudden increase in fee rates due to misalignment between costs and collections; (4) provide opportunities for stakeholder input; and (5) promote understanding and acceptance of the fee."); *id.* at 24 ("fees that are not regularly reviewed run the risk of becoming misaligned with costs and consequently overcharging or undercharging users"); *id.* at 27 ("We have generally highlighted the importance of retrospective regulatory reviews to, among other things, respond to changes in technology, market conditions, and the behaviors of regulated entities that cannot be predicted by prospective analysis before implementation of regulations.").

[289] NRC Interview.

[290] 88 Fed. Reg. 5051 (Jan. 26, 2023) (setting transaction fees for FY 2023 and noting the statute directs it to publish notice of new fee rates "not later than 30 days after the date on which an Act making a regular appropriation for the applicable fiscal year is enacted").

[291] SEC Interview.

Decision makers thus need to assess the risk of revenue instability—for instance, considering whether an agency's costs of providing services or the demands for its services depend on factors that are difficult to predict—in order to gauge the benefit of frequent review and adjustment. That benefit must be weighed against the cost of performing that review and adjustment, which will depend in part on the process used. If the agency sets and adjusts fees using notice and comment rulemaking, and especially if it includes other steps such as public hearings or meetings with an advisory committee, frequent adjustments may impose a significant burden on agency resources.[292] A robust public process for fee setting and adjusting will, itself, have benefits and costs that vary depending on the situation. For example, although the SEC sets its registration fees and transaction fees annually and adjusts its transaction fees midyear if actual transactions do not align with forecasts, the statutory formula leaves little discretion for the agency.[293] There would be little benefit to a notice-and-comment process because the statute leaves so little to the agency. In contrast, EPA uses more elaborate procedures and chose to revise its electronic manifest user fees every two years, citing the administrative burden of an annual process, as well as the potential advantage to users of having a stable fee schedule for two years.[294] Even a biennial process can be cumbersome: EPA's consultation of a federal advisory committee as part of the process means that agency personnel must begin the fee-setting process within a year of concluding the prior process.

The experience of the NRC illustrates some of the values that must be balanced when considering how often and how to adjust fees. A robust internal and public process, combined with a need to set fees annually, means the agency finishes its fee-setting process very close to the end of the fiscal year in which those fees are assessed—which means that it must also adjust the fees for the final months in order to reconcile its actual collections with the final target. The NRC prepares its budget proposal based in part on the number of applications that companies predict filing; it then receives appropriations for the funds to review the applications. Even if the number of applications is lower than predicted, meaning that it receives fewer user fees in connection with application review, it must recover its enacted budget through user fees. Its solution is to adjust the annual fees for that same fiscal year. Although the flexibility to do so ensures that it can recover its full enacted budget as required, adjustments when collections fall below expectations—for instance, if a licensee stops operating or a new application does not materialize—can have a significant impact on the annual fees of other companies. The agency must still recover the budget from existing licensees, even if it is not performing the work projected. This creates some tension between considerations of equity, on the one hand, and the agency's statutory mandate, on the other hand.

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[292] If the agency uses notice and comment rulemaking, a variety of additional analyses may need to be performed and additional steps completed. This could include preparation of a regulatory flexibility analysis, 5 U.S.C. §§ 601-612, for instance, and compliance with the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520. Various executive orders may also apply.

[293] The statutory provisions governing these fees set out a precise method for determining the annual adjustments. *See, e.g.*, 87 Fed Reg. 53030 (Aug. 30, 2022) (registration fees for FY 2023); 88 Fed. Reg. 5051 (Jan. 26, 2023) (transaction fees for FY 2023).

[294] 83 Fed. Reg. at 432-33 ("While the Agency appreciates that an annual fee revision process would be even more responsive to program cost and manifest number changes than the final rule's two-year cycle, the Agency is persuaded that any such advantage is overwhelmed by the additional administrative burden to EPA in conducting a nearly constant, annual fee refresh process. Also, we believe there are advantages to users in having access to a stable fee schedule of two years' duration, rather than having to anticipate and react to a more frequent fee revision process.").

Reviewing the Fee Program

Review of the user fee program itself might consider (1) whether the agency engages in other activities that could and should be supported by user fees, for instance, because of a change in the agency's authorizing legislation, as well as (2) review of the basic design decisions that informed the current user fee program, including whether there have been any unintended consequences that need to be addressed. Significant changes in the agency's authorizing legislation—new mandates as well as removal of mandates—may require review of the agency's funding and consideration of whether additional user fees (under the IOAA or as part of that authorizing legislation) would be warranted. Third-party interest in the impact of the user fee program—for instance, stakeholder concerns or scholarly research suggest that the program design has had unintended collateral consequences—may be an important signal that the design should be reexamined. Doing so transparently and with the participation of all interested parties may promote acceptance of the conclusions from this review.

Even without these triggers, regular review of the design would be prudent. One option is to force review through a sunset provision, i.e., providing that the agency's authority to assess user fees expires on a fixed date. Negotiation of reauthorizing legislation provides an opportunity to consider, among other things, whether the user fee structure continues to align with the agency's responsibilities.[295] For example, user fees imposed by FDA are authorized in detailed statutes that are reworked every five years after a multi-year negotiation process that shapes not only the legislative approach but an accompanying set of non-statutory "performance goals" for the agency. For the prescription drug user fees, FDA must, by law, negotiate with not only the companies paying fees, but also representatives of the public interest, and the minutes of the meetings must be made public.[296] EPA's user fees for pesticide registration similarly require reauthorization, and development of the reauthorizing legislation usually includes stakeholders.[297] The benefits of a robust public reauthorization process should be weighed against its potential costs. As noted earlier, requiring regular reauthorization of a user fee program on which an agency heavily depends—particularly if there is a strong public interest in the agency's continuing to perform its functions—may affect negotiation of the program design in unpredictable ways and may result in legislative riders that would not have been accepted under other circumstances.

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[295] GAO-15-1718, *supra* note 18, at 24 ("The reauthorization establishes the fee requirements and the process by which FDA establishes the annual fee rates and requires FDA to provide annual reports on its progress in meeting negotiated performance goals for the 5-year period. The reauthorization gives FDA, industry, and public stakeholders the opportunity to propose and discuss enhancements and adjustments for the next iteration of the program.").

[296] 21 U.S.C. § 379h-2(f) (describing consultative process for developing recommendations for Congress with respect to reauthorization); 85 Fed. Reg. 34736 (June 8, 2020) (announcing initial public meeting for negotiation of prescription drug user fee program for fiscal years 2023 through 2027) and FDA, *PDUFA VII: Fiscal Years 2023-2027* (here) (posting of meeting minutes from more than 100 meetings with industry and more than a dozen meetings with other stakeholders). Representatives of the public interest have concerns, however, that they are not in the room during the discussions between FDA and industry. Public Citizen Interview.

[297] GAO-15-1718, *supra* note 18, at 28 ("For the pesticide registration service fee, EPA provides technical input to a coalition of stakeholders that helps develop the reauthorization statute."). Pursuant to the Pesticide Registration Improvement Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459, EPA's authority to extended the authority to collect pesticide maintenance fees lasts through FY 2027, and its authority to collect pesticide registration service fees lasts through FY 2029.

IV. Recommendations

This final section presents, on the basis of the preceding sections, and adopting the conventional wisdom about the constitutionality of modern user fee arrangements, four broad recommendations for decision makers considering whether to establish a user fee program and how to design that user fee program.

A. Involve Stakeholders and Ensure Transparency

The research and interviews for this project suggested that the most significant issue for user fee program designers today may be ensuring that stakeholders have a seat at the table during program design as well as fee setting, whether these happen at the legislative level or at the agency level. These stakeholders include at least users (the prospective payers) and organizations that will represent their interests, but also those to whom the fees will be passed on, and indeed any who might be affected by the imposition of the fee or the design of the fee program. For example, if a user fee will be passed on from hazardous waste receiving facilities to hazardous waste generators, the latter have an interest in the amount of the fee. And if a user fee will be passed on from a regulated company to its customers, the latter have an interest in the fee structure. If the user fee scheme is meant to encourage or discourage particular private behaviors or activities, the stakeholders probably also include constituencies who would be affected by that behavior. To give an example: if a user fee is meant to reduce congestion at airports during peak hours, taxi drivers may have an interest in the user fee program. Further, the stakeholders include anyone with an interest in the work that is performed by the agency and funded by those fees—patients who will use the medical devices approved by FDA, for example—if for no other reason, then because insufficient collections might jeopardize the agency's ability to perform its work.

