



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

July 17, 2023

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Ms. Faye I. Lipsky
Federal Register Liaison
Office of Regulations
Social Security Administration (SSA)
3rd Floor (East), Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235-6401

Re: Docket No. SSA-2022-0013, Setting the Manner of Appearance of Parties and Witnesses at Hearings, 88 Fed. Reg. 32,145 (May 19, 2023)

Dear Ms. Lipsky:

On behalf of the Office of the Chair of the Administrative Conference of the United States (ACUS), I offer the following comments in response to the above-referenced notice of proposed rulemaking (NPRM).

ACUS is an independent agency in the executive branch charged by statute with making recommendations to the President, Federal agencies, Congress, and the Judicial Conference of the United States to promote efficiency, participation, and fairness in adjudication and other administrative procedures. Its official recommendations are issued by its Assembly, more than half of whose members are government officials appointed by Federal agencies. *See* 5 U.S.C. § 591 *et seq.* Recommendations and their accompanying reports appear at www.acus.gov.

ACUS has long encouraged agencies, particularly those with high-volume caseloads like SSA, to consider “whether the use of VTC [hearings] would be beneficial as a way to improve efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of proceedings” (Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, [76 Fed. Reg. 48,795](https://www.acus.gov/2011/08/09/2011-4-agency-use-of-video-hearings-best-practices-and-possibilities-for-expansion) (Aug. 9, 2011)). ACUS has set forth best practices and practical guidelines for conducting traditional VTC hearings and, more recently, “virtual hearings” in which participants appear remotely from a location of their choosing using internet-based videoconferencing software. *See* Recommendation 2014-7, *Best Practices for Using Video Conferencing for Hearings*, [79 Fed. Reg. 75,119](https://www.acus.gov/2014/12/17/2014-7-best-practices-for-using-video-conferencing-for-hearings) (Dec. 17, 2014); Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, [86 Fed. Reg. 36,083](https://www.acus.gov/2021/07/08/2021-4-virtual-hearings-in-agency-adjudication) (July 8, 2021).

For this rulemaking and generally, SSA may wish to consult these recommendations and the many other relevant [resources](#) available on ACUS’s website. As particularly relevant to this NPRM, Recommendation 2021-4, while generally encouraging agencies to offer virtual hearings when appropriate, advises agencies to consider whether virtual hearings may create a potential barrier to access for individuals who belong to underserved communities, such as low-income

individuals who may have difficulty obtaining access to high-quality personal devices or private internet service. SSA's plan to permit claimants to appear virtually by online video in a hearing office with agency-supplied electronic devices and internet connection, instead of only allowing this option for claimants using personal or borrowed devices in private locations, helps ensure that all claimants are afforded the same options for virtual hearings, regardless of their ability to pay for or otherwise obtain a suitable device or internet connection on their own.

Recommendation 2021-4 encourages agencies to develop guidelines for conducting virtual hearings, make those guidelines publicly available prominently on their websites, and consider which of those guidelines to include in their codified rules of practice. SSA's proposed rules address several of these recommended guidelines, such as the circumstances in which an individual's virtual participation may be inappropriate; the process by which claimants can object to participating virtually; and the technological requirements for virtual hearings. SSA should also consider addressing, in its codified rules or in subregulatory guidance, whether to make available or require attendance at "a general training session or pre-hearing conference to discuss technological requirements, procedural rules, and standards of conduct for virtual hearings" (Recommendation 2021-4). There are costs associated with offering such sessions and conferences, but SSA should also consider the benefits of helping individuals who may have difficulty using a personal device or internet-based videoconferencing software and educating participants on the rules and standards they are expected to follow during the virtual hearing. Such proactive measures may help to reduce or eliminate delays before or during hearings caused by participants' unfamiliarity with the technology or videoconferencing software and prevent disruptions caused by participants' ignorance of applicable procedural rules or behavioral standards for virtual hearings.

ACUS has recommended that agencies develop protocols or best practices for participating in virtual hearings, including those addressing "[w]hen adjudicators will stop or postpone virtual hearings due to technical problems and what actions will be taken to attempt to remedy the problems while preserving participants' hearing rights" (Recommendation 2021-4). SSA's proposed revisions to [20 CFR 404.944](#) and [416.1444](#) clarify that an ALJ could stop a hearing temporarily and continue it at a later date if the ALJ found that one or more variables outside of the agency's control, such as audio or video quality, materially affected a hearing. SSA may wish to consider explaining when a hearing is "materially affected" and providing examples. For example: Would a complete lack of video materially affect the hearing, even if the audio was unaffected? Does the standard for determining whether a hearing is materially affected change depending on which participant is impacted—for instance, a claimant, appointed representative, or witness? What specific factors and/or circumstances should the ALJ consider when making a determination that a hearing was materially affected? To preserve the claimant's hearing and due process rights, SSA may also wish to clarify the actions that the ALJ or hearing office staff will take to attempt to remedy any technical problems, before or after stopping the hearing, when variables outside the agency's control materially affect the hearing.

ACUS has recommended that agencies provide information on virtual hearings in pre-hearing notices to participants that include or direct them to applicable guidelines (Recommendation 2021-4). In its pre-hearing notices, SSA should include information about the possible manners of appearance; explain the claimant's ability to object to virtual hearings; and

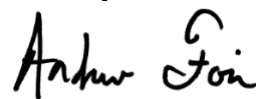
explain what the claimant would need in order to appear via each manner. SSA should include any other information that would help claimants make informed decisions about their preferred manner of appearance and ensure this information stays up to date.

ACUS has recommended that agencies collect feedback from participants to assess their satisfaction with the virtual hearing format and identify any concerns (Recommendation 2021-4). SSA should continue to survey claimants who appear at virtual hearings to gauge their satisfaction with the process. SSA should also “maintain open lines of communication with representatives in order to receive [their] feedback about the use of virtual hearings” (Recommendation 2021-4). Additionally, ACUS has recommended that agencies’ quality assurance systems “assess whether decisions and decision-making processes... [a]re consistent across all adjudications of the same type” and that agencies “consider whether to publicly disclose data in case management systems in a de-identified form (i.e., with all personally identifiable information removed)...” (Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, [87 Fed. Reg. 1722](#) (Jan. 12, 2022)). To measure how virtual hearings compare with in-person hearings in terms of procedural fairness and substantive outcomes, SSA may wish to consider tracking and publishing disposition data for each different type of hearing modality as a part of the agency’s quality review process.

Virtual hearings should be utilized and conducted in a manner that promotes the principles of fairness, efficiency, and participant satisfaction, which form the cornerstones of adjudicative legitimacy (Recommendation 2014-7; Recommendation 2021-4). Accordingly, when revising its regulations and issuing subregulatory guidance, SSA should ensure that virtual hearings provide a claimant experience that meets or exceeds the in-person hearing experience.

ACUS’s Office of the Chair thanks SSA for this opportunity to provide comments on the agency’s use of virtual hearings and the rules related to setting the manner of appearance at hearings. Please contact Lea Robbins at lrobbins@acus.gov or (202) 480-2094 if you have questions or would like further information.

Sincerely,



Andrew Fois
Chair



Lea Robbins
Attorney Advisor

cc: Patrick R. Nagle
ACUS Government Member from the Social Security Administration