Whether the designing happens in Congress or at the agency, creating ample opportunities for public participation throughout the design and fee setting processes will have a number of important benefits. But the benefits will vary with the agency and fee. In the case of a user fee collected from a regulated industry and used to support regulation, for instance, involving representatives of the public interest during design of the program may help to address concerns about capture. Involving payers in design decisions will allow decision makers to take into account industry practices and considerations that might be relevant. If designers envision firms tracking their own use of a particular agency service, for instance, it might be important to understand whether those firms will need to make substantial changes to their technology and how quickly those changes could be made. If designers envision collecting substantial user fees on a regular basis from firms, it might be important to understand whether the business cycle of the industry makes certain times of year better, and whether it would be easier to work with regular adjustments or to have larger less frequent adjustments.

If the agency will be regularly revising its fees, involving payers in the fee setting process will avoid surprises, which may improve acceptance of the fees (for instance, eliminating administrative challenges and litigation) and compliance. But when Congress has provided detailed instructions and the agency's rate revision process is fairly mechanical, resulting in fee amounts that could be roughly anticipated, involving payers may yield no benefit. If the agency must forecast use of its services when setting fees, though, it might reach a more accurate number if it solicits input from the likely users. An example might be an agency (such as the NRC) that receives a small number of applications each year, each of which requires substantial

resources to review. In other cases, though, it may be preferable to base forecasts exclusively on historical data, i.e., to use a time series forecast (as the SEC does) rather than turning to outside sources of data.

Even when Congress appears to have limited the agency's discretion, there may be points in the process for appropriate input. Consider, for instance, a law providing that an agency's costs of administering a particular program are to be fully recovered in a specific type of user fee levied on a specific class of regulated entities. The agency may still make important decisions that affect the fee payers and that might benefit from public vetting. These could include, for instance, the decision to make significant capital investments that affect its oversight of the regulated entities. In some cases, these decisions are not made when the agency sets the fees—potentially a mechanical process—but rather at the outset, when it prepares a budget proposal for the year. For agencies whose fees will reflect their budget proposals—because their budget proposals form the basis for their appropriations, which they are then required to collect in fees—it may be appropriate to involve fee-paying stakeholders in some capacity during the budget formulation process. Transparency and public participation do, however, come with costs. For instance, robust public processes for program design and fee setting take both time and resources. In some cases, decision makers will face a choice between frequent fee setting on the one hand, and a robust public fee setting process on the other hand.

Finally, the research for this project uncovered a non-transparency issue that raises profound concerns. There is no authoritative public list of federal agency user fees. OMB declined to provide one, and although the Budget Appendix of the United States Government indicates which agencies have offsetting collections (and how much) it does not detail the individual user fees. And as a general rule, agencies do not provide this information clearly to the public. A few agencies maintain pages on their websites listing every user fee and providing hyperlinks to the relevant regulations and *Federal Register* notices. The vast majority do not. The Appendix presents a list compiled for this project by the consultant from public sources—including reports of the Government Accountability Office (GAO); reports from the Congressional Research Service; the Budget Appendix of the U.S. Government; searches of the United States Code, Code of Federal Regulations, and *Federal Register*; and agency websites—but it is far from exhaustive and may well include user fees that are no longer assessed by the agencies in question because the services are no longer offered. Agencies collected more than half a trillion dollars in user fees in FY 2022, and the public—including not only user/payers but everyone affected, including regulatory beneficiaries and the general taxpaying public—should have easy access to a straightforward explanation from every agency collecting user fees of this significant non-tax source of its operating funds.

Recommendations

- User fee programs to implement the IOAA should be designed using notice and comment rulemaking. Agencies should consider carefully whether section 553 of the APA also requires them to follow notice and comment procedures when setting and updating their fee schedules, even if doing so simply involves plugging new numbers into cost recovery formulas already published in the Code of Federal Regulations. Even if not required, notice and comment would be appropriate if the agency anticipated changing fees after a number of years without any changes, for example, if its costs had changed significantly, or if for some other reason it anticipated a significant increase or decrease in fees.

Changes in the fee schedule should be announced well in advance of their effective date, using methods of communication appropriate to the payers (and in the case of individual payers, taking accessibility into account).

- Lawmakers creating new statutory user fee programs should, as a general rule, make significant design decisions themselves, with input from the agency, prospective payers (users), and other interested parties, including (as applicable) regulatory beneficiaries, those to whom the fees will be passed on, and others affected. If lawmakers instead give an agency discretion to make significant user fee design decisions, they should require the agency to use notice and comment procedures during the design process. In addition, in some situations—for instance, if Congress gives the agency broad discretion to decide which services and goods will be funded with fees, if the fees will have substantial budgetary implications for payers, or if equity or other considerations may prompt calls for numerous waivers and exemptions—lawmakers should consider requiring, and (if lawmakers do not) agencies should consider voluntarily following, additional procedures to ensure thorough vetting of the decisions made. Additional procedures might include holding public meetings and opening dockets to solicit suggestions, working with public advisory committees on user fee design, and sharing preliminary working papers with the public for comment.

- Lawmakers creating new statutory user fee programs—and, if lawmakers have not addressed the issue, agencies implementing new statutory user fee programs—should consider whether and how interested parties, including feepayers, should be involved when the agency sets and updates its fee schedules. Generally, the more discretion the agency has in setting the fee amounts, the more robust the procedures for public participation (including potentially notice and comment rulemaking) should be. Among other things, notice and comment may be warranted if the agency anticipates changing fees after a number of years without any changes, if its costs have changed significantly, or if for some other reason it anticipates a significant increase or decrease in fees. To give another example, if an agency translates an aggregate target number for fee collections into specific user fee amounts for different services and feepayer communities, it should generally do so through notice and comment. In every case, changes in the fee schedule should be announced well in advance of their effective date, using methods of communication appropriate to the payers (and in the case of individual payers, taking accessibility into account).

- If lawmakers decide that an agency or agency program should be fully funded by user fees, either the lawmakers or the agency should ensure that interested parties, including feepayers, have an appropriate opportunity to participate when foundational decisions are made that affect the amount the agency will seek to recover—such as decisions about significant capital expenditures, forecasting, and formulation of the annual budget proposal.

- If an agency does not follow notice and comment rulemaking and place its fee schedule in the Code of Federal Regulations, it should publish its fee schedule in the *Federal Register*. In addition, any agency that assesses user fees should maintain a page on its

website devoted to the user fees, identifying and explaining the fees in language that the general public can understand. This web page should provide links to its statutory authority to impose user fees, to its most recent *Federal Register* fee notices, to the relevant provisions of the Code of Federal Regulations (if applicable), and to any other documents relating to the fee program and schedule.

- Agencies that have designed their own user fee programs (i.e., because lawmakers have given them the discretion to design the programs) should consider periodically asking both fee payers and other stakeholders for comment on the user fee program design. If lawmakers choose to make the significant design decisions themselves, they should consider sunset provisions, so that reauthorization provides an opportunity to reconsider the design and assess whether the user fee continues to align with the agency's responsibilities.

B. Address Risk of Distorting Agency Decisions and Private Behavior

The research and interviews for this project indicate concerns that user fee programs may have unintended consequences—specifically that they may skew agency decision making or private behavior in ways that are unintended and not desirable.

The most significant issue suggested in the literature (and during one interview) is the perception that user fees paid by regulated industry to their regulator creates a conflict of interest at the agency. The notion is that an agency dependent on user fees may—presumably without intention to do so—favor the interests of those paying the fees over other considerations. In the literature this concern has been raised about user fees paid to FDA. But there are other concerns as well, including concern that the structure of a fee program might skew regulatory decision making (as in the USPTO's decision to collect more fees *after* patent issuance than at the time of the patent application) and concerns that fee amounts, including reductions and waivers, will skew private behaviors in ways that were not intended.

The question whether an existing user fee program, or the collection of user fees, has affected outcomes—whether regulatory decision making or private behaviors—is susceptible to empirical examination. But even if the empirical evidence does not substantiate concerns about a statistical bias attributable to user fees, widespread belief that an agency is laboring under a conflict of interest may undermine its effectiveness in engaging with the public on important matters. Consequently, steps to mitigate potential conflicts of interest—when designing programs that could present that risk, or after concerns have been raised about existing programs—may be desirable even in the absence of empirical evidence of harm.

Recommendations

- Undesirable unanticipated consequences, by their nature, tend to arise *after* user fee implementation. But lawmakers and agency decision makers should be mindful of the risk even when designing a user fee program in the first instance. For instance, novel user fee structures should be assessed carefully for their potential to have spillover effects. A robust public design process, involving all potentially affected stakeholders, may help identify those effects.

- If an agency collects significant user fees from companies that it regulates, concerns about conflicts of interest may arise. Consequently, the service for which regulatory user fees pay should generally be procedural rather than substantive: more meetings, for instance, or more guidance on a particular topic, rather than particular outcomes. Lawmakers should consider requiring, and agency decision makers should consider ensuring, that other interested parties, including both regulatory beneficiaries and persons to whom the fees might be passed on (if different), have an opportunity to review the services that are proposed to be provided. And although this will not be possible if an agency is fully fee funded, personnel whose salaries are funded by user fees should generally play no role in preparing the agency's budget requests or setting fee amounts.

- If an agency is fully fee funded, it should generally be transparent about and during its budget formulation process, so that interested parties (not only fee payers but others affected by the fee design, such as those to whom the fees will be passed) may participate when significant decisions are made that will affect fee amounts.

- The possibility that a user fee program has affected outcomes should be examined empirically, whenever possible, if serious questions have been raised and reforms are under consideration. Robust peer-reviewed empirical studies performed by the private sector may be sufficient, but in their absence lawmakers may need to consider requesting study by the GAO or (if warranted) the relevant inspector general, or lawmakers or agencies may need to consider mechanisms to fund private sector studies with grants.

- When secondary (spillover) effects attributable to a design feature are identified, either as a theoretical matter or as an empirical matter, an agency—and lawmakers if appropriate—should engage in a transparent public process that assesses the costs and benefits of the responsible program design feature.

- If concerns about capture or conflict of interest are raised, or statistical bias has been documented, lawmakers should consider measures that will ensure greater oversight and control over the relevant agency decision making. These steps could include placing the fees in the U.S. Treasury and requiring an annual appropriation before the agency may obligate the funds (i.e., giving the agency offsetting receipt authority rather than offsetting collection authority), limiting the purposes for which the collected fees may be used, making substantive changes to the agency's authorizing statute to further cabin its discretion when making the decisions in question, imposing more elaborate reporting requirements (beyond those required by the CFO Act, assuming it applies to the agency) and ensuring that the reports are shared with interested parties, and providing for expiry and reauthorization of the agency's user fee authority in order to force regular scrutiny of the program.

C. Consider and Address Risk and Impact of Revenue Instability

Some agencies may face a risk of revenue instability, which happens when fee collections are insufficient to cover the costs that they are intended to cover. This can happen because collections fall below expected levels, because costs exceed expected levels, or both.

Various aspects of the user fee program design can increase or decrease the risk of either happening as well as (perhaps) the impact of its occurring. Program designers can, in other words, take steps to minimize the risk and impact of revenue instability. But these steps may be unacceptable as a policy matter, or they may impose a significant burden or cost on the agency. Designers will therefore need to consider the absolute risk and likely impact of any revenue instability, and the extent to which the proposed steps would mitigate both, before determining whether to move forward. To give an example: any mechanism that ensures fees are adjusted frequently—based on the agency's evolving assessment of the amount its services will be used and its assessment of its likely costs in providing those services—should reduce the risk of costs and collections becoming misaligned. This process can, however, be resource intensive for an agency—itself requiring funds, for instance, and diverting agency personnel from other obligations. If the resulting changes are likely to be modest, the reduction in risk of revenue instability will be correspondingly quite small, and the cost of this process—unless it can be done without an elaborate public procedure—will probably not be justified.

The risk of collections falling short, or costs exceeding expectations, may also depend on factors unrelated to the user fee program itself—some specific to the agency and its mission, but others exogenous. For instance, market conditions could affect demand for the services or goods offered by the agency. Unanticipated scientific and technological developments could increase, decrease, or change the activities of the companies it regulates, shifting demand unexpectedly from one type of service to another type of service. Some risk may stem from variables that are difficult or impossible to predict.

The impact of revenue instability—meaning the significance of the revenue instability—may depend on the agency's role and responsibilities. For instance, lawmakers and the public may be concerned about revenue instability when an agency is engaged in activities meant to protect the public's health and safety.

In general, the more an agency depends on fees, the greater the risk that revenue instability will affect its ability to perform the activities assigned by Congress. But if Congress has authorized creation of a reserve fund that can be obligated in any year without further appropriation, the agency may be able to weather periods of revenue instability with no change in its operations. In addition, depending on the user fee authorizing legislation and any language accompanying its appropriations, an agency may have more or less ability to shift resources around—or indeed, to adjust other fees—in response to fluctuation in collections. Lawmakers will need to weigh the benefits of providing an agency with this flexibility against the reduction in congressional oversight of spending and prioritization that would result.

Recommendations

- User fee program designers should pay close attention to the nature and consequences of being partly or fully dependent on user fees. When designing a user fee program, lawmakers and agency-level program designers should consider the risk of revenue instability, meaning both its likelihood and its impact, and take steps to mitigate that risk.

- When assessing the likelihood of revenue instability, program designers should identify factors that may affect the agency's costs (such as labor costs, capital costs, and the likely demand for its goods and services) and the timing of its costs (its spending patterns), factors that may affect its collections and the timing of those collections, and whether its

costs decline when its collections decline. They should question any assumptions they have made, such as assumptions about the impact of fee waivers and exemptions on demand. And they should consider the social welfare implications of the agency's collections falling short, for instance if it had no other source of funding to continue its program(s).

- Program designers should solicit the views of interested parties, including not only feepayers but regulatory beneficiaries and others, when assessing the likelihood and impact of revenue instability.

- If an agency's program costs will not drop when its collections drop, or if its revenue instability would have a significant negative social welfare impact, lawmakers should consider ways to mitigate the risk. Among other things they might consider authorizing or requiring the agency to adjust fee rates more often (including in the middle of the fiscal year), allowing the agency to use appropriated taxpayer funds to cover shortfalls in exigent circumstances, authorizing the agency to use its funds for a wide range of program purposes, allowing the agency to retain its fee collections until expended, structuring the program so that fees reimburse expenses already borne by appropriations, or creating a reserve fund.

- When considering these measures, lawmakers should consider the associated costs. If annual (or more frequent) fee schedule updates are needed, lawmakers should consider making the significant design decisions themselves (setting a formula, for instance) and directing agency personnel to revise the numbers through a public process that does not involve rulemaking. Solutions that reduce congressional oversight should generally be avoided if there are concerns about capture, conflict of interest, or statistical bias in agency outcomes.

D. Consider Values Other than Efficiency

When collected in connection with discrete transactions that entail provision of goods or services of value to identifiable recipients, user fees may encourage more rational consumption of those goods and services than would otherwise be the case. Economic efficiency was the initial justification for user fees in the middle of the 20th century. Some may view it as a compelling basis for their imposition today, and some may view it as the only permissible basis for their imposition. When collected from regulated entities to support regulatory activities, user fees may put more resources at an agency's disposal than would be available if these same activities had to be funded exclusively through appropriations from general revenue. The additional resources may improve regulatory decision making—for instance, through increased hiring, infrastructure improvements, and investment in continuing education—which may benefit not only the regulated entities but also the public. Even when they do not put more (total) resources at the agency's disposal, user fees may alleviate pressure on the federal budget. The prospect of additional resources for government programs without an increase in general taxes provides, for many, another compelling basis for user fee programs.

Notwithstanding the efficiency and resource justifications for user fee programs, there may be persuasive reasons to take other values, goals, and priorities into account when deciding

whether to impose fees and when structuring a particular user fee program. There may be social policy reasons to impose, or not impose, user fees in the first instance. An example would be the congressional decision that the U.S. Coast Guard should not collect user fees in connection with search and rescue. These issues often emerge in connection with rate reductions, waivers, and exemptions when an agency collects transactional fees from individual members of the public. Another example would be the lifetime national parks pass for Gold Star Families.

Other design issues may implicate a variety of public policy issues. An example might be USPTO's decision to shift most of its patent fee collection to post-issuance fees in order to allow inventors to make informed decisions about continuing investment in their patent rights. Another might be the congressional decision that the statutory incentives to develop drugs for rare diseases should include exemption from the now $4 million user fee that other companies pay to have their drug applications reviewed. Another example might be the need to consider fairness to current fee payers when a fully fee-funded agency decides how much staff time to spend developing a regulatory framework for prospective new entrants.

Recommendations

- As a general rule, classic transactional fees—not those for regulatory services, such as application review, but those for goods and services the consumption of which is truly voluntary—should still be grounded in economic efficiency. Program designers should, however, consider fee reductions, exemptions, and waivers to further other social values and priorities. These might include consideration of fairness and equity (e.g., the NMFS registration fee exemption for indigenous persons engaged in spear fishing) as well as the possibility that reduction, exemption, or waiver would further *other* policy goals (e.g., the free national parks annual pass for fourth graders).

- Lawmakers should be cautious about authorizing regulatory user fees in order to increase the operating funds available to regulatory agencies. Although revenue enhancement may be appealing, these arrangements create a risk that important decisions about the agency's programming and priorities will be made without legislative oversight and without the involvement of others who may be affected. If lawmakers authorize regulatory user fees, all affected stakeholders—not just the prospective feepayers—should be involved in the program design.

- Lawmakers may wish to consider other values, goals, and priorities when designing a user fee program. In contrast, program designers at the agency level should be wary of effecting substantive policy goals through user fee design—in other words, modifying private behaviors indirectly through economic incentives—without clear congressional authorization to do so and without following a notice and comment process. Agency decision makers should consider additional steps beyond notice and comment—such as consulting a public advisory committee or convening a public hearing—if the policy choices may be controversial or if the proposed design will adversely affect some feepayers (for instance, a new waiver that will require other feepayers to subsidize the users whose fee has been waived).

- If program designers are considering waivers and exemptions, they should consider the likely impact of these exceptions on demand for the agency's services and (if the agency

is fully fee funded) the fairness of expecting other feepayers to subsidize both the exceptions and (if they are assessed case by case) their administration. If the exceptions would significantly increase the fees paid by others but further important social values, it may be appropriate to use appropriations instead.

Appendix: Key User Fee Programs[298]

Agency	Fee
Department of Agriculture	
Agricultural Marketing Service (AMS)	*Fees for Certain Voluntary Services.* AMS charges fees for voluntary grading, inspection, certification, auditing, and laboratory services for a variety of agricultural commodities, including meat, poultry, fruits, vegetables, eggs, dairy products, rice, cotton, and tobacco. These are assessed pursuant to the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622(h), the Cotton Statistics and Estimates Act, 7 U.S.C. §§ 473a, 473d, the U.S. Cotton Standards Act, 7 U.S.C. § 55, the Cotton Futures Act, 7 U.S.C. § 15b, and the Tobacco Inspection Act, 7 U.S.C. §§ 511-511s.
Animal and Plant Health Inspection Service (APHIS)	*Agriculture Quarantine Inspection (AQI) Fees.* APHIS charges fees for inspection services in connection with arrivals at air, sea, and land ports of entry pursuant to 21 U.S.C. § 136a. *See* 7 C.F.R. § 354.3. Both APHIS and the U.S. Department of Homeland Security's Bureau of Customs and Border Protection (CBP) provide the services. The U.S. Treasury maintains an AQI user fee account containing all user fees collected for AQI program services, as well as associated late payment penalties and interest charges. APHIS is responsible for distributing AQI funds to APHIS and CBP. *Export Certification Fees.* APHIS assesses a fee for issuance of a phytosanitary certificate to export plants and plant products, pursuant to 21 U.S.C. § 136a. *See* 7 C.F.R. § 354.2. *Veterinary Services Import/Export User Fees, and Veterinary Diagnostic User Fees.* APHIS imposes user fees—under 21 U.S.C. § 136a—in connection with animals that are imported or exported, including user fees for use of space at animal import centers, user fees for inspection of live animals at land borders, and user fees for endorsing export certificates. *See* 9 C.F.R. Part 130.
Federal Grain Inspection Service (FGIS, part of AMS)	*Grain Inspection Service Fees.* The FGIS collects various fees to cover the costs of performing official inspection and weighing services under the United States Grain Standards Act. 7 U.S.C. §§ 79a, 87e, 87h; 7 C.F.R. §§ 800.71, 800.72, 800.73; FGIS Directive 9180.74 (Oct. 1, 2023).

[298] This table does not identify every agency that assesses a user fee or every user fee assessed by the agencies listed. Further it omits many filing fees associated with proceedings within the agency (such as filing fees associated with appeals), many fees for services such as providing transcripts and copies of documents, and fees for responding to requests under the Freedom of Information Act (FOIA). It also omits exceptions and nuances. (By way of example: it reports that FDA collects a user fee with every new drug application and every biologics license application, but it does not elaborate exceptions such as the exception for an application submitted by a state government entity.) Finally, although the table generally cites the statutory provisions on which these agencies have based these user fees (for instance, as reported in an early *Federal Register* notice), it takes no position on whether the statutes in fact authorize the fees assessed by the agency (or whether the statutes comport with the U.S. Constitution).

Agency	Fee
Food Safety and Inspection Service (FSIS)	*Fees for Inspection Services and Laboratory Accreditation*. The Federal Meat Inspection Act, 21 U.S.C. §§ 601 et seq., and the Poultry Products Inspection Act, 21 U.S.C. §§ 451 et seq., require inspection of livestock and poultry slaughtered at official establishments and of meat and poultry processed at official establishments. The Egg Products Inspection Act, 21 U.S.C. §§ 1031 et seq., requires inspection of egg products processed at official plants. FSIS bears the cost of the inspections, except it assesses user fees for inspection services performed on holidays or on an overtime basis. Under the Agricultural Marketing Act (AMA), 7 U.S.C. §§ 1621 et seq., FSIS provides a range of voluntary inspection, certification, and identification services to assist in the orderly marketing of various animal products and byproducts. The AMA provides that FSIS may assess and collect fees to recover the costs of the voluntary inspection, certification, and identification services it provides. Also under the AMA, FSIS provides certain voluntary laboratory services that establishments and others may request it to perform. The AMA provides that FSIS may collect fees to recover the costs of providing these voluntary services. *See* 9 C.F.R. Part 391.
Rural Housing Service (RHS)	*Guaranteed Loan Technology Fee*. Under the Housing Opportunity Through Modernization Act of 2016, 42 U.S.C. § 1472(i), RHS collects a guarantee underwriting user fee from lenders for their use of the Rural Housing Service's automated guaranteed loan systems. The fee funds information technology enhancements needed to improve program delivery and reduce burden to the public. *Initial and Annual Guarantee Fees.* As part of the Guaranteed Rural Rental Housing Program, under the Housing Act of 1949, 42 U.S.C. § 1490p-2, RHS guarantees loans for the development of housing and related facilities in rural areas. Subsection (g) authorizes RHS to charge fees to lenders for loan guarantees, which are used to cover the costs of loan guarantees.
U.S. Forest Service (Forest Service)	*Recreation User Fees*. Under the Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6802, the Forest Service charges fees for use of standard amenities (picnic areas, developed trailheads, and the like) as well as expanded amenities (such as campgrounds). It also assesses fees for special use permits. *Grazing Fees*. Under the 1978 Public Rangelands Improvement Act, the Forest Service assesses a federal grazing fee for use of certain public lands in 16 western states by cows, horse, sheep, and goats.
Department of Commerce	
International Trade Administration (ITA)	*Export and Investment Promotion Information and Service Fees.* The U.S. & Foreign Commercial Service (US&FCS) within the ITA offers "standard" and "customized" trade promotion services to U.S. businesses, for which it collects fees. For instance, through the "Gold Key Service," it arranges meetings in foreign markets to match U.S. exporters with prospective sales agents or distributors, manufacturers,

Agency	Fee
	licensees, franchisees, or strategic partners. 31 U.S.C. § 9701 (IOAA); *see* 82 Fed. Reg. 31752 (Oct. 1, 2017) (most recent notice of implementation of user fees).
National Oceanic and Atmospheric Administration (NOAA)	*Environmental Data Fees*. The National Environmental Satellite, Data and Information Service (NESDIS), within NOAA, charges fees for special access to environmental data and information that it collects and maintains. (Most of these data are provided at no fee, but NESDIS makes special data products available as well.) 15 U.S.C. § 1534; 15 C.F.R. Part 950. *Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) Fees.* As amended, this statute authorizes NOAA Fisheries—also known as the National Marine Fisheries Service—to regulate commercial and recreational fisheries in U.S. waters. Among other things, NOAA Fisheries establishes catch limits as well as limited access programs and requires various types of permits (which depend in part on the area and the type of fishing permit type). It collects a variety of fees, typically from vessels and vessel operators, but also from the fish processors that receive fish subject to a fisher management plan. To give an example, it collects fees for foreign fishing vessel permits and when applicable poundage fees and observer fees. 16 U.S.C. § 1824; 50 C.F.R. § 600.518. To give another example, it collects a fee for issuance of an exempt fishing permit, which authorizes for limited testing, public display, data collection, exploratory fishing, compensation fishing, conservation engineering, health and safety surveys, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species (under a fishery management plan or fishery regulations) that would otherwise be prohibited. 16 U.S.C. § 1853(b); 50 C.F.R. § 600.745. And to give a final example, Alaska processors and registered buyers of groundfish and halibut pay an ex-vessel value-based fee to support the funding and deployment of observers on vessels and in plants. 16 U.S.C. § 1862; 50 C.F.R. § 679.55. *Seafood Inspection Program Fees.* NOAA Fisheries collects fees for contract and non-contract inspection services performed by its Seafood Inspection Program, which provides inspection and auditing services to domestic seafood processors and distributors. Agricultural Marketing Act of 1946, 7 U.S.C. § 1622; 50 C.F.R. Parts 260 & 261.
United States Patent and Trademark Office (USPTO)	*Patent Fees.* USPTO collects filing fees in connection with a variety of patent filings (e.g., a basic filing fee for a utility patent, as well as an additional filing fee for each independent claim in excess of three). It assesses patent search fees, patent examination fees, patent issue and publication fees, patent extension of time fees, various other miscellaneous fees, and—after patent issuance—patent maintenance fees and various other post-issuance fees. It also assesses fees associated with the Patent Trial and Appeal Board, petition fees, service fees, and fees in connection with registering to practice before the agency. There are also fees associated with submissions and other activities under the Patent Cooperation Treaty. 35 U.S.C. § 41, plus uncodified language in § 10 of the Leahy-Smith America Invents Act (AIA), Pub. L.

Agency	Fee
	No. 112-29, 125 Stat. 284, 317-318. The regulations are scattered through 37 C.F.R., but can also be identified through the Fee Schedule on USPTO's website. *Trademark Fees.* USPTO assesses a variety of fees in connection with trademark applications (e.g., a basic fee for a paper trademark application), petitions, and letters of protest. There are also post-registration fees (e.g., registration renewal application fees), fees associated with Trademark Trial and Appeal Board, fees in connection with the Madrid Protocol, trademark service fees, and the Fastener Quality Act. 15 U.S.C. § 1113, plus uncodified language in § 10 of the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, 317-318; 37 C.F.R. §§ 2.6, 2.7, 7.6; see also the Fee Schedule on USPTO's website.
Department of Defense	
Department of Defense (DoD)	*Fees for Assistance Provided to Entertainment-Oriented Media Productions.* Department of Defense (DoD) policy states that DoD "assistance may be provided to an entertainment media production, to include fictional portrayals, when cooperation of the producers with the Department of Defense benefits the Department of Defense, or when such cooperation would be in the best interest of the Nation." 32 C.F.R. § 238.4. Pursuant to 10 U.S.C. § 2264 and 31 U.S.C. § 9701, production companies must reimburse the government for expenses incurred as a result of DoD assistance. 32 C.F.R. § 238.6.
United States Army Corps of Engineers (USACE)	*Recreation Use Fees*. The USACE operates more than 2000 recreation areas, at which it charges fees for the use of boat launch ramps and swimming beaches, as well as fees for camping and camping-related services, and fees for specialized facilities (such as group picnic shelters) and events. These are assessed pursuant to section 210 of the Flood Control Act of 1968, codified at 16 U.S.C. § 460d-3, and section 1047 of the Water Resources Reform and Development Act of 2014, codified at 33 U.S.C. § 2328a.
Department of Energy	
Federal Energy Regulatory Commission (FERC)	*Filing Fees.* Pursuant to 31 U.S.C. § 9701 (IOAA), FERC assesses filing fees in connection with various submissions: a pipeline certificate authorization application, a petition for issuance of a declaratory order, a request for review of a remedial order, a request for review of a denial of adjustment, a request for written legal interpretation from the Office of General Counsel, a request for review of a jurisdictional agency determination, a petition for rate approval, and a request for certification of qualifying status as a small power production facility or cogeneration facility. 18 C.F.R. §§ 381.207, 381.302, 381.303, 381.304, 381.305, 381.401, 381.403, 381.505.

Agency	Fee
Power Marketing Administrations (PMAs)	*Rate Payments.* The four Power Marketing Administrations (PMAs)—Bonneville Power Administration (BPA), Western Area Power Administration (WAPA), Southeastern Power Administration (SEPA), and Southwestern Power Administration (SWPA)—operate electric systems and sell the electrical output of federally owned and operated hydroelectric dams. Flood Control Act of 1944, 16 U.S.C. § 825s ("sale of electrical power from reservoir projects"); Reclamation Project Act of 1939, 42 U.S.C. § 485h(c) ("furnishing water to municipalities; sale of electric power; lease of power privileges").
Department of Health and Human Services	
Centers for Disease Control and Prevention (CDC)	*Vessel Sanitation Program*. The CDC assesses user fees for vessel sanitation, construction, and renovation inspections. First, every passenger cruise vessel that has a foreign itinerary involving a U.S. port and carries 13 or more passengers is subject to twice yearly unannounced operational sanitation inspections and, when necessary, reinspection. Second, cruise vessel design and equipment must meet the program's sanitary design criteria standards and routine operational inspection requirements. Third, cruise vessel owners and shipyards that build or renovate cruise vessels can request construction or renovation inspections of new or renovated vessels before their first or next operational inspection. In each case, the fee depends on the size of the vessel. *E.g.*, 88 Fed. Reg. 55048 (Aug. 14, 2023) (notice of fee schedule for FY 2024); *see also* 52 Fed. Reg. 45019 (Nov. 24, 1987) (first publication of fee schedule). *Respiratory Certification Program.* The CDC, through the National Institute for Occupational Safety and Health (NIOSH), charges fees for services provided to applicants for conformity assessment activities conducted by NIOSH for respiratory protective devices. Fees are charged for (1) respirator certification application processing, (2) initial review and approval of manufacturing facilities, (3) quality site audits, and (4) product audits to verify the performance of approved respirators. 42 U.S.C. Part 84. 30 U.S.C. § 7 ("fees for tests or investigations"); 31 U.S.C. § 9701 (IOAA).
Centers for Medicare and Medicaid Services (CMS)[299]	*Clinical Laboratory Improvement Amendments of 1988 (CLIA) User Fees.* CMS collects "certificate fees" for issuance and renewal of clinical laboratory certifications. It also collects fees for inspection of

[299] Pharmaceutical manufacturers also pay an annual fee that is used by CMS to finance health services for Medicare beneficiaries. This fee does not appear to satisfy the definition of a "user fee" adopted for this report, and it is not included in the table. Section 9008 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 859 (2010), as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (not codified), imposes a "branded prescription drug fee" on certain entities engaged in the business of manufacturing or importing branded prescription drugs. The Internal Revenue Service calculates and

(continued…)

Agency	Fee
	nonaccredited laboratories and for evaluating accredited laboratories to determine if an accreditation organization's standards and inspection process are equivalent to the CLIA program. PHSA § 353(m), 42 U.S.C. § 263a(m). *Federally-Facilitated Exchange User Fees and State-Based Exchange on the Federal Platform User Fees.* CMS collects user fees from health insurance issuers who offer qualified health plans through federally-facilitated exchanges as well as those who offer plans through state-based exchanges on the federal platform. 45 C.F.R. § 156.50. For the 2024 benefit year, it has proposed a rate of 2.5 percent of total monthly premiums and a rate of 2.0 percent of total monthly premiums, respectively. 87 Fed. Reg. 78206, 78213 (Dec. 21, 2022). 31 U.S.C. § 9701 (IOAA).
Food and Drug Administration (FDA)	*Accredited Third-Party Certification Program User Fees*. Accredited Third-Party Certification is a voluntary program in which FDA recognizes "accreditation bodies" that accredit third-party "certification bodies." The certification bodies in turn conduct food safety audits and issue certifications of foreign food facilities. FDA itself also directly accredits certification bodies to perform those audits. The program assess application fees (for accreditation bodies seeking recognition, and for certification bodies seeking accreditation directly from FDA) as well as annual fees (for recognized accreditation bodies and for accredited certification bodies). 21 U.S.C. § 384d; 21 C.F.R. §§ 1.700-1.725. *Animal Drug User Fees*. FDA collects fees in connection with the submission of certain animal drug applications and supplemental applications, as well as annual fees from each sponsor of an application, each product marketed, and each establishment (manufacturing location). 21 U.S.C. § 379j-12. *Animal Generic Drug User Fees*. FDA collects fees in connection with the submission of certain abbreviated applications for generic animal drugs, as well as annual fees from each sponsor of an application and each marketed product. 21 U.S.C. § 379j-21. *Biosimilar User Fees*. FDA collects fees for products in the agency's "biosimilar product development program"—an initial fee to enter the program, an annual fee while the product remains in the program, and a reactivation fee if the sponsor wants to resume participation after leaving the program. The agency also assesses a user fee for each biosimilar biological product application, as well as an annual

administers the fee, which is based on the company's branded prescription drug sales during the preceding calendar year. *See* 79 Fed. Reg. 43631 (July 28, 2014), codified at 26 C.F.R. Parts 51, 602. The companies pay their fees to the U.S. Treasury, and section 9008(c) expressly appropriates to the Federal Supplementary Medical Insurance (Medicare Part B) Trust Fund an amount equal to the fees received. (The U.S. Treasury transfers the fees annually.) CMS uses the Trust Fund—which is also funded through general tax revenue and premiums paid by enrollees—to finance health services for Medicare beneficiaries.

Agency	Fee
	"program" fee for each approved product (up to five products per application). 21 U.S.C. §§ 379j-51, 379j-52, 379j-53. *Color Additive User Fees*. FDA collects fees for listing and certification of color additives. 21 U.S.C. § 379(e). *Export Certificate Fees*. FDA will, on request, prepare a certificate about the regulatory or marketing status of a product being exported from the United States. The agency collects user fees for export certificates prepared for human drugs, animal drugs, and devices. 21 U.S.C. § 381(e)(4)(B). *Generic Drug User Fees*. FDA collects an annual program fee from every generic drug company (based on the number of approved applications in its portfolio); annual facility fees from active pharmaceutical ingredient manufacturers, finished dosage form manufacturers, and contract manufacturers identified in approved applications; a one-time fee for holders of drug master files (referenced by generic applicants); and a filing fee for each abbreviated new drug application. 21 U.S.C. § 379j-41, 379j-42. *Human Drug Compounding Outsourcing Facility Fees.* An entity that elects to register with FDA as a drug compounding outsourcing facility must pay an annual establishment fee. In addition, if FDA must visit the facility for a reinspection because of noncompliance identified during a prior inspection, the entity must pay a reinspection fee. 21 U.S.C. § 379j-62. *Mammography Facility Fees.* FDA collects fees from persons who own or lease mammography facilities to cover the costs of inspections conducted by the agency, states designated as "States as Certifier" (SAC) states, and state or local agencies acting on behalf of FDA. 42 U.S.C. § 263b(r). *Medical Device User Fees.* Every company that distributes medical devices intended for use in the United States must register with FDA and pay an annual registration fee. In addition, there are filing fees associated with premarket submissions (such as premarket notifications, premarket approval applications, and de novo classification requests) as well as certain other submissions (such as a request for the agency's views on the classification of and requirements applicable to a device). 21 U.S.C. § 379j. *Over-the-Counter (OTC) Monograph Drug User Fees*. FDA collects an annual facility fee from every qualifying person who owns a facility engaged in manufacturing OTC monograph drugs, as well as a fee from each person that submits an OTC Monograph Order Request (OMOR). 21 U.S.C. §§ 379j-72. *Prescription Drug User Fees.* FDA collects a fee with each application for approval of a new drug under the FDCA or licensure of a biological application. It also assesses an annual "program fee" for the products with approved applications. 21 U.S.C. §§ 379g, 379h.

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	Tobacco User Fees. FDA collects user fees from manufacturers and importers of cigarettes, snuff, chewing tobacco, roll-your-own tobacco, cigars, and pipe tobacco. The total amount of fees for each year is specified by statute, and FDA assess one fourth of the amount each quarter, allocating the assessment among the different classes of products (based on the class's volume of products in commerce) and within each class based on the company's market share. 21 U.S.C. § 387s. *Voluntary Qualified Importer Program User Fees.* FDA collects a fee from each importer participating in the Voluntary Qualified Importer Program (QVIP), which provides for (voluntary) expedited review and import entry of human and animal food for participating importers. 21 U.S.C. § 379j-31.
Department of Homeland Security	
Federal Emergency Management Agency (FEMA)	*Flood Map Related Fees.* FEMA charges fees for processing certain map change requests to National Flood Insurance Program flood map products, requests for Letter of Determination Review (for a property owner to appeal a lender's flood zone determination), and requests for Flood Insurance Study backup data. 44 C.F.R. § 65.17; 44 C.F.R. Part 72; 80 Fed. Reg. 2955 (Jan. 21, 2015) (current fees, also on agency's website). [No clear reference to statutory language authorizing the fee.] *Radiological Emergency Preparedness Program*. FEMA collects user fees from Nuclear Regulatory Commission (NRC) licensees of commercial nuclear power plants, to fund offsite radiological emergency planning, preparedness, and response. 42 U.S.C. § 5196e; 44 C.F.R. Part 354.
U.S. Citizenship and Immigration Services (USCIS)	*User Fees Charged for Immigration or Naturalization Benefits.* USCIS is mostly user fee funded and collects fees for a variety of services, e.g., applications to replace permanent resident cards, applications for travel documents, applications for permission to reapply for admission after deportation, immigrant petitions from standalone investors, applications for employment authorization, and so forth. 8 U.S.C. §§ 1254a, 1254b, 1304, 1356; 8 C.F.R. Part 106.
United States Coast Guard (USCG)	*Merchant Mariner Credentialing Fees*. The USCG collects fees with applications for merchant mariner credentials. 46 U.S.C. § 2110; 31 U.S.C. § 9701; 46 C.F.R. § 10.219. *Vessel Inspection Fees.* The USCG collects inspection and examination fees from all vessel owners and operators requesting certification, vessels required to have a Certificate of Inspection and those required to have a Certificate of Compliance. 46 U.S.C. § 2110; 31 U.S.C. § 9701; 46 C.F.R. Part 2.10.
U.S. Customs and Border Protection (CBP)	*Customs Fees.* CBP collects a variety of customs user fees, for instance upon the arrival of a commercial vessel (watercraft), commercial truck, passenger or commercial freight railroad car, private vessel or

Agency	Fee
	private aircraft, dutiable mail, or passenger aboard a commercial vessel or commercial aircraft. It also collects an annual user fee from customs brokers. 19 U.S.C. § 58c; 19 C.F.R. § 24.22. *Immigration Inspection User Fee*. CBP collects a user fee for immigration inspection of passengers on commercial aircraft or vessels. 8 U.S.C. § 1356, 8 C.F.R. part 286. *Agricultural Quarantine Inspection (AQI) User Fee.* See above, under APHIS.
Department of Housing and Urban Development	
Office of Manufactured Housing Programs (OMHP)	*Technical Suitability of Products (TSP) User Fee.* The Technical Suitability of Products program provides a mechanism for acceptance of new materials and products to be used in buildings financed with HUD-insured mortgages. HUD collects user fees for issuance of structural engineering bulletins (SEBs), mechanical engineering bulletins (MEBs), materials releases (MRs), and use of materials bulletins (UMs). The fees apply to initial issuance, revision, or renewal (every three years). 42 U.S.C. § 3535(j); 24 C.F.R. § 200.934.
Department of the Interior	
Bureau of Land Management (BLM)	*Grazing Fees.* Under the 1978 Public Rangelands Improvement Act, the BLM assesses a federal grazing fee for use of certain public lands in 16 western states by cows, horse, sheep, and goats. 43 U.S.C. § 1905; 43 C.F.R. § 4130.8-1. *Recreation Fees*. The BLM collects recreation fees on the lands it manages, specifically for (1) special recreation permits (commercial use, competitive events, group activities, recreation events, and providing vending services or supplies associated with recreation events); (2) recreation use permits, which include standard amenity fees (e.g., for day use areas and visitor centers) as well as the expanded amenity fees charged by campgrounds; and (3) individual special recreation permits, which are issued when special measures need to be taken. Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6802. *Minerals Management Fees.* The BLM charges roughly four dozen different fees for processing applications and other documents related to its minerals program (management of locatable, saleable, and leasable minerals on federal land). For instance, it collects a fee for a license to mine coal, a fee for a geophysical exploration permit in Alaska, and a fee for recording a mining claim or site location. 43 U.S.C. § 1734; 43 C.F.R. § 3000.12 (listing the full fee schedule).
Bureau of Ocean Energy Management (BOEM)	*Fees for Certain Services*. BOEM manages offshore U.S. energy and mineral resources, and it assesses a fee for various services. For instance, it grants leases for mineral exploration and development of the Outer Continental Shelf, and a exploration plan must be submitted for approval before an operator (the

Agency	Fee
	company assigned by the lessee) may begin exploratory drilling on a lease. And it assesses a user fee for its processing of an exploration plan. 31 U.S.C. § 9701 (IOAA); 30 C.F.R. §§ 550.125, 556.106.
Bureau of Reclamation (Reclamation)	*Application and Use Fees.* In connection with applications for authorization to use Reclamation land, facilities, and waterbodies, the agency collects an application fee as well as fees to cover its review and continued processing of the application. In addition, the agency charges a fee for actual use of Reclamation land, based on a valuation or on competitive bidding. 31 U.S.C. § 9701 (IOAA); 43 C.F.R. § 429 Subpart D.
National Park Service (NPS)	*Recreation Fees.* The Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6802, authorizes the Park Service to collect and use recreation fees, including entrance fees and amenity fees for certain equipment and services, such as campgrounds. The National Park Service Concessions Management Improvement Act of 1998, 54 U.S.C. §§ 101917, 101925, authorizes the Park Service to collect and use certain fees from concessioners that operate businesses in park units. *See also* 54 U.S.C. § 103104 (authorizing recovery of costs associated with special use permits).
U.S. Fish and Wildlife Service (USFWS)	*Recreation Fees*. USFWS collects an entrance fee at national wildlife refuges and national fish hatcheries, as well as hunting and fishing permit fees, special permit fees, and commercial operation fees. Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6802; 54 U.S.C. § 103104. *Import and Export License Application Fees; Inspection Fees.* Importing or exporting wildlife for commercial purposes requires a license from the USFWS, which collects both an application fee and inspection fees. 31 U.S.C. § 9701 (IOAA); 50 C.F.R. Part 14.
Department of Justice	
Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)	*Federal Firearms License Fees.* ATF charges a fee for each firearms license and ammunition license, which in turn are required for manufacturers, importers, and dealers. 18 U.S.C. § 923; 27 C.F.R. § 478.42. *Explosives Permits User Fees.* ATF charges a fee for every license to engage in business as an importer or manufacturer of, or a dealer in, explosive materials, and it charges a fee for permits to use explosive materials. 18 U.S.C. § 843; 27 C.F.R. §§ 555.41-555.43.
Drug Enforcement Administration (DEA)	*Annual Registration Fees.* Under the Controlled Substances Act, DEA charges annual fees for applications to register to engage in manufacture, distribution, dispensing, import, and export of controlled substances and listed chemicals. 21 U.S.C. §§ 821, 958(f); 21 C.F.R. Part 1309.

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Federal Bureau of Investigation (FBI)	*Criminal Justice Information Services Division User Fees.* FBI collects user fees from authorized entities (federal, state, and other authorized entities) requesting noncriminal justice, fingerprint-based and name-based criminal history record information (CHRI) checks. These checks are performed for noncriminal justice, nonlaw enforcement employment and licensing purposes, and for certain employees of private sector contractors with classified government contracts. 34 U.S.C. § 41104; 28 C.F.R. § 20.31.
Department of Labor	
Mine Safety and Health Administration (MSHA)	*Approval and Certification Fees.* MSHA collects fees for the approval and certification of equipment, materials, and explosives for use in mines. 30 U.S.C. § 966; 30 C.F.R. Part 5.
Occupational Safety and Health Administration (OSHA)	*Application Processing and Audit Fees.* Many OSHA safety standards require testing and certification of equipment or products that are used in the workplace. This testing and certification is done by organizations that apply to OSHA for recognition as "nationally recognized testing laboratories" (NRTLs). OSHA charges fees for services rendered to the NRTLs: application processing, on site reviews, and various other services. 31 U.S.C. § 9701; 29 C.F.R. § 1910.7(f).
Department of State	
Bureau of Consular Affairs	*Passport Fee.* The State Department charges fees for the execution and issuance of passports. 22 U.S.C. § 214; 22 C.F.R. Subpart D.
Department of Transportation	
Federal Aviation Administration (FAA)	*Registration, Certification, and Related Fees.* The FAA charges various registration and certification fees; for instance, it charges a fee for registering an aircraft and issuing a dealer's aircraft registration certificate. 49 U.S.C. §§ 45302, 45305; 14 C.F.R. § 47.17. *Fees for Certification Services and Production-Certification Services Provided Outside the United States.* The FAA collects fees for certification services provided by the agency for persons outside the United States, including airman certificate services and aircraft certificate services, as well as production certificate services (services relating to approval to manufacture products pursuant to an FAA-approved type design). 31 U.S.C. § 9701 (IOAA); 14 C.F.R. Part 187 Appendix C; 14 C.F.R. § 61.13. *Overflight Fees.* The FAA collects an "overflight fee" from every person who conducts an overflight through either "enroute" or "oceanic" airspace. (An overflight through "enroute" airspace goes through U.S.-controlled airspace where primarily radar-based air traffic services are provided, and an overflight

Agency	Fee
	through "oceanic" airspace goes through U.S.-controlled airspace where primarily procedural air traffic services are provided.) 31 U.S.C. § 9701 (IOAA); 49 U.S.C. § 45301; 14 C.F.R. Part 187.
Federal Motor Carrier Safety Administration (FMCSA)	*Unified Carrier Registration System Fees.* The FMCSA collects filing fees for registration of motor carriers, motor private carriers, freight forwarders, and brokers. 49 U.S.C. § 13908; 31 U.S.C. § 9701 (IOAA); 49 C.F.R. Part 360.
National Highway Traffic Safety Administration (NHTSA)	*Registration Fees.* Motor vehicles not manufactured to conform to federal motor vehicle safety standards may be imported on a permanent basis only by an importer that has registered with NHTSA (or by someone under contract with a registered importer). NHTSA collects fees to administer the registered importer program, including an annual fee from registered importers, a fee for filing a petition for a determination whether a vehicle is eligible for importation, and a fee for importing a vehicle pursuant to a determination. 49 U.S.C. § 30141; 49 C.F.R. Part 594.
Pipeline and Hazardous Material Safety Administration (PHMSA)	*Natural Gas and Hazardous Liquids Pipeline Fees.* PHMSA collects annual fees from persons operating gas pipeline transmission facilities, liquefied natural gas pipeline facilities, and hazardous liquid pipeline facilities, generally based on the number of miles of pipeline each operator has in service. 49 U.S.C. § 60301. *Underground Natural Gas Storage Fees.* PHMSA collects an annual fee from every entity that operates an underground natural gas storage facility. 49 U.S.C. § 60302.
Department of Treasury	
Bureau of the Fiscal Service	*User Fees.* The Fiscal Service collects fees to cover the costs it incurs for services performed relative to qualifying companies to become authorized sureties and/or reinsurers on federal bonds. 31 U.S.C. § 9701 (IOAA); 31 C.F.R. § 223.22.
Internal Revenue Service (IRS)	*Historic Easements User Fee.* The IRS collects a user fee from any person claiming a deduction for a historical conservation easement donation. 26 U.S.C. § 170(f)(13). *Disclosure of Returns and Return Information*. The IRS collects fees for reproducing individual and business tax returns, for its income verification express service, and for U.S. residency certifications. 26 U.S.C. § 6103. *User Fees for Letter Rulings, Opinion Letters, Determination Letters, and Advisory Letters*. Section 7528 of the Internal Revenue Code directs the Secretary to require the payment of user fees for requests

Agency	Fee
	to the IRS for ruling letters, opinion letters, and determination letters, and other similar requests. The fees appear at Appendix A to Rev. Proc. 2022-1. 26 U.S.C. § 7528. *Other User Fees.* The IRS has published regulations imposing user fees on the following services: (1) entering into an installment agreement, (2) restructuring or reinstating an installment agreement, (3) processing an offer to compromise, (4) taking the special enrollment examination to become an enrolled agent, (5) enrolling an enrolled agent, (6) renewing the enrollment of an enrolled agent, (7) enrolling an enrolled actuary, (8) renewing the enrollment of an enrolled actuary, (9) renewing the enrollment of an enrolled retirement plan agent, (10) taking the registered tax return preparer competency examination, (11) applying for a preparer tax identification number, and (12) requesting an estate tax closing letter. 31 U.S.C. § 9701 (IOAA); 26 C.F.R. Part 300.
Office of the Comptroller of the Currency (OCC)	*Assessment Fees.* Every national bank and federal savings association pays a semiannual assessment fee to the OCC. In addition, every independent credit card national bank and independent credit card federal savings association pays an assessment based on receivables attributable to credit card accounts owned by the national bank or federal savings association. 12 U.S.C. § 16; 12 C.F.R. § 8.2. *Fees for Special Examinations and Investigations.* The OCC assesses a fee for various examinations and investigations. 12 U.S.C. § 16; 12 C.F.R. § 8.6.
United States Mint	*Sale of Numismatic Coins and Other Items.* In addition to producing coins for circulation, the U.S. Mint prepares and distributes items for collectors: gold, silver, and platinum coins, proof sets, commemorative coins, uncirculated coins, medals, and even holiday ornaments. 31 U.S.C. § 5111 (authority to make and distribute). The U.S. Mint website explains that the prices "must be self-sufficient and cover all of the associated costs of our numismatic portfolio, plus enough margin to cushion against volatility" and that "excess funds are returned to the Treasury General Fund to reduce the annual budget deficit of the federal government."
Environmental Protection Agency	
Environmental Protection Agency (EPA)	*Manifest Fees*. Recipients of hazardous waste pay a user fee to support EPA's electronic hazardous waste manifest system. 42 U.S.C. § 6939g; 42 C.F.R. § 264.1312. *Toxic Substances Control Act Fees.* EPA collects fees from chemical manufacturers and importers to defray a portion of the costs associated with implementation of the Toxic Substances Control Act (TSCA); the implementing rule requires payment of fees for eight categories of activities or triggering events (e.g., EPA-initiated risk evaluation under TSCA § 6). 15 U.S.C. § 2625(b); 40 C.F.R. Part 700.

Agency	Fee
	Pesticide Registration Service Fees and Pesticide Maintenance Fees. EPA assesses pesticide registration service fees, which vary depending on the type of application submitted and which action the applicant requests (out of several hundred identified in a series of tables). 7 U.S.C. § 136w-8. EPA also collects annual maintenance fees from pesticide registrants, generally based on the number of registrations held. 7 U.S.C. § 136a-1. *Motor Vehicle and Engine Compliance Program Fees.* Manufacturers of regulated motor vehicles, motor vehicle engines, various nonroad engines and equipment, stationary internal combustion engines, and regulated portable fuel containers pay fees to support activities related to EPA's vehicle and engine compliance programs. 42 U.S.C. § 7552 (part of the Clean Air Act). *Title V Operating Permit Fees*. Title V of the Clean Air Act requires certain facilities that are sources of air pollutants to obtain operating permits. Most permits are issued by state or local agencies ("part 70" permits, referring to 40 C.F.R. part 70), but some are issued by EPA ("part 71" permits, referring to 40 C.F.R. part 71). Every part 71 source must pay an initial fee to EPA and, thereafter, an annual fee. 42 U.S.C. § 7661a(b); 40 C.F.R. § 71.9.
Other Agencies	
Commodity Futures Trading Commission (CFTC)	*Review Fees.* The CFTC charges fees to recover the costs it incurs in reviewing the rule enforcement programs of any registered futures associations (currently only the National Futures Association) as well as designated contract markets, each of which is a "self-regulatory organization" overseen by the CTFC. 7 U.S.C. § 16a; 17 C.F.R. Appendix B to Part 1.
Farm Credit Administration (FCA)	*Annual Assessment*. FCA regulates the farm credit system, and its administrative expenses are funded mostly by annual assessments on the institutions—banks and associations, and also Federal Agricultural Mortgage Corporation (Farmer Mac)—that make up the system. 12 U.S.C. § 2250; 12 C.F.R. Part 607.
Federal Communications Commission (FCC)	*Application Processing Fees*. The FCC charges processing fees for licenses, equipment approvals, antenna registrations, tariff filings, formal complaints (not ordinary complaints), and other authorizations and regulatory actions. 47 U.S.C. § 158; 47 C.F.R. §§ 1.1101-1.1109. *Annual Regulatory Fees.* The FCC collects annual fees from regulated entities in the mass media, common carrier, wireless, international and cable television services. 47 U.S.C. § 159; 47 C.F.R. §§ 1.1152-1.1156. *Auction Payments.* The FCC collects upfront payments, down payments, and subsequent payments for licenses that the FCC auctions. 31 U.S.C. § 9701 (IOAA); 47 C.F.R. §§ 1.1181-1.1182.

Agency	Fee
Federal Maritime Commission (FMC)	*Passenger Vessel Operator Performance and Casualty Certificate Fees.* The FMC charges application fees for various certificates obtained by passenger vessel operators, such as the Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation. 31 U.S.C. § 9701 (IOAA); 46 C.F.R. Part 540. *Ocean Transportation Intermediary License Application Fees.* The FMC charges a user fee for licensing ocean transportation intermediaries. 31 U.S.C. § 9701 (IOAA); 46 C.F.R. § 515.5. *Other Filing Fees*. The FMC collects a variety of other filing fees, including fees for filings in adjudications before the agency (complaint fees, petition fees, and so forth), 46 C.F.R. Part 502, and fees with submission of ocean common carrier and marine terminal operator agreements, *id.* Part 535. 31 U.S.C. § 9701 (IOAA).
Federal Trade Commission (FTC)	*Premerger Notification Program Fees*. The FTC collects fees with premerger notification and report forms filed under the Hart-Scott-Rodino Act. The latest fee amounts were dictated in the Merger Filing Fee Modernization Act, Division GG of the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328. *See* 136 Stat. 5967; 15 U.S.C. § 18a note. *Telemarketer Fees.* The FTC collects a fee from telemarketers, which must download the numbers on the National Do Not Call Registry (to ensure they do not call consumers who have registered). 15 U.S.C. § 6152; 16 C.F.R. Part 310.
National Aeronautics and Science Administration (NASA)	*Various Fees.* Pursuant to 31 U.S.C. § 9701, NASA charges fees for use of various agency resources. For instance, aircraft that are not operated for the benefit of the U.S. government and that land at a NASA airfield facility without preapproval are usually assessed a user fee under 14 C.F.R. § 1204.1407. In addition, NASA's Airborne Science Program gives researchers access to NASA aircraft for science experiments on a fee-for-service basis. The user fees are based on the flight hour cost, mission specific costs, and any ancillary support costs.
National Credit Union Administration (NCUA)	*Operating Fees.* The NCUA charters, regulates, and insures deposits in federal credit unions and insures deposits in federally insured state-chartered credit unions. These activities are partially supported by an annual operating fee paid by each federal credit union. 12 U.S.C. § 1755(a); *see* 88 Fed. Reg. 43149 (July 6, 2023) (requesting comment on changes to the methodology used to determine how it apportions these user fees).
Nuclear Regulatory Commission (NRC)	*Hourly Service Fees.* The NRC charges hourly fees for licensing services, inspection services, and special products. 31 U.S.C. § 9701 (IOAA); 10 C.F.R. Part 170.

Agency	Fee
	Annual Fees. The NRC collects annual fees from persons who hold licenses, certificates of compliance, sealed source and device registrations, and quality assurance program approves issued by the agency. 42 U.S.C. § 2215; 10 C.F.R. Part 171.
United States Postal Service (USPS)	*Mailing and Shipping Fees*. The Postal Regulatory Commission (PMC) sets the fees that USPS charges for mailing and shipping services. 39 U.S.C. § 303; *see*, *e.g.*, PRC Docket No. R2023-2, 88 Fed. Reg. 23113 (Apr. 14, 2023) (notice of planned rate adjustment for mailing services); PRC Docket No. CP2023-151, 88 Fed. Reg. 31527 (May 17, 2023) (notice of planned rate adjustment for competitive shipping services).
Securities and Exchange Commission (SEC)	*Registration Fees.* The SEC collects fees from issuers on the registration of securities pursuant to section 6(b) of the Securities Act of 1933, 15 U.S.C. § 77f(b), on specified proxy repurchases of securities pursuant to section 13(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(2), and on specified solicitations and statements in corporate control transactions pursuant to section 14(g) of the Exchange Act, 15 U.S.C. § 78n(g). *Transaction Fees.* The SEC collects fees from the national securities exchanges based on the aggregate dollar amount of sales of certain securities transacted, and fees from each national securities association based on the aggregate dollar amount of covered sales transacted by or through any member of the association other than on an exchange, pursuant to section 31 of the Securities Exchange Act of 1934, 15 U.S.C. § 78ee.
Surface Transportation Board (STB)	*Application Fees.* The STB collects fees with the filing of various applications, such as an application for the pooling or division of traffic, an application involving the purchase of a motor carrier of passengers, an application for approval of a non-rail rate association agreement, an application for a certificate authorizing the extension of lines of railroad, an application of a class II or class III carrier to acquire an extended or additional rail line, an application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof, an application for two or more carriers to consolidate or merge their properties or franchises into one corporation, and a carrier's application to purchase the properties of another by purchase of stock. 31 U.S.C. § 9701 (IOAA); 49 C.F.R. § 1002.2. *Other Filing Fees.* The STB collects fees with filings in formal proceedings before the board, including a formal complaint alleging unlawful rates or practices of carriers, a competitive access complaint, a petitions for a declaratory order, an appeal of an STB decision, and a request for waiver or clarification of its regulations. And it collects fees with filings in informal proceedings, such a filing of tariffs and the filing of water carrier annual certifications. 31 U.S.C. § 9701 (IOAA); 49 C.F.R. § 1002.2.

Agency	Fee
	Service Fees. The STB collects various service fees, such as fees for messenger delivery of its decisions to a railroad carrier's agent in Washington, D.C., and an application fee for the STB practitioner's exam. 31 U.S.C. § 9701 (IOAA); 49 C.F.R. § 1002.2